1988

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Rachel A. Campbell

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LIABILITY OF INDEPENDENT SERVICERS AND REPAIRERS OF AIRCRAFT

RACHEL A. CAMPBELL

IMAGINE THAT THE owner of a small private plane contracts with an aircraft service facility for several specific repairs. The servicer completes the work satisfactorily but fails to notice a rusted wing bolt that would necessitate repair work not in the contract. Soon after, the owner is injured in a crash due to the rusted bolt. Is the servicer liable?

Suppose an aircraft owner entrusts his twin engine jet to an aircraft service facility for a regular maintenance inspection and signs a repair contract denying the servicers' liability for any consequential damages. The subsequent maintenance process results in the servicer accidentally grinding a hole in the plane's wing. Can the owner recover damages for loss of use of the aircraft?

Finally, imagine that an airplane owner leaves his craft with a service facility for repairs, and the parties specifically agree that the ignition keys will be removed while the plane is in the shop. During the night, two intoxicated persons find the keys left in the ignition and proceed to fly the plane, which crashes. Is the servicer liable for damage to the aircraft?

These scenarios are real1, and the issues raised are typi-

1 See, e.g., World Enterprises, Inc. v. Midcoast Aviation Serv., Inc., 713 S.W.2d 606 (Mo. Ct. App. 1986) (aircraft owner denied damages for loss of use in contract action against repairer); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975) (aircraft owner denied recovery under strict liability theory against repairer who approved plane after visual inspection); Lewis v. Jensen, 39
cal of a growing number of cases being brought by aircraft owners and passengers against servicers under a myriad of theories growing out of the inspection, maintenance, repair, or overhaul of aircraft and their components. This comment examines developments in several of the most common areas of aircraft servicer liability. Section I focuses on servicer liability for negligence, including the sub-issues of servicer compliance with Federal Aviation Administration (FAA) regulations, res ipsa loquitur, contributory negligence by the pilot, and the borrowed servant doctrine. Section II examines strict liability in the service context, an issue which has been addressed by a large number of courts in recent years. Section III looks at contract issues of servicer liability, including liability limitations and breach of implied warranty of workman-like service. Section IV contains a discussion of servicers' potential liability as bailees. Finally, Section V provides suggested guidelines to help servicers avoid liability under these theories.

I. Servicer Liability for Negligence

The law as to the negligence liability of aircraft repairmen, servicemen, and maintenance facilities is influenced in part by federal legislation and regulations, and in part by case law resting primarily on established principles of product liability law applicable to independent contractors engaged in the repair of chattels. As a practical matter, the measure of a defendant's negligence is based upon whether he, acting as a prudent person, should have anticipated the end result of his actions. If so, he can

Wash. 2d 301, 235 P.2d 312 (1951) (aircraft servicer held liable for destruction of aircraft due to theft).

2 See Fulton, The Plight of Aircraft Manufacturers and Service Facilities, FOR THE DEF. April 1982, at 16 [hereinafter Fulton]. It has been suggested that the rise of consumerism has provided impetus to aircraft owners to make claims not only for damage to the product itself, but also for the economic loss arising by reason of the downtime necessary to repair the aircraft or one of its component parts. Id.

3 2 S. SPEISER & C. KRAUSE, AVIATION TORT LAW 575 (1979) [hereinafter SPEISER & KRAUSE].

4 F. BIEHLER, AVIATION MAINTENANCE LAW 88 (1975) [hereinafter F. BIEHLER].
generally be held liable for the damages sustained by the plaintiff. These basic principles can be complicated, however, by special circumstances often present in servicer liability cases, as illustrated below.

A. Establishing Liability

Actions against independent servicers or repairers of aircraft for personal injury, death, or property damage allegedly caused by the servicer’s negligence generally involve application of traditional common-law concepts of negligence, including: (1) duty owed the plaintiff by defendant; (2) a breach of this duty; and (3) injury occasioned by such breach. The plaintiff must show and prove the existence of all of these elements if he is to recover.

1. The Duty of Reasonable Care

Assuming a duty of care exists, the question naturally arises as to how much care is required. As usually expressed by the courts, the yardstick is that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. When applying this standard to persons in the aviation industry, it is necessary to look to the standards applied to other skilled
professions for guidance. The law requires those engaging in activities requiring unique knowledge and ability to give a performance commensurate with the undertaking. As one court stated in a case involving a physician, the professional "must have latitude for play of reasonable judgment, and this includes room for not too obvious or gross errors according to the prevailing practice of his craft." It would therefore seem that the person responsible for the maintenance of an aircraft should not be held to a standard either appreciably greater or far below that required of others entrusted with life and property. He would accordingly be held liable only for negligence — that is, a lack of due care or failure to comply with the standards generally prevailing in his specialty occupation.

9 Id.; see also 14 C.F.R. § 43 (1988), which sets forth requirements for certification of aircraft servicers.
10 F. Biehler, supra note 4.
11 Christie v. Callahan, 124 F.2d 825 (D.C. Cir. 1941).
12 F. Biehler, supra note 4, at 89.
13 Id. For examples of circumstances which have prompted decisions against aircraft repairers, see Vrooman v. Beech Aircraft Corp., 183 F.2d 479, 481 (10th Cir. 1950) (rule of liability which applies to the manufacturer of goods is also generally applicable to one who negligently makes, rebuilds, or repairs a chattel for another); Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371 (Mo. 1986) (en banc) (repairer liable for faulty work done without consulting supplier's maintenance manual); Potter v. Hartzell Propeller, Inc., 291 Minn. 513, 189 N.W.2d 499 (1971) (repair station liable for negligent modification of a component part); Trans Caribbean Airways, Inc. v. Lockheed Aircraft Serv. Int'l, Inc., 14 A.D.2d 749, 220 N.Y.S.2d 485 (1961) (aircraft service company liable for faulty repairs); American Airways v. Ford Motor Co., 170 Misc. 721, 10 N.Y.S.2d 816 (1939) (repairer liable for plane crash caused by minute tool marks on propeller hub).

For negligence cases where the results were favorable to repairers, see Spellissy v. United Technologies Corp., 823 F.2d 438 (11th Cir. 1987) (repairer not liable where evidence of his procedures shows it unlikely that faulty pin was used); Fisher v. Bell Helicopter Co., 403 F. Supp. 1165 (D. Colo. 1975) (helicopter overhauled held not liable for crash which occurred eleven months after overhaul); Lock v. Packard Flying Serv., Inc., 185 Neb. 71, 173 N.W.2d 516 (1970) (repairer could not be expected to anticipate that pilot would neglect to make a reasonable preflight inspection); Kenty v. Spartan Aircraft Co., 276 P.2d 928 (Okla. 1954) (repairer did not have reason to assume pilot would fail to discover its failure to fuel the plane).
a. Standards of Ordinary Care

One case illustrating actions found to constitute negligence is *Ingle v. Swish Manufacturing Southeast, Inc.* Appellant, a pilot, survived a plane crash that occurred when his plane apparently ran out of fuel while in the air. He subsequently brought suit against the service facility that had recently worked on the plane. The court reversed a directed verdict for the service facility in light of evidence that the servicer had neglected to perform a calibration of the fuel cell probes that activate fuel gauge measurements and affect fuel gauge accuracy. The evidence also showed that the fuel gauge had been replaced in the plane three years earlier and had never been calibrated, and that the servicer had knowledge of these facts. The court found that this evidence raised questions as to whether the plane ran out of fuel, as to fuel gauge accuracy, as to the degree of inspection required, performed, or neglected by the servicer, and as to the undisputed failure of the servicer to inform the appellant that the plane had been run on the ground during maintenance.

A more recent example of negligence by a servicer is *Soria v. Sierra Pacific Airlines, Inc.*, which involved the crash of a commercial airliner. The plaintiff, a passenger

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15 Id., 297 S.E.2d at 508. The subject MU-2 plane, a sophisticated aircraft, was leased out by its owner on a charter basis. Id. at 507. The plaintiff was employed on a regular basis to pilot the aircraft. Id. In this particular instance, the plane had been confiscated in the Bahamas following apparent use by a charterer for drug smuggling; the interior was ravaged and there was other major damage. Id. at 508. The plaintiff testified that he told the repairer he wanted a complete "stem to stern" inspection of the plane, but the repairer stated that the plaintiff mentioned only three or four specific things he wanted done. Id.
16 Id. at 507. The plaintiff's claims against the repairer included fraud and negligence. Id. at 509.
17 Id. The plaintiff had filled the plane with fuel before leaving it with the repairer. Id. at 508. During repairs the engine was run for a substantial length of time as part of a "ground-run," but the repairer failed to inform the pilot of this or to perform a calibration test — an annual requirement that is relatively simple to perform and takes about an hour. Id.
18 Id.
19 Id. at 509.
who survived the crash but suffered serious injuries, filed suit against the plane’s owner, lessee, manufacturer, and servicer. The court found that maintenance personnel who had allowed bolts connecting the pilot’s controls with the plane’s elevator devices to remain unfastened had exhibited callous indifference to the safety of passengers, and punitive damages of $750,000 were awarded. In addition, the court found that evidence of numerous discrepancies in maintenance practice and procedures was relevant in examining why the particular maintenance form that would have covered reinstallation of flight controls on the plane was missing.

In Cincotta v. United States, employees of a government subcontractor were killed in a crash during a test flight. The proximate cause of the crash was the negligent installation of a “snap ring” by Air Force technicians responsible for maintaining and repairing the aircraft. In holding the defendant liable, the district court stressed that the nature of the repair added “a measure of strictness to the degree of care required of those charged with the responsibility for the maintenance . . . of these components; because the safety of the aircraft and its crew is involved.”

On the other hand, a servicer avoided liability for negligence in Cheek v. Avco Lycoming Division. Soon after an engine overhaul by the defendant servicer, the plaintiff’s
plane exhibited violent vibrations which forced the plain-
tiff to make an emergency landing.29 The plaintiff subse-
quently had the engine disassembled and repaired by a
different service facility prior to bringing suit.30 The
court, in reversing an $8,100 judgment against the de-
fendant, held that aircraft engine parts and testimony re-
garding inspection of those parts were inadmissible in a
negligence action against an overhauler where the engine
had been out of the aircraft owner's control since the al-
leged malfunctioning, where several other mechanics had
inspected the engine, and where the engine had already
been disassembled and certain parts partially replaced.31

Similarly, the aircraft servicer prevailed in Fisher v. Bell
Helicopter Co.,32 when a helicopter it had serviced eleven
months before crashed due to engine failure.33 Although
the district court stressed that "a plane is an inherently
dangerous and sensitive instrumentality which can cause
great harm if high standards of care are relaxed,"34 the
court held that these high standards had been met where
the servicer used parts approved (improperly) by the
manufacturer and performed its work properly in all re-
spects.35 These examples serve to illustrate that although
an aircraft servicer is not held to insure the safety of an
aircraft, he will apparently be held to a standard of spe-
cialized knowledge not applicable to those outside his

29 Id., 371 N.E.2d at 995. The overhaul had been commissioned by the plane's
previous owners, who sold the plane to the plaintiff approximately one year
before the emergency incident took place. Id.
30 Id. at 996. Soon after the emergency incident, the plaintiff had the engine
removed from the plane and sent to a repair service in Oklahoma, where it re-
mained for more than five months. Id. at 995. It was then returned to the plain-
tiff, disassembled, in a crate in which "he found missing parts, damaged parts,
good parts, and parts that had been partially repaired." Id. Of the engine parts
from the crate, none contained a serial number which would have identified the
engine, and thus the airplane, from which they were taken. Id. at 996.
31 Id. As the court stated, "[b]y the time [the plaintiff] received the disassem-
bled engine in a crate, visibly in substantially altered condition, it was questiona-
ble whether all of the parts even came from the same engine." Id.
33 Id. at 1168.
34 Id. at 1172.
35 Id. at 1173.
field, including pilots. This "unwritten standard" has led to confusion recently in cases involving FAA regulations and airworthiness directives, as it is sometimes unclear whether the pilot or the mechanic has primary responsibility for certain maintenance procedures. This dilemma is discussed in the next subsection.

b. Negligence Per Se Under FAA Regulations

A statute or administrative regulation, if adopted for the protection of a certain class of persons, may provide the standard of care to such persons in negligence actions. The doctrine of negligence per se holds that the violation of such a statute or regulation, when resulting in harm to a plaintiff who is within the class of persons intended to be protected by the statute or regulation, will be considered negligence as a matter of law. Under the law of many states, violation of an applicable Federal Aviation Regulation (FAR) amounts to negligence per se.

A recent case in illustration is Fagerquist v. Western Sun Aviation, Inc., in which the daughter of a pilot killed in an airplane crash brought a wrongful death action against the airplane retailer which also maintained the craft. The court applied the doctrine of negligence per se, based on the principle that when the person injured is of

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37 W. TURLEY, AVIATION LITIGATION 38 (1986) [hereinafter W. TURLEY].
38 1 SPEISER & KRAUSE, supra note 3, § 1.17, at 45.
39 191 Cal. App. 3d 709, 236 Cal. Rptr. 633 (1987). The plane involved was a 42X Piper aircraft. Id., 236 Cal. Rptr. at 634. Defendant leased the craft to a local commercial airline which employed the plaintiff's father as a pilot.
40 Id. A few days before the crash, the defendant had performed a scheduled maintenance on the plane, replacing the No. 6 left engine cylinder with a new cylinder. Id. Subsequently, plaintiff reported that the plane was running "rough," and the defendant then did some trouble-shooting and cleaned and replaced some parts in the engine. Id. A short time later, the left engine ceased functioning and the plane crashed. Id. at 635. Experts determined the left engine failed because of a hole in the No. 6 cylinder caused by defective casting in the manufacturing process. Id. Plaintiff elected not to sue the manufacturer, but recovered against the defendant servicer for strict products liability for selling a defective aircraft and engine parts and for negligently maintaining the airplane. Id.
the class the regulation violated is designed to protect, and the injury is of the type the regulation was promulgated to avoid, there is an inference that the injury proximately flowed from the violation. The court held that FAA regulations which specifically prescribe safety-oriented conduct necessarily set forth the standard of care required by the doctrine of negligence per se. If the violation of a regulation can create a presumption of negligence, the question arises as to whether compliance will constitute non-negligence — and the answer is no. As the effect of violation is to create an element of negligence, so the effect of compliance is merely an indication of due care.

If the FAA decides that an unsafe condition exists which warrants immediate corrective action, it may issue an Airworthiness Directive (AD). Once an AD is issued, it has the force of law and therefore provides constructive notice to all aircraft owners, operators, and overhaulers. A

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41 Id. at 642. The regulation at issue here involved the servicer’s use of a checklist mandated by the FAA during the inspection of aircraft. Id.; see 14 C.F.R. § 43.15(c)(1)(1988). The court noted that there was evidence that if the checklist had been properly utilized and the mechanical history of the aircraft properly produced, the crack in the left engine cylinder which caused the crash would have been discovered. Fagerquist, 236 Cal. Rptr. at 642-43.

42 Fagerquist, 236 Cal. Rptr. at 639-42.

43 F. Biehler, supra note 4, at 108.

44 Id.

45 14 C.F.R. § 39.1 (1981); see also Fulton, supra note 2, at 20. See generally Fleming, The Duty of the Manufacturer to Recall Aircraft, 45 J. Air L. & Com. 581 (1980) for a discussion of ADs and the manufacturer’s duty to recall defective aircraft. Often, ADs are also based upon service bulletins which have been issued by manufacturers to correct a defect. Fulton, supra note 2, at 20. ADs can range from the requirement of a placard being affixed to the aircraft, explaining what actions should be taken under certain circumstances, to emergency ADs issued to stop flights so as to prevent catastrophic happenings. See Fleming, supra, at 582-583.

Before an AD is issued and published in the Federal Register, it must pass the muster of the AD Review Board and its legal counsel. Fulton, supra note 2. It then goes to the FAA in Oklahoma City, which has 72 hours to mail it to registered owners of the aircraft or equipment involved, according to FAA records. Id. Methods of securing ADs include subscription to the Federal Register, the biweekly AD Summary, issued by the FAA at Oklahoma City for both small and large aircraft, and various private publications. Id.

46 14 C.F.R. § 39.3 (1988). ADs are Federal Aviation Regulations and are published in the Federal Register as amendments to FAR Part 39.
certain amount of confusion exists concerning who is responsible for AD compliance — the aircraft owner or the mechanic? The United States government has placed the responsibility on owners to maintain their aircraft in accordance with Federal Air Regulations (FARs). Of these FARs, the one most likely to cause problems is Part 91, which places primary responsibility on owners to ensure compliance with technical mechanical standards. Part 91 requires an inspection every twelve calendar months by a properly authorized mechanic. Pursuant to FAR Part 43, Appendix D, the mechanic must follow a checklist during his inspection. Implicit within this inspection is compliance with all ADs and a reporting of the manner in which the AD compliance was accomplished. The inspector must set forth any alterations made on the plane, and all entries must then be placed in the aircraft’s airframe log or engine log.

It is generally thought that an owner who does not check for AD compliance and make the appropriate logbook entries opens himself to legal action. The owner can claim, however, that he is at the mercy of the mechanic and/or repair shop in ensuring complete compliance with AD Notes, since many ADs apply to minor components — such as alternators, fuel injection pump gaskets, turbochargers, or seatbelt latches — which the owner may not know are in his aircraft. Eisner v.

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47 F. Biehler, supra note 4, at 41.
48 See 14 C.F.R. § 43 (1988), which governs maintenance, preventive maintenance, rebuilding, and alteration of aircraft and associated appliances. It specifies who is authorized to perform these functions and keep the applicable records.
50 14 C.F.R. § 91.168 (1988). This annual inspection is required in addition to any 100-hour inspections due under 14 C.F.R. § 91.169(b), and must be properly signed off by an Airframe and Power Plant Mechanic with an Inspection Authorization (IA) certification. Id. An annual inspection can replace the 100-hour inspection, but a 100-hour inspection cannot replace an annual. Id.
52 Id.; see 14 C.F.R. § 43.11(b) (1988).
54 See Fulton, supra note 2, at 21.
55 Id.; see, e.g., 49 Fed. Reg. 5057 (1984) (AD added for certain wire bundles in
*Bethori* is one example of a case considering the rights of an aircraft owner against a service facility for failure to comply with an AD note. The defendant was a certified FAA aircraft mechanic hired by the plaintiff to conduct a pre-purchase inspection of a plane the plaintiff was interested in buying. In the presence of the plaintiff, the defendant conducted what the plaintiff understood to be an airworthiness inspection. The defendant reported to the plaintiff that he found nothing to indicate the airplane was not airworthy. The court found, however, that the defendant was negligent in failing to discover and advise the plaintiff of an outstanding AD note, and further, failed to comply with his contractual obligation to the plaintiff. The issue of who is responsible for compliance with ADs has not been settled by existing cases, and this

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56 *Case No. 995, 322 (Cuyahoga County Common Pleas Court of Ohio, 1980),* as cited in Fulton, supra note 2, at 21.

57 *Id.* As a certified FAA aircraft mechanic, the defendant was authorized to pass upon the airworthiness of a plane, subject to FAA regulations. *Id.; see 14 C.F.R. § 43.7 (1988).* If he found that a plane that came under his care was not airworthy, he was obliged to so notify the owner; if any defects that caused it to be unairworthy were not corrected, the fact of its not being airworthy was to be reported to the FAA. *See 14 C.F.R. § 43.11 (1988).*

58 *Eisner, supra* note 56. The defendant had been advised of the purpose for which the inspection had been requested. *Id.*

59 *Id.*

60 *Id.* The FAA periodically issued airworthiness directive orders (AD Notes) to all certified mechanics, who were obliged to retain them for reference. *Id.* On February 13, 1968, the FAA issued such an AD Note for the Hartzell propeller on the S35 Bonanza aircraft. Apparently, the defendant failed to make the plaintiff aware of this particular note. *Id.*

61 *Id.* The court stated:

> Defendant . . . seems to contend that because Section 91.63 of applicable FAA rules holds that the owner or operator of a plane is primarily responsible for maintaining the plane, that there, therefore, was no obligation upon him. The obligation for maintaining the plane in an airworthy condition, so far as the general public is concerned, is that of the owner. However, the rule that requires an aircraft mechanic be licensed by the FAA and to comply with its regulations imposed the obligation to exercise ordinary care and also to comply with the obligations of his contract. *Id.*
Clarification of this area by the FAA would greatly assist all parties involved and would help to ensure uniform outcomes in similar cases.

2. Res Ipsa Loquitur in Servicer Liability Cases

The doctrine of res ipsa loquitur ("the thing speaks for itself") creates a presumption of negligence under certain circumstances. When there is an accident of the type which ordinarily does not occur without being caused by negligence, the other probable causes are eliminated by the evidence, and the indicated negligence is within the scope of the defendant's duty to the plaintiff, then the defendant's negligence may be inferred. Therefore, at first glance, the doctrine of res ipsa loquitur would seemingly be very useful in overcoming a common obstacle in servicer liability cases: proof of actual negligence during the servicing process.

To impose liability under the doctrine of res ipsa loquitur, a plaintiff generally must show that: (1) the event is of a kind that seldom occurs without negligence; (2) the instrument which caused the injury was in the exclusive control of the defendant; and (3) the injury was not due to the plaintiff's own action. It is the second of these requirements that most often presents difficulty for a plaintiff at...

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62 See, e.g., F. Biehler, supra note 4, at 40-41.
63 W. Turley, supra note 37, at 38.
64 Restatement (Second) of Torts § 328D (1965). The doctrine allows a plaintiff who does not have any knowledge of or access to the facts concerning the defendant's conduct to point to the fact of the accident, and to create an inference that, even without a precise showing of how the defendant behaved, the defendant was probably negligent. Id. Some courts view res ipsa loquitur as creating a presumption of negligence which would shift the burden of proof, while other courts view it as providing circumstantial evidence which permits an inference of negligence but does not shift the burden of proof. See, e.g., Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782, 784 (1953).
65 The doctrine has been successfully invoked by plaintiffs in plane crash cases against pilots and airlines. See, e.g., Newing v. Cheatham, 15 Cal. 3d 351, 540 P.2d 33, 124 Cal. Rptr. 193 (1975) (pilot liable for negligence in unexplained plane crash).
66 Restatement (Second) of Torts § 328D (1965).
tempting to recover against a servicer under this theory.\textsuperscript{67} Because the duty for proper maintenance of a plane is usually shared by the pilot or owner and the repairer, it generally cannot be said as a matter of law that the repairer had exclusive control over the plane so as to render res ipsa loquitur applicable.\textsuperscript{68}

Moreover, some states impose additional res ipsa loquitur requirements that have presented difficulty for plaintiffs seeking to recover against aircraft servicers. In \textit{Stevens v. Bernard},\textsuperscript{69} for example, the court held that the mere occurrence of a plane crash together with a repairer's exclusive control of the aircraft prior to the crash did not, under Oklahoma law, establish the "foundation fact" from which an inference of negligence could be drawn under the doctrine of res ipsa loquitur.\textsuperscript{70} The court explained that the plaintiff must present cogent evidence as to the cause of the accident; the court would not simply infer that the defendant was negligent in repairing the aircraft and then, from that inference, "further infer that such negligence created a defective condition in the aircraft which was the proximate cause of the accident. . . ."\textsuperscript{71}

\textsuperscript{67} See Annotation, \textit{supra} note 6, at 1324.

\textsuperscript{68} See, \textit{e.g.}, Trihey \textit{v. Transocean Air Lines, Inc.}, 255 F.2d 824 (9th Cir.) (court concluded that to consider the repairer liable there must be a showing that its failure to maintain the plane in proper mechanical condition was a proximate cause of the crash), \textit{cert. denied}, 358 U.S. 838 (1958); \textit{Power Serv. Supply, Inc. v. E.W. Wiggins Airways, Inc.}, 9 Mass. App. Ct. 122, 399 N.E.2d 878 (1980) (res ipsa loquitur inapplicable where suit was brought against helicopter repair company for personal injuries and property damage arising from the crash of a helicopter which was found with a crucial nut and bolt missing).

\textsuperscript{69} 512 F.2d 876 (10th Cir. 1975).

\textsuperscript{70} \textit{Id.} at 880. As the court explained:

[While there is a conflict in the decisions relative to the application of that doctrine, there is no dispute relative to the meaning of the words res ipsa loquitur. They simply mean "the thing speaks for itself." And that means the \textit{thing} or \textit{instrumentality} involved speaks for itself. It clearly does not mean the \textit{accident} speaks for itself. It means that when the initial fact, namely what thing or instrumentality caused the accident has been shown then, and not before, an inference arises that the injury or damage occurred by reason of the negligence of the party who had it under his exclusive control.]

\textit{Id.}

\textsuperscript{71} \textit{Id.} at 880-81. The court stressed that "[a]n inference (of negligence under
In a second example, the court in *Winans v. Rockwell International Corp.* also refused to apply res ipsa loquitur against an aircraft repairer. The court stated that under Louisiana law, the real res ipsa loquitur inquiry is whether the facts of the controversy suggest negligence of the defendant, rather than some other factor, as the most plausible explanation of the accident. The trial court refused to instruct the jury on the doctrine of res ipsa loquitur because a defendant whose fault caused the injury was not joined, fault by the deceased pilots of the jet was not negated, and it was not shown that others who had control of the jet after the defendants were fault-free.

In summary, because servicers seldom have exclusive control over the maintenance of an aircraft, courts seem reluctant to infer servicer negligence absent some additional proof, thus rendering the doctrine of res ipsa loquitur virtually useless in servicer liability cases. As a result, plaintiffs relying solely on the res ipsa loquitur theory generally have not prevailed against aircraft servicers in liability cases. The inference cannot supply the foundation fact from which it arises. The application of the principle [of res ipsa loquitur] is defeated if an inference that the accident was due to a cause other than the defendant’s negligence could be drawn as reasonably as one that it was due to his negligence. Important in actions of this class is that the plaintiff prove freedom of fault on the part of all through whose hands the instrumentality passed after it left the defendant. See *supra* notes 68-74 and accompanying text for examples of servicer liability cases where res ipsa loquitur was determined inapplicable.

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72 705 F.2d 1449 (5th Cir. 1983). The case involved a wrongful death action brought against manufacturers and repairers of a jet that exploded in midair. Id. at 1451. Two pilots, attempting an emergency landing after discovering an onboard fire, died in the explosion. Id. The evidence showed that in the period before the accident, the aircraft had been leaking fuel. Id. An employee of the owner had called the repairer to inform him of the leak; the repairer advised that the leak was not a significant problem and advised against attempting to repair it at that time. Id. Although other minor repairs were subsequently performed by the repairer, no effort was ever made to repair the fuel leak. Id.

73 Id. at 1455. The court noted that “[a]pplication of the principle [of res ipsa loquitur] is defeated if an inference that the accident was due to a cause other than the defendant's negligence could be drawn as reasonably as one that it was due to his negligence.” Id.

74 Id. The court explained that “[i]mportant in actions of this class is that the plaintiff prove freedom of fault on the part of all through whose hands the instrumentality passed after it left the defendant.” Id.

75 See *supra* notes 68-74 and accompanying text for examples of servicer liability cases where res ipsa loquitur was determined inapplicable.
B. Potential Defenses to Negligence Liability

1. Contributory Negligence

In certain instances, aircraft servicers have escaped liability when their alleged negligence resulted in a danger that would have been disclosed had the airplane's pilot discharged his responsibility of making a preflight inspection. Servicers have also avoided liability when their alleged negligence would have been of no consequence if the pilot had merely performed the customary practice of checking his gasoline and oil gauges. On the other hand, contributory negligence failed as a defense to repairer liability in Woodling v. Garrett Corp., in which the widow of a deceased airplane passenger brought a wrongful death action against both the owner and operator of the aircraft and the manufacturer and repairer of the engine part. The United States Court of Appeals for the Second Circuit affirmed the finding that defects in the manufacture and repair of an aircraft part had proximately caused the airplane to crash, notwithstanding the alleged intervening negligence of the owner and operator of the airplane in failing to ground the plane despite repeated "tripping" of the plane's generators. The court's finding was supported by evidence that the manufacturer and repairer knew that the operator of the aircraft would not, on his own, be able to correct the defect.

Woodling thus established that under New York law, notwithstanding the intervening act of a third person be-

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76 14 C.F.R. § 91.29 (1988) states that no person may operate a civil airplane that is not airworthy, and the pilot in command is responsible for determining whether that airplane is in condition for safe flight. "A reasonable interpretation of this requirement is that the pilot is responsible for detecting those unairworthy conditions that the average pilot would spot." F. BIEHLER, supra note 4, at 35. "It is wholly unreasonable to expect that he would be required to perform a detailed inspection prior to flight." Id.
77 See Annotation, supra note 6, at 1322.
78 813 F.2d 543 (2d Cir. 1987).
79 Id. at 543. The plane, a Lockheed Jetstar, crashed near Westchester Airport in New York, killing its two-man crew and all six passengers. Id. at 546.
80 Id. at 556.
81 Id.
tween the original negligence and the ultimate injury, the original negligent actor can be found to have proximately caused the injury if the intervening act was normal and foreseeable. The negligence of the intervening actor who knows of the dangers and merely fails to warn or otherwise protect the plaintiff does not, of itself, relieve the original actor from liability. This example again illustrates the specialized standard of "reasonable" care applied to servicers of aircraft even as against pilots, who are assumed to have somewhat specialized knowledge themselves as to aircraft maintenance procedures. Although negligence by a pilot as to very basic inspection procedures can relieve a servicer of liability, the courts seem reluctant to allow such relief for servicers in all but the most blatant pilot negligence cases.

2. The Borrowed Servant Doctrine

The borrowed servant doctrine also stands as a potential defense for repairers charged with negligence. According to this doctrine, if the general employees of one employer are placed under the control of another employer in the manner of performing their services, they become his special or borrowed employees and he can be held liable for the consequences of their negligence. Alternatively, if the employees remain under the control of their general employer in the manner of performing their services, the general employer is liable for their negligence.

In Franks v. Associated Air Center, Inc., an action was brought against an aircraft repair company for negligently damaging the plaintiff's airplane while attempting to repair it. The defendant invoked the borrowed servant

\[\text{Note:}\]

- \[\text{Id.}\]
- \[\text{See supra notes 76-78 and accompanying text.}\]
- \[\text{See Franks v. Associated Air Centers, Inc., 663 F.2d. 583, 587 (5th Cir. 1981).}\]
- \[\text{Id.}\]
- \[\text{663 F.2d 583 (5th Cir. 1981).}\]
- \[\text{Id. at 584. In addition to the negligent repair claim, the plaintiff also sued under Texas' Deceptive Practices-Consumer Protection Act, Tex. Bus. & Com.}\]
doctrine in attempting to hold the plaintiff vicariously liable for the negligence of the employees who had worked on the aircraft. Although the defendant acknowledged that the maintenance workers were not under the plaintiff’s employ, the defendant charged that the workers were subject to the plaintiff’s right of control. The defendant’s contention was that when the retraction test was being performed, the plaintiff’s employees who were present had the right to control the defendant’s employees working on the aircraft. In finding for the plaintiff, the United States Fifth Circuit Court of Appeals held that the fact that one gives general instructions and directions to another’s employee is not sufficient to make the employee a borrowed servant, nor is cooperation and consultation with the employees enough to establish a right of control. Although the court determined that the bor-

CODE ANN. § 17.41 (Vernon 1987), alleging that the defendant had charged him an unconscionable amount for its services. Id. A jury found for the plaintiff on both claims and the trial judge denied the defendant’s motions for judgment notwithstanding the verdict and a new trial. Id. The defendant then appealed from the denial of its motions. Id.

88 Id. at 585. The plane, an HFD 320 Hansa jet aircraft owned by plaintiff John Franks, was flown by two of the plaintiff’s employees to the defendant’s repair facilities. Id. The plane was brought to the defendant for repair of the landing gear and landing gear doors of the aircraft. The plaintiff’s employees were alerted to this problem when a warning light in the cockpit indicated that the wheel door, which was supposed to close following retraction of the landing gear, would not completely close. Id. To determine the cause of the malfunction, a retraction test was performed, in which the plane was lifted from the floor upon jacks and a device called a hydraulic mule was used to pump fluid through the plane’s hydraulic system. Id. One of the plaintiff’s employees assisted in the test by sitting in the cockpit to raise and lower the landing gear while the defendants employees applied pressure to the plane’s hydraulic system through the use of the hydraulic mule. Id. The plaintiff’s second employee stood by on the ground during the procedure. Id. During the last recycling of fluid through the plane’s hydraulic system, there was a loud ripping noise, apparently due to too much pressure having been applied to the system. Id. Considerable damage occurred to the landing gear systems of the aircraft, and substantial amounts of hydraulic fluid were sprayed about. Id. The plane was subsequently transferred to a different repairer and was ultimately repaired at a cost of $4,416.40 in labor and $7,026.07 in parts. Id. On top of this, the plaintiff received a bill from the defendant repairer for $2,175 in labor charges. Id.

89 Id. at 587.

90 Id.

91 Id. The court found “considerable evidence” to support the jury’s finding
rowed servant doctrine was not applicable to the facts of Franks, it did not preclude the possibility that the facts in similar cases might establish a right to control.\textsuperscript{92}

II. STRICT LIABILITY OF AIRCRAFT REPAIRERS

Although Section 402A of the American Law Institute Restatement (Second) of Torts \textsuperscript{93} provides for strict liabil-

the employee who had assisted in the cockpit did not have a right of control over defendant's employees, since he was "in the cockpit and unable to see what [the defendant's employee] was doing; more importantly, he was actually being instructed by [the defendant's employee] when to raise and lower the landing gear." \textit{Id.} The defendant also contended that, regardless of whether the plaintiff's employee standing by on the ground did actually supervise the procedure, the fact that he felt he had the right to tell the defendant's employees that they were doing something wrong if he saw it meant that he had a right of control. \textit{Id.} To this the court responded:

\begin{quote}
We think this argument misconstrues the meaning of "right of control" in the context of the borrowed servant doctrine. The fact that an employer gives general instructions and directions to the employee of another is not sufficient to make the latter a borrowed servant. Nor is a cooperation and consultation with the employees enough to establish a right of control. Right of control is necessarily determined as an inference from such facts and circumstances as the nature of the general project, the nature of the work to be performed by the machinery and employees furnished, length of the special employment, the type of machinery furnished, acts representing an exercise of actual control, the right to substitute another operator of the machine, etc.
\end{quote}

\textit{Id.} at 587-88 (citations omitted).

Finally, in response to the defendant's argument that the right to substitute another operator is an important factor to be considered in determining the right to control, the court noted that there was no evidence in the record that the plaintiff's employee could have ordered the defendant's employees to stand aside and let him perform the work himself. \textit{Id.} at 588.

\textsuperscript{92} \textit{Id.} at 587.

\textsuperscript{93} Section 402A of the American Law Institute's Restatement (Second) of Torts provides in full:

\textbf{\textsuperscript{\textsection}402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.}

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
ity of the seller of a product, it is less clear whether strict liability applies to a provider of services. In general, the emerging view seems to be that the rendering of services does not give rise to the doctrine of strict liability because usually there is no mass production and distribution, nor are there consumers needing protection from an unknown manufacturer or seller.\(^9\) Texas is among the states which have consistently refused to apply strict liability to sellers of services,\(^9\) although the rule in the sales/service hybrid situation is less clear.\(^9\) Few aircraft servicer cases have examined this issue to date, but it seems logical that aircraft repairs could be analogized to repairs of other complex machinery. Courts in cases involving such machinery repairs have generally refused to apply the strict liability doctrine.\(^9\)

From the aircraft repairer liability cases involving this issue to date,\(^9\) it seems that the courts have yet to hold an

\[\text{(a) the seller has exercised all possible care in preparation and sale of his product and}
\]

\[\text{(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.}
\]

\text{Restate\textit{ment (Second) of Torts § 402A (1965).}}


\(^9\) \textit{See Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Civ. App. 1975) (strict liability applicable where city provided both product and service through utility company).}


\textit{See also} \textit{Annotation, Application of Rule of Strict Liability in Tort to Person Rendering Services, 29 A.L.R.3d 1425 (1970) for cases considering application of strict liability to other types of services.}

\(^9\) \textit{See, e.g.,} Winans v. Rockwell Int'l Corp., 705 F.2d 1449 (5th Cir. 1983) (ap-
aircraft repairer strictly liable in tort solely for damages stemming from work he has performed. One of the earliest cases to address this issue was *Raritan Trucking Corp. v. Aero Commander, Inc.*

Although the United States Court of Appeals for the Third Circuit declined to hold an aircraft repair shop strictly liable in tort for failing to correct a landing gear strut extension, the court recognized that many of the same policy considerations supporting strict liability in product sales cases were also present under the facts before it:

Here we have a similar risk of harm to Raritan, its employees, passengers, and members of the public from the operation of a plane with inoperable landing gear. In turning the plane over to Raritan after repairing it, Continental [the servicer of the aircraft] necessarily represented that the landing gear remained in proper operating condition. And Raritan's reliance was, of necessity, great. Raritan had neither adequate knowledge nor sufficient opportunity to determine if the work on the landing gear had left it

applying La. law) (repairer of engines on jet that exploded in midair could not be held liable on strict liability theory for engine defects existing after it overhauled the engine); *Raritan Trucking Corp. v. Aero Commander, Inc.*, 458 F.2d 1106 (3d Cir. 1972) (applying N.J. law) (strict liability not applicable against aircraft repairer where no goods or other property was supplied); *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 539 P.2d 584 (1975) (pilot injured in plane crash could not recover from aircraft repairer under theory of strict liability). *But see Wagner v. Flightcraft, Inc.*, 31 Wash. App. 558, 643 P.2d 906 (1982) (repairer who sold carburetor repair kit and then sold overhauled carburetor to plane's owner was seller for strict liability purposes).

See Davis, *Aviation Repair Stations and Strict Liability*, 40 J. Air L. & Com. 413 (1974) [hereinafter Davis], for a discussion of potential liability in negligence and strict liability, both directly and vicariously, against the segments of the aviation industry involved in the inspection, maintenance, repair and overhaul of aircraft and their various components.

* See Davis, *Aviation Repair Stations and Strict Liability*, 40 J. Air L. & Com. 413 (1974) [hereinafter Davis], for a discussion of potential liability in negligence and strict liability, both directly and vicariously, against the segments of the aviation industry involved in the inspection, maintenance, repair and overhaul of aircraft and their various components.

458 F.2d 1106 (3d Cir. 1972). Approximately one year after the plaintiff took possession of the aircraft, the manufacturer issued a service bulletin to correct a possible landing gear strut extension which could prevent the landing gear from locking in an "up" position. *Id.* at 1109. Part I of the bulletin called for inspection of the strut within the next 25 hours' flight time, while Part II of the bulletin specified modifications to prevent future strut overextension. *Id.* The defendant servicer performed Part I and found no overextension. *Id.* After this inspection the plane was flown for about 16 hours and made 15 landings with no noted difficulty. *Id.* Shortly thereafter, the defendant undertook the modifications required by Part II of the service bulletin, and on the very next flight two days later a crash occurred. *Id.*
in proper operating condition, and thus had to rely upon the skill, care, and reputation of Continental.\textsuperscript{100}

Even though these similar elements were present, the court was "convinced that the application of strict liability by the New Jersey courts in this case cannot be predicated with great assurance."\textsuperscript{101}

Like the court in \textit{Raritan}, the majority of jurisdictions today have refused to impose strict liability on those who merely provide repairs,\textsuperscript{102} although public policy grounds for subjecting the furnisher of services to strict liability have been vigorously advanced.\textsuperscript{103} In \textit{Hoffman v. Simplot}

\begin{itemize}
\item \textsuperscript{100} \textit{Id.} at 1114.
\item \textsuperscript{101} \textit{Id}. The court noted that "no New Jersey case has extended the strict liability theory to a case in which there has been no goods or other property supplied," and did not "think that the New Jersey courts would extend strict liability to this case." \textit{Id.} at 1113. \textit{But see} Consumers Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093 (3d Cir. 1986) (applying N.J. law) (plaintiff allowed recovery on strict liability theory for damages caused by defectively repaired engine where major parts which were also supplied were defective).

In addition, a number of jurisdictions have held that repairers and other providers of services are not "sellers" within the meaning of Section 402A and thus are not subject to its rule of strict liability for injuries caused by defects in products supplied by them in the course of their services. \textit{See}, \textit{e.g.}, Vergott v. Desert Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972) (hospital not "seller" of needle that broke in patient's vein); La Rossa v. Scientific Design Co., 402 F.2d 937, 943 (3d Cir. 1968) (engineering firm not strictly liable for injuries resulting from its services); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954) (hospital not a "seller" of blood).
\item \textsuperscript{103} \textit{See}, \textit{e.g.}, Johnson, 604 F.2d at 955-56, in which the court stated: [T]he reasons for imposing strict liability on a manufacturer do not apply equally to a furnishers of services upon whom liability is sought
Aviation, Inc., the several owners of an airplane sued a repair company when their plane crashed after a wing strut broke, following a visual inspection of the airplane by the repairers. After noting that the rule of strict liability for suppliers of services had been uniformly and consistently rejected by other jurisdictions, the Idaho...
Supreme Court likewise rejected strict liability against the defendant, stating:

It is sufficient to say that as contrasted with the sales of products, personal services do not involve mass production with the difficulty, if not inability, of the obtention of the proof of negligence. The consumer in the personal service context usually comes into direct contact with the one offering service and is aware or can determine what work was performed and who performed it.106

As distinguished from repairs, an overhaul more closely resembles the manufacture of a new product and seemingly would offer greater support for imposition of strict liability.107 At least one recent case, however, has precluded strict liability for overhaulers as well as repairers. In Winans v. Rockwell International Corp.,108 the United States Court of Appeals for the Fifth Circuit held that a repairer of engines on a jet that exploded in midair could not be held liable on a strict liability theory for engine defects existing after it overhauled the engine.109 These examples, together with the stated rationales, seem to illustrate an emerging trend against applying strict liability in cases involving aircraft repairs.

III. Contract Liability of Aircraft Repairers

Several contract issues commonly arise in aircraft re-
pairer liability cases, including liability limitations and the implied warranty of workmanlike service.

A. Liability Limitations

Although liability limitations in service contracts have been held unconscionable in certain instances, other courts have upheld such limitations. For example, in *World Enterprises, Inc. v. Midcoast Aviation,*\(^1\) the court held that a provision in the repair contract which excluded incidental and consequential damages resulting from a breach of contract to repair an airplane was not unconscionable or against public policy.\(^2\) Further, the court held that the wording of the clause disallowed recovery of economic damages for loss of use while the plane was being repaired.\(^3\) In reaching this decision, the court considered the fact that the limitation clause was contained in a contract between two commercial entities that had previously contracted with each other, was not hidden in fine print, was capitalized and underscored, and was neither unusual nor particularly harsh.\(^4\) This example seems typical of the tendency of modern courts to uphold such limitations when they are set forth clearly and the parties appear to be dealing on equal footing.\(^5\)

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1. 713 S.W.2d 606 (Mo. 1986). The case involved an action by the plane owner against the repairer for damage caused when the repairer attempted to remove a crack from the plane's wing by grinding, which resulted in a hole in the wing. *Id.* at 607.

2. *Id.* at 610. In examining this issue, the court noted that unconscionability can be either procedural or substantive. *Id.* Procedural unconscionability arises during the contracting process and involves fine print, misrepresentation, and unequal bargaining positions. *Id.* at 611. Substantive unconscionability involves undue harshness in the contract terms themselves. *Id.* Neither type was found to exist here. *Id.*

3. *Id.* at 610. The court pointed out that the contract here provided specific reference to "incidental or consequential commercial damages or losses," and noted that under the Uniform Commercial Code, many courts have held that consequential damages specifically include damages for loss of use. *Id.*

4. *Id.* at 611.

5. See, e.g., *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519 (9th Cir. 1987) (exculpatory clause in contract for sale of aircraft was not void as against public policy); *2000 Watermark Ass'n Inc. v. Celotex Corp.*, 784 F.2d 1183 (4th Cir. 1986) (contract law permits parties to negotiate allocation of
B. *Implied Warranty of Workmanlike Service*

The theory of an implied warranty of workmanlike service was endorsed in the 1950s in several United States Supreme Court decisions dealing with ship repairs, and has since been applied as well to aircraft repairs. The Supreme Court established early on that the warranty of workmanlike service is comparable to a manufacturer’s warranty of the soundness of a manufactured product, and negligence plays no part in this theory of recovery. In subsequent cases, the Court reaffirmed the implied warranty theory and outlined the policy reasons for imposing this essentially "strict" liability:

True the defect here was latent and the stevedore free of negligent conduct. But latent defects may be attributable to improper manufacture or fatigue due to long use and may be discoverable by subjecting the equipment to appropriate tests. It is considerations such as these that underlie a manufacturer’s or seller’s obligation to supply products free of defects and a shipowner’s obligation to furnish a seaworthy vessel. They also serve to render a tort standard of negligence inapplicable to the stevedore’s liability under its warranty of workmanlike service. For they illustrate that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

This theory of implied warranty was applied to aircraft

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115 See *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Crumady v. The J.H. Fisser*, 358 U.S. 423 (1959); *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). All three cases involved actions by a shipowner to recover indemnity from a stevedoring contractor, where the contractor’s employee had recovered judgment against the shipowner on the basis of unseaworthiness; see also *Davis*, supra note 98, at 418.

116 *Ryan Stevedoring*, 350 U.S. at 133-34.

repairs in *Hoffman v. Simplot Aviation, Inc.* In confirming the existence of an implied warranty of workmanlike service, the Idaho Supreme Court noted that the standard imposed may vary depending upon the expertise of the actor, the nature of the services, and the known resultant danger to others from the actor’s negligence or failure to perform. In attempting to determine the precise distinction between the doctrine of implied warranty and negligence in cases involving the rendering of personal services, however, the court failed to recognize the substantive difference between the two doctrines as earlier established by the Supreme Court. As a result of this blur in reasoning, the *Hoffman* court ultimately held that both contributory negligence and assumption of the risk are defenses to the theory of implied warranty — a theory which has not been well-supported. In summary, the theory of implied warranty of workmanlike service, although relatively novel, seems to be gaining some acceptance in the area of services and is a potentially applicable cause of action in aircraft repairer liability cases.

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118 97 Idaho at 32, 539 P.2d at 584; see supra notes 104-105 and accompanying text for the factual background of *Hoffman*.

119 *Hoffman*, 539 P.2d at 588. The court noted, however, that:

The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. *Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.*

Id. (citing *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954)).

120 See *Ryan Stevedoring*, 350 U.S. at 133-34, emphasizing that negligence plays no part in the doctrine of implied warranty of workmanlike service.

121 *Hoffman*, 539 P.2d at 590.


123 See, e.g., *Insurance Co. of N. Am. v. Radiant Elec. Co.*, 55 Mich. App. 410, 222 N.W.2d 323 (1974) (electrician held to extend an implied warranty of fitness for both the wiring and the manner in which it was installed); see also *Farnsworth, Implied Warranties of Quality in Non-Sales Cases*, 57 Colum. L. Rev. 653 (1957); Greenfield, supra note 102, at 661.
IV. THE SERVICER’S LIABILITY AS A BAILEE

Generally, the common law principles of bailment and negligence control the disposition of cases involving the liability of the bailee of an aircraft for damage to the craft. Whether the action on the bailment sounds in contract or tort appears, for the most part, to make little difference in the outcome of the cases; determinations of whether or not the bailment contract was breached, or whether or not the bailee was negligent in handling the property, are dependent upon similar factors. These factors include the duties of the bailee according to the nature and terms of the bailment, and a determination of whether those duties and obligations were properly met under common law rules of negligence.

A. Examples of Bailee Liability Situations

Although a bailee of an airplane is not generally considered an insurer of the craft against damage, he has the duty to exercise reasonable care under the circumstances and is liable for any damage resulting from the absence of such care. Bailees for repair have been found liable for fire damage, aircraft destruction or damage caused by wind or storm where the aircraft was not sufficiently tied down, damage caused by negligent handling or parking, and damage occurring during unauthorized use of the aircraft by the bailee, his agents, or third parties.

In Winchell v. Alaska Airlines, Inc., the repairer agreed to have a bailed aircraft overhauled within a period of sixty days, but still retained possession of the unrepaird aircraft more than one year after the sixty days had ex-

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125 Id. at 866.
126 Id. at 868. For the liability of a bailee or lessee of an aircraft, generally, see 8 AM. JUR. 2D Aviation §§ 28-29 (1972).
127 See notes 126-145 and accompanying text for examples of liability of aircraft bailees; see also F. BIEHLER, supra note 4, at 63-86 for a discussion of bailment liability of aircraft servicers.
pired. The court held that the long delay in making repairs was negligence, and that such negligence, in concurrence with a hangar fire, was the proximate cause of the loss of the aircraft. Thus, the bailor was entitled to recovery. The court noted, however, that the nature of the repair contract did not make the repairer an insurer of the aircraft. Express language to that effect is necessary to convert the bailee's liability to that of an insurer.

A common situation giving rise to an action against a bailee for repair of an aircraft occurs when a parked plane is destroyed or damaged by violent storms or gusts of wind. In *Olan Mills, Inc. v. Cannon Aircraft Executive Terminal, Inc.*, a repairer was held liable for negligently failing to properly secure the bailor's aircraft against expected dangerous weather conditions. The court determined that a storm with heavy winds gusting to ninety-two miles per hour was not "so extraordinary or so far outside the range of human experience" as to excuse the repairer for destruction of the plane under the force majeure doctrine.

Courts have also held bailees liable for negligently parking or otherwise handling aircraft bailed for repair. A typical example is *M.B. Haynes Electric Corp. v. Justice Aero Co.*, in which an aircraft was damaged when an employer of the repairer apparently lost control of the aircraft as he was attempting to park it, causing it to collide

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129 Id. at 340; see also Southeastern Air Serv., Inc. v. Edwards, 74 Ga. App. 582, 40 S.E.2d 572 (1946) (aircraft servicer liable as bailee for fire caused by negligent handling of radio equipment).
131 Id.
132 See, e.g., Rutledge v. Des Moines Flying Serv., Inc., 254 Iowa 809, 119 N.W.2d 262 (1963) (bailee liable for damage to plane caused by windstorm where plane was improperly tied down).
133 273 N.C. 519, 160 S.E.2d 735 (1968).
134 Id. at 741.
135 See, e.g., St. Paul Fire & Marine Ins. Co. v. General Air Serv., Inc., 513 So. 2d 1322 (Fla. Dist. Ct. App. 1987) (bailee liable for parts broken while aircraft was in possession of air service company); see also Annotation, *supra* note 124.
136 263 N.C. 437, 139 S.E.2d 682 (1965).
with another plane. The court found that the bailor's evidence showing that he delivered his airplane to the bailee in fine performing condition for repairs to its radio, that the bailee accepted it, and that the next day the bailee had the airplane in its possession and control in damaged condition made out a prima facie case of actionable negligence against the bailee.

Bailees of aircraft have also been charged with liability for damage sustained by the aircraft while being used in violation of a written or oral agreement between the bailor and the repairer. In Gruender v. Holt, for example, the plaintiff's aircraft, which had been leased to a third party, was confiscated by local drug enforcement agencies. The craft had suffered substantial damages from its use in illegal drug trafficking activities. The plaintiff recovered his aircraft and delivered it to the repairer for service with strict instructions not to release it to anyone other than the plaintiff. The plane was subsequently stolen, and one of the plaintiff's arguments was that the repairer was absolutely liable for the "misdelivery" of the plane to the thief. In the alternative, the plaintiff claimed that the repairer was liable for the theft because it was negligent in protecting the aircraft. The court held that even though the repairer's failure to deliver the plane established a prima facie case of negligence, the repairer was not at fault in the bailment action for contributing to theft because it had used reasonable care to protect the plane. The court noted that the

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137 Id. at 683.
138 Id. at 685.
139 See, e.g., Southeastern Air Serv., Inc. v. Carter, 78 Ga. App. 8, 50 S.E.2d 156 (1948) (repairer liable for destruction of plane which occurred during unauthorized test flight); Lewis v. Jensen, 39 Wash. 2d 301, 235 P.2d 312 (1951) (aircraft repair company liable when plane was stolen and destroyed after repairer negligently left keys in plane).
140 714 F.2d 45 (6th Cir. 1983).
141 Id. at 46.
142 Id.
143 Id.
144 Id. at 47. The defendant secured the plane by tying it down, chocking the wheels, locking the cabin, and removing the keys. Id. In addition, a chain link
plaintiff could not claim that the repairer failed to secure the plane properly, especially since the plaintiff failed to inform the repairer of the substantial likelihood that the plane would be stolen again.145

B. Liability Limitations in Bailment Contracts

Contractual limitations of liability, which are not uncommon in bailment contracts, can be a prominent factor in relieving a repairer of liability. In *Revenue Aero Club v. Alexandria Airport*,146 an aircraft owner executed a repair contract stating that the repairer would not be held responsible for loss occasioned by fire, theft, or any other means beyond the control of the repairer. Although the aircraft was subsequently stolen, the court held that the repairer was not liable, and pointed out that the agreement involved was not an ordinary contract of bailment because of the liability limitations.147 The owner was thus under a burden to prove that the loss of the aircraft could have been prevented by the repairer.148 In summary, courts today seem unwilling to hold aircraft servicers liable as virtual insurers of the planes they repair, and appear quite willing to enforce contract limitations in aircraft bailment situations — views which seem generally favorable to aircraft servicers.

V. GUIDELINES FOR AVOIDING LIABILITY

The current trend toward inflated verdicts, coupled with the public attitude toward consumerism, dictates future increases in claims against aircraft repairers by owners and operators.149 What steps can be taken by repair

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144 *Id.*
145 *Id.*
146 192 Va. 231, 64 S.E.2d 671 (1951).
147 *Id.* at 673.
148 *Id.* The court stated that "[i]n this situation the bailee may escape liability by showing that his failure to redeliver was . . . without his fault, but this is an affirmative defense which he must prove." *Id.*
149 Fulton, *supra* note 2, at 29.
facilities to limit the impact of such lawsuits? Suggested tentative guidelines include:

(a) Make sure employees are aware of maintenance and record-keeping regulations. This will help ensure that proper entries are made on work orders and in log books.\(^{150}\)

(b) Include liability limitations in all service contracts. These clauses should be specific and conspicuous.\(^{151}\)

(c) Keep detailed files and records of airworthiness directives, beyond what is required by law. Include information on how and when compliance was achieved, as well as who performed the work.

(d) Make sure all maintenance and repair work is double-checked by a supervisor or mechanic other than one performing the work.

(e) List ADs which were complied with or were not applicable, instead of simply stating that all airworthiness directives have been complied with to the date of inspection.\(^{152}\)

(f) Place the aircraft owner or pilot on written notice of work which should be performed, but which by reason of expense or the desire not to incur downtime is not undertaken by the pilot or owner.\(^{153}\)

VI. CONCLUSION

The discussions above summarize some of the most common bases of aircraft repairer liability. While liability will, of course, depend on the specific facts of each case, several apparent trends have emerged over the past few decades, and these trends pose some potentially major

\(^{150}\) See supra notes 48-53 and accompanying text for examples of regulations of which aircraft mechanics should be aware.

\(^{151}\) See supra notes 110-114 and accompanying text for examples of liability limitations which have been upheld by courts.

\(^{152}\) Fulton, supra note 2, at 24.

\(^{153}\) Id. Additionally, Fulton suggests that following a claim or suit, the service facility should make an investigation of service or maintenance performed at other facilities, scrutinize the flight log and obtain the FAA record of the pilot, and secure an expert to investigate the possibility of pilot error, negligence of another service operator, or design-induced damage.
implications for both aircraft servicers and owners. For example, the variance in outcomes of recent negligence cases seems to indicate a divergence of views on just exactly what "reasonable care" means in regard to aircraft servicers.\textsuperscript{154} The issues range from whether aircraft servicers should be held to a special standard of care due to the extremely technical aspects of their work, to how much responsibility aircraft owners should be required to assume for the maintenance and inspection of their aircraft.\textsuperscript{155} Differing views on these issues could conceivably give rise to forum shopping, as some jurisdictions are bound to eventually appear more favorable to plaintiffs. In addition, aircraft servicers in areas which tend to favor plaintiffs might find they are operating less profitably as insurance rates rise and court awards continue to increase. The result might be a steep decrease in the number of servicers in those geographical areas, which would certainly be a major disadvantage to the aircraft and flight industries. One solution might be a clarification of the standard of care required of aircraft servicers, including a more specific rule on responsibility for compliance with ADs.

Application of "strict liability" to repairs and services is still an unsettled issue in many states,\textsuperscript{156} adding further uncertainty to the already risky aircraft service industry. The current trend indicates a reluctance to apply strict liability in service cases — a position that seems in keeping with the basic principles upon which strict liability was developed. Though some courts have indicated that repairers can be strictly liable, most seem to agree that the "defect" in such cases lies with the actual work and not with the serviced aircraft.\textsuperscript{157}

Courts desiring to hold aircraft servicers absolutely liable can also adopt the emerging theory of implied war-

\textsuperscript{154} See supra notes 8-31 and accompanying text.
\textsuperscript{155} See supra notes 47-62 and accompanying text.
\textsuperscript{156} See supra notes 93-109 and accompanying text.
\textsuperscript{157} Id.
ranty of workmanlike service.\textsuperscript{158} Since no proof of negligence is required under this theory, widespread adoption would almost certainly result in an increased number of judgments against servicers. Jurisdictions considering application of this theory should therefore also consider the prudence of applying an absolute liability theory to an industry as essential as the aircraft repair industry. Although negligence in the aircraft service field cannot be tolerated, adoption of absolute liability may cause an increase in insurance rates for repairers and a potential decrease in the number of repairers who can afford to remain in business.

Courts considering bailment cases today seem reluctant to hold aircraft servicers to a standard of care so high as to make them insurers,\textsuperscript{159} a view which seems contrary to the direction many courts appear to be moving in the negligence and implied warranty areas.\textsuperscript{160} While these prevalent views on bailment liability certainly seem fair to the servicers, owners could be disadvantaged in not being able to recover for theft or damage if the servicer can show he used reasonable care. One possible implication could be a tendency by aircraft owners to avoid servicers whose contracts include broad liability disclaimers, assuming other servicers are available. Additionally, aircraft owners will be forced to assume greater responsibility for making their planes theft-proof and for selecting the most careful servicers — a responsibility which does not seem unreasonable.

Aircraft servicers should certainly realize the overwhelmingly urgent need to take action now that might avoid liability in the future. Accurate record-keeping, adherence to sound business practices, and routine use of liability limitations in service contracts are simple measures that will contribute greatly toward this end. Servicers should also pay close attention to the fate of strict

\textsuperscript{158} See supra notes 115-123 and accompanying text.
\textsuperscript{159} See supra notes 124-148 and accompanying text.
\textsuperscript{160} See supra notes 154, 158.
liability and implied warranty theories in aircraft repair cases. If these theories become widely adopted, the impact is likely to be felt throughout the aircraft and flight industries, and a potentially major increase in liability awards to aircraft owners and passengers could make aircraft servicers an endangered species.