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RECENT DEVELOPMENTS IN AVIATION CASE LAW

Michael J. Sehr*

I. INTRODUCTION

REPORTING ON recent developments in aviation case law requires the imposition of a number of definitional restraints in order to limit the task to manageable proportions. First, the concept of "aviation case law" for the purpose of this article has been narrowed to those areas of the law which most directly affect the concerns of attorneys practicing in the area of aviation tort law. Within such areas, however, certain select nonaviation cases have been reported because they may be significant to aviation practitioners. The clearest example of such an area is the case law arising under the Foreign Sovereign Immunities Act.

Second, the standards for identifying a development in the law, as distinguished from simply another reported case, have been flexible. In certain areas, trial court opinions have been included because of the paucity of appellate authority, while in other areas decisions of the lower courts have been excluded because they demonstrate no development of legal principle. Finally, "recent," for purposes of this article, can be defined as including the period from November 1, 1985 through February 15, 1987, although later cases have been included on a selective basis.

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In the past year there have been significant developments in a number of areas. Of particular importance are the reported cases involving the National Transportation Safety Board and the government contractor defense. In addition, specific crashes have generated important decisions. For example, the litigation arising out of the KAL aircraft shot down by the Soviet air force has produced a number of Warsaw Convention opinions, and the crash of a Pan American jet at New Orleans has generated several opinions on wrongful death damages.

II. JURISDICTION

A. Subject Matter Jurisdiction and Other Issues Raised Under the Foreign Sovereign Immunities Act

A number of issues have been raised concerning the Foreign Sovereign Immunities Act (FSIA) in the last year. These issues have been explored in both aviation and nonaviation cases. A brief review of those cases is worthwhile here because of the potential importance of these issues to foreign air carriers.

1. Subject Matter Jurisdiction and the Retrospective Application of the FSIA

The United States Court of Appeals for the Eleventh Circuit held that FSIA did not confer subject matter jurisdiction on a foreign sovereign in a matter involving transactions, activities, and events occurring prior to 1952. In *Jackson v. People's Republic of China*, the court of appeals was asked to decide whether there was subject matter jurisdiction over the People's Republic of China in a matter involving bearer bonds issued in 1911. The court, relying on the lower court's analysis of the FSIA, the legislative history of the Act, and the plain language of the statute,

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1 28 U.S.C.A. § 1602 (West Supp. 1987). The FSIA was enacted in 1976 to grant authority to the federal courts over decisions of sovereign immunity and to codify the restrictive theory of sovereign immunity.
2 794 F.2d 1490 (11th Cir. 1986).
held that there is no retrospective application of the FSIA to alter any rights with respect to pre-1952 causes of action. The court noted that its decision was inconsistent with the Second Circuit opinion in *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*

In *Gayda v. USSR,* the United States District Court for the Eastern District of New York denied defendants' motion to dismiss on grounds of lack of jurisdiction under the FSIA. The action arose out of the air crash disaster in Warsaw, Poland on March 14, 1980. Defendants, manufacturers of a Soviet made aircraft, moved for dismissal for lack of subject matter jurisdiction over the action and in personam jurisdiction over them.

Defendants argued that they were entitled to immunity under the FSIA, and that plaintiffs could prove no set of facts within the commercial activities exception contained in FSIA which would entitle them to relief. The court stated that the burden of proof in establishing the inapplicability of an exception to immunity rests upon the party claiming immunity. Plaintiffs alleged that the various defendants designed, manufactured, assembled, tested, inspected, marketed, sold, leased, and serviced the aircraft, and the court held that these allegations qualify as commercial activities within the meaning of the FSIA. Defendants' affidavits in support of their motion failed to show that they did not have a connection to any of these activities. Accordingly, the court held that subject matter jurisdiction was proper.

The court similarly disposed of defendants' argument that it lacked in personam jurisdiction over them. It held that in personam jurisdiction exists as long as the defendants in such an action are properly served under the FSIA's service provision.

In *Barkanic v. People's Republic of China,* the United States District Court for the Eastern District of New York

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dealt with subject matter jurisdiction under the FSIA in a wrongful death action arising out of an air crash that took place in China. The court held that the defendant, which was a foreign sovereign, should be dismissed for lack of subject matter jurisdiction under the FSIA. In so holding, it stated that a federal court cannot assert jurisdiction over a "foreign state" under the FSIA without a sufficiently significant nexus between the complaining party's claims and the foreign state's commercial activities in the United States. In this case the only connection between the plaintiff's claims and the foreign agency's commercial activities in the United States was that a private travel agent in the United States issued two unconfirmed tickets to plaintiff's decedent for a flight to be conducted exclusively in the People's Republic of China. The court found these facts to be insufficient to establish a nexus between the activities and the United States.

In In re Korean Air Lines Disaster of September 1, 1983, the United States District Court for the District of Columbia held that the United States had no subject matter jurisdiction in a case where the plaintiff's decedent, a passenger killed aboard the Korean Airlines flight shot down by the Soviets, purchased his ticket from a travel agent in Montreal, Canada. In arriving at this conclusion, the court rejected the argument that the decedent was to leave from New York, make intermediate stops in foreign nations, and then return to New York, and refused to look beyond the face of the ticket in determining the passenger's destination.

2. The "Act of State" Doctrine

A pair of cases in the Fifth and Sixth Circuits dealing with the 1983 nationalization of Mexican banks distin-
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guished the application of the "act of state" doctrine from the FSIA. In Grass v. Credito Mexicano, S.A., the Fifth Circuit, in a securities action brought by a United States citizen against a Mexican national bank, held that the FSIA did not bar the action because of the "commercial activities exception" contained in that statute. The court did find, however, that, under the act of state doctrine, the Mexican government's currency control decisions were clearly beyond the inquiry of United States courts. The court clearly distinguished and limited its application of the act of state doctrine to acts committed by a foreign government in its own territory. It held that the act of state doctrine did not bar that part of plaintiff's claim which was based on the Mexican bank's failure to comply with the law at a time prior to the nationalization. The Sixth Circuit reached a similar result in Riedel v. Bancam, S.A., where the court held that the lower courts had subject matter jurisdiction over a securities violation and contract action against a nationalized Mexican bank.

3. Exclusivity of the FSIA as a Source of Jurisdiction

A district court has addressed the issue of whether the FSIA is the exclusive source of jurisdiction over a foreign sovereign. In Amerada Hess Shipping Corp. v. Argentina, the district court held that the FSIA exceptions are the exclusive source of jurisdiction over a foreign sovereign, even in instances where another federal statute may confer jurisdiction. The court in Amerada Hess held that the Alien Tort Act does not provide a basis for jurisdiction. The

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9 797 F.2d 220 (5th Cir. 1986).
11 Grass, 797 F.2d at 222.
12 792 F.2d 587 (6th Cir. 1986).
FSIA "narrows the class of defendants," but does not repeal any conflicting provisions of the Alien Tort Act. However, the Alien Tort Act does not create an implied exception to the FSIA. In so ruling, the court expressly disapproved a previous holding to the contrary in Von Dardel v. USSR.

In Schroeder v. Lufthansa German Airlines, the district court held that the FSIA's jurisdictional provision precludes a trial by jury. The court reasoned that this section of the FSIA did not deny plaintiff's Seventh Amendment right to jury trial, because the Seventh Amendment preserves a right to jury trial only if such right existed at common law, and there was no right to a jury trial against a foreign sovereign in 1791. The plaintiff argued that the federal diversity statute conferred an alternative source of jurisdiction over Lufthansa, permitting a jury trial because Lufthansa is also a citizen or subject of a foreign state. The court, however, rejected this argument and held that such jurisdiction was not proper in this case because an entity such as Lufthansa cannot be both a foreign state under the FSIA and a citizen or subject of a foreign state under the federal diversity statute.

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15 Amerada Hess, 638 F. Supp. at 76.
17 19 Av. Cas. (CCH) 18,347 (N.D. Ill. 1985).
18 28 U.S.C. § 1330(a) (1982). This section provides as follows:

The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Id.
19 The Seventh Amendment to the United States Constitution provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.
4. Waiver of Sovereign Immunity

In Herciare International v. Argentina, a district court held that when a foreign state willingly consents to suit in a United States court, and files a counterclaim against the plaintiff, it cannot later invoke sovereign immunity with respect to execution of any judgment against it. The plaintiff in that case obtained a judgment against Argentina for breach of contract resulting from a commercial transaction between the parties. When Argentina did not pay on the judgment, the court granted an order permitting execution of the judgment. Plaintiff then levied the judgment against an Aerolineas Argentinas Boeing 727 commercial airliner. Aerolineas Argentinas, the Argentine airline, is wholly owned by the Republic of Argentina. Argentina claimed that it had not waived its sovereign immunity in the case, and that the plaintiff had therefore improperly levied upon its property. The court held that Argentina, in answering the complaint in the original case, implicitly waived its sovereign immunity and the

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22 The FSIA provisions for waiver of immunity provide as follows:
(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if - (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or . . .
(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if - (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, . . .
(d) The property of a foreign state, as defined in section 1603(1)(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action
immunity of its agencies. The court said that, in order to waive its sovereign immunity to jurisdiction while retaining immunity as to execution, the foreign state and its agencies must *expressly* retain that immunity, either in the answer to the complaint or in some other form.\textsuperscript{23}

Aerolineas Argentinas also argued that it is a separate and distinct entity apart from the Republic of Argentina. The court held that where a sovereign owns all of the assets of an agency any presumption that the agency is an entity separate from the sovereign is overcome.\textsuperscript{24}

In *Aboujdid v. Singapore Airlines*,\textsuperscript{25} the Court of Appeals of the State of New York considered whether an air carrier could waive the defense of sovereign immunity. This case arose out of the hijacking of an Air France aircraft to Entebbe, Uganda in 1976, and involved Gulf Aviation (Gulf) and Singapore Airlines (Singapore) as defendants. The claims against Air France had previously been dismissed on *forum non conveniens*\textsuperscript{26} and Warsaw Convention\textsuperscript{27} grounds in *People ex rel. Compagnie Nationale Air France v. Giliberto*.\textsuperscript{28} *Aboujdid* was filed in New York state and was pending at the time the *Giliberto* case was dismissed. Gulf filed an answer raising four affirmative defenses, but not raising the issue of sovereign immunity. Singapore filed a motion to dismiss on grounds of *forum non conveniens*. After extensive argument and appeal, the court denied this motion. Thereafter, Singapore filed an answer, raising sovereign immunity as a defense. Gulf later removed the action to a federal district court and, at some point, re-
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quested leave to amend its answer to raise the defense of sovereign immunity. The federal court remanded the case to state court and Gulf was allowed to amend its answer. The trial court held that Gulf had waived its sovereign immunity defense, but allowed Gulf to assert that defense because it found that there was no prejudice to the plaintiffs since Singapore had properly raised the defense. The trial court found that there was no immunity, however, because the actions complained of came within the "commercial activity" exception to the FSIA. On appeal, the appellate division disagreed with the trial court's finding on this issue, holding that the "commercial activity" exception did not apply in this case and that Singapore should therefore be dismissed. It also held that Gulf had waived its sovereign immunity defense by failing to assert the defense in its original answer.

The court of appeals concluded that failure to raise the sovereign immunity defense in the first responsive pleading was not, per se, an implied waiver of the defense. Instead, the test was whether the defendant had "consciously decided to take part in the litigation." The factors the court cited as significant were: 1) Gulf filing a counterclaim against the plaintiffs and their attorneys; 2) the raising of affirmative defenses which did not include sovereign immunity; and 3) the failure to assert sovereign immunity as a defense for almost five years. The court of appeals further affirmed the appellate division's conclusion that the "commercial activity" exception of the FSIA did not apply. Therefore, it affirmed the dismissal of Singapore and found that there was no sovereign immunity defense as to Gulf.

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29 Aboujdid, 494 N.E.2d at 1057.
30 Id.
31 Id. at 1058-59.
32 Id. at 1059.
33 Id. at 1060.
34 Id. at 1059.
B. Personal Jurisdiction

1. Personal Jurisdiction Under the FSIA

In *Meadows v. Dominican Republic*, the district court applied section 1605(a)(2)(iii) of the FSIA to find that the Dominican Republic and one of its executive agencies were not immune from suit. The court said the jurisdictional analysis under this action was two-fold. The court must first determine (1) whether the case falls into a statutory sovereign immunity exception, and (2) whether exercise of personal jurisdiction is constitutionally permissible. With respect to personal jurisdiction, the court held that contacts relevant to jurisdiction encompassed the entire United States, not just the forum state. The court did not agree with the argument that only contacts relating to the transaction at issue were relevant in determining whether the exercise of personal jurisdiction is constitutionally permissible.

Under this analysis, therefore, minimum contacts anywhere in the United States by a foreign sovereign are sufficient to confer in personam jurisdiction. The court in *Crimson Semiconductor, Inc. v. Electronum* reached a similar result. In that case the court applied the *International Shoe Co. v. Washington* test, stating that the factors to be considered in determining whether personal jurisdiction is proper in a given case are “[1] the extent to which defendants availed themselves of the privileges of American law, [2] the extent to which litigation in the United States would be foreseeable to them, [3] inconvenience to defendants of litigating in the United States, and [4] the countervailing interests of the United States in hearing the suit.”

The United States District Court for the Eastern District

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56 Id. at 605-06.
58 326 U.S. 310 (1945).
59 *Crimson Semiconductor*, 629 F. Supp. at 907 (quoting Texas Trading v. Federal Republic, 647 F.2d 300 (2d Cir. 1981)).
of Pennsylvania reached a contrary result in *Unidyne Corp. v. Aerolineas Argentinas*.\(^4\) In *Unidyne*, a domestic corporation was not allowed to recover from a foreign airline for damages suffered in transit, because the district court would not exercise personal jurisdiction over the air carrier under a "national contacts" theory. The court did not agree with the plaintiff that satisfying sections 1605\(^4\) (subject matter jurisdiction), 1391(f)\(^4\) (venue), and 1608\(^3\) (service of process) automatically confers personal jurisdiction under the FSIA. A constitutionally required minimum contacts test must also be met, and the court ruled that the adoption of a "national contacts" approach did not satisfy such test.\(^4\)

2. Personal Jurisdiction Over Private Parties

In *Farnham v. Bristow Helicopters*,\(^4\) the United States Court of Appeals for the Fifth Circuit considered whether Louisiana's long-arm statute\(^4\) required a connection between the activities which constituted "doing business" in the state and the actions giving rise to a claim for wrongful death. The defendants in *Farnham* included Bristow Helicopters, Ltd. (Bristow, Ltd.), which was organized under the laws of the United Kingdom. That corporation had two subsidiaries, one of which was an Indonesian corporation named P.T. Masayu Helicopters (Masayu). The wrongful death action arose out of the operations of Masayu in Indonesia. The district court dismissed the plaintiffs' claims, holding that there was no personal jurisdiction over the defendants because Louisiana's long-arm statute required a nexus between the actions constituting "doing business" in the state and the cause of action.

The Fifth Circuit affirmed the district court's decision.

\(^{40}\) 19 Av. Cas. (CCH) 18,115 (E.D. Va. 1985).
\(^{44}\) *Unidyne*, 19 Av. Cas. (CCH) at 18,199.
\(^{45}\) 776 F.2d 535 (5th Cir. 1985).
The court initially reviewed the requirements of the due process clause of the Fourteenth Amendment and found that the amendment did not require a nexus between a defendant's actions in the state and the activities giving rise to the claim. Within the "perimeter" established by the due process clause, however, the court pointed out that states can, and have, adopted more restrictive long-arm statute provisions.

The Fifth Circuit had previously interpreted the Louisiana long-arm statute as not requiring a connection between business transacted in Louisiana and an asserted claim in Pedelahore v. Astropark. However, in Farnham the court reviewed two Louisiana appellate court cases issued subsequent to the opinion in Pedelahore. In those cases, the courts rejected the Pedelahore decision and required a connection between the transaction of business in Louisiana and the asserted claim. The Fifth Circuit therefore agreed with the district court's conclusion that such a connection was required. Since Bristow, Ltd's actions in Louisiana were not connected to the helicopter accident in Indonesia, the court held that Bristow, Ltd. was not subject to jurisdiction in Louisiana. The court further held that Masayu could not be subject to jurisdiction as a subsidiary of Bristow, Ltd. It found that the action of Bristow, Ltd. in recruiting the helicopter pilot who was eventually involved in the fatal accident at Louisiana State University had no significant relationship to the claim, and therefore did not create a basis for jurisdiction.

In Scott v. Breeland, the United States Court of Appeals for the Ninth Circuit directly addressed the question of the permissible scope of a state long-arm statute under the due process clause of the Fourteenth Amendment. The case was filed in the United States District Court for

47 U.S. Const. amend. XIV.
48 Farnham, 776 F.2d at 537 (citing Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984)).
49 745 F.2d 346 (5th Cir. 1984).
50 Farnham, 776 F.2d at 538.
51 792 F.2d 925 (9th Cir. 1986).
the Central District of California, hence California’s long-arm statute\textsuperscript{52} governed personal jurisdiction. That statute provides that “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.”\textsuperscript{53} The Ninth Circuit concluded that “federal courts in California may exercise jurisdiction to the fullest extent permitted by due process.”\textsuperscript{54}

In determining the extent to which due process allows personal jurisdiction over a nonresident, the court relied on Helicopteros Nacionales,\textsuperscript{55} in which the Supreme Court explained the distinction between general jurisdiction and specific jurisdiction. General jurisdiction requires that a nonresident defendant’s activities within the state be substantial or continuous and systematic, and creates jurisdiction even for claims unconnected to the defendant’s in-state activities. Specific jurisdiction is restricted to causes of action arising out of the defendant’s forum activities. Having made this distinction, the court found that specific jurisdiction must meet a three part test in order to satisfy the requirements of due process. First, the nonresident defendant must purposefully avail himself of the privilege of conducting activities in the forum through an act or transaction. Second, the claim must arise out of one of the defendant’s forum activities. Third, the exercise of jurisdiction must be reasonable under the circumstances.\textsuperscript{56}

In Scott, the claim arose out of an alleged assault on the plaintiff by the defendant which occurred on an aircraft in Reno, Nevada before it left for a flight to California. The defendant was taken off the aircraft before it proceeded to California. The court found that the contacts between the defendant and the State of California were insufficient to support general jurisdiction over the defendant. Since

\textsuperscript{52} \textsc{cal. civ. proc. code} § 410.10 (west 1973).
\textsuperscript{53} id.
\textsuperscript{54} scott, 792 f.2d at 927 (citing data disc, inc. v. systems technology assoc., 557 f.2d 1280, 1285 (9th cir. 1977)).
\textsuperscript{55} 446 u.s. at 408.
\textsuperscript{56} scott, 792 f.2d at 927.
the alleged assault took place while the aircraft was on the ground in Reno, Nevada, the court found that the defendant "neither performed an act or consummated a transaction whereby he can be said to have 'purposefully avail[ed] himself of the privilege of conducting activities in [California], thereby invoking the benefits and protections of its laws.'" Therefore, the court affirmed the dismissal of the plaintiff's action for lack of in personam jurisdiction.

In *Thompson v. Bellanca Aircraft Corp.*, the Massachusetts Superior Court held that Massachusetts' long-arm statute did not grant personal jurisdiction over a corporation that had purchased the assets of a bankrupt aircraft manufacturer, even though the defendant was presently engaged in the business of selling spare parts for the aircraft under the bankrupt manufacturer's name. This wrongful death action resulted from the crash of an aircraft which had been designed by Bellanca Aircraft Corporation in 1970. In 1980 Bellanca Aircraft Corporation filed for bankruptcy, and in 1982, pursuant to an asset purchase agreement, Viking Aviation, Inc. obtained the right to use the name of "Bellanca." Viking Aviation did not, however, assume the liabilities of Bellanca. After the purchase, the defendant manufactured replacement parts for the model aircraft involved in the crash at issue, but did not sell any spare parts for use on the accident aircraft. In addition, the defendant leased a portion of the physical facilities once owned by Bellanca.

Plaintiffs argued that the defendant corporation was a "mere continuation or reincarnation" of Bellanca. Therefore, plaintiff argued that it should fall under the exception to the general rule that successor corporations are not liable for the negligence of their predecessor. The court stated that defendant was not a "mere continuation," and held there was no authority for imputing a predecessor corporation's business contacts to a succes-

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57 *Id.* at 928.
sor corporation for the purpose of establishing personal jurisdiction under the product line theory, or any other theory. Therefore, the court held that the defendant did not have minimum contacts with the forum state under the facts alleged.\textsuperscript{59}

C. \textit{Forum Non Conveniens}

In \textit{In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982},\textsuperscript{60} the United States Court of Appeals for the Fifth Circuit reviewed the application of the \textit{forum non conveniens} doctrine where an aviation accident occurred in the United States. Several of the passengers killed in the crash were citizens and residents of Uruguay. The plaintiffs were relatives of the decedents, and one plaintiff sought, \textit{inter alia}, recovery for the death of his aunt.

The defendant air carrier moved to dismiss on the grounds of \textit{forum non conveniens}, having indicated its willingness to "(1) submit to the jurisdiction of the courts of Uruguay, (2) concede liability, (3) waive any statute of limitations defense, (4) waive the Warsaw Convention limitation of damages, and (5) guarantee satisfaction of any judgment entered against it in Uruguay."\textsuperscript{61} The trial court denied the defendant's motion to dismiss and the defendant appealed.\textsuperscript{62}

On appeal the Fifth Circuit, citing \textit{Gulf Oil Corp. v. Gilbert}\textsuperscript{63} and \textit{Piper Aircraft Corp. v. Reyno}\textsuperscript{64} held that the first determination that must be made with respect to a \textit{forum non conveniens} motion is whether American or foreign law applies to the action. The court stated, "[i]f American law, either federal or state, applies to the action, the federal court should retain jurisdiction; if foreign law applies, dismissal may be appropriate if there exists a more conve-
nient forum." The court then turned to the question of which law would apply to the action. It determined that Uruguayan law would apply with respect to whether recovery should be allowed for the interests of a nephew, but Louisiana law would apply with respect to the measure of damages. The court then reviewed the private-interest and public-interest factors set forth in *Gulf Oil*, and determined that Louisiana was a more appropriate forum for this proceeding than Uruguay.

The United States Court of Appeals for the Eighth Circuit, in a nonaviation products liability case, recently upheld a *forum non conveniens* dismissal in *De Melo v. Lederle Laboratories*. The plaintiff in that case was a Brazilian school teacher who was treated with the drug Myambutol, and developed a side effect of optic atrophy, which led to permanent blindness. The drug was manufactured and distributed in Brazil by a Brazilian corporation that was a wholly owned subsidiary of Lederle, an American corporation. The drug had been developed in the United States, and certain warnings concerning the drug were translated from the English language into Portuguese. The English language version warned of permanent vision loss, while the Portuguese version warned only of a temporary vision loss.

The Eighth Circuit reviewed the public and private interest factors set forth in *Gulf Oil*. It found that the unavailability of punitive damages and damages for pain and suffering did not render Brazil an inadequate forum. Despite conflicting evidence, the court found that contingent fee contracts and free legal assistance were available in Brazil. The court's opinion cited several cases finding that Brazil provides an adequate alternative forum for the purpose of *forum non conveniens* analysis.

Having found that the public interest factors favored

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65 *In re Air Crash Near New Orleans*, 789 F.2d at 1096.
66 Id. at 1097.
67 801 F.2d 1058 (8th Cir. 1986).
68 330 U.S. at 508-09.
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dismissal, the court then turned to the private interest factors set forth in *Gulf Oil*. With respect to the availability and access to evidence, the court pointed out that the district court required Lederle to provide access to evidence existing in the United States if the case went forward in Brazil. However, if the case went forward in the United States, Lederle would be deprived of access to evidence relating to the plaintiff’s treatment, doctors, and the warnings about the drug given in Brazil. The court also pointed out that Lederle would not be able to implead potential third party defendants in a United States action. Finally, the court found that imposing the costs of litigation on the citizens of Minnesota, where the suit was filed, would be inappropriate, since there were virtually no contacts between the incident and Minnesota. In a footnote the court pointed out, “Minnesota apparently was chosen as a forum because [plaintiff’s] attorney, the father of a Peace Corps worker [plaintiff] met in Brazil, lives in Minnesota.” Therefore, the court found the district court’s dismissal on *forum non conveniens* grounds to be reasonable and affirmed.

The leak of methyl isocyanate from a Union Carbide plant at Bhopal, India in December of 1984 led to a storm of litigation and controversy when a number of plaintiffs filed personal injury actions against Union Carbide in the United States. The Judicial Panel for Multidistrict Litigation assigned the federal court cases arising out of this disaster to Judge Keenan of the United States District Court for the Southern District of New York.

In an exhaustive opinion, Judge Keenan dismissed the cases on the grounds of *forum non conveniens* in May 1986. The *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984* decision contains an extensive review of the adequacy of the Indian judicial system as an alternative forum. The court concluded that a foreign ju-

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69 Id. at 508.
70 De Melo, 801 F.2d at 1064 n.6.
The court then went on to examine the private and public interest concerns mandated by *Gulf Oil*.

A unique aspect of the Bhopal case was that the government of India had enacted legislation providing that it had the exclusive right to represent Indian plaintiffs. The government of India then asserted a claim in the Bhopal litigation against Union Carbide, and further asserted that it chose to litigate in the United States. The court nevertheless found that the Indian government had paramount interest in the case being litigated in India. After balancing all of the factors required by the doctrine of *forum non conveniens*, the court dismissed the action, conditioned upon Union Carbide's agreement that it would submit to jurisdiction in India, waive any statute of limitations defenses, agree to satisfy any judgment rendered against it, and submit to discovery under the model of the Federal Rules of Civil Procedure.

In *Kryvicky v. Scandinavian Airlines System*, the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of plaintiff's wrongful death action against an airplane manufacturer and an airline arising out of a crash in Spain. The Sixth Circuit affirmed the district court's conclusion that Spain provided an adequate alternative forum under *forum non conveniens* grounds. One of the defendants, Boeing, submitted an affidavit of a Spanish attorney attesting that Spain recognized the cause of action for wrongful death, Spanish courts would exercise jurisdiction when the defendants admitted to jurisdiction, and

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72 Id. at 852.
73 330 U.S. at 508-09.
74 *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. at 867.
Spanish courts would permit defendants to waive any statute of limitations defense. Following *Gulf Oil*\textsuperscript{76} and *Piper*,\textsuperscript{77} the Sixth Circuit found that Spain offered an adequate alternative forum.

The Superior Court of Connecticut refused to dismiss a lawsuit involving a foreign aircrash in *Miller v. United Technologies Corp.*\textsuperscript{78} In that case the plaintiffs were survivors of members of the Egyptian Air Force who died in the crash of an F-16 aircraft. The aircraft was manufactured by General Dynamics, the engines were designed and manufactured by United Technologies, and the fuel pump was designed and manufactured by Chandler Evans, Inc., all in the United States.

Following the *Bhopal* opinion closely, the court in *Miller* found that the Egyptian legal system provided an adequate alternative forum. The court then turned to the private interest factors set forth in *Gulf Oil*.\textsuperscript{79} The court found that the relevant evidence and documents in the case were scattered throughout the United States and Egypt. It further found, however, that the documents relating to the design and manufacture of the aircraft and its components contained the "crucial evidence" in the case, and that the cost of translating these documents into Arabic or French for use in Egyptian litigation would outweigh the cost of translating relevant Egyptian documents into English.\textsuperscript{80}

With respect to the availability of witnesses, the court pointed out that the defendants had participated in the accident investigation, and therefore not only their manufacturing personnel, but also their investigative personnel were in the United States. The plaintiff contended that the eyewitnesses to the accident were members of the American military who were now United States residents.

\textsuperscript{76} 330 U.S. at 501.
\textsuperscript{77} 454 U.S. at 235.
\textsuperscript{78} 40 Conn. Supp. 451, 515 A.2d 386 (1986).
\textsuperscript{79} 330 U.S. at 508.
\textsuperscript{80} *Miller*, 515 A.2d at 394-95.
Finally, the court observed that almost all of the expert witnesses would be Americans since Egypt has no domestic aircraft industry. Discounting any interests in a view of the accident scene, the court concluded that the private interest factors weighed in favor of retaining jurisdiction in Connecticut.\footnote{Id. at 395.}

In reviewing the public interest factors set out in \textit{Gulf Oil} the court concluded that Egyptian law would apply whether the case remained in Connecticut or was transferred to Egypt. The court further decided that Egypt's interest in the litigation was superior to that of Connecticut. Despite the fact that the court had concluded that Egypt provided an adequate remedy, and the public interest factors pointed to the litigation being transferred to Egypt, the court held that Connecticut should retain the case because of the significance of the private interest factors indicating the case should remain in Connecticut, and in deference to the plaintiffs' choice of forum.

Finally, in \textit{Smedesman v. United Air Lines}, a New York state court dismissed an action on \textit{forum non conveniens} grounds on the condition that defendant accept service in New Jersey or Illinois, and waive any present or future statute of limitations defenses. In \textit{Smedesman}, there was an alleged accident aboard a United Airlines aircraft originating in New Jersey and landing in Illinois. Plaintiff resided in New Jersey and received medical attention in New Jersey and Illinois. Under the circumstances, the court stated that there is no indication that any transaction took place in New York, and granted defendant's motion to dismiss.

\textbf{III. Federal Preemption}

In \textit{Wardair Canada v. Florida Department of Revenue}, the United States Supreme Court addressed the issue of
whether individual states have the power to levy sales taxes on aviation fuel used by foreign airlines. In 1983 the State of Florida enacted a fuel tax at a rate of five percent on all aviation fuel including that sold to foreign airlines. Wardair obtained an injunction in Florida state court against the collection of the tax. The state appealed the case to the Supreme Court of Florida, which reversed the trial court and held that the tax did not violate the Commerce Clause or the "U.S./Canadian Agreement," and that the federal government had not preempted the right of the states to levy sales taxes on aviation fuel.

The United States Supreme Court affirmed the decision of the Supreme Court of Florida. In an opinion written by Justice Brennan, the Court first noted that the federal government had not completely preempted state regulation of international aviation by enacting the Federal Aviation Act. 85 The Court held that there was no express preemption of state law, and where there is no actual conflict between federal and state law, it is required "that there be evidence of a congressional intent to pre-empt the specific field covered by the state law." 86 The Court found, to the contrary, that the Federal Aviation Act specifically allowed sales taxes on the sale of goods or services, and did not preempt state action in this area.

The Court then turned to the question of whether the Commerce Clause of the United States Constitution prohibited Florida from enacting a fuel tax on foreign air carriers. 87 The Court noted that Wardair had acknowledged that the tax did not violate the Commerce Clause as it applied to domestic air carriers, since it met the tests previously set out by the United States Supreme Court to judge whether a state tax violates the interstate application of the Commerce Clause. However, the Commerce Clause also provides that Congress shall have power "to regulate

86 Wardair Canada, 106 S. Ct. at 2372.
87 Id.
commerce with foreign nations." In *Japan Line, Ltd. v. County of Los Angeles*, the Court had required that a state tax affecting foreign commerce be judged under two additional criteria: first, whether the tax "creates a substantial risk of international multiple taxation" and second, "whether the tax prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments." Wardair acknowledged that the tax did not create a danger of multiple taxation. Therefore, the sole question before the Court was whether the Florida tax would threaten the ability of the federal government "to speak with one voice." The Solicitor General of the United States joined with Wardair in urging the court to conclude that the tax had such an effect.

The Court rejected the argument of Wardair and the Solicitor General. It found that the Chicago Convention on International Civil Aviation (The Chicago Convention) did not forbid sales taxes on fuel, but did preclude tax on fuel which is "on board an aircraft . . . on arrival . . . and retained on board on leaving." Wardair and the Solicitor General also relied on a resolution of the International Civil Aviation Organization (ICAO) which would preclude sales taxes by states on aviation fuel purchased by foreign air carriers. The Court found that the United States was simply a member of ICAO and that the resolution could not be construed as reflecting the national policy of the federal government.

The Court was much more swayed by the fact that the United States had entered into more than seventy bilat-

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88 Article I of the U.S. Constitution provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3.
90 Id. at 451.
91 Id.
92 Wardair Canada, 106 S. Ct. at 2373.
94 Wardair Canada, 106 S. Ct. at 2374.
eral aviation agreements with foreign states which prohibited national taxation of aviation fuel, but, by negative implication, allowed such taxation by political subdivisions of those nations. The Solicitor General conceded, "none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic." The Court concluded, "It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to reverse the policy that the Federal Government has elected to follow." The Court took pains to point out, however, that it was taking no position with respect to whether the Commerce Clause would invalidate Florida's sales tax in the absence of the bilateral agreements.

In *Hiawatha Aviation v. Minnesota Department of Health*, the Supreme Court of Minnesota addressed the issue of whether the state could regulate entry into the field of air ambulance service. The plaintiff had been denied permission under a state regulatory scheme to begin air ambulance service. It appealed the decision of the state agency denying permission on the ground that federal law had preempted the states from regulating entry into the air ambulance field. The Minnesota Supreme Court concluded that the federal registration requirement that an air carrier must meet in order to operate as an air taxi providing ambulance operations demonstrated that the federal government intended to preempt regulation of entry into that field. However, the court further held that the state had the power to regulate such operations in "its traditional role in the delivery of medical services," including staffing requirements, the qualifications of per-
sonnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions.

In *Christie v. Miller*, the Oregon Court of Appeals upheld a dismissal of an action by landowners who sought an injunction to prohibit the owners of a private airstrip from taking off or landing in patterns which would take planes over the landowners' property. The court held that federal law preempted the power of state courts to grant the injunctive relief requested. In addition, the court held that the trial court properly dismissed the nuisance action on the ground that the airstrip owners had acquired a prescriptive easement.

IV. TORT LITIGATION — SUBSTANTIVE

A. Liability of Air Carriers: The Warsaw Convention

The Warsaw Convention governs the liability of air carriers arising out of international air transportation in most instances. Despite recent setbacks for the plaintiffs' bar in the valuation of the limitations of liability contained in the Convention and the scope of the injuries coming within the Convention, there have been continued attempts to use the Convention to broaden air carrier liability.

1. Status of High Contracting Party

In *Hyosung (America), Inc. v. Japan Air Lines Co.* a district court addressed the issue of whether Korea and the United States are in "treaty relations" with respect to the Warsaw Convention. The Republic of Korea is a party to the Hague Protocol, but has never ratified the original

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100 79 Or. App. 412, 719 P.2d 68 (1986).
Warsaw Convention. The United States is not a party to the Hague Protocol. The court took note of the decision in *In Re Korean Air Lines Disaster of September 1, 1983,*\(^\text{105}\) and reviewed the provisions of the Vienna Convention on the Law of Treaties,\(^\text{106}\) which provides that a state that becomes a party to a treaty after an amending agreement enters into force shall be considered a party to the treaty as amended. The state shall also be considered a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement. The court found that since the United States and Korea have both adhered to the unamended portions of the Warsaw Convention, the Convention applies to disputes arising from international air transportation between the two countries which are affected by the unamended portions of the Convention. Because the Warsaw Convention applied to the plaintiff’s claims in the case, the court found that federal subject matter jurisdiction existed and denied the defendant’s motion to dismiss.

2. Federal Jurisdiction

In *Darras v. Trans World Airlines*\(^\text{107}\) the court addressed the issue of whether a claim made on the basis of the Montreal Agreement\(^\text{108}\) provides a sufficient basis for federal jurisdiction. The plaintiff in *Darras* asserted that the court lacked federal jurisdiction, because his claim was based on the Montreal Agreement, rather than the Warsaw Convention. The court concluded that the Montreal Agreement merely raised the limits of liability under the Convention and that it was the Convention that created


\(^{106}\) *Hyosung*, 624 F. Supp. at 728.


\(^{108}\) The Montreal Agreement was entered into on May 13, 1966 between the International Air Transport Association and various airline carriers. The Agreement involves Article 22(1) of the Warsaw Convention allowing carriers and passengers by "special contract" to increase the liability limitations established by the Warsaw Convention. *See* 31 Fed. Reg. 7302 (1966).
the plaintiff’s cause of action. In an earlier case, Dorizas v. K.L.M. Royal Dutch Airlines, the court held that an action under the Warsaw Convention created federal jurisdiction.

3. Injuries and Events Within the Scope of the Warsaw Convention

(a) Mental Anguish

In In re Eastern Airlines, Inc., Engine Failure, the court addressed the question of whether mental anguish, standing alone, was compensable under the Warsaw Convention. The case arose out of an Eastern Airlines flight from Miami to Nassau in which the aircraft suffered failure of all three engines. The crew and passengers prepared for an emergency landing in the Atlantic Ocean, but the pilots were able to restart an engine and land safely in Miami. The plaintiffs sued Eastern claiming mental anguish related to the preparations for the emergency landing and included a claim under the Warsaw Convention. The defendants moved to dismiss on the grounds that mental anguish is not compensable under the Warsaw Convention.

The court in In re Eastern Airlines held that mental anguish was not compensable. The court reviewed the language of Article 17 of the Convention in its original French. Article 17 provides that the air carrier shall be liable in the event of the “death or wounding of a passenger or any other bodily injury suffered by a passenger.” The court noted that the term, “bodily injury,” was translated from the French “lesion corporelle” which had been interpreted in the case of Burnett v. Trans World Airlines as requiring “an infringement of physical integrity.”

112 Id. at 312.
113 968 F. Supp. 1152 (D.N.M. 1979).
114 Id. at 1156.
The court concluded that such an interpretation excluded claims for strictly mental injuries. However, in *Borham v. Pan American World Air Ways*, the United States District Court for the Southern District of New York held that claims for emotional or mental injury were included within Article 17 of the Warsaw Convention. In *Borham*, the plaintiffs were attempting to avoid the application of the statute of limitations contained in Article 29 of the Convention. Therefore they argued that emotional and mental injuries were not within Article 17's definition of "bodily injury." The court disagreed, pointing out that the Second Circuit had taken a broad view in interpreting the term "bodily injury." Therefore, the court found that the plaintiffs' claims were within the Warsaw Convention. Since the plaintiffs failed to file their claims within the two year statute of limitations contained in Article 29 of the Convention, the court dismissed all of their claims as time barred.

(b) Unusual or Unexpected Events

In *Fischer v. Northwest Airlines*, the plaintiff suffered a heart attack while en route between Chicago and Seoul, Korea. The court, relying on *Air France v. Saks*, held that the passenger's heart attack and subsequent death were not the result of any unusual or unexpected external event connected with the flight and therefore did not come within the scope of the Warsaw Convention. Further, the court held that the airline's alleged refusal to aid the passenger after his attack was also not an "accident." The court dismissed the plaintiff's Warsaw Convention claims, but allowed a state law negligence claim to proceed.

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115 19 Av. Cas. (CCH) 18,236 (S.D.N.Y 1986).
116 Article 29 provides that the statute of limitations for claims under the Warsaw Convention is two years. Warsaw Convention, 49 U.S.C. app. § 1502 (1982).
117 *Borham*, 19 Av. Cas. (CCH) at 18,238.
In *Margrave v. British Airways*, the plaintiff claimed that a back injury she suffered while sitting aboard an aircraft which was delayed because of a bomb threat constituted an “accident” within the meaning of the Warsaw Convention. The court, however, granted summary judgment for the defendant on the ground that there was insufficient evidence that the plaintiff’s back injury was the result of prolonged sitting.

In *Arkin v. Trans International Airlines*, the United States District Court for the Eastern District of New York concluded that a tire blow out was an occurrence governed by the Warsaw Convention. The plaintiffs in *Arkin* were delayed on their flight from New York to Portugal. Part of the delay was attributable to a tire blow out on take off from New York. The court concluded that the Warsaw Convention governed some of the plaintiffs’ claims since the tire explosion on the aircraft was an “accident” within the meaning of the Convention. However, since the plaintiffs failed to file their action within two years of the flight, Article 29(1) of the Convention barred the action.

The court also considered whether the plaintiffs’ claims for preembarkation delay came within the Warsaw Convention. Article 19 of the Warsaw Convention provides, “The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods.” The court concluded that this provision applied to claims “uniquely associated with air travel,” and did not apply to the plaintiffs’ claims for preembarkation delay since those claims arose out of the activity of the airline in simply operating a waiting room. Therefore, the court dismissed those claims as unsubstantiated.

The plaintiff in *Salazar v. Mexicana Airlines*, claimed

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120 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,368 (S.D.N.Y. Sept. 10, 1986).
121 19 Av. Cas. (CCH) 18,311 (E.D.N.Y. 1985).
123 *Arkin*, 19 Av. Cas. (CCH) at 18,314.
124 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,114 (D.C. Tex. March 10, 1986), dism’d, 800 F.2d 1143 (5th Cir. 1987).
that his neck was injured when the aircraft in which he was a passenger bounced twice on landing. The court found that the landing was not "unexpected or unusual" and therefore no liability under the Warsaw Convention could attach.

In *Wogel v. Mexicana Airlines*, the plaintiffs were "bumped" from a flight from Chicago to Acapulco. The United States District Court for the Northern District of Illinois found that plaintiffs' claim came within the Warsaw Convention and was therefore barred by the Convention's two year statute of limitations. On appeal, however, the Seventh Circuit reversed, holding that the Warsaw Convention does not provide a cause of action for discriminatory bumping under the Federal Aviation Act.

In *Striker v. British Airways Board*, an airline employee grabbed the plaintiff by the arm and physically shoved him into the aircraft as he was attempting to exit. The court found that the events leading up to the plaintiff's injuries constituted an "accident" under the Warsaw Convention.

4. *Exclusivity of the Warsaw Convention as a Remedy*

As suggested by *Fischer*, the courts have struggled with the question of whether the Warsaw Convention supplies the exclusive remedy for injury and damage suffered in the course of international air transportation.

In *Newsome v. Trans International Airlines*, the Supreme Court of Alabama found that the Warsaw Convention provided the exclusive remedy to passengers whose charter flight was delayed for thirty-two hours. Article 19 of the Convention provides that the carrier is liable for dam-

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125 821 F.2d 442 (7th Cir. 1987).
126 Id.
127 Id.
129 623 F. Supp. 1064 (N.D. Ill. 1985). *See also supra note 118 and accompanying text.*
ages occasioned by delay, and the court determined that this provision prevented plaintiffs' remedies from being affected by tariffs adopted pursuant to federal regulations. Since the Convention provided a remedy, however, the court found that remedy to be exclusive, preventing the parties from recovering under claims based on state law.

In Borham v. Pan American World Airways,\(^1\) the court found that the Warsaw Convention is the exclusive remedy for injuries sustained in international air travel. Since the plaintiffs' claims for emotional and mental injuries were found to be within the scope of the Warsaw Convention, and the plaintiffs had not filed such claims within the Convention's two year statute of limitations, the court held that all of the claims were barred.

The United States District Court for the Southern District of Florida took the opposite view of the exclusivity of a Warsaw Convention cause of action in Rhymes v. Arrow Air.\(^2\) That case arose out of an Aero Air military charter crash in Gander, Newfoundland. Eighteen plaintiffs filed their claims in Florida state court, pleading causes of action under state wrongful death statutes. The defendant removed those cases to federal court on the ground that, since the flight involved international air transportation, the plaintiffs' exclusive remedy was under the Warsaw Convention and that federal jurisdiction was established by that Convention, relying on Benjamins v. British European Airways.\(^3\) The court disagreed, pointing out that Article 24 stated that "any action for damages however founded, can only be brought subject to the conditions and limits set out in this convention."\(^4\) The court therefore concluded that the Warsaw Convention contemplated causes of action other than that created by the Convention itself, but that such actions would be con-

\(^1\) Borham, 19 Av. Cas. (CCH) at 18,236; see also supra notes 115-117 and accompanying text.


\(^3\) 572 F.2d 913 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979).

\(^4\) Rhymes, 636 F. Supp. at 740.
trolled by the Convention's provisions. Because the plaintiffs in the state court cases did not plead a cause of action under the Warsaw Convention, the court found that there was no federal jurisdiction and remanded the cases to the state court.

In *Insurance Co. of North America v. Pan American World Airways,* the court found that the Warsaw Convention provided the exclusive remedy for claims arising out of international air cargo transportation. The court acknowledged the conflict between the Ninth Circuit, which has held the Warsaw Convention not to be exclusive, and the Fifth and Third Circuits, which have held it to be an exclusive remedy. The court found that the purposes of the Warsaw Convention required uniformity in dealing with claims arising out of international air transportation, and those purposes would be best served if state law claims were not allowed.

5. Adequacy of Notice of the Limitation of Liability To Passengers For Injuries and Death

There have been two recent significant decisions on the effect of the print-type contained in the notice of limitation of liability required by the Warsaw Convention. Pursuant to the Montreal Agreement of 1971, the notice of limitation of liability must be in at least ten-point type. The United States Court of Appeals for the Fifth Circuit accordingly refused to apply the limitation of liability because the Pan Am tickets involved were printed in nine-point type in *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9, 1982.* In reaching its decision, the Fifth Circuit followed and adopted the reasoning of the United

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136 See *In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983).*
138 See *Insurance Co. of North America, 20 Av. Cas. (CCH) at 17,248.*
139 789 F.2d 1098; see also supra notes 60-65 and accompanying text.
States Court of Appeals for the Second Circuit in *In re Air Crash Disaster at Warsaw, Poland.*

The United States District Court for the District of Columbia took the opposite position in *In Re Korean Airlines Disaster of September 1, 1983.* In that case, the air carrier issued airline tickets containing a notice of the limitation of liability under the Montreal Agreement in eight-point type. The court carefully reviewed the history of the litigation relating to type size and the requirement of notice to airline passengers that has developed since the decision in *Lisi v. Alitalia-Linee Aeree Italiane.* The court concluded that the Montreal Agreement does not operate as an amendment to the Warsaw Convention. Therefore, violation of the type requirements set forth in the Montreal Agreement does not operate to abrogate the liability limitations contained in the Convention.

The court pointed out that a different result would be possible if there had been a clear political decision to void the treaty liability limitation where there has not been adequate notice of that limitation. The court emphasized that in the negotiations leading to the Montreal Agreement the issue was the amount of the limitation, not notice of the limitation. Because the Executive Branch continued to support the Warsaw Convention, the court deferred to that branch, stating:

Since the branches of government invested by the Constitution with the power to make and break treaty obligations continue to assert the utility of the Convention, and to assert the enforceability of the treaty limitation, these private citizens may not, indeed the court may not, define the treaty limitation out of existence, even in narrow circumstances. That task, difficult though it has proven to be, has been assigned to the legislative and executive branches of our government.

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141 19 Av. Cas. (CCH) 17,584 (D.D.C. Nov. 26, 1985); see also supra notes 6-7 and accompanying text.
142 370 F.2d 508 (2d Cir. 1966), aff’d, 390 U.S. 455 (1968).
143 *In re Korean Airlines Disaster,* 19 Av. Cas. (CCH) at 17,595.
The plaintiffs appealed this portion of the opinion. That appeal is currently pending before the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{144}

6. \textit{Compliance With Requirements}

(a) \textit{Passenger Baggage and Cargo}

There has been continued active litigation with respect to the effect of a failure to include all of the information required by the Warsaw Convention on cargo and baggage documents. In \textit{Republic National Bank v. Eastern Airlines},\textsuperscript{145} the United States District Court for the Southern District of New York held that the failure to provide all of the required information with respect to checked baggage containing currency did not prevent the carrier from limiting its liability under the Warsaw Convention. Eastern accepted baggage from an air courier employed by Republic National Bank with the knowledge that the baggage contained large amounts of United States currency. The baggage check documents did not contain a number of the required entries as set forth in Article 4 of the Warsaw Convention.

Relying on \textit{Exim Industries v. Pan American World Airways},\textsuperscript{146} the court allowed Eastern to limit its liability pursuant to the Convention. In determining whether an airline that has failed to provide a baggage check with the required information will be allowed to utilize the limitation of liability contained in the Convention, the court held that it should take a practical approach "that looks to the purposes of the Convention's requirements and determines whether they have been met in the circumstances of each case."\textsuperscript{147} For example, in the absence of a notation as to the weight of the baggage, it could be assumed that the weight was equal to the maximum allowable weight for baggage. It was also clear that the passenger was

\textsuperscript{144} The appeal is pending at the deadline for this paper (November 1, 1986).
\textsuperscript{145} 639 F. Supp. 1410 (S.D.N.Y. 1986), aff'd, 815 F.2d 240 (2d Cir. 1987).
\textsuperscript{146} 754 F.2d 106 (2d Cir. 1985).
\textsuperscript{147} \textit{Republic Nat'l Bank}, 639 F. Supp. at 1415.
aware of the Warsaw Convention and the limitations contained in it, and therefore the failure to include the baggage liability limitations required by the Convention on the claim check did not preclude the carrier from relying on the Convention. Finally, the fact that the passenger's ticket number was not recorded on the baggage claim check had no effect since the baggage was assumed to have been stolen, and there was no evidence of misdelivery to another passenger. Therefore, the court upheld the right of Eastern to limit its liability under the weight provisions contained in the Convention.

Gill v. Lufthansa German Airlines also addressed the issue of the effect of an airline's failure to include the information required by Article 4 of the Warsaw Convention on a baggage claim check. In Gill the plaintiff claimed that the carrier wrongfully demanded that he check his carry-on baggage even though it was no larger than the carrier's specifications for carry-on baggage. He did not receive a claim check for the baggage. The defendant argued that since the plaintiff received claim checks for his other luggage, the failure to provide the information requested by Article 4 was "a technical and insubstantial omission that would not vitiate the liability limitations of the Convention." The court held that Article 4 must be strictly interpreted and, under such an interpretation, the liability limitations of the Warsaw Convention did not apply. The court relied, in part, on the fact that the plaintiff did not have an opportunity to take self-protective measures, because he was required to check his luggage at the last minute.

(b) Time Limitations

In St. Paul Insurance Co. v. Venezuelan International Airways, the United States Court of Appeals for the Eleventh Circuit determined that a claim was governed by

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149 Id. at 1455.
time limitations contained in a tariff in addition to those contained in the Warsaw Convention. The court held that when the notice of loss requirements of an airway bill conflict with a tariff, the provisions of the tariff take precedence.

In *Hatzlachh v. Lufthansa German Airlines*,\(^{151}\) the court found that the two year statute of limitations contained in Article 29 of the Warsaw Convention barred the plaintiff's claim. The consignee had refused delivery of the shipment and the plaintiff requested return of the goods, but did not file suit until over three years later. Article 29 requires suit to be filed within two years, "reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped."\(^{152}\) The court found that the shipper's request for return of the goods established that transportation had "stopped" by that date.

In *Maro Leather Co. v. Aerolineas Argentinas*,\(^{153}\) the court addressed the issue of what time limit applies for notice of loss when part of a shipment is not delivered. In the case of a "partial loss" a seven day time limit applies while in the case of a "loss, including non-delivery" a 120 day time limit applies. In this case only seven of nine pallets of goods were delivered. The court found that the 120 day provision for "a loss, including non-delivery" applied, and therefore the plaintiff's claim was not barred.\(^{154}\)

In *Interglobe Imports v. Alisped International Forwarding*,\(^{155}\) the consignee sued to recover for damage to fabric shipped from Florence, Italy to New York. The court granted summary judgment for the defendant because the plaintiff made notice of the claim orally, while Article 26(3) of the Warsaw Convention requires that a notice of


\(^{154}\) *Id.* at 17,516.

7. Recovery of Punitive Damages Under the Warsaw Convention

In Harpalani v. Air-India, the plaintiff sued Air India, claiming to have been "bumped" from a flight between Bombay and New York. The plaintiffs sought compensatory and punitive damages. The defendant moved to dismiss the claim for punitive damages on the ground that such damages are not recoverable under the Warsaw Convention.

The court in Harpalani granted the defendant's motion to dismiss. The court interpreted Articles 17 through 19 of the Warsaw Convention, which are the sections creating a basis for carrier liability, as plainly limiting that liability to compensatory damages. The court also found that the obvious purpose of the Convention was to allow adequate compensation to passengers for most losses at reasonable rates. Thus, the court held that allowing punitive damages would be inconsistent with this purpose. Finally, the court pointed out that no court had ever awarded punitive damages under the Convention. Where willful misconduct has been proven in the past, damages were based upon compensation principles.

Butler v. Aero Mexico raised questions relating to wrongful death damages under the Warsaw Convention, but in addressing those issues the Court discussed the recoverability of punitive damages under the Convention. In Butler, the defendant objected that the trial court failed to apply Alabama law, which allows only punitive damages in wrongful death cases. The United States Court of Appeals for the Eleventh Circuit held that punitive damages awards "conflict with the tenor of the Warsaw Conven-

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156 Id. at 17,433.
158 Id. at 799.
159 774 F.2d 429 (11th Cir. 1985).
and therefore an award of pecuniary damages, rather than punitive damages, was appropriate. Second, the court held that in calculating damages under the Warsaw Convention it is not necessary to reduce the plaintiff’s damages to account for income taxes which would have been due on the decedent’s income.

8. Wilful Misconduct

Two cases from the United States District Court for the Southern District of New York addressed the question of what level of activity would amount to "wilful misconduct" so as to avoid the limitation of liability contained in the Warsaw Convention. In *Baker v. Landsdell Protective Agency* [161] the plaintiff alleged that she lost $200,000 worth of jewelry contained in a handbag as it was being passed through a security checkpoint. The plaintiff claimed that an employee of the defendant stole the jewelry, and that the theft was wilful misconduct which could be imputed to the defendant. The court disagreed and held that if an employee did steal the jewelry, the theft was not within the scope of his employment, and therefore could not be imputed to his employer.

The court also refused to find wilful misconduct in the designing of the baggage checkpoint, or in the failure to follow an internal memorandum relating to how to check hand-baggage. The court found that the defendant’s action in publishing a memorandum containing instructions was evidence of the exercise of due care to safeguard passenger belongings, and not evidence of wilful misconduct. Finally, the court suggested that, in order to find wilful misconduct with respect to the loss of a valuable item, the passenger must show that the air carrier knew of the existence of the item. [162]

In contrast to *Baker*, the court in *Merck Co. v. Swiss Air*

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[160] Id. at 431.
[162] Id. at 168.
Transport Co.\(^1\) found that the violation of an internal company policy could give rise to a finding of wilful misconduct. In *Merck*, workers transferred a shipment of experimental vaccines from a warehouse area known as the "cool room" to the "freezer room" and the vaccines were destroyed. Swiss Air had a company policy of checking several times a day on its temperature controlled rooms, but failed to do so in this case. The court ruled that the failure of Swiss Air to follow its stated policy precluded the entry of summary judgment for the carrier since a reasonable person could find that Swiss Air's actions amounted to wilful misconduct.

Finally, in *Butler v. Aeromexico*,\(^2\) the United States Court of Appeals for the Eleventh Circuit found that the flight crew's action in failing to use the aircraft radar despite the existence of bad weather, and the failure to abandon an approach when they lost visual contact with the airport constituted wilful misconduct which rendered inapplicable the Warsaw Convention and Montreal Agreement liability limitation of $75,000 per passenger.

9. **Definition of "Single Operation" Pursuant to Article I(3)**

In *Lemly v. Transworld Air Lines*,\(^3\) the United States District Court for the Southern District of New York reviewed the requirement that a domestic flight be part of a "single operation" with an international flight in order to come within the Warsaw Convention. In *Lemly*, the plaintiff planned to fly from Baltimore to New York, and, on the next day, fly on a different air carrier from New York to Saudi Arabia. Tickets for the two flights were purchased on different days. The plaintiff fell and suffered injuries while boarding the aircraft for the Baltimore to New York flight. The court held that the two flights were not part of a "single operation" as that term is used

\(^{1}\) 19 Av. Cas. (CCH) 18,190 (S.D.N.Y. 1985).
\(^{2}\) 774 F.2d 429 (11th Cir. 1985).
\(^{3}\) 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,106 (S.D.N.Y. Apr. 29, 1986), aff'd, 807 F.2d 26 (2d Cir. 1986).
in Article I(3) of the Warsaw Convention. The court emphasized that the air carrier for the Baltimore to New York segment had no notice of the international character of the flight. The court further emphasized that, in order for Article I(3) to apply, it must be found that both the passenger and the air carrier intended the flight to be a single operation. The court stated, “The separate handling of ticket reservations, payment, issuance and delivery of the tickets for the domestic and international flights strongly indicated (as it does here) that the parties did not consider the flights to constitute a single operation.”

10. Choice of Law

In *Harris v. Polskie Linie Lotnicze*, the court decided that because of interaction between the Warsaw Convention and the FSIA, Polish law must govern the issue of recoverable damages in a wrongful death case. In *Harris*, the plaintiff’s decedent died in an aircraft crash near Warsaw, Poland. The case came within both the Warsaw Convention and the FSIA. Article 24 of the Warsaw Convention requires that “applicable local law” be used in determining the appropriate measure of damages. The court found that where jurisdiction is based on the FSIA, the applicable local law is the FSIA. In reviewing the FSIA, the court relied on section 1606, and found that Congress, by implication, suggested that “the law of the place where the action or omission occurred” would govern the issue of damages. Since the crash occurred in Poland, the court found that the “action or omission” occurred there.

The plaintiff attempted to counter this conclusion by arguing that the complaint contained general allegations of

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166 *Id.* at 17,108 (citing *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 748 F.2d 94, 96-97 (2d Cir. 1984)).
167 641 F. Supp. 94 (N.D. Cal. 1986).
168 See supra notes 1-34 and accompanying text.
170 *Harris*, 641 F. Supp. at 97.
171 *Id.* at 99.
negligence that prevented the court from concluding that the plaintiff's claims would be based on actions or omissions occurring in Poland. The court found, however, that in a case governed by the Warsaw Convention and the Montreal Agreement, the act of negligence giving rise to liability is "the failure to land the aircraft safely" and therefore, under section 1606 of the FSIA, Polish law must govern the issue of damages. It should be noted that the court found that Polish law was not significantly different from the California damage law urged by the plaintiff.

11. Vicarious Limitation of Liability

In a case not directly related to the Warsaw Convention, but affecting the liability of air carriers for the shipment of goods, the United States Court of Appeals for the Second Circuit recently held in _Lerakoli, Inc. v. Pan American World Airways_ that the Lausanne Convention protected not only the United States Postal Service, but also those airlines with which it contracted for the carriage of mail. The Lausanne Convention limits the liability of the United States Postal Service to approximately $15.76 per item. Lerakoli had mailed eleven packages of diamonds by registered mail from New York to Belgium. The packages never arrived in Belgium. The United States Postal Service contracted with Pan American World Airways for the transportation of mail to Belgium. The Court of Appeals found that it was necessary to apply the limitation of liability contained in the Lausanne Convention to those airlines with which the Postal Service contracted for carriage of mail. The court pointed out that in the Warsaw Convention context the limitations of liability have been extended to the employees and agents of the

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172 Id. at 98.
173 783 F.2d 33 (2d Cir. 1986).
175 _Lerakoli_, 783 F.2d at 38.
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air carriers involved in international air travel because failure to do so would allow the Warsaw Convention to be circumvented. Similarly, failure to extend the protection of the Lausanne Convention would affect the ability of the postal service to contract with airlines for the carriage of mail. Therefore, the court held that the Convention limited Pan Am's liability.

12. Class Certification

The plaintiff in Sanchez v. Avianca Airlines\textsuperscript{176} sought to have her action certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The plaintiff's claim was for a three hour delay in a flight from Bogata, Columbia to New York. The plaintiff had the burden of proving that (1) the class was so numerous that joinder of all members was impracticable, (2) there were questions of law or fact common to the class, (3) the claims or defenses were typical of the claims or defenses of the class, and (4) she would fairly and adequately protect the interests of the class. Further, the plaintiff was required to establish, pursuant to Rule 23(b)(3), "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."\textsuperscript{177}

The court denied class certification, holding that a class action was not a superior remedy since the airline did not have the addresses of the other passengers on the flight, and identification of passengers on a two-year old international flight by names only would be difficult.\textsuperscript{178} The court refused to grant a "fluid" class recovery because the court found such a recovery to be inconsistent with the policies behind the Warsaw Convention.\textsuperscript{179}

\textsuperscript{176} 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,357 (S.D.N.Y. Apr. 30, 1986).
\textsuperscript{177} Id. at 17,358.
\textsuperscript{178} Id. at 17,359.
\textsuperscript{179} Id.
B. Liability of the United States Government

There have been a number of reported decisions relating to the liability of the United States Government. They can be divided roughly into two categories. First, there has been continued development and refinement of the law governing the duties of air traffic controllers and pilots. Second, there is a class of cases wherein Federal Aviation Administration (FAA) employees allegedly performed inspections and certifications negligently, giving rise to liability under the Federal Tort Claims Act (FTCA). For the most part, the courts have rejected these claims on the grounds that the FAA's actions in the area of inspection are "discretionary functions" which fall outside the FTCA. If the claims are not governed by the FTCA, governmental immunity applies and the claims must fail. The controlling case in this area is the United States Supreme Court decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense.

1. Negligence of Air Traffic Controllers

In First America Bank Central v. United States, the United States District Court for the Western District of Michigan held that air traffic controllers who allowed a commercial jet aircraft to land in front of a private light aircraft were not negligent in connection with the crash of the private aircraft as a result of flying into the vortex generated by the commercial airliner.

In this case the plaintiff's decedent entered the terminal control area at the Dallas/Ft. Worth Regional Airport without radio or transponder contacts. The pilot never established radio contact with the approach radar controller or the landing radar controller during his approach. The air traffic controllers located the decedents' plane on radar, and alerted a commercial jet airliner coming in for

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183 Id. at 463.
landing that there was traffic which was not in radio contact with the controllers. When the pilot of the commercial jet located the decedents' plane and determined there was no danger of a mid-air collision, the controllers allowed the commercial jet to land according to its final approach sequence. Decedents' plane, which was behind the commercial jet, crashed as a result of the vortex turbulence generated by the commercial jet.

The court, applying Michigan law, stated that violations of the Federal Aviation Regulations (FARs) constitute evidence of negligence under Michigan law. The court found that the decedent, as the pilot in command, is charged with knowledge of the contents of the FARs and the Airman’s Information Manual (AIM) with regard to explanations of and procedures for avoiding turbulence. The pilot’s duty to “see and avoid,” said the court, remains, regardless of whether the controller has given a landing clearance to the commercial jet. The court then found that under the facts of this case the controllers did not deviate from their standard of care for the safe conduct of planes. The court said that the operational responsibilities of air traffic controllers are governed by 14 C.F.R. § 65.45(a), which requires compliance with the Air Traffic Control Manual (ATCM). Under the facts of this case, the controllers acted in accordance with the manual.

In *Barbosa v. United States*, the Court of Appeals for the Eleventh Circuit affirmed a district court’s finding that the failure of air traffic controllers to inform a pilot of the weather conditions did not constitute a breach of their duty. In *Barbosa*, plaintiff’s decedent ran into thunderstorms on a visual flight rules (VFR) flight. The pilot failed to request updated weather information from air traffic controllers, as the AIM required. The Eleventh Circuit affirmed the district court, stating that any duty on the part of the air traffic controllers arises from the ATCM. It rejected the plaintiff’s argument that the

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184 811 F.2d 1444 (11th Cir. 1987).
ATCM requires controllers to provide weather information to pilots. Instead, the court held that the ATCM does not require controllers to give weather information to pilots, as such information is available to pilots both on the ground and in the air from other sources.

In *Rawl v. United States*, the United States Court of Appeals for the Fourth Circuit addressed the issue of whether an air traffic controller's negligence could be an intervening and superseding cause of an accident, thereby allowing a claim against the United States even in the face of a pilot's contributory negligence. In *Rawl*, a VFR rated pilot and his wife were killed while attempting an instrument flight rules (IFR) approach at night. The district court found that the flight controller was negligent in directing the pilot to make a series of abrupt maneuvers, thereby inducing spatial disorientation. Further, the district court found that the controller failed to suggest alternative airports where VFR conditions prevailed. The district court held this negligence to be a superseding or intervening cause of the accident, thereby allowing a claim for the pilot's death even in the presence of the negligence of the pilot in attempting to land in IFR conditions.

On appeal, the Fourth Circuit pointed out that there was no South Carolina precedent allowing a claim on the basis of an intervening and superseding cause where the plaintiff was guilty of contributory negligence, which is a complete bar to recovery in South Carolina. Even assuming that it would, the court held that a superseding or intervening cause must be entirely unforeseeable and unexpected, thereby breaking the connection between the initial negligence action and the injury. Because the air traffic controller's negligence was not unforeseeable and unexpected, it was not a superseding cause, and the pilot's contributory negligence barred a claim against the United States.

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In *Daley v. United States*, the United States Court of Appeals for the Eleventh Circuit held that an air traffic controller’s duty in performing his job function was to exercise “due care” under Florida law. When the controller has notice of an emergency situation, however, the court held that due care requires special attention. In *Daly*, a pilot and two passengers in a Twin Beechcraft were on approach to Gainesville Regional Airport under IFR conditions. They informed the controller that they had one engine out and were encountering difficulty in feathering the propeller of the engine. The Eleventh Circuit affirmed the district court finding that, in these circumstances, the controllers had a duty to undertake reasonable efforts to immediately determine the aircraft’s exact location, and warn its pilot of the dangers presented by television towers that they knew to be in the area. The aircraft collided with a guy wire of a television antenna, resulting in the accident.

*Murff v. United States* involved a mid-air collision between a Cessna 172 flying under VFR and a Fairchild F-27 flying under IFR. The Fairchild F-27 landed successfully, but the Cessna crashed, causing the death of both the flight instructor and student pilot aboard.

The flight instructor and student pilot were “presumably” engaged in an instrument training, therefore the court concluded that the student was wearing a hood which limited his vision to the aircraft instruments. The Court of Appeals described the Cessna as “burning no landing light and with one of its two lookouts blinded, maneuvering at a dangerous altitude in an intersection of aerial traffic without having notified the controllers of what it was about.”

The court of appeals pointed out that the collision took place in an area of clear air, with the result that the primary responsibility for avoiding collisions rests with the

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187 785 F.2d 552 (5th Cir. 1986).
188 Id.
pilot, not the controller. Although the trial court found that the air traffic controller failed to issue sufficient warnings to the pilots of the two aircraft, the court of appeals found that the pilots of the Cessna had the "primary duty" to avoid the collision and that the controller's duty was "secondary." Since Texas law permits no recovery against one who is less negligent than the plaintiff, the court of appeals reversed the judgment in favor of the plaintiff and remanded with instructions to enter judgment for the defendant.

In *McGory v. United States*, the United States District Court for the Northern District of Ohio held that the United States was not liable under the FTCA for the deaths of six persons killed when their aircraft apparently ran out of fuel and crashed. In this case, governed by Ohio law, the court found that the controllers were not negligent in the performance of their duties and complied with applicable regulations governing a situation where an aircraft runs out of fuel due to the pilot's error.

In *Shankle v. United States*, two civilian pilots sought and received permission to perform a photographic formation flight over Randolph Air Base. After closely avoiding a mid-air collision with a T-37 military jet, the civilian aircraft collided in mid-air with another aircraft and crashed, causing the death of both pilots and a nonpilot photographer.

The plaintiff pursued two theories against the government: first, the military air traffic controllers and pilots were negligent; and second, the government was negligent in allowing the civilians to engage in a poorly planned formation flight. The court of appeals affirmed, without discussion, the district court's conclusion that there was no air traffic controller or military pilot negligence. The court of appeals further found that the military owed no duty to the civilian pilots to prevent them

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189 Id. at 554.
190 3 Av. L. Rep. (CCH) (20 Av. Cas.) 17,758 (N.D. Ohio Jan. 27, 1987).
191 796 F.2d 742 (5th Cir. 1986).
from taking a poorly planned formation flight over the Air Force base.

The district court found that an Air Force officer had acted on behalf of the civilian pilots in obtaining permission for them to engage in the flight without first thoroughly investigating the pilot’s flight plan and his qualifications. Applying Texas law, the court of appeals held that the Air Force officers had no duty to the plaintiffs to make such an investigation. The court stated that, with certain exceptions, “one person is under no duty to control the conduct of another, even if he has a practical ability to exercise such control.”

In *Largent v. United States*, the plaintiffs argued that the crash of a Beach Baron resulted from airframe icing and that the weather briefing given by the local flight service station was inadequate to warn of icing conditions. The district court found that the weather briefing given by a flight service station specialist was inadequate in failing to advise the pilot of a flight precaution for icing issued ten hours before the briefing. The court further found, however, that the pilot was negligent in failing to inquire about the possibility of icing in light of the forecast for snow and freezing temperatures which he did receive. The court also noted that the pilot took off into IFR flight conditions without being currently rated for such a flight, and that the aircraft was overweight at the time of takeoff. Further, the court held that icing may not have been a cause of the accident, which could have been caused by spatial disorientation. The court pointed out that the pilot had experienced difficulty in handling a twin engine aircraft in instrument conditions. The court made a two-tiered holding: first, it found that icing did not cause the accident; second, it found that even if icing did cause the accident, the plaintiff’s contributory negligence barred his claim and the claim of his passenger because the pilot

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192 *Id.* at 746 (quoting *Otis Eng’g v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)).
193 *19 Av. Cas.* (CCH) 4876 (D.S.D. 1986).
and the passenger were involved in a "joint venture." The court therefore entered judgment in favor of the United States.

2. Negligent Inspection: The Progeny of Varig Airlines

The courts have continued to refine the application of the Varig Airlines doctrine during 1986. Mitchell v. United States involved the decision of the Bonneville Power Administration (a federal entity) to adopt the FAA's policy of not marking ground wires on transmission towers below 500 feet. The plaintiff's decedent was killed when his crop duster struck such a ground wire and crashed.

In determining whether the discretionary function exception to the FTCA applied, the district court distinguished between "operational level" and "planning level" activities. The United States Court of Appeals for the Ninth Circuit rejected this distinction. In light of the Varig Airlines decision, the court held that the purpose of the discretionary function exception was to "prevent judicial second guessing of legislative and administrative decisions based on social, economic, and political policy." The court found that the Bonneville Power Administration's decision to adopt the FAA policies with respect to the marking of ground wires was so based. The court further suggested that any decision not to warn of potential safety hazards comes within the discretionary function exception.

In Proctor v. United States, the United States Court of Appeals for the Ninth Circuit faced the question of whether the discretionary function exception would bar a claim that the FAA failed to adequately inspect a specific portion of an aircraft. In Varig Airlines, the Supreme Court ruled that the decision to adopt a "spot-check" system of inspection, and the application of that system to the spe-

194 Id. at 4885 n.1.
195 787 F.2d 466 (9th Cir. 1986).
196 Id. at 468.
197 781 F.2d 752 (9th Cir.), cert. denied, 106 S. Ct. 2918 (1986).
cific aircraft involved in that case, came within the discretionary function exception. In Proctor, the plaintiffs alleged that the FAA did carry out an inspection, but did so negligently. The Court of Appeals, however, cited the language from Varig that "the discretionary function exception precludes a tort action based on the conduct of the FAA in certificating . . . aircraft for use in commercial aviation." Based on this broad language, the court held that a claim for negligence in performing an actual inspection also falls within the discretionary function exception.

In Colorado Flying Academy v. United States, the Court of Appeals for the Tenth Circuit held that an employee's decisions in designing the terminal control area for Denver's Stapleton Airport came within the discretionary function exception. The issue raised in Colorado Flying Academy related to the failure of the designer to follow FAA regulations in designing the terminal control area.

In addition to the courts of appeals, the district courts have also interpreted Varig Airlines to grant the discretionary function exception a wide application. In Waymire v. United States, the United States District Court for the District of Kansas dismissed a claim against the United States based on the issuance of a standard airworthiness certificate with respect to a Cessna 320 aircraft. The aircraft had been modified by the addition of a Radome Unit, during which the Pitot tubes had been moved, rendering one or both of them inoperable. The plaintiff argued that Varig Airlines did not apply because inspections for airworthiness certificates are carried out under mandatory guidelines or regulations, and therefore, the government employee carrying out such an inspection has no "discretion." The court found this distinction to be unpersuasive because aircraft inspection involves only the govern-

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199 Id. at 753.
199 724 F.2d 871 (10th Cir. 1984), cert. denied, 106 S. Ct. 2915 (1986).
200 Id. at 876-77.
ment’s interest in regulating private activity, and the primary responsibility for the safety of the aircraft lies with the owner. The court pointed out that the FAA inspector involved in the case was only required, under FAA regulations, to inspect the aircraft “as necessary.” He was therefore granted sufficient discretion to make the discretionary function exception applicable.

The Eleventh Circuit in *Heller v. United States*, upheld the district court’s dismissal of a pilot’s action against the FAA for negligent denial of his first-class medical certificate. The court ruled that the trial court properly dismissed for lack of subject matter jurisdiction a commercial airline pilot’s complaint in which he alleged that the FAA denied him a first-class airman medical certificate because of its negligent investigation, data collection, data production, and diagnostic procedures and activities. It held that implementation of the FAA’s medical certification program is a discretionary activity which is protected under the FTCA.

3. *Feres Doctrine*

There was almost no judicial activity involving the *Feres* doctrine during the past year until the United States Supreme Court decided *Johnson v. United States* on May 18, 1987. Since the decision of the Supreme Court in *Feres v. United States*, it has been clear that “a soldier may not recover under the Federal Tort Claims Act for injuries which arise out of or are in the course of activities incident to service.” In *Johnson v. United States*, the United States Court of Appeals for the Eleventh Circuit had affirmed, after a rehearing en banc, an earlier decision of a panel of the court finding that a claim by a serviceman participating in military maneuvers against a civilian air

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202 Id. at 1403.
203 803 F.2d 1558 (11th Cir. 1986).
207 779 F.2d 1492 (11th Cir. 1986).
traffic controller was not barred by the *Feres* doctrine. The court pointed out that the Supreme Court in *Shearer*, while barring the claim involved, had found that the *Feres* doctrine could not be reduced to a few "bright-line rules". The appellate court emphasized the importance of determining whether or not the claims asserted against the United States would implicate civilian courts in conflicts involving the military structure or military decisions.

In *Johnson*, a coast guard helicopter pilot was killed while on a military mission when a civilian air traffic controller directed the pilot into a mountainside in IFR conditions. The court of appeals stated, "[T]he claims presented are based solely upon the conduct of the civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion."

The Supreme Court, in a five-to-four vote, reversed the appellate court and ruled that *Feres* bars a wrongful death action even when the cause of the death was allegedly wrongful actions by a civilian employee of the FAA. The majority opinion, written by Justice Powell, reaffirmed the continuing validity of the *Feres* doctrine to bar all suits by military personnel or their survivors against the government based upon service-related injuries.

The Court reexamined the rationale behind the *Feres* doctrine in reaching its decision. First, "[t]he relationship between the Government and members of its armed forces is 'distinctively federal in character.'" Second, "the existence of . . . generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service related injuries." Since the

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208 Id. at 1494.
209 Id.
211 Id.
Veterans' Benefit Act provides compensation for service-related injuries, the Court found unconvincing the argument that Congress could have contemplated "recovery for service-related injuries under the FTCA."\textsuperscript{212} Third, suits by members of the military against the government are barred "because they are the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."\textsuperscript{213}

The Supreme Court then found that plaintiff's decedent was killed while performing a rescue mission on duty for the Coast Guard, whose "primary duty" was to perform such missions. Because Johnson was acting under orders of the Coast Guard, "the potential that this suit could implicate military discipline is substantial."\textsuperscript{214}

In a dissent written by Justice Scalia, four members of the Court argued that \textit{Feres} was "wrongly decided" and criticized the decision. The dissent examined each of the factors cited by the majority as the rationale behind \textit{Feres}, and concluded that \textit{Feres} cannot be justified on the basis of these factors. The dissent noted that the Court had not been specifically asked to overrule \textit{Feres}, and stated that it "need not resolve whether considerations of \textit{stare decisis} should induce us, despite the plain error of the case, to leave bad enough alone."\textsuperscript{215}

In \textit{Walls v. United States},\textsuperscript{216} the United States District Court for the Southern District of Indiana found that the \textit{Feres} doctrine barred a serviceman's action for injuries suffered in the crash of a Cessna-172 aircraft on lease to the Peterson Air Force Base Aero Club. The court ruled that the plaintiff's injuries occurred while he was on active duty with the U.S. Army and that his action was therefore barred. The plaintiff was taking advantage of the Aero

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 2069 (quoting Shearer v. United States, 473 U.S. at 59).
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.} at 2075.
\textsuperscript{216} 651 F. Supp. 1049 (S.D. Ind. 1987).
Club, "an instrumentality of the United States Air Force," at the time of the accident.\textsuperscript{217} The court stated that, if the courts allow servicemen to bring lawsuits for injuries incurred while engaged in Aero Club activities, there could be adverse effects on military discipline and decision making.

C. Liability of Aircraft Manufacturers

Recent case law involving the liability of aircraft manufacturers can be divided into three categories. First, there has been a major revolution in restricting the liability of aircraft manufacturers through the strengthening of the government contractor defense. Second, courts continue to struggle with the issues regarding the validity of statutes of repose and their application. Finally, there are a few miscellaneous cases discussing various products liability issues.

1. The Government Contractor Defense

The last year has seen a dramatic turn of events with respect to the liability of manufacturers providing aircraft products to the military. By early 1986 there were two significant appellate court opinions on the government contractor defense. The first was \textit{Koutsoubos v. Boeing Vertol},\textsuperscript{218} in which the United States Court of Appeals for the Third Circuit held that the defense would apply if the manufacturer could establish that the government set specifications for the product, the manufacturer complied with those specifications, and the government knew as much or more than the manufacturer about the dangers inherent in the design of the product. In \textit{Shaw v. Grumman Aerospace Corp.},\textsuperscript{219} the United States Court of Appeals for the Eleventh Circuit articulated a much more difficult test for the manufacturer to meet in order to establish the government contractor defense. \textit{Shaw} required that the

\textsuperscript{217} \textit{Id.} at 1051.
\textsuperscript{218} 755 F.2d 352 (3d Cir. 1985).
\textsuperscript{219} 778 F.2d 736 (11th Cir. 1985).
manufacturer establish that it did not participate in any substantial way in the design of the allegedly defective product, or that it warned the military of the design risks and proposed alternative designs and the military then chose to proceed with purchasing the allegedly defective product.

On May 27, 1986, the United States Court of Appeals for the Fourth Circuit handed down a trilogy of decisions rejecting Shaw and strongly endorsing the government contractor defense. In Tozer v. LTV Corp., the widow and minor children of a navy pilot filed suit against LTV Corp. and its subsidiary, Vought Corporation, under the Death on the High Seas Act (DOHSA) and general maritime law. In upholding a verdict for the plaintiffs, the district court distinguished the leading case on the government contractor defense, McKay v. Rockwell Int'l Corp., on the grounds that McKay was limited to strict products liability claims while Tozer's claim was based on negligence theories.

The Fourth Circuit rejected the district court's distinction between negligence and strict products liability theories. The court reviewed the policy considerations underlying the government contractor defense. First, the court noted that the judicial branch has a long standing policy, based on the separation of powers embodied in the Constitution, against interference with military affairs. Second, citing McKay, the court pointed out that civil courts are poorly equipped to balance the values inherent in the design of sophisticated military equipment which is contemplated for use in situations and at performance levels that simply find no analogue in civilian life.

Third, the court observed that the government provided alternate sources of compensation for servicemen injured

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220 792 F.2d 403 (4th Cir. 1986).
223 Tozer, 792 F.2d at 406.
during military service in the Veterans' Benefit Act.\textsuperscript{224} Fourth, the court endorsed the discussion in \textit{McKay} that military pilots assume the risk of the dangers of their calling, and to treat them as ordinary consumers would “de-mean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled.”\textsuperscript{225}

In denying recovery, the court found that the military procurement process inherently involves close cooperation between the government contractor and the military. It rejected the test announced in \textit{Shaw}, requiring that the contractor not participate in the design of the product, because “if the defense were to be waived by such participation, the contractor would be trapped between its fear of liability and its desire to provide needed ideas and information.”\textsuperscript{226} The court concluded that without the government contractor defense “there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development.”\textsuperscript{227}

The court ultimately adopted the four part test which was originally set forth in \textit{McKay}. This test provides that a government contractor providing military equipment is not subject to liability in tort where

(1) The United States is immune from liability under \textit{Feres} and \textit{Stencel},

(2) The supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment,

(3) The equipment conforms to those specifications, and

(4) The supplier warned the United States about patent errors in the government’s specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.\textsuperscript{228}

\textsuperscript{225} \textit{Tozer}, 792 F.2d at 407 (quoting \textit{McKay}, 704 F.2d at 453).
\textsuperscript{226} \textit{Id}.
\textsuperscript{227} \textit{Id}.
\textsuperscript{228} \textit{Id}. at 408 (quoting \textit{McKay}, 704 F.2d at 451).
The court held that the defense would be equally applicable to negligence claims as well as strict products liability claims since negligence claims would equally require the jury to attempt to second guess military design decisions.

In *Dowd v. Textron, Inc.*, the families of two navy pilots killed in the crash of a Bell helicopter due to a phenomenon known as "mast bumping" brought suit against the manufacturer. That phenomenon had, in fact, occurred before with respect to the Bell helicopters involved in the accident. The Army and Bell both studied the history of "mast bumping," and Bell then suggested a number of modifications to the rotor system. The Army rejected Bell's proposed modifications.

In a per curiam opinion, the United States Court of Appeals for the Fourth Circuit reversed a trial court judgment in favor of the plaintiffs, and restated the government contractor defense it had previously announced in *Tozer*. The plaintiffs in *Dowd* argued that the rotor system was designed in the early 1960's without any government participation. The court of appeals rejected this argument, pointing out the fact that the Army had rejected proposed modifications to the systems, and that Bell could not modify the system without its permission. The court concluded that to impose liability on Bell in a situation where it could not modify the design would be to "impose liability without responsibility." The court emphasized that the Army was aware of the problems and capabilities of the rotor system which Bell supplied, but, nevertheless, decided to use that system.

A third case, *Boyle v. United States Technologies Corp.*, extended the government contractor defense to breach of warranty claims, but avoided ruling on whether the defense would apply to subsequent overhauls of military equipment by the manufacturer. In *Boyle*, a Marine
drowned after the helicopter in which he was flying crashed in the Atlantic Ocean. His family sued United Technologies, alleging negligence and breach of warranty in the design of the escape hatch on the helicopter, and negligent overhaul of the helicopter control system. The jury returned a verdict in favor of the Marine’s family in the amount of $725,000.

The Fourth Circuit, citing Tozer, rejected the plaintiffs’ claims based on the design of the escape hatch. With respect to the claim of negligent overhaul, the court in Boyle declined to base its decision on the application of the government contractor defense to subsequent overhaul by the contractor. Instead, the court pointed out that the plaintiffs’ claim was based on the presence of a metal chip in the hydraulic components of the control system. The plaintiffs had not established that the chip was introduced into the hydraulic system at the time it was overhauled by the defendant, and there were two other possible sources from which the chip could have entered the system. Relying on Virginia law, the court held that the plaintiff failed to establish the defendant’s responsibility “with reasonable certainty.” Therefore, the court reversed the judgment for the plaintiffs, and remanded the case to the trial court with directions to enter judgment for the defendant.

The government contractor defense has also received strong support at the district court level. In Hendrix v. Bell Helicopter Textron, the United States District Court for the Northern District of Texas entered judgment for the defendant based on the government contractor defense. Hendrix involved the death of servicemen in the crash of a Bell helicopter shortly after takeoff in Hanau, Germany. According to Army accident reports, the failure of a bolt, which led to mast bumping and separation of the main rotor system, ultimately caused the accident.

The district court detailed at length Bell’s review of the

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235 Id. at 416.
safety of the bolts and its attempts to have them replaced and the Army's and Navy's rejection of Bell's findings and suggestions. The court further found that "no other accident has ever occurred because of a failure of [the] bolt," and entered judgment for the defendants at the close of a bifurcated liability bench trial. The court noted that the Fifth Circuit adopted the government contractor defense as set forth in *McKay v. Rockwell International Corp.* by its decision in *Bynum v. FMC Corp.*

The court also found that the helicopter met the Army's specifications, in compliance with the third element of the *McKay* test, since the Army accepted delivery of the helicopter. With respect to the fourth element of the *McKay* test, the court found that Bell "knew of no dangers in the procured product, either patent or latent, about which the government did not know." The court held further that "the duty of the military contractor to warn the government about any defects in the specifications or use of the equipment which was known to the military contractor but not to the government must be judged at the time of contracting and delivery of the procured product." The court based this holding on *McKay* and on Texas product liability law. The court went on to point out, however, that even if Bell was under a continuing duty to advise the government of defects, it had discharged the duty in that case.

The Boeing Company successfully asserted the government contractor defense in *Humphreys v. Boeing*. Humphreys was injured in the crash of a U.S. Army Chinook helicopter manufactured by Boeing "during an aft gear slope landing." The United States District Court for the Eastern District of Pennsylvania granted Boeing's motion...

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235 Id. at 1554.
237 770 F.2d 556 (5th Cir. 1985).
238 *Hendrix*, 634 F. Supp. at 1557.
239 Id.
241 Id.
for summary judgment on the basis of the government contractor defense. The court found that the Third Circuit had adopted the government contractor defense in *In re Air Crash Disaster at Mannheim Germany.* It then described the requirements for the government contractor defense as follows:

1) That the government establish the specifications for the product;
2) That the manufacturer complied with these specifications;
3) That the government knew as much as or more than the contractor about the hazards of the product as designed.

In *Humphreys,* Boeing and the plaintiffs agreed that the first two requirements had been met. The only issue in the case was whether Boeing and the government possessed equal knowledge of the hazards involved in operating a helicopter. The court found, based on affidavits submitted by Boeing, that "it is utterly inconceivable that Boeing could know more about the hazards involved in aft gears slope landing than the Army, which had developed the maneuver and the highly detailed procedures to accomplish it in a safe manner." Since Boeing had established the government contractor defense, the court entered judgment in its favor and against the plaintiff.

2. *Statutes of Repose*

Several years ago, in a wave of products liability reform, a number of states enacted statutes of repose. These statutes typically barred claims based on products liability theories if the product was manufactured more than a fixed number of years before the action was filed, regardless of when the injury occurred. These statutes re-

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242 769 F.2d 115 (3d Cir. 1985).
243 *Id.* at 121.
244 *Humphreys,* 20 Av. Cas. (CCH) at 17,601.
ceived varied reception in the courts, and a number of them have been held unconstitutional under state constitutions.246

*Berry v. Beech Aircraft Corp.*247 involved the application of the Utah products liability statute of repose248 to bar a claim arising out of the crash of a twenty-three year old aircraft. Unlike some statutes of repose, the Utah law barred products liability claims on all theories against the manufacturer. The plaintiffs challenged this statute of repose as a violation of various provisions of the Utah Constitution. In evaluating the validity of the statute, the Utah Supreme Court first turned to the "open courts" provision of the Utah Constitution which provides, that "every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law".249 After extensive review of the decisions of other courts throughout the country which have analyzed statutes of repose in light of similar provisions, the court found that the open courts provision of the Utah Constitution is satisfied if the challenged law "provides an injured person an effective and reasonable alternative remedy 'by due course of law' for vindication of his constitutional interest."250 If the law provides no such remedy, then a statute can be valid only if "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective."251 The court then found that the Utah statute completely barred any remedy to an injured person if it applied to that person's claim. Further, the court found that the statute did not "reasonably and substantially advance its stated purpose."252 The court also

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249 UTAH CONST. art. I, § 11.
250 *Berry*, 717 P.2d at 670.
251 *Id.*
252 Id. at 682.
found the statute to be unconstitutional as violating the section of the Utah Constitution guaranteeing a right of action for wrongful death.\textsuperscript{253} It should be noted that the court took pains to distinguish the decision in which it upheld a statute of repose contained in the Medical Malpractice Act and its decision upholding a statute of repose intended to protect architects and builders.

The Oregon statute of repose\textsuperscript{254} received considerably more favorable treatment at the hands of the Oregon Court of Appeals in \textit{Erickson Air Crane Co. v. United Technologies Corp.}\textsuperscript{255} In that case the plaintiff purchased a helicopter from United Technologies in 1971 which crashed in June, 1981, presumably because of a defective compressor disc. The plaintiff claimed to have received documents in 1977 indicating that the useful life of the disc was 6000 hours, rather than the correct 4000 hours. The trial court denied the defendant's motion for summary judgment based on the Oregon statute of repose and entered a judgment for the plaintiff in the amount of $7,404,775.

The court of appeals reversed the trial court's decision, holding that the court should have granted defendant's motion for summary judgment based on the statute. The court concluded that the plaintiff's claim was governed by the Oregon statute of repose and that, under the statute, a products liability action must be commenced within eight years from the date of the first purchase of the product for use or consumption.\textsuperscript{256} Since the statute did not contemplate a manufacturer's negligent actions or omissions before or after the date of purchase as having any bearing on the limitation period, any allegations concerning such actions were not relevant to the determination of whether the statute barred the plaintiff's claims. The court relied

\textsuperscript{253} \textit{Id.} at 684.
\textsuperscript{255} 79 Or. App. 659, 720 P.2d 389 (1986).
\textsuperscript{256} \textit{Erickson Air Crane}, 720 P.2d at 390.
on *Dague v. Piper Aircraft Corp.*257 in holding that, even if an
aircraft manufacturer has a continuing duty to warn of de-
fects in a product after sale of the product, the statute of
repose bars products liability claims against the manufac-
turer based on breach of that duty after the time limit con-
tained therein has lapsed.

3. Miscellaneous Cases

Perhaps more than any other area of aviation law, the
liability of aircraft manufacturers is particularly depen-
dent upon state law, and, for the most part, that law is
established through cases which do not involve aviation.
During the past year many states have passed legislation
reforming their tort systems,258 and these reforms should
have a larger effect on the liability of aircraft manufactur-
ers than the unrelated case law regarding personal injury
litigation. However, a review of a few miscellaneous
products liability decisions reported in the last year is use-
ful to highlight recent trends in this litigation.

In *Rehler v. Beech Aircraft Corp.*,259 a Beech Baron crashed
after going into a low altitude flat spin. The plaintiff al-
leged that the Pilot Operating Handbook misrepresented
the procedure for recovery from a "steep" spin as being
applicable to all spins. The court characterized this as a
claim of implied misrepresentation, and suggested that
such misrepresentations would not be actionable under
Texas law, which allows a cause of action for affirmative or
expressed misrepresentations. However, the court went
on to find that the plaintiff’s theory had been adequately
submitted to the jury and rejected.

The plaintiff in *Rehler* also argued that the Beech Baron
suffered from "undue" spinning tendencies and that
Beech was intentionally deceptive in its flight tests during
the certification of the Baron. The court rejected this ar-

gument on the grounds that the plaintiff failed to show

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259 777 F.2d 1072 (5th Cir. 1985).
that the FAA aircraft certification procedures would have revealed any undue spinning tendency, and there was no direct evidence of any misrepresentation. Regarding the plaintiffs’ claims based on a direct theory of product defect, the court found, after a detailed discussion of Texas jury instructions, that the jury’s verdict in favor of the defendant should be affirmed.

In In re Air Crash Disaster at Metropolitan Airport, Detroit, Michigan, January 19, 1979,260 the United States Court of Appeals for the Sixth Circuit addressed the question of the admissibility of FAA airworthiness directives. The case arose out of a Gates Learjet crash at Detroit Metropolitan Airport in 1979. Allegedly, the crash resulted from aerodynamic stall on approach for landing. Later in the same year, the FAA issued an airworthiness directive requiring an increase in landing and approach speeds under certain conditions, and warning that even small accumulations of ice and snow on the wing’s leading edge can cause aerodynamic stall prior to activation of the stall warning system. The court of appeals affirmed the district court’s refusal to admit this evidence based on Rule 407261 of the Federal Rules of Evidence.

The court declined to follow Herndon v. Seven Bar Flying Service,262 and instead followed Werner v. Upjohn Co.263 The proponents of the airworthiness directive argued that Rule 407 did not apply since the subsequent remedial measures were required by the FAA rather than undertaken by the defendant itself. The court, however, re-

261 Fed. R. Evid. 407 provides as follows:
When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership control, or feasibility of precautionary measures, if controverted, or impeachment.
262 716 F.2d 1922 (10th Cir.), cert. denied, 446 U.S. 958 (1983).
fused to follow this reasoning. Instead, it cited Werner in concluding that, if such documents were admitted, manufacturers “might be discouraged from taking early actions on their own and from participating fully in voluntary compliance procedures.”

In ruling on a motion for a new trial, a district court in Pennsylvania recently allowed evidence of a pilot’s alcohol consumption over twenty-four hours prior to the crash at issue in the lawsuit. In *Stevens v. Cessna Aircraft Co.*, the decedent pilot’s former wife brought suit against Cessna for alleged defects in the rudder controls of a Cessna 411 aircraft, and for an implied failure to warn of the defects. The crash occurred soon after takeoff when the plane was at an altitude of one hundred feet. The pilot notified the tower that he had lost power in his left engine and turned to land. An examination of the wreckage revealed that the pilot had not retracted the landing gear or feathered the propeller of the dead engine. Cessna contended that the pilot’s failure to perform these acts constituted misuse of the plane, because he could simply have landed without turning at the time he lost the engine. Cessna’s evidence of decedent’s misuse came from a physician trained in aeronautical psychology who testified that decedent had been under a great deal of stress in his personal life, and that he had been drinking about twenty-four hours prior to takeoff. The expert testified that residual effects from alcohol can hamper perception even after twenty-four hours. Plaintiff objected to this testimony because decedent’s autopsy revealed no alcohol in his bloodstream. The court denied plaintiff’s motion for a new trial and ruled that evidence of decedent’s alcohol consumption was proper because it showed the stress on decedent and it supported the suggestion that decedent’s perceptions may have been dulled at the time of the accident. The evidence was held to be admissible because it is of the type normally relied on by such

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264 *In re Air crash at Detroit*, 18 Av. Cas. (CCH) at 917.

experts, pursuant to Rule 703 of the Federal Rules of Evidence. Further, the court noted that the limiting instructions which were given at trial effectively negated any prejudicial effects of the evidence.

In an action by an airplane owner against a repair shop for breach of a contract to repair, and repairer's counter-claim for repair and storage costs, a Missouri court of appeals held that an exculpatory clause excluding liability for incidental and consequential damages was not an affirmative defense and was not waived by the repairer's failure to assert the defense in its answer. In World Enterprises v. Midcoast Aviation Services,267 the court held that an affirmative defense involves additional facts to those pleaded in the complaint, so that even if the complaint is true, defendant avoids legal responsibility. The additional facts include acts, transactions, or occurrences that are not a part of the original contract or transaction, but have arisen since the cause of action came into existence. The liability limitation contained in the contract between the aircraft owner and repairer does not present such an additional fact, and consequently did not constitute an affirmative defense. The court also denied the counter-defendant's argument that interpretation of the contract provision was a jury question. Because the exculpatory clause was unambiguous, the court ruled that it could be interpreted as a matter of law. Finally, the court found that the exculpatory clause, which provided that the repairer would not be liable for "any consequential commercial damages," served to preclude loss of use damages sought by the owner.

In Schneider v. Cessna Aircraft Co.,268 the Court of Appeals of Arizona held that the trial court should have given a jury instruction on the duty of a manufacturer to warn against flying an aircraft in subfreezing weather without draining the fuel system. The court found that if there

266 Fed. R. Evid. 703.
267 713 S.W.2d 606 (Mo. Ct. App. 1986).
was any evidence tending to establish plaintiff's theory that the airplane manufacturer's failure to warn of difficulties with operating the airplane in freezing weather made the product defective, the trial court should have given the instruction. In this case, there was evidence of a number of forced landings and crashes attributable to ice forming on a "tee-fitting" in the fuel lines.

The Missouri Supreme Court, in *Nesselrode v. Executive Beechcraft* held that the plaintiff's evidence in that case sufficiently established the existence of an industry standard intended to safeguard against the incorrect installation of symmetrical flight parts that have asymmetrical functions. Plaintiffs' decedent died as a result of mechanical trim tab actuators that were accidentally reversed during a mechanical inspection, causing them to work in reverse during flight. The Missouri Supreme Court discussed various standards used in different jurisdictions to define when a product is "defective" under the Restatement (Second) of Torts, Section 402A, but noted that Missouri has neither adopted the consumer expectation test nor a risk-utility test, but instead presents the issue of a product being "unreasonably dangerous" to the jury as an ultimate issue.

The court also addressed the Missouri standard for a failure to warn case, concluding that such a case requires a two-step inquiry. First, the fact finder must determine whether the product is unreasonably dangerous when put to normal use without proper warnings, and second, it must determine whether the manufacturer gave adequate warnings or any warnings at all. Under this standard, the court upheld the jury's determination that defendant's failure to affix a warning to visually identical actuators or a warning in the maintenance manual about the possibility of an accidental reversal was the proximate cause of the accident.

In *Thibodeau v. Beech Aircraft Corp.*, the United States
Court of Appeals for the Tenth Circuit affirmed a jury verdict allowing recovery to a plaintiff for injuries sustained when the cabin door of his Beechcraft Baron 95-B55 airplane opened during flight. At trial, plaintiff prevailed on negligence and failure to warn claims, and Beech won on strict liability grounds. On appeal, Beech argued that the trial court erred by failing to instruct the jury that its compliance with applicable FAA rules creates a rebuttable presumption that its product was not defective and it was not negligent. The Eleventh Circuit held that the FAA regulations were inapplicable to the action.

In Norton v. Temsco Helicopters,\textsuperscript{271} the United States Court of Appeals for the Ninth Circuit affirmed summary judgment in favor of defendant on plaintiff’s claim of intentional interference with prospective economic advantage. Plaintiff, an employee of defendant Temsco Helicopters, suffered injuries when the helicopter he was piloting crashed. He sued Hiller Aircraft, the manufacturer of certain bearings which were found to have caused the crash. Temsco Helicopters intervened as a plaintiff in Norton’s prior action, and in a subrogation action on behalf of its insurer.

In the prior action, the helicopter manufacturer claimed that an improper maintenance procedure, “staking”, was the cause of the helicopter’s failure. Temsco claimed that “staking” had not been performed on the helicopter. Before trial in the prior action, it was discovered that Temsco had indeed “staked” the aircraft, but, during discovery, had altered maintenance records to conceal this fact. The parties entered into a settlement agreement worth approximately $1 million. In the present action, plaintiff alleged that Temsco’s actions in altering the maintenance records forced him to settle his claim against the manufacturer for less than its actual worth.

The Ninth Circuit affirmed the district court’s finding that the plaintiff could not establish the elements of his

\textsuperscript{271} 812 F.2d 1411 (9th Cir. 1987) (Decision not for publication and not to be cited to or used by courts).
cause of action. The court found that Temsco Helicopters’ alteration of the records could not have damaged the plaintiff, because such alteration did not affect his right to recover damages against the manufacturer.

In *Monger v. Cessna Aircraft Co.*, the United States Court of Appeals for the Eighth Circuit affirmed the district court’s refusal to instruct the jury that a pilot was presumed to have checked his aircraft for water in the fuel tank prior to takeoff. Experts testified that the crash occurred because the plane ran out of fuel, and circumstantial evidence indicated that the decedent pilot did not have access to a ladder which could have allowed him to conduct a proper inspection of the aircraft’s fuel supply before takeoff. Such evidence of the decedent pilot’s negligence in failing to check the fuel, according to the Eighth Circuit, was enough to deprive the plaintiff of an instruction on the presumption of due care.

The Eighth Circuit also upheld the district court’s refusal to allow into evidence a letter from the chief of the FAA’s Flight Standards Division which criticized Cessna for past failures to identify safety problems. The court said that the letter did not specifically relate to whether this model plane and its fuel system had received proper FAA approval or were otherwise unsafe.

In *Bancorp Leasing & Financial Corp. v. Augusta Aviation Corp.*, the United States Court of Appeals for the Ninth Circuit affirmed the district court’s dismissal of an action on the grounds that the plaintiff had not obtained service within sixty days of filing the complaint, as required under Oregon’s two year products liability statute of limitations. At the district court level, Bancorp, which had purchased the rights to the helicopter from codefendant Aircraft At Your Call, Inc., and then leased the helicopter back to codefendant, argued that the statute should be tolled because none of the defendants were present in Oregon at the time of the accident. The Ninth Circuit rejected this

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272 812 F.2d 402 (8th Cir. 1987).
273 813 F.2d 272 (9th Cir. 1987).
argument, citing numerous authorities in favor of its holding. The court also rejected plaintiffs’ argument that the breach of warranty claim is governed by the four-year statute of limitations, finding that the Oregon legislature intended to include all products-related claims within the products liability statute.

In Norris v. Bell Helicopter Textron, the Louisiana Court of Appeals held that the original manufacturer of a helicopter was not liable in products liability because major alterations and repairs were made to the helicopter between the time of design and manufacturer and the time of the accident. The court stated that, though the manufacturer would not be exculpated from liability merely by the fact that major alterations and repairs had been made to the product, in this case seventeen years had passed from manufacture to accident. In addition the helicopter log was missing for records of repair from 1963 through 1976. Under these facts, the appellate court reversed the trial court’s finding that the crash had been caused by “excessive flapping” and that such “excessive flapping” was a design defect in the Bell 47 helicopter. The court also ruled that the trial court’s admission and consideration of Army reports about related “flapping” problems on helicopters was erroneous, because the plaintiff failed to show similarity between the helicopters in the reports and the Bell 47 helicopter.

In United States Helicopters v. Black, the North Carolina Supreme Court, in an action by a helicopter manufacturer seeking recovery for damage to one of its helicopters, held that an individual who rented the helicopter from the company was a bailee of the helicopter. At trial, the court granted the defendant a directed verdict, and the North Carolina Court of Appeals affirmed. Under the facts of this case, the defendant rented the helicopter from the plaintiff in order to take flying lessons. The defendant rejected the plaintiff’s offered helicopter instructor, and in-

stead received instruction from a friend who was a qualified instructor. The crash of the helicopter resulted from the negligence of the instructor. The North Carolina Supreme Court reversed the decision of the appellate court, and held that a bailee is liable not only for the results of his own negligence but also for that of his agents. Since the defendant’s instructor was at the controls of the helicopter at the defendant’s request he was held to be the defendant’s agent. The plaintiff had previously established that the defendant was the bailee of the helicopter because the plaintiff delivered the helicopter to the defendant, the defendant accepted, and the helicopter was in the defendant’s sole custody at the time of the accident.

V. TORT LITIGATION — DAMAGES

Damages law applied in aviation cases is usually governed by state law, although in certain limited circumstances federal or foreign law may apply. To the extent there are any damages issues unique to aviation law, they generally involve choice of law issues and the scope of recoverable damages under the Warsaw Convention. A review of the other issues concerning damages that have arisen in aviation cases can therefore give no more than a brief overview of the area.

A. Wrongful Death Cases

In Yowell v. Piper Aircraft Corp.,276 the Texas Supreme Court addressed a number of issues concerning recovery in wrongful death cases. The court first considered the plaintiff’s claim for loss of prospective increase of inheritance. The court pointed out that, in Texas, allowing the recovery of such loss would not constitute a double recovery because the decedent’s estate has no cause of action for lost future earnings. The court rejected the defendant’s argument that loss of inheritance damages are too speculative, reasoning that such damages are no more

276 703 S.W.2d 690 (Tex. 1986).
speculative than the other elements of "pecuniary loss in a wrongful death action such as lost support, guidance, and training." Loss of inheritance damages were defined as "the present value that the deceased, in reasonable probability, would have added to the estate and left at natural death to the statutory wrongful death beneficiaries but for the wrongful act causing the premature death." \(^{277}\)

In *Yowell*, the jury awarded the estate of each of the four decedents $500,000 for mental anguish suffered prior to death. The plaintiffs added the claim for mental anguish on the last day of trial, after the close of testimony. The Texas Supreme Court held that this was acceptable since Piper had sought, and received, leave to change its theory of defense in mid-trial.

In addition to the mental anguish claims, the adult plaintiffs sought damages for loss of society, companionship, and affection. The court extended its previous holding allowing recovery for loss of companionship and society for the death of a minor child to cover any family member entitled to recover under the Texas Wrongful Death Statute. \(^{279}\)

The United States Court of Appeals for the Fifth Circuit also addressed the issue of loss of inheritance as an element of wrongful death damages in *Marks v. Pan American World Airways*. \(^{280}\) That case involved Louisiana law, which had traditionally denied loss of inheritance as an element of wrongful death damages. The Fifth Circuit found, however, that when the Louisiana legislature amended the wrongful death statute \(^{281}\) in 1961 to include claims of adult children among the "primary class" of survivors, it cast doubt upon the continued denial of loss of inheritance as an element of damages. The court did not rule

\(^{277}\) *Id.* at 633.

\(^{278}\) *Id.*


\(^{280}\) 785 F.2d 539 (5th Cir. 1986).

on whether the plaintiffs could recover such damages in that case, because it found that the plaintiffs’ expert testimony as to the amount of such damages was too speculative and conjectural. The court cited lack of persuasive evidence as to the decedent’s future work plans, investments, spending habits, commitments to savings plans, tax planning, and the effect of federal and state estate and inheritance taxes. In Marks, the court also approved the award of $250,000 per parent for each of the four children of the two decedents for loss of love and affection.

The court returned to the issue of expert testimony with respect to loss of inheritance claims in the case of Eymard v. Pan American World Airways. In a very strongly worded opinion, the court held that federal trial court judges have a duty to “take hold of expert testimony in federal trials,” and strongly disapproved of the practice of simply letting all expert testimony go to the jury regardless of its reliability. The court pointed to signs which it felt indicated the inadmissibility of expert testimony. First, the court pointed to testimony which the expert would not “be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review.” The second sign of inadmissibility cited by the court was testimony from the “professional expert” who spent substantially all of his time consulting with attorneys and testifying. The court did not rule testimony from such an expert inadmissible per se, but commented that “experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge’s decision that he is an ‘expert.’” The court found that the testimony of the economist used to support the claim of loss of inheritance was based on

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282 795 F.2d 1230 (5th Cir. 1986).
283 Id. at 1234.
284 Id.
285 Id.
286 Id.
speculation and was "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating [the amount of inheritance]." 287

The jury in Eymard awarded $1,100,000 to each of the three children of the two decedents. The awards were based upon a general verdict rather than special interrogatories giving an item by item calculation of the elements of damages. The court of appeals suggested that the trial court should have used special interrogatories.

One element of the plaintiffs' damage claims was the loss to the surviving children of the love and affection of an unborn brother who was killed in the crash. The court allowed this recovery based on a Louisiana statute specifically providing for recovery for the wrongful death of an unborn child. The court, however, limited the recovery to $10,000 per surviving child.

After reviewing all the evidence relating to damages, the court concluded that the maximum allowable award to each child was $801,000. Because the jury had awarded more, and the jury's calculation of damages was unclear since no special interrogatories were used, the court remanded the case to the district court for a new trial on damages and ordered that the district court use special interrogatories in submitting the case to the jury.

In Matuz v. Gearadin Corp., 288 the California Court of Appeals considered whether a meretricious spouse could recover under the California Wrongful Death Act. The case arose out of an air crash on Catalina Island. The plaintiff was a passenger in the aircraft and witnessed the injury and death of her meretricious spouse. With respect to the spouse, the complaint alleged that for up to five years prior to January 3, 1983, plaintiff and the decedent had a "stable and significant relationship with each other" and a mutual understanding and agreement to cohabitate and

287 Id. at 1235.
eventually marry. Plaintiff and the decedent maintained exclusive sexual relations with each other, had a "family type" relationship in that they maintained one residence at which they lived together and gave the appearance of a marriage relationship, and shared a "high degree of economic cooperation and entanglement." The court determined that recovery for wrongful death was governed exclusively by the California Wrongful Death Act. That statute allows recovery for a "putative spouse," but has no provision allowing recovery for a meretricious spouse. The court found that the term "putative spouse" means that the surviving spouse of a void or voidable marriage must have a good faith belief that the marriage was valid. The plaintiff in Matuz did not claim that she believed she was married.

In rejecting plaintiff's claims based on the equal protection provisions of the California and United States Constitutions, the court set forth three considerations supporting the legislature's refusal to extend recovery to meretricious spouses: (a) the legislature could reasonably conclude that a relationship which the parties have chosen not to formalize by marriage lacks the necessary permanence to allow the survivor to recover damages for wrongful death, which look to the future and are intended to compensate for future loss, (b) an action based on a meretricious relationship presents greater problems of proof and dangers of fraudulent claims than an action by a spouse or putative spouse, and (c) the exclusion of meretricious spouses is reasonably related to the state's legitimate interest in promoting marriage.

In McCandless v. Beech Aircraft Corp., the United States Court of Appeals for the Fifth Circuit reviewed wrongful death damages arising out of the crash of a Beech Baron. The decedent was a self-employed businessman who operated a ranch, a cattle sale barn, a cattle feed lot, and an aviation school. The only testimony on the loss of sup-

289 779 F.2d 220 (5th Cir. 1985).
port element of damages was by a neighbor of the decedent who testified that it would cost $50,000 to hire help to perform the services previously performed by the decedent. The court found this to be sufficient evidence to support the jury's verdict of $200,000 for loss of support. The court also examined whether mental anguish was recoverable under the Texas Wrongful Death Act. It found that Texas law allowed recovery by a decedent's children but went on to hold that Texas would require a physical manifestation of mental anguish before allowing such recovery. According to the court the record did not contain any "evidence of mental anguish beyond mere sorrow or grief." Therefore, the court refused to allow recovery for mental anguish.

In In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, the Seventh Circuit upheld a $3 million damage award in favor of the widow of a pilot killed in an air crash. The Seventh Circuit affirmed the trial court's exclusion of evidence regarding the widow's receipt of approximately $425,000 in insurance payments for the purpose of reducing the widow's damages for lost support. The court said that the trial court did not abuse its discretion by deciding to exclude evidence of the receipt of insurance benefits, because the danger of unfair prejudice substantially outweighed its probative value. However, the Seventh Circuit held that the trial court erred in excluding evidence of the income taxes the deceased pilot would have paid on his earnings, since that evidence was relevant to the measure of damages under Arizona's wrongful death statute and, therefore, should have been admitted under the Federal Rules of Evidence. The trial court also erred in refusing to instruct the jury that its award would not be taxed, since failure to give that instruction denied effect to the federal interest of preventing the jury from inflating its award.

291 McCandless, 779 F.2d at 226.
292 803 F.2d 304 (7th Cir. 1986).
B. Punitive Damages

In *Andor v. United Air Lines*, the Oregon Court of Appeals upheld an award of punitive damages against an airline. The case arose out of the crash of United Flight 173 near Portland, Oregon in 1978. The jury returned a verdict of $161,275.32 in compensatory damages and $750,000 in punitive damages.

In upholding the award of punitive damages, the court of appeals first observed that, under Oregon law, a corporate defendant is liable for punitive damages if such damages could have been imposed upon any of its employees. The court found that the actions of both the United pilot and the United employees responsible for maintenance on the aircraft were sufficiently egregious to sustain the jury's award of punitive damages.

The United DC-8 crash in that case occurred because the aircraft ran out of fuel. On approach to Portland, the aircraft suffered a "heavy to severe jolt-jolt" due to abnormal extension of the landing gear. The pilot abandoned the landing and began attempts to determine if the landing gear was down and locked. Investigators later determined that the landing gear was, in fact, properly extended. The aircraft continued to burn off fuel and the crew prepared for an emergency landing. Unfortunately, the pilot was unaware of the allowable tolerance in the fuel supply indicator system and the aircraft ran out of fuel six miles short of the airport. The abnormal extension of the landing gear was due to a corrosion problem known to United on this aircraft specifically and DC-8's in general. With this knowledge, United had taken what it considered to be adequate corrective measures.

The court of appeals found that the actions of both the flight crew and maintenance personnel were adequate to support the punitive damages awarded in that case. The

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293 79 Or. App. 311, 719 P.2d 492 (1986).
294 *Andor*, 719 P.2d at 494.
295 *Id.* at 495.
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The court characterized the pilot's actions as evincing "an 'I know better than you do' attitude under circumstances where following the human and mechanical signals was essential to the safety and life of the plane's passengers."\(^{296}\) The court also found "United's inattention to a known defect in landing gear mechanism,"\(^{297}\) to be sufficient to support punitive damages on the basis of inadequate maintenance.

United argued that any failure with respect to the maintenance of the landing gear could not support the award of punitive damages because it was "highly extraordinary"\(^{298}\) that a landing gear malfunction would lead to the aircraft running out of fuel. The court of appeals, however, found that there was sufficient evidence to support a jury verdict that United could have reasonably foreseen the causal connection between the two events.

United also argued that punitive damages were not recoverable unless there was an intent to injure, as opposed to wanton misconduct. The court of appeals disagreed, approving the trial court's jury instruction allowing punitive damages "if defendants' conduct goes beyond mere carelessness to a willful or wanton disregard of risk of harm to others of a magnitude evincing a high degree of social irresponsibility."\(^{299}\) The jury instruction had defined wanton misconduct as, "deliberate disregard of the rights and safety of others."\(^{300}\)

In *Soria v. Sierra Pacific Airlines*,\(^{301}\) the Idaho Supreme Court held that an agreement by plaintiff, the manufacturer of the aircraft, and a company under contract to maintain and repair the aircraft did not constitute a "Mary Carter" agreement. As a result, the court upheld the trial court's refusal to require that the contents of the agreement be disclosed to the jury.

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\(^{296}\) Id. at 496.

\(^{297}\) Id. at 497.

\(^{298}\) Id.

\(^{299}\) Id. at 495 n.3.

\(^{300}\) Id.

\(^{301}\) 111 Idaho 594, 726 P.2d 706 (1986).
The court said that a “Mary Carter” agreement consists of three parts. First, the agreeing defendant remains a party to the plaintiff’s action until there is a verdict unless the court or the plaintiff releases the defendant at an earlier point. Second, the agreeing parties promise to keep the agreement secret. Third, the agreeing defendant guarantees that the plaintiff will receive a certain recovery. In return for this promise, the agreeing defendant’s liability is decreased in direct proportion to the increase in the nonagreeing defendants’ liability. Using this three part inquiry, the court found that the agreement between plaintiff and defendant in this case was not a “Mary Carter” agreement. In this agreement, the defendants did not guarantee that the plaintiffs would recover a specified amount, nor did they agree to increase the plaintiffs’ recovery in any manner. Instead, the defendant manufacturer and maintenance company simply agreed not to contest plaintiffs’ damage case against the airline. In return, the plaintiffs agreed to dismiss their claims against the manufacturer and the maintenance company. Thus, the defendants did not promise plaintiffs any guaranteed sums. Therefore, the court held that the trial court did not commit error in refusing to require that the contents of the agreement be disclosed.

The court also found that there was sufficient evidence to support an award of punitive damages in this case. The court, however, remanded to the district court for determination of the amount of the punitive damages. Under the facts of this case, a failure in the plane’s elevator controls caused the accident. The defendant airline employees used a bolt which was both the wrong size and the wrong strength to connect the pilot’s controls with the elevator devices. The employees also installed the bolt backwards, and never secured the bolt with a nut and cotter pin. In addition, maintenance forms regarding the pilot’s control rods to the elevator devices were missing. Finally, the airline employees signed maintenance forms stating that they had checked the bolt in question approxi-
mately one year after its installation and found no problems. The trial court found that, if the bolt had been properly inspected, such inspection would have revealed that the workers had failed to properly install the correct bolt. The Idaho Supreme Court held that such evidence conclusively showed that the airline acted in a manner that was "an extreme deviation from reasonable standards of conduct." The court remanded to the district court to determine whether the $750,000 of punitive damages awarded was excessive.

C. Mental Anguish

In *Bode v. Pan American World Airways*, the United States Court of Appeals for the Fifth Circuit considered the adequacy of jury instructions with respect to damage claims for mental anguish. The plaintiffs in the case were residents of the immediate vicinity of the site of a Pan Am Boeing 727 crash in Louisiana. The plaintiffs included parents and children in a home thirty to fifty feet from the crash site, as well as two persons who were away from home at the time of the accident, but arrived at the scene immediately thereafter in search of family members. Two of the plaintiffs owned a home that was completely destroyed by the accident.

The trial court in *Bode* instructed the jury that it could "award damages to the extent that you find those damages have been proved by a preponderance of evidence for mental anguish, fear, fright and anxiety suffered by each of these plaintiffs as a direct result of the crash." The defendant appealed, maintaining that the district court should have informed the jury that under Louisiana law damages are not recoverable for mental anguish resulting from witnessing damage to another person's property or witnessing the injury or death of another person.

The Fifth Circuit agreed with the defendant's conten-
tion, and held that recovery for the plaintiffs' mental anguish "must be limited to fear or fright for their own safety, or because of damage to their property in their presence." Since the record at trial contained numerous references to the plaintiffs' mental anguish over the peril, injury, and death suffered by friends and neighbors, and because of the general destruction of the neighborhood, the jury had not been given appropriate instructions to separate the elements of recoverable from nonrecoverable damages. Consequently, the court remanded the case for a new trial, and did not bar the claims of the two adults who were not present at the accident, but arrived shortly thereafter.

In Darras v. Trans World Airlines the United States District Court for the District of Massachusetts denied a damage claim by the wife of an individual who was a passenger on a hijacked TWA plane. The plaintiff sued for emotional distress and mental anguish allegedly suffered while watching seventeen days of media coverage of the hijacking. The court ruled that the complaint failed to state a claim for recovery because, under Illinois law, recovery for negligent infliction of emotional distress suffered by a bystander who witnessed the injury of another is limited only to those who were in the "zone of physical danger."

D. Miscellaneous Cases

The United States Court of Appeals for the Second Circuit recently vacated an award of $1,142,888 and remanded the damages issue for further proceedings in Woodling v. Garrett Corp. In that case, plaintiff received an award against Texasgulf Aviation and Texasgulf. Texasgulf Aviation was the employer of plaintiff's decedent, who was killed on a business trip. In addition to the dam-

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305 Id.
307 Id. at 17,442.
308 813 F.2d 543 (2d Cir. 1987).
age award, the jury found a basis for rescission of a $250,000 settlement agreement between plaintiff and Texasgulf. Texasgulf argued on appeal that it was entitled to judgment as a matter of law on the basis of the release signed by plaintiff, and on worker's compensation immunity because it was the decedent's employer. The court, however, found that Texasgulf Aviation, not Texasgulf, was the actual employer, because Texasgulf Aviation had exclusive supervisory control with respect to flight safety and operations. Because Texasgulf and Texasgulf Aviation were separately incorporated, the court declined to extend workers' compensation immunity to Texasgulf.

On the issue of damages, the Second Circuit held that the district court erred in allowing the jury to deduct income taxes from decedent's future cost earnings. It also held that the trial court had incorrectly failed to require the plaintiff to pay Texasgulf interest on the $250,000 she received as settlement for the period during which she had the money prior to her rescission of the settlement agreement.

In *Piper Acceptance Corp. v. Barton*, Piper sued the buyer of a Piper aircraft who refused to make payments under the sales contract in an unsuccessful attempt to have defects in the plane repaired. Defendant then sued Piper Aircraft Corporation, Piper Sales East and others in a third-party action, to recover for economic loss under theories of strict liability, negligence, breach of contract, and breach of warranty.

The court sustained the argument of the third-party defendants that the purchaser could not recover under strict liability or negligence because he did not suffer any personal injury. The court, applying New York law, ruled that these theories are unavailable when there has been no personal injury. Next, the court agreed with Piper that, under New York law, implied warranties do not run to a remote purchaser where only economic loss is at issue.

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Therefore, since the plaintiff did not purchase the plane directly from Piper Aircraft Corporation but from a dealer, and because there were no allegations of personal injury, any implied warranties did not run to the purchaser's benefit.

Piper Aircraft Corporation next argued that the express warranty supplied with the plane limited the remedy available for breach of express warranties to repair or replacement of the defective parts. The court said that the limitation of remedy contained in the express warranty supplied with the plane, and the exclusion of consequential damages provision are distinct provisions in a warranty. It affirmed that, in the absence of bad faith or willful, dilatory conduct with respect to the limited remedy provided in the warranty, exclusion of consequential damages remains effective even if the limited remedy has failed of its essential purpose. The court followed a recent New York case in which a state court held that a limitation of remedy survives unless it fails of its essential purpose under UCC Section 2-719(2), while an exclusion of consequential damages survives unless it is unconscionable under UCC Section 2-719(3). It thus granted Piper's motion for summary judgment with respect to the purchaser's claims based upon strict tort liability or prior warranties, and with respect to the claims for consequential and incidental damages.

In Nyer v. United States, the plaintiff suffered a broken leg and first, second, and third degree burns over at least 12% of her body. She suffered these injuries while trapped in her car after the crash of a Cessna 411 aircraft

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\(^{910}\) This section states as follows:

\(\ldots\) (2) where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act. (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.


\(^{911}\) 19 Av. Cas. (CCH) 5731 (S.D. Ohio 1986).
flown by FBI agents at Montgomery, Ohio. The court found that the plaintiff sustained Post-Traumatic Stress Disorder as a result of the accident. Although the plaintiff was found to be able to do most of the things she could do before the accident, the court awarded $250,000 in damages for past and future physical and mental disabilities.

In *Wong v. Spear*, a daughter and grandson sought recovery for emotional injuries, including Post-Traumatic Stress Disorder, caused by witnessing the death of the daughter's mother. The defendant argued that, with respect to the daughter, the plaintiff was required to differentiate between the injuries caused by the sensory and contemporaneous sensory perception of the death of the mother, as opposed to the trauma suffered simply because of the fact of the mother's death. The court found that such a distinction could not be made, and awarded the mother $500,000 to compensate for Post Traumatic Stress Disorder in addition to her medical expenses and lost earnings.

Finally, in *Hervey v. American Airlines*, the plaintiffs sought recovery from an air carrier for failure to warn them of the possibility of inclement weather on their vacation. The Oklahoma Supreme Court found "no law nor theory of law which supports plaintiffs' claims against defendant." The court observed, however, that "[j]ust as taking a vacation carries with it the risk of encountering rainy weather, filing a frivolous and vexatious appeal carries with it the risk that the Supreme Court may impose attorneys fees as costs." The court granted such an award in that case.

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312 19 Av. Cas. (CCH) 18,013 (Cal. 1985).
313 720 P.2d 712 (Okl. 1986).
314 Id. at 713.
315 Id.
316 Id.
VI. TORT LITIGATION — MISCELLANEOUS ISSUES

A. Cases Involving the National Transportation Safety Board

Case law has continued to develop concerning the use of testimony and materials generated in connection with the investigation of aircraft accidents by the National Transportation Safety Board (NTSB). While aircraft manufacturers are not the only members of the aviation community with interest in the NTSB, these cases often involve products liability claims.

In *Curry v. Chevron*, the United States Court of Appeals for the Fifth Circuit faced two issues which occur with some frequency in aviation litigation. First, certain plaintiffs attempted to have their expert witness rely on the probable cause conclusions of the NTSB with respect to the crash. They argued that, under Rule 703 of the Federal Rules of Evidence, the expert should have been allowed to testify that the NTSB probable cause conclusions were one of the sources upon which he relied in reaching his opinion. The Fifth Circuit rejected this claim and affirmed the trial court's refusal to allow the expert to refer to the probable cause findings.

Second, one of the plaintiffs attempted to rely on a theory of *res ipsa loquitur* in his claims against the helicopter manufacturer Sikorsky. The Court of Appeals noted that, under Louisiana law, *res ipsa loquitur* is only a rule of circumstantial evidence used in negligence actions, and the plaintiff's burden under products liability theory is, in the court's view, less than that required under *res ipsa loquitur*. Further, the court pointed out that it was far from clear that a defect in the manufacture of the helicopter was the

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317 779 F.2d 272 (5th Cir. 1985).
318 Fed. R. Evid. 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.
most plausible explanation for the accident, which the court found to be a requirement for the application of res ipsa loquitur.

In *Mullen v. Quickie Aircraft*, the United States Court of Appeals for the Tenth Circuit also addressed the question of the proper use of NTSB reports by expert witnesses. The plaintiff's expert in *Quickie* had relied on the factual portions of the report in reaching his conclusions, which were the same as or similar to those reached by the NTSB in its probable cause finding. Apparently, the expert did not refer specifically to the NTSB probable cause finding in his testimony. The Tenth Circuit upheld this use of the NTSB report. This case also presented the court with the question of whether an exculpatory provision in a sales contract can bar claims for personal injury based on negligence, breach of warranty, and products liability. *Quickie* involved the purchase of an ultralight aircraft kit by the plaintiff, a sophisticated consumer who was, among other things, involved in commercial aircraft propeller construction. Moreover, the plaintiff had met with the principals of the corporation selling the ultralight kit, and had actually modified the sales contract for the aircraft. Based on these somewhat unique facts, the court of appeals held that the exculpatory agreement was not unconscionable and would bar plaintiff's claims based on negligence and breach of warranty. The court remanded the case to the district court with instructions to certify to the Colorado Supreme Court the question of whether an exculpatory agreement could validly preclude claims based on strict products liability theories.

In *Swett v. Schenk*, the United States Court of Appeals for the Ninth Circuit addressed the question of the permitted scope of discovery of discussions in the course of NTSB investigations. *Swett* involved the crash of a Cessna aircraft. Under the usual procedures, a representative of Cessna participated in the NTSB investigation, discussed

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319 797 F.2d 845 (10th Cir. 1986).
320 792 F.2d 1447 (9th Cir. 1986).
the accident with the investigator for the NTSB, and may have expressed an opinion as to the cause of the accident. At a subsequent deposition, the NTSB investigator was asked to testify as to the contents of the conversations with the Cessna representative. He refused to do so, relying on federal regulations governing the testimony of NTSB personnel.

During trial, the California state court judge ordered the NTSB investigator to answer the questions relating to his discussions with the Cessna representative. When the investigator continued to refuse to do so, the state court held the investigator in contempt and eventually issued a bench warrant for his arrest. Subsequently, the NTSB removed the action to the United States District Court for the Central District of California. That court dismissed the state court’s contempt citation and the plaintiff then appealed that dismissal to the Ninth Circuit.321

On appeal, the court held that the removal of the contempt citation from state to federal court was proper. With respect to the substantive issue of whether statements made to NTSB investigators in the course of their investigation are discoverable, the court refused to reach the merits. Instead, it held that the state court had no jurisdiction to hold the NTSB investigator in contempt, since the NTSB investigator relied upon a valid federal regulation in acting as he did.322 The court found that it had no jurisdiction to consider the issue of whether the regulations substantively barred the plaintiff from obtaining the requested testimony concerning the statements of the Cessna representative. The court suggested that the proper method for challenging the NTSB’s interpretation of the federal regulations relating to the testimony of NTSB investigators would be a direct action against the NTSB pursuant to 49 U.S.C. § 1903(c) or 5 U.S.C. § 702.323

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321 Id. at 1449.
322 Id. at 1451.
323 5 U.S.C. § 702 (1982) entitles a person to a judicial review, if the person
In *First National Bank v. Cessna Aircraft Co.*, the court held that an investigation report prepared by the Canadian Aviation Safety Board fell within the hearsay exception of Federal Rule of Evidence 803(8)(c) and is admissible. Cessna objected to the report, and contended that, by analogy to federal regulations prohibiting NTSB reports from being admitted into evidence, it should be excluded. The court stated that the statutory provision is not literally applicable to agencies other than the NTSB. The court then found that the hearsay exception in Rule 803(8)(c) was applicable because the Canadian reports were "factual findings." The court also allowed to stand certain statements in the report which were technically double hearsay. However, it did not allow references to other crashes involving Cessna to be included, because the plaintiff did not demonstrate substantial similarity between the other accidents and the accident involved in the case.

In *Graham v. Teledyne-Continental Motors*, the plaintiff appealed the trial court's denial of a temporary restraining order to the United States Court of Appeals for the Ninth Circuit. Specifically, plaintiff, the wife of a deceased pilot, sought to have a teardown and inspection of the plane's engines on the premises of the manufacturer, as directed by the Independent Safety Board Act of 1974. The Ninth Circuit held that plaintiff had no right to have a technical representative at the NTSB inspection since these investigations are not primarily for the purpose of determining civil liability. The court also denied the plaintiff's constitutional due process claim. It then denied plaintiff's motion for a rehearing and motion for show cause against the NTSB. Following the Ninth Cir-

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suffers a legal wrong because of the adverse effects of an agency action. Another provision states that any order issued by the NTSB shall be subject to judicial review. See 49 U.S.C. app. § 1903(d)(1982).


325 FED. R. EVID. 803(8)(c).

326 805 F.2d 1386 (9th Cir. 1986).

cuit's denial, plaintiff moved for a stay of the teardown before the Supreme Court. However, on March 9, 1987 the Supreme Court denied the motion to bar the NTSB from destructive testing of the crashed airplane.328

B. Choice-of-Law

Probably more than any other tort litigation, aviation cases tend to present very complex choice of law issues. This is not only because of the inherently multi-state nature of the facts relating to most accidents, but also because of overlapping federal and state jurisdiction, and the potential application of foreign law to certain fact situations. The courts have continued to struggle with these issues in the last year.

The United States Court of Appeals for the Fifth Circuit addressed the issue of which state statute of limitations should apply to claims for negligence, strict liability, and breach of warranty in Price v. Litton Systems.329 The accident in Price took place at Fort Rucker, Alabama. The plaintiffs' claims were originally filed in Mississippi state court, but were later removed to the United States District Court for the Southern District of Mississippi. The defendants moved to dismiss based on the Alabama statute of limitations, and the trial court granted their motion. The Ninth Circuit analyzed the various multi-state contacts presented in the case and found that Alabama law applied since the helicopter flight involved was to take place entirely within the state of Alabama and the decedents were stationed at Fort Rucker, Alabama at the time of the accident. The court therefore rejected the plaintiffs' characterization of the place of the accident as merely "fortuitous."330

The court then noted that Mississippi courts would apply Mississippi law to procedural issues. However, since Alabama courts construed the two year statute of limita-

329 784 F.2d 600 (5th Cir. 1986).
330 Id. at 605.
tions contained in the Alabama Wrongful Death Act\textsuperscript{331} to be substantive and not procedural, the Ninth Circuit would apply the Alabama statute of limitations. The court therefore upheld the dismissal of the plaintiffs' tort claims.

With respect to breach of warranty claims, however, the court took a different approach. In the Mississippi statute governing warranty claims, there is a provision suggesting that the Mississippi courts should apply Mississippi law to breach of warranty claims.\textsuperscript{332} The court concluded that it should follow an explicit provision directing it with respect to the choice-of-law issue. However, it found that the only connection between the accident and Mississippi was that Mississippi was the forum state. Therefore, it remanded the case to the trial court to consider whether the application of Mississippi law would be constitutional.\textsuperscript{333}

In \textit{Springer v. United States},\textsuperscript{334} the court analyzed which law would be applicable to a claim under the FTCA. That act provides that the government is liable "for injury . . . or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant \textit{in accordance with the law of the place where the act or omission occurred}."\textsuperscript{335} The case involved Maryland and North Carolina traffic controllers who were allegedly negligent. The court held that both North Carolina and Maryland conflict of law rules would apply. Fortunately, both states' choice of law rules pointed to the application of the law of South Carolina since the accident occurred there. The court did not speculate on what would happen if the conflict rules of

\textsuperscript{331} ALA. CODE § 6-5-410 (1975).
\textsuperscript{332} MISS. CODE ANN. § 75-1-105 (1972).
\textsuperscript{333} Price, 784 F.2d at 609.
Maryland and North Carolina pointed to the substantive law of two different states.

In *Yates v. Lowe,* the Georgia Court of Appeals again upheld the doctrine of *lex loci delicti.* The plaintiffs in *Yates* were the wife and children of a pilot who was killed when the aircraft he was piloting crashed at Dog Island, Florida. The wife and children were injured in the crash and filed suit in Georgia, stating in their complaints that the recovery they sought was limited to available liability insurance coverage. The defendant moved for summary judgment, relying on the doctrines of interspousal and parental immunity under Georgia law. The Court of Appeals found that Florida and not Georgia law applied under the doctrine of *lex loci delicti.*

With respect to the issue of interspousal immunity, the court followed Florida law, which does not waive interspousal immunity even where there is liability insurance to pay a resulting judgment. The plaintiff also argued that since her spouse was dead, the doctrine should not apply. Finding no Florida law directly on point, the court resorted to Georgia law to reject plaintiff's argument, and upheld the doctrine of interspousal immunity.

The court determined that Florida had modified the doctrine of parental immunity to the extent that the parent was covered by insurance. Before the court would apply the Florida rule, it determined that it was not "so offensive to the public policy of Georgia as to preclude its application . . . ." The court therefore denied the defendant's motion for summary judgment as to claims of the pilot's children.

In *Wert v. McDonnell-Douglas,* the plaintiff's decedent was a member of the Indiana Air National Guard who was killed during a training mission in Alabama. The case was filed in United States District Court in Arizona and trans-

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537 Id. at 114.
538 Id. at 114.
ferred to the United States District Court for the Eastern District of Missouri pursuant to the federal removal statute. The defendants moved to dismiss based on the Indiana statute of repose.

The court first determined that section 1404(a) required that it apply the conflict of law rules of Arizona, not Missouri. Arizona applies the most significant contacts rule to tort conflict of laws issues. Under that analysis the court observed, "[i]n cases involving aircraft accidents, the general rule is that little weight is given to the place of injury in choice-of-law determinations." In cases involving aircraft, "the relationship of the parties is generally centered on the aircraft itself." However, the court observed that the place of the accident in Wert was not merely fortuitous, since the training flight took off and was planned for execution and landing in Arizona.

The court reviewed the choice of law question with respect to the specific issue raised by defendants: the applicable statute of repose. It found that the primary purpose of Indiana in enacting its statute of repose was to limit the liability of Indiana manufacturers and to conserve the judicial resources of the Indiana courts. Since the case was not pending in Indiana and none of the defendants were domiciled in Indiana, the court found that "Indiana's interest should be discounted." The court went on to determine that no state other than Arizona had a "more significant" relationship to the case and therefore held that Arizona's law would apply.

C. Death on the High Seas Act

The Supreme Court of the United States clarified the scope of the Death on the High Seas Act (DOHSA) in Off-

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342 Wert, 634 F. Supp. at 404.
343 Id. at 404 n.3 (citing Pittway Corp. v. Lockheed Aircraft Corp., 641 F.2d 524, 527 n.2 (7th Cir. 1981)).
344 Id. at 404.
shore Logistics v. Tallentire. The Court held that where a death occurs on the high seas, DOHSA provides the exclusive remedy, and that the measure of damages provided by DOHSA cannot be supplemented by state wrongful death statutes.

Tallentire involved the crash of a helicopter approximately thirty-five miles off the coast of Louisiana. Plaintiffs filed suits in federal district court raising claims under DOHSA, the Outer Continental Shelf Lands Act (OC-SLA), and the Louisiana wrongful death statute. DOHSA limits recovery to pecuniary loss, while Louisiana law would allow damages for nonpecuniary loss. The defendant argued that DOHSA is the exclusive remedy for death on the high seas, and the district court agreed.

On appeal, the United States Supreme Court, in a five to four decision, held that DOHSA is the exclusive remedy available for death on the high seas. The majority opinion, written by Justice O'Connor, contains an extensive review of the history of wrongful death actions under maritime law. Congress enacted DOHSA in 1920 to remedy the situation created by the ruling of the Supreme Court in The Harrisburg, which held that general federal maritime law did not afford a wrongful death cause of action to survivors of individuals killed on the high seas. DOHSA created such a cause of action, but in section 7 states as follows: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act."

Within the territorial waters of each state there is authority that the state wrongful death statutes would apply.

348 LA. CIV. CODE ANN. art. 2315 (West Supp. 1987).
351 119 U.S. 199 (1886).
However, in *Moragne v. States Marine Lines*, the Supreme Court held that a federal remedy for wrongful death does exist under general maritime law, at least where the death occurs in the territorial waters of the United States. In later cases, it held that the federal maritime action for wrongful death includes claims for loss of support, services, society, and funeral expenses, but not for mental anguish. In *Mobil Oil Corp. v. Higginbotham*, the Court held that the damages recoverable in a *Moragne* action do not supplement the measure of damages provided for in DOHSA.

The plaintiffs in *Tallentire*, therefore, proceeded on the theory that the Louisiana wrongful death statute could apply separately from DOHSA, relying in part on section 7. In an extremely elaborate opinion, Justice O'Connor reviewed the extensive legislative history of DOHSA, and concluded that section 7 preserves state court jurisdiction over DOHSA claims, but does not allow the state wrongful death act measure of damages to be applied under those claims. The Court rejected an argument based on OCSLA, which adopts state law with respect to accidents occurring on fixed structures such as off-shore oil drilling platforms. The Court pointed out that OCSLA specifically provides in section 1332(2) that “the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected.” It held that both DOHSA and its ruling in *Executive Jet Aviation v. City of Cleveland* mandated that maritime law and not OCSLA be applied to the deaths in *Tallentire*.

The decision in *Tallentire* suggests that, as a helicopter goes from shore to an off-shore oil drilling platform, several different measures of damages apply to any wrongful death action arising out of the operation of the helicopter. While traveling over land, the state wrongful death act

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555 *Tallentire*, 106 S. Ct. at 2492.
would most likely apply. While the helicopter is over the first three miles from the shore, actions for wrongful death could be brought under the principles of *Moragne*, or potentially under state wrongful death statutes. Between three miles and the off-shore drilling platform, *DOHSA* is the exclusive remedy for wrongful death. But at the off-shore oil drilling rig itself, *OSCLA* comes into effect and adopts the state wrongful death act again.

D. *The Hague Convention*

The Hague Convention\(^{357}\) governs certain international discovery procedures. The Convention was designed to address disparities between discovery procedures in civil law countries and common law countries. The problem in this regard is two-fold. In civil law countries discovery procedures are judicial or quasi-judicial in nature, and a private American attorney undertaking such action may be engaging in an "unlawful usurpation of the public judicial function, and an illegal intrusion on that nation's judicial sovereignty."\(^{358}\) On the other hand, American lawyers often encounter considerable difficulty in obtaining evidence in foreign countries. The procedures set forth in the Hague Convention were designed to address both of these problems. In the United States, the issue giving rise to most of the litigation over the Hague Convention is its application to a foreign national properly before the United States courts.

In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*,\(^{359}\) the United States Supreme Court held that the Hague Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory.

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\(^{358}\) *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 123 (8th Cir. 1986).

Aerospatiale was sued in the United States District Court for the Southern District of Iowa by persons injured in the crash of an aircraft it had manufactured. Aerospatiale is owned by the Republic of France. It objected to certain discovery requests directed to it on the grounds that the Hague Convention provided exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory to the Convention. The Court flatly rejected this position.\footnote{Id. at 2553.}

The Court also rejected the holding of the United States Court of Appeals for the Eighth Circuit\footnote{Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa, 788 F.2d 1408 (9th Cir. 1986).} that the Hague Convention did not apply to discovery conducted under the Federal Rules of Civil Procedure. Instead the Court held that where “it is necessary to seek evidence abroad . . . the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses.”\footnote{Societe Nationale Industrielle Aerospatiale, 107 S. Ct. at 2557.} The court therefore held that the Hague Convention was an optional procedure to which a court may turn to facilitate discovery. The Court directed the District Courts to:

- take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.\footnote{Id.}

Justice Blackmun filed an opinion concurring in part and dissenting in part, in which Justices Brennan, Marshall and O'Connor joined. While rejecting the positions that the Hague Convention does not apply to foreign litigants in United States courts or conversely, that it is the exclusive method of discovery with respect to those liti-
gants, Justice Blackmun found that there should be a general presumption that there should be a first resort to the Convention's procedures. Justice Blackmun suggested that the lower court's case by case analysis of comity factors pursuant to the majority opinion should lead them to resort to the Hague Convention in a majority of cases.\textsuperscript{364}

\textbf{VII. Insurance Coverage}

\textbf{A. Compliance with Pilot Qualification Exclusions/Warranties}

In \textit{Ideal Mutual Insurance Co. v. Myers},\textsuperscript{365} the United States Court of Appeals for the Fifth Circuit reviewed the pilot qualifications clause in the context of a VFR pilot flying in IFR conditions. In that case, an accident occurred shortly after takeoff from Rockwell Texas Airport. The pilot received a weather briefing indicating that conditions for the flight were "VFR with no restrictions as to visibility."\textsuperscript{366} A number of witnesses testified that fog limited visibility at the airport around the time of takeoff to a quarter-mile.

The insurance policy required that a pilot have "valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved."\textsuperscript{367} The pilot at the time of the accident had only a VFR rating.

The court reviewed two Texas cases which had considered whether a flight should be characterized as an IFR flight or VFR flight for purposes of a pilot warranty provision. In \textit{Glover v. National Insurance Underwriters},\textsuperscript{368} the Supreme Court of Texas had adopted a rule that the conditions existing at the inception of the flight would control whether it would be characterized as an IFR or a VFR flight for insurance coverage purposes. However, in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{364} \textit{Id.} at 2562 (Blackmun, J., dissenting).
\item \textsuperscript{365} 789 F.2d 1196 (5th Cir. 1986).
\item \textsuperscript{366} \textit{Id.} at 1205.
\item \textsuperscript{367} \textit{Id.} at 1204.
\item \textsuperscript{368} 545 S.W.2d 755 (Tex. 1977).
\end{enumerate}
\end{footnotesize}
United States Fire Insurance Co. v. Marr’s Short Stop,\textsuperscript{369} the court had held that a pilot who took off in VFR conditions but knowingly flew into IFR weather knew that the flight would be characterized as an IFR flight and therefore knew that recovery under his insurance policy would be precluded.

After reviewing the evidence relating to the issue of whether conditions at the airport at the time of takeoff were VFR or IFR, the court concluded that summary judgment for the insurance carrier would be inappropriate because there was a genuine issue of material fact. It remanded the case for trial to determine the weather conditions existing at the time of takeoff, and the pilot’s knowledge of those conditions.

The opinion in Myers contains an extended discussion of the adequacy of a reservation of rights letter, the duty to defend and the adequacy of the defense provided, waiver and estoppel, and the effect of a settlement agreement and assignment of rights under a policy to the plaintiff on the insured’s coverage. Since these are issues not unique to aviation, they are beyond the scope of this article. However, the court’s opinion presents a useful review of judicial policing of the relationship between an insured and its insurance carrier.

In Ranger Insurance Co. v. Robertson,\textsuperscript{370} the Texas Court of Appeals again reviewed a pilot warranty clause with respect to the issue of characterizing a flight as either VFR or IFR. The court concluded that the controlling factor in characterizing the flight as IFR or VFR is weather information received by the pilot before take-off. If the pilot knew, from the weather information received, that he would have to fly through IFR weather, to reach his destination, then the flight was IFR; otherwise it was VFR. The flight path should be examined as a whole, rather than in segments, so that insurance coverage does not flicker on and off as the IFR or VFR nature of the

\textsuperscript{369} 680 S.W.2d 3 (Tex. 1984).

\textsuperscript{370} 707 S.W.2d 135 (Tex. 1986).
weather changes along the flight-path.\textsuperscript{371} The significance of this holding is that, apparently, a VFR pilot advised en route of IFR conditions, could knowingly encounter those conditions without voiding coverage under his insurance policy.

The Robertson opinion, like the Myers opinion, discusses a number of issues related to the insurer’s duties to the insured in the defense of a lawsuit. Any insurance carrier contemplating a denial of coverage in Texas litigation should consider it carefully.

The United States Court of Appeals for the Fifth Circuit addressed a pilot warranty exclusion in \textit{Ideal Mutual Insurance Co. v. Last Days Evangelical Association}.\textsuperscript{372} In that case the insurance policy required that the pilot in question have a minimum of 1,045 “total logged flying hours.”\textsuperscript{373} The insured had failed to prove in the trial court, as it was required to do under Texas law, that the pilot had the required logged time. The court rejected the arguments of the insured which attempted to avoid the requirement of logged time. Instead, it affirmed the concept that logged flight time is a relevant underwriting consideration to the insurer, and that therefore the courts should uphold a provision in the policy which requires substantiation of a pilot’s experience. The court found under Texas law, however, that even if the pilot warranty provision excludes coverage, the breach of that provision must have been “either the sole or one of several causes of the accident.”\textsuperscript{374} It further found that under Texas law the burden is on the insured to prove that the exclusion does not apply, and therefore the insured in that case was required to prove that the breach of the pilot provision, or more specifically lack of pilot experience, was not a cause of the accident.

\textsuperscript{371} Id. at 139 (citation omitted).
\textsuperscript{372} 783 F.2d 1234 (5th Cir. 1986).
\textsuperscript{373} Id. at 1237.
\textsuperscript{374} Id. at 1240.
In *Insurance Co. of Pennsylvania v. Mather*, a Pennsylvania trial court considered an insurance policy which required that the pilot be "properly certificated, qualified and rated under the current applicable Federal Air Regulations" for the operation involved. The insurer alleged that the pilot had made false statements to the FAA when he applied for his medical certificate and had failed to reveal that he suffered from angina pectoris and was on medication. Therefore, the insurer argued that the insured had violated the pilot warranty provision, and voided coverage under the policy. The court interpreted the policy language as requiring only the possession of a medical certificate which the FAA had not suspended or revoked. It refused to consider the validity of the medical certificate, declaring that the FAA possessed exclusive jurisdiction to review the validity of medical certificates. It acknowledged that the FAA would refuse to review the validity of a medical certificate issued to a deceased pilot since such pilot could not present a threat to the public interest or safety. Finally, the court indicated that its ruling might be different if the insurance policy had required the pilot to have a "valid" current medical certificate or had expressly stated that fraud in obtaining a medical certificate would void the policy.

In *Proprietors Insurance Co. v. Northwestern National Bank*, the Minnesota Court of Appeals reviewed a policy which contained an endorsement naming the pilot who operated the aircraft at the time of the accident "provided he has ... a minimum of 1,200 total logged flying hours." The parties stipulated that the pilot's log book showed only 871.1 flying hours at the time of the accident. The 1,200 hour requirement was based on the pilot's application.

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376 *Id.* at 17,184.
377 *Id.* at 17,187.
378 374 N.W.2d 772 (Minn. 1985).
379 *Id.* at 774.
In reviewing Minnesota law, the court concluded that the insurance carrier had the burden of proving that it did not include the provision in the policy as to logged flying time with an intent to deceive or to defraud the insured, or to increase the insured's risk of loss. The insurance carrier's underwriter testified that the premium would not have increased if the carrier had known the pilot's actual logged hours. With respect to the intent to deceive or to defraud, the court emphasized that the insurance carrier had introduced no evidence of reliance upon the representation of 1,200 logged hours, and therefore had failed to meet its burden of proving an intent to deceive or defraud.

The insurance carrier was more successful in asserting a pilot qualification exclusion in another Minnesota case, *Eastern Aviation & Marine Underwriters v. Gilbertson*. In that case, the insurance policy required that the pilot hold a FAA pilot certificate "in full force and effect." The aircraft crashed while being piloted by the owner's brother, who did not have a pilot's license, although he often used the aircraft.

The insured claimed that the policy was ambiguous because it required that a pilot have a pilot certificate to be covered in one section, while another section extended coverage to "any person while using the aircraft with the permission of the named insured." The court rejected this claim, finding that the policy required a permissive user to also hold a pilot certificate. It therefore upheld summary judgment for the insurer, finding that the policy did not cover the accident.

### B. Renter Pilot Exclusions

In *Avemco Insurance Co. v. Hill*, the Oregon Court of Appeals refused to enforce a renter pilot exclusion con-

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Id. at 568.

Id.

tained in a policy endorsement. In that case, a written binder had been issued to the insured which contained neither the renter pilot exclusion nor any reference to the form endorsement which excluded renter pilot coverage. The policy, issued after the accident, contained the endorsement, and the insurer argued that the parties had agreed that there would be no coverage for renter pilots. The court ruled, however, that under the Oregon statutory scheme relating to insurance policy binders, the insurer could not present evidence of the parties' oral agreement. The court also refused to allow the insurer to amend its complaint to state a claim for reformation of the policy.

In *Ideal Mutual Insurance Co. v. Patzer*, 384 the United States District Court for the District of Montana upheld a renter policy exclusion. In that case, the policy provided that the term "Insured" contained therein did not apply to a person operating the aircraft under the terms of a rental agreement. However, the policy identified the use of the aircraft as "Limited Commercial" including "[r]ental to pilots."385 A rental pilot was operating the aircraft at the time of the accident, and the insured claimed that the conflict between the definition of an insured under the policy and the allowed uses of aircraft created an ambiguity in the policy which should be resolved by providing coverage to the renter pilot. The court found the policy to be unambiguous and refused to hold that the policy provided such coverage. Its opinion collects the authorities on both sides of this issue.

C. Other Coverage Cases

The United States Court of Appeals for the Eleventh Circuit addressed the question of whether an aircraft is a "vehicle" for purposes of insurance coverage in *Certain British Underwriters at Lloyds of London v. Jet Charter Service*.

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385 Id. at 427.
386 789 F.2d 1534 (11th Cir. 1986).
In that case Aero Service workers extensively damaged a Boeing 707 in the course of repairs. Lloyds had issued an "Airport Owners Operators Liability Insurance" policy to Aero Service. That policy excluded coverage for property in the care, custody, or control of the insured, but excepted "vehicles that are not the property of the Assured whilst on the premises specified in the Schedule." Lloyds claimed that the Boeing 707 was not a "vehicle" and therefore the exclusion applied. Aero Service argued that an aircraft was a vehicle and therefore came within the exception to the exclusion.

The trial court granted Aero Service's motion for summary judgment, finding that the policy covered the damage to the aircraft. On an estoppel theory, Lloyds had offered evidence that the same aircraft had previously been damaged while in the possession of Aero Service. Aero Service had at that time made a claim on a prior Lloyds policy for the damage to the aircraft. This claim had been denied based on the care, custody, or control exclusion. Aero Service had then requested a quotation for coverage which would include coverage for aircraft in Aero Service's care, custody, and control. After being informed that inclusion of aircraft in its possession would lead to a five-fold increase in its premium, Aero Service did not request that coverage be extended to those aircraft. Aero Service later renewed the policy, but the coverage was not included in the renewed policy. Nevertheless, the trial court found that such coverage existed.

On appeal, the court reviewed various sources to interpret the term "vehicle" as used in the policy. As described by the dissent, the majority found a clear and unambiguous interpretation of the term "vehicle" based upon

a law dictionary that goes one way and standard dictionary that goes the other, an opinion of the United States

387 Id. at 1536.
Supreme Court rendered in 1931 when airplanes had minor significance, a dissenting opinion from the Iowa Supreme Court, and Florida statutes that point both ways.\textsuperscript{388}

The dissent pointed out, probably correctly, that a more logical resolution of the case would have been to allow Lloyds to prevail under an estoppel theory, rather than a holding that the term "vehicle" clearly and unambiguously does not include aircraft.

Two recent cases have discussed whether aircraft operations are within the double indemnity provisions of life insurance policies. In \textit{Sutherland v. Great Fidelity Life Insurance Co.},\textsuperscript{389} the Kentucky Supreme Court held that a double indemnity provision requiring that the insured undertake air travel as a "fare paying passenger" would apply where the insured paid cash and the pilot providing the transportation lacked a commercial license to transport passengers. In \textit{Brill v. Indianapolis Life Insurance Co.},\textsuperscript{390} the insurance policy provided that it would pay double indemnity if the insured's death was "the result of an injury sustained while the Insured was a fare-paying passenger in a public conveyance then being operated by a licensed common carrier for passenger service."\textsuperscript{391} The court found that a special helicopter flight in Ireland, arranged specifically for four executives traveling on business, satisfied the requirements of the policy. It therefore affirmed the trial court's summary judgment in favor of the insured.

Another court faced a similar issue in \textit{Pearce v. American Defender Life Insurance Co.}\textsuperscript{392} In that case, the plaintiff purchased a $20,000 life insurance policy with a triple indemnity provision for accidental death. The triple indemnity provision did not apply to death as a result of an

\textsuperscript{388} Id. at 1539 (Godbold, C.J. dissenting).
\textsuperscript{389} 707 S.W.2d 344 (Ky. 1986).
\textsuperscript{390} 784 F.2d 1511 (11th Cir. 1986).
\textsuperscript{391} Id. at 1512.
\textsuperscript{392} 316 N.C. 461, 343 S.E.2d 174 (1986).
aircraft accident if the insured was a member of the crew or the aircraft was "maintained or operated for military or naval purposes." The insured later joined the Air Force and was killed in a crash during a training mission.

After the insured joined the Air Force he had written the insurer asking whether the triple indemnity provision applied to his activities in the Air Force. He received a letter from the insurer stating that the triple indemnity provision would be applicable unless he was killed as the result of an act of war.

The North Carolina Supreme Court found that the triple indemnity provision was not ambiguous and the insured’s death was excluded from coverage under that provision. The court further held that the letter from the insurer did not alter coverage because its author had neither actual nor apparent authority to bind the insurer. However, the court did find that the insurer’s actions could be construed as a violation of North Carolina’s Unfair Trade Practices Act, which, the court pointed out, mandates treble damages.

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593 Pearce, 343 S.E.2d at 176.
594 Id. at 177.
595 Id. at 181.
Comments