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Matrin J. Foley

Ronald E. Hulting

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RECENT DEVELOPMENTS IN AVIATION LAW

MARTIN J. FOLEY* AND RONALD E. HULTING**

INTRODUCTION

REVOLUTIONARY is perhaps the best word to describe the preceding year's legal effects on the world-wide aviation community. Recognizing the critical significance of all aspects of aviation to our nation's transportation, communications, defense and economic prosperity, United States courts and legislatures have been actively reevaluating and restructuring the rules affecting not only the domestic but also the international aviation community.

In a dramatic and, arguably, long overdue legislative act, the United States Congress passed the Airline Deregulation Act of 1978, which entirely overhauls the aviation regulatory system. Congress intends the bill to be a legislative mandate to the Civil Aeronautics Board (CAB), both as to the direction and policy of aviation regulation and as to the limits of such policy. This legis-

* B.A. 1968; J.D. 1974; MBA 1975, University of Southern California; Member of the California Bar. Mr. Foley is an associate at the Los Angeles office of Adams, Duque & Hazeltine. He specializes in aviation litigation with an emphasis on products liability law. He is a member of the American Bar Association and is the Vice-Chairperson of the Aviation and Space Law Committee of the Insurance, Negligence and Compensation Law Section. He is also Vice-Chairperson of the Law and Technology Section, Chairperson of the Products Liability Committee, and a member of the Aviation and Aerospace Committee of the Los Angeles County Bar Association.

** B.S. 1964, United States Air Force Academy; M.S. 1972, Air Force Institute of Technology; J.D. 1978, University of Southern California; Member of the California Bar. Mr. Hulting is an associate at the Los Angeles office of Adams, Duque & Hazeltine. He is a member of the American Bar Association.

1 This article reviews cases and legislation promulgated between March 1, 1978 and January 15, 1979.


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lation establishes specific programs for increased competition and a new policy statement to encourage competition. To accomplish its goals, the bill liberalizes air carrier entry into new markets and reduces control of fares. Under its "sunset provisions" the CAB's control of air transportation will be phased out beginning December 31, 1981. The CAB's existence will be completely phased out by January 1, 1985, unless the CAB convinces Congress that the CAB is needed.

This is not, however, all that the current Administration is doing. The Carter Administration is pursuing an aggressively pro-competitive "open skies" policy for civil aviation affecting domestic and international civil aviation. On the international front, a series of bilateral agreements have increased the number of services between the United States and other countries and have allowed greater scope for reduction in air fares.

In addition, the CAB has struck at the heart of the International Air Transport Association (IATA) price agreements with its "show cause" order, issued in June, 1978. Put in its simplest terms, the order asks IATA to persuade the CAB that it should not remove the antitrust exemption from airlines' taking part in traffic conferences, which are considered to be against the public interest because of their competitive structure. As a consequence, delegates to IATA's 34th Annual Meeting were faced with a task of forging a "new IATA." This "new IATA" represents an attempt at self-regulation by the world's major airlines which will allow them to pursue self-interest. It seems evident, however, that IATA's framework will inevitably become looser as its trade association activities become increasingly divorced from fare and rate fixing.

The activities of domestic and international aviation regulatory institutions are not the only significant events of the preceding year. In an ever-increasing volume, the courts of the United States are handling aviation-related litigation and establishing new rules of conduct and standards of liability for enterprises and individuals.

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3 Airline Deregulation Act at § 1551.
involved in aviation. This article discusses and analyzes the most significant United States court decisions during the last year for the purpose of highlighting these new developments and trends.

I. LAW AFFECTING AVIATION MANUFACTURERS

It is rapidly becoming apparent that the most effective method for a corporation to insulate itself against liability and to protect itself against defense costs and expenses is by drafting appropriate language in the purchase and sale documents accompanying the component or the aircraft. In *Pakistan International Airlines Corp. v. The Boeing Co.*, a Pakistani International Airlines (PIA) aircraft made a hand landing at Ankara on January 24, 1972. A Boeing survey team assisted PIA two days later by performing a visual inspection of the damaged aircraft's landing gear. The aircraft was later repaired, but, while under tow, the left main gear trunnion support fitting collapsed causing $500,000 in damage. Because of the exclusionary terms of the repair contract, PIA was forced to allege that the cause of the damage was the Boeing survey team's failure to discover the gear damage in the initial visual survey. Boeing, however, pointed out that when PIA purchased the aircraft in 1961, it had done so pursuant to a purchase agreement which contained an indemnity clause. Relying on this contract language, the district court granted summary judgment. The Ninth Circuit Court of Appeals affirmed, holding that the indemnity clause of the aircraft purchase agreement between PIA and Boeing barred PIA's action because the damages were sustained during a subsequent negligent inspection of the aircraft by Boeing employees and because the inspection constituted an indemnified "special service" to PIA under the 1961 purchase agreement.

Likewise, in a major decision, *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, the Texas Supreme Court was faced with the question of whether, in an "as is" sale to a commercial buyer, the seller's disclaimer of liability for physical damage caused to the product itself is effective under the Uniform

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7 15 Av. Cas. 17,160 (9th Cir. 1978).
8 Id. at 17,161-62.
9 15 Av. Cas. 17,357 (Tex. 1978).
Commercial Code (UCC). The court first had to decide whether, in a commercial sale and absent any personal injury or damage to other property, strict liability should be extended to cover loss resulting from damage to the product itself. Noting that there was no consensus in jurisdiction which had previously addressed the question, the court analyzed the purposes of strict liability in contract law and concluded that "injury to the defective product itself is an economic loss governed by the Uniform Commercial Code." Moreover, the court decided that the "as is" aircraft sale

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The nature of the loss resulting from damage that a defective product has caused to itself has received the attention of several commentators. Dean Page Keeton writes:

A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms only the product should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage limited solely to the property, recovery should be available, if at all, on a contract-warranty theory.


11 15 Av. Cas. 17, 357, 17,360 (Tex. 1978).
agreement was sufficiently precise and broad to eliminate all the seller's implied warranties and, therefore, that the seller was exonerated from liability for the damages to the aircraft.

Rules regarding sales are Draconian when contrasted with strict product liability theories and can surprise the manufacturer that thought it was protected. In Van Den Broeke v. Bellanca Aircraft Corp., for example, Bellanca's disclaimer of warranties on the sale of a crop-dusting plane, which was not included in the contract, did not affect the buyer's remedies under the UCC. Although the warranty registration postcard, which was returned to Bellanca by the buyer after the sale, was claimed to limit Bellanca's obligations with respect to the warranties, the court stated that it had no effect on the buyer's subsequent action for breaches of implied warranties under the UCC. The court so held because it did not deem this "notice" to be a part of the contract nor consider its return by the buyer to constitute a waiver of any remedies under the UCC.

A further example is Tuttle v. Kelly-Springfield Tire Co. Therein, the Oklahoma Supreme Court reversed the trial court's verdict for the defendant tire manufacturer reasoning that Tuttle, who was injured when a tire blew out, should have been allowed to pursue her theory of expressed warranty. The court reasoned that the tire was expressly warranted against blowout and that the warranty's limitation to repair or replacement, which excluded a personal injury remedy, was prima facie unconscionable under UCC Section 2-719. The court further ruled that this prima facie case of unconscionability was not rebutted by plaintiff's failure to show that the tire was defective because defectiveness is irrelevant to an action for breach of warranty. Recognizing that the UCC is somewhat inconsistent in allowing a disclaimer for all warranties while simultaneously presuming the unconscionability of any warranty that purports to limit personal injury remedies in connection with consumer goods, the Oklahoma high court concluded this

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13 2 PROD. LIAB. REP. (CCH) ¶ 8,283 (5th Cir. 1978).
14 Id. at 17,457-58.
15 2 PROD. LIAB. REP. (CCH) ¶ 8,288 (Okla. 1978).
was a matter governed by public policy concerning consumer protection. What looked like, but was not, the giving of relief in the form of an expressed warranty was unconscionable as a "surprise limitation" and, therefore, was against public policy.\(^\text{16}\)

It is of significant interest to manufacturers, defense counsel and plaintiff's attorneys that in the last year Arizona, Colorado, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, Nebraska, New Hampshire, Oregon, Rhode Island, South Dakota, and Tennessee have adopted comprehensive products liability statutes which substantially alter or short-circuit developing products liability trends in those states' courts.\(^\text{17}\)

II. AIRPORTS, FBO'S AND OWNER/OPERATORS

A. Airport Noise Regulation

_San Diego Unified Port District v. Gianturco\(^\text{18}\)_ involved an intriguing attempt by a state agency to impose noise controls on a local airport by means of a flight curfew. The Port District, which operates San Diego's Lindbergh Field, brought an action against California's Department of Transportation (CalTrans) and two of its officers seeking a declaration that the curfew imposed on the airport by CalTrans as a condition to granting a variance from noise standards applicable to airports was unconstitutional. The Air Transport Association of America intervened as plaintiffs.

On plaintiffs' motion for preliminary injunction and defendants' motion for summary judgment, the district court's Chief Judge held that: (1) the Port District and the intervenor commercial airlines demonstrated that they would suffer irreparable injury if they were required to comply with CalTrans' conditions to the granting of the variance; (2) the Port District established a substantial likelihood of success on the merits of their claim that the curfew imposed was unconstitutional because it invaded a field preempted by federal law, and (3) the Port District demonstrated that serious questions were raised in its action and established that the balance of hardships tipped sharply in their favor and in favor of the intervenor commercial airlines since the longer curfew imposed by

\(^{16}\) _Id._ at 17,481.

\(^{17}\) 1 _PROD. LIAB. REP._ (CCH) \$5 3010, 3080.50, 3420 (1979).

CalTrans would disrupt or destroy the balance existing between the concerns of airport area residents, the needs of the community as a whole, and the requirements of the airlines. The court, therefore, granted the preliminary injunction sought by the Port District and the intervenor commercial airlines and denied CalTrans' motion for summary judgment.19

B. Airport Security

It is noteworthy that the Federal Aviation Administration (FAA) proposes to extend the regulations pertaining to aircraft security to cover: (1) charter flights conducted by domestic, flag, supplemental and foreign air carriers, and, (2) all intrastate operations conducted by a commercial operator which engages in common carriage with a specified frequency between two points entirely within any state. In addition, the FAA's proposal would require that these flights be provided with appropriate law enforcement personnel by either airport operators or certificate holders to support passenger screening operations.20

C. FBO Liability

While contracts are often a good method of exculpating liability,21 one may have to be both a Solomon and a Teiresias when seeking a release from an aviation consumer or user of aviation services. In Gross v. William Sweet,22 the plaintiff enrolled in a parachute training school operated by the named defendant doing business as Stormville Parachute Center, and signed a broad "responsibility release."23 Plaintiff also informed his instructor of a

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19 Id. at 283-95.  
21 See text accompanying notes 7-15 supra.  
23 The "responsibility release" read as follows:
I, the undersigned, hereby, and by these covenants, do waive any and all claims that I, my heirs, and/or assignees may have against Nathaniel Sweet, the Stormville Parachute Center, the Jumpmaster and the Pilot who shall operate the aircraft when used for the purpose of parachute jumping for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport.  
Id. at 17.305-06.
prior leg injury sustained some years before. After receiving one hour of on-land training, plaintiff was flown to an altitude of 2800 feet where, following instructions, he jumped from the aircraft. On landing, plaintiff broke the previously injured leg.\textsuperscript{24} The trial court dismissed plaintiff's complaint because of the release. On appeal the case was reversed because the appellate court concluded that the release did not relieve the jump school from its own negligence or from complying with applicable federal air regulations (specifically, obtaining a medical certificate of plaintiff's physical condition and providing adequate pre-jump training). Furthermore, the appellate court reinstated plaintiff's complaint and dismissed defendant's affirmative defense of release.\textsuperscript{25}

D. Owner/Operators and Aircraft Registration

Considering the number of aircraft recordation cases decided by our nation's courts last year and the substantial similarity of the issues raised in each, it is worthwhile to review briefly the law pertaining to registration of interests in aircraft. The Federal Aviation Act (Act) created a framework for a nationwide system to record certain interests in aircraft and major aircraft components.\textsuperscript{26} To the extent that state law conflicts with any part of the Act, it is preempted under the power of Congress to regulate interstate commerce. There is no question that Congress has preempted the field insofar as registration and recording of title instruments affecting commercial aircraft are concerned.\textsuperscript{27} However, the Act provides that state law shall determine the initial or inherent validity of any instrument recorded under the Act's provisions.\textsuperscript{28} At least six appellate court cases last year might have been obviated had the participants taken note of these rules.\textsuperscript{29}

\textsuperscript{24} Id. at 17,305.
\textsuperscript{25} Id. at 17,306.
\textsuperscript{29} (i) The Act creates a framework for a nationwide system to record interests in aircraft and it provides that the initial or inherent validity of any recorded instrument shall be determined by state law. Therefore, when more than one state is implicated in a transaction, the law of the state where a security agree-
III. LIABILITY FOR AVIATION CRASHES

A. Strict Liability

(1) Crashworthiness

For a considerable number of years the aviation plaintiffs' bar has urged our nation's courts to recognize the concept of crashworthiness as a viable cause of action against airframe and component was delivered and where the collateral is located governs. Under state law the assignment of the security interests by the back of the aircraft seller eliminated the underlying debt and the foreclosure upon the aircraft was wrongful. Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 15 Av. Cas. 17,123 (5th Cir. 1978).

(ii) The aircraft registration provisions of the Act do not preempt a state from enacting legislation calling for the registration of aircraft and the payment of a registration fee. Moreover, the state's repeal of statutes for the assessment of personal and business property taxes was not an implied repeal of its aircraft registration statute. New Jersey Dept. of Transp., Div. of Aeronautics v. Greene, 15 Av. Cas. 17,102 (N.J. Super. 1978).

(iii) The system of recordation of security interests in aircraft under the Act does not preempt state law that would otherwise govern priorities of lien and title interests in aircraft. Accordingly, an aircraft buyer in the ordinary course of business prevailed over the holder of a prior security interest created by the seller and recorded pursuant to the Act. Cessna Fin. Corp. v. Skyways Enterprise, Inc., 15 Av. Cas. 17,126 (Ky. 1978).

(iv) The federal system of recordation of security interests in aircraft created by the Act does not preempt state law that would otherwise govern priorities of lien and title interests in aircraft. Accordingly, the interest of an aircraft buyer in the ordinary course of business prevailed over the interest of a recorded floor plan lien. Sanders v. M. D. Aircraft Sales, Inc., 15 Av. Cas. 17,245 (3d Cir. 1978).

(v) A buyer who purchased an aircraft from a fixed base operator and who knew that operator's principal business was a fixed base operation, not the sale of aircraft, was not a buyer in the ordinary course of business. Moreover, even if the buyer had been a buyer in the ordinary course of business, the Act renders the properly registered security interest enforceable against the buyer in the ordinary course who subsequently purchased the aircraft. O'Neill v. Barnett Bank, 15 Av. Cas. 17,253 (Fla. Dist. Ct. App. 1978).

(vi) The system of recordation of conveyances affecting title to or security interests in aircraft created by Section 503 of the Act does not preempt the state rule that a buyer in the ordinary course of business takes chattels free of a security interest created by the seller. Haynes v. General Elec. Credit Corp., 15 Av. Cas. 17,321 (4th Cir. 1978). But see CIM Int'l v. United States, 15 Av. Cas. 17,193 (C.D. Cal. 1978) (an interesting aspect of the necessity of recordation to perfect a security interest).

Crashworthiness is a generic term concerned with the capability of vehicle occupants to survive impact situations with minimal human damage. The concept is also referred to by such terms as "post accident survivability," "second collision," "second accident," "post crash" and "enhanced" injuries. See Dreisonstok v. Volkswagenwerk A.G., 489 F.2d 1066, 1069 n.3 (4th Cir. 1974) (definitional authorities cited thereat).
ponent manufacturers.\(^1\) Although their past efforts were largely un-
availing,\(^2\) a significant body of recent scientific engineering thought
proceeded to develop the concept.\(^3\) Either because of the pressure
from the legal community or because of the advancement of scient-
ific and engineering knowledge, courts in the early 1970's started

\(^1\) Although the lifesaving and injury minimizing benefits of crash-
worthy aircraft designed have been recognized for nearly fifty years,
it was not until the past decade that a fundamental change in design
philosophy has evolved. Whereas earlier every attempt was made
to introduce safety factors or features which would prevent an
accident from occurring, it is now recognized that a statistically and
socially significant number of accidents are inevitable and, hence,
the aircraft designer should accordingly plan for them. Crash-
worthiness \(\ldots\) a new technology \(\ldots\) has emerged. The scientific
base problems which encompass this technology are manifold and
complex. They span a spectrum which includes the interrelationship
of biomedical and applied mechanics problems.

AIRCRAFT CRASHWORTHINESS vii (K. Saczalzki, G. Singley III, W. Pilkey, & R.
Huston eds. 1975) [hereinafter cited as AIRCRAFT CRASHWORTHINESS].

\(^2\) One of the more significant aviation legal decisions of the past
year is a jury award of $900,000.00 to the survivors of a man
killed in a crash of a Cessna 206 in Nevada in 1971. The 206, while
on an aerial survey flight, flew into a blind canyon and crashed
while attempting to turn around.

The jury agreed that pilot error was the cause of the crash, but it
faulted Cessna for a defectively designed seatbelt which resulted
in the death of a passenger. In effect, the jury declared that the pilot
caused the crash, but that Cessna caused the injuries, and should
be liable for them. To our knowledge, this is only the second prod-
uct liability lawsuit won by a plaintiff based solely on the lack of
 crashworthiness of the airplane.


\(^3\) See, e.g., AIRCRAFT CRASHWORTHINESS, supra note 31; THE ANGLE OF
SHOULDER SLOPE IN NORMAL MALES AS A FACTOR IN SHOULDER DESIGN, AM 65-14
(1965); FAA, DOT, THE BENEFITS OF THE USE OF SHOULDER HARNESS IN GEN-
ERAL AVIATION AIRCRAFT, FAA-AM-72-3 (1972); FAA, COCKPIT DESIGN FOR
IMPACT SURVIVAL, AM-66-3 (1966); FAA, DOT, CRASHWORTHINESS, SAE
750539 (1975); FAA, DOT, INDEX TO FAA OFFICE OF AVIATION MEDICINE
REPORTS: 1961 THROUGH 1973, FAA-AM-74-1 (1974); FAA, DOT, EFFECTIVE-
NESS OF RESTRAINT EQUIPMENT IN ENCLOSED AREAS, FAA-AM-72-6 (1972);
FAA, DOT, EXPERIMENTAL IMPACT PROTECTION WITH ADVANCED RESTRAINT
SYSTEMS: PRELIMINARY PRIVATE TESTS WITH AIR BAG AND INERTIA REEL/
INVERTED-Y YOKE TORSO HARNESS, AM 69-4 (1969); FAA, DOT, GENERAL
AVIATION STRUCTURES DIRECTLY RESponsible FOR TRAUMA CRASH DECELERA-
TIONS, FAA-AM-71-3 (1971); FAA, DOT, PATHOLOGY OF TRAUMA ATTRIBUTED
TO RESTRAINT SYSTEMS IN CRASH IMPACTS, AM 69-3 (1969); FAA, THE PRE-
DOMINATE CAUSE OF CRASHES AND RECOMMENDED THERAPY, AM 66-8 (1966);
FAA, RECOMMENDATIONS FOR RESTRAINT INSTALLATION AND GENERAL AVIATION
AIRCRAFT, AM 66-33 (1966); U.S. ARMY AIR MOBILITY RESEARCH AND DE-
VELOPMENT LABORATORY, CRASH SURVIVAL DESIGN GUIDE, USAAM RADL TECH-
NICAL REPORT 71-22 (1971).
to apply crashworthiness concepts to the automobile industry.\textsuperscript{34}

On July 20, 1978, the California Fourth District Court of Appeals decided \textit{McGee v. Cessna Aircraft Co.}\textsuperscript{35} Helen McGee was in the left front seat of a 1968 model 177 Cessna Cardinal that crashed on March 28, 1971, while departing Warner Springs Airport in San Diego County. The weather was clear when the aircraft struck hilly terrain to the northeast of the airport. Interestingly, none of the four persons on board received major injuries from the original crash. Upon impact, however, the front of the aircraft burst into flames which quickly entered the cockpit under the control panel. McGee, who was unconscious after the crash, and who was the last to be removed from the aircraft, received such severe burns that both legs were amputated. Evidence indicated that her injuries were almost entirely due to the post-crash fire.\textsuperscript{36}

McGee's theories of Cessna's liability sounded in both negligence and strict liability. Specifically, McGee alleged that the Cardinal's fuel system was unsafe because there was located on the passenger side of the engine firewall a gasoline "accumulator"\textsuperscript{37} which was susceptible to and was in fact penetrated by the air-


\textsuperscript{35} 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978) [hereinafter cited as \textit{McGee}].

\textsuperscript{36} 82 Cal. App. 3d at 1008, 147 Cal. Rptr. at 695.

\textsuperscript{37} [The fuel in the aircraft was contained in the wings which were affixed to the top of the aircraft fuselage. A fuel line then carried the fuel through a fuel selector valve. . . .

From the fuel selector valve, the fuel line then proceeds to a fuel reservoir tank, identified during the trial as the "accumulator" tank. This tank is located on the passenger side of the firewall separating the passenger cockpit from the engine compartment. It rests immediately in front of the feet and legs of both the pilot and co-pilot controlling the aircraft. The top of the accumulator tank is part of the floor of the cockpit and is made of thin aluminum sheet metal. The fuel line proceeds from the accumulator through a shut-off valve located on the firewall into the carburetion system of the engine of the aircraft.

82 Cal. App. 3d at 1009, 147 Cal. Rptr. at 696.
craft’s non-retractable nosewheel strut, thus causing a second accident—the post-crash fire. The trial court determined that crashworthiness should be treated as a matter of negligence and not strict liability because, among other reasons, “strict liability puts too much of an onus on the manufacturer.” Accordingly, the trial court only instructed the jury on negligence principles.

Reversing the jury’s verdict for Cessna, the appellate court held that “California has not only imposed responsibility on a manufacturer for a defective or defectively designed part causing the injury in a secondary accident matrix but has done so under strict liability rules.” As to Cessna’s arguments that crashworthiness should not be applied to aviation cases and that the strict liability approach to aviation crashworthiness is unfair to aircraft manufacturers, the court gave short shrift stating “[t]hese are not legal arguments . . . and are best left for the Legislature.” This case reaffirms and extends the position that “[t]he manufacturer must evaluate the crashworthiness of his product and take such steps as may be reasonable and practicable to forestall particular crash injuries and mitigate the seriousness of others.” After McGee, there is no doubt that this injunction will be applied with the California courts’ customary vigor to aviation crashworthiness. The decision was appealed to the California Supreme Court which, on September 27, 1978, declined to grant a hearing. Therefore it stands presently as the definitive position on aviation crashworthiness in California.

In applying the crashworthiness concept, the California courts, hopefully, will look to Texas for some assistance. Turner v. Gen-

38 McGee asserted the fuel system of the aircraft was inherently unsafe because Cessna knew the nose wheel strut was susceptible to deformation either in a crash or due to rough handling; the nose-wheel strut collapsed, telescoped upon impact and ruptured the accumulator tank, permitting fuel to escape in an area where combustion would and did in fact occur, thus causing the second accident—a post-crash fire.

82 Cal. App. 3d at 1007, 147 Cal. Rptr. at 695.

39 82 Cal. App. 3d at 1010-11, 147 Cal. Rptr. at 696-97.

40 82 Cal. App. 3d at 1017, 147 Cal. Rptr. at 701.

41 82 Cal. App. 3d at 1019, 147 Cal. Rptr. at 702-03.

42 82 Cal. App. 3d at 1013, 147 Cal. Rptr. at 698.

eral Motors Corp.," cited by Cessna in McGee as establishing a negligence standard for crashworthiness cases, was appealed and the verdict for plaintiff reversed in a well-reasoned and analytically sophisticated opinion. The trial court, following Turner I, applied crashworthiness principles but ignored Turner I's instructions regarding a set of balancing factors for the jury to consider in a crashworthiness case. The trial court, instead, allowed an instruction charging the jury on a consumer expectation test and the jury returned a verdict for the plaintiff. In reversing, the Turner II court stated:

We are of the opinion that the following factors should be balanced, as directed by Turner [I], in making the determination of whether the design is or is not defective: (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use; (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive; (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs; (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.  


The first appeal is Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) [hereinafter cited as Turner I].

66 567 S.W.2d at 816-18 (citations and footnotes omitted).

[These terms "reasonable consumer" (and his expectations) and "prudent manufacturer" (and his awareness of risks) have no place in an instruction to the jury considering a crashworthiness case. Each term has already acquired a fairly clear meaning in the ordinary strict liability case, i.e., those involving a product defectively produced. These terms, when we come to apply a balancing test—as we must do under Turner [I], Larsen [v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968)], Dreisonstok [v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974)], and Huff [v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977)]—are purely subjective in nature and do not place before the jury the true elements making up either a cause of action or a defense thereto in a crashworthiness case.

An overwhelming majority of jurisdictions follow Larsen in determining that "intended use" encompasses vehicle accidents and that liability for a manufac-
It is further noteworthy that in 1978 the Massachusetts District Court, Appellate Division and the Missouri Court of Appeals each addressed the crashworthiness concept for the first time and concluded that the doctrine would be accepted as a basis for liability in those states.

Clearly, crashworthiness is a concept “whose time has come” and in view of McGee, it appears likely this basis for liability will be applied by other jurisdictions to aviation cases. If those other jurisdictions follow Turner II, it will be imperative for aircraft manufacturers to be prepared to defend themselves with appropriate documentation to meet the burden imposed upon them by Turner II’s balancing test.

(2) Design defects

While there have been many interesting and significant cases decided in the aviation products liability design field in the preceding year, the most important legal activity in this area has
taken place in the definition of the term "design defect." In its most general sense, strict products liability means that a manufacturer is strictly liable in tort if he places on the market a product which, because of a defect in its manufacture or design is unsafe for its intended or reasonably foreseeable use, and if an injury is caused by such defect.\textsuperscript{61} Plaintiff's burden of proof is then: (a) demonstrating the defendant's status as a manufacturer, retailer, or otherwise; (b) proving the defect; (c) showing that the defect existed when the product left the defendant's possession; (d) demonstrating the design of the product was the proximate cause of plaintiff's injuries; (e) showing that the product was used in an intended or reasonably foreseeable manner; and (f) proving the nature of plaintiff's injury.\textsuperscript{62} The crux of the entire burden of proof, 


\textsuperscript{62} E.g., Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972) [hereinafter cited as Cronin].
therefore, how one defines the term "defect."

It is helpful initially to distinguish between manufacturing defects on the one hand and design defects on the other.62 Manufacturing defects pose little analytical difficulty. When dealing with a manufacturing defect, it is a simple matter of showing that the product as it comes off the assembly line is different from other items on the assembly line. In other words, it is an unintended result of the manufacturing process. When dealing with design defects, however, analytical difficulties increase substantially.64 Here the product comes out exactly as intended by the manufacturer. The materials meet the requirements specified for the product, the product is exactly as the company's engineers intended and the quality control was appropriate. The plaintiff in a design defect case is alleging not only that a particular product is defective, but that every single product in that entire product line is defective because all were improperly designed.

How can a court and lay jury make what many argue to be a manufacturing decision which in effect substitutes the trier of fact's judgment for that of the manufacturer?65 Three tests have been generally applied to attempt to make this determination. The first is a consumer expectations test, which holds that a product is defective if it is not reasonably fit for its ordinary or reasonably foreseeable uses. This test sounds in warranty language.66 It is extremely rudimentary and we submit that it defies rational application to any but the most primitive or unsophisticated products.67

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67 Foley & Prairie, Products Liability Law in California, LOS ANGELES LAWYER, October 30, 1978, at 37.
and that it certainly does not apply to aircraft. Furthermore, the focus of the consumer expectations test is on the consumer and not on the product. The thrust of the judicial opinions in the products liability field, however, has been to focus to the extent possible on the product itself.\textsuperscript{58}

The second test is contained in the Restatement (Second) of Torts in Section 402A: "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."\textsuperscript{59} Obviously the particular standard that emerges from the 402A test is that an item is in a defective condition if it is "unreasonably dangerous."

In an explanatory comment to this Section, the Restatement indicates that a product is unreasonably dangerous when it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer purchasing the product with the ordinary knowledge common to the community as to the product's characteristics.\textsuperscript{60} While some courts maintain that this is merely a restatement of the consumer expectations test, others vigorously argue that it is not. The leading clash has been between California in the former camp and New Jersey in the latter.\textsuperscript{61}

The third test may be characterized as a risk/utility analysis. The approach has been developed by Dean John W. Wade of Vanderbilt Law School and Dean Page Keeton of University of Texas School of Law.\textsuperscript{62} Dean Wade put it this way:

The time has now come to be forthright in using a tort way of thinking and tort terminology in cases of strict liability in tort. . . . The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product.


\textsuperscript{59} Restatement (Second) of Torts § 402A (1965).

\textsuperscript{60} Id., Comment i. California has rejected the "unreasonably dangerous" terminology of Section 402A of the Restatement. See Cronin, supra note 52.

\textsuperscript{61} Compare, e.g., Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960), with Cronin, supra note 52.

and ask whether he was then negligent in putting it on the market or supplying it to someone else.\footnote{Wade, \textit{supra} note 53, at 834-35.}

In other words, Dean Wade posits as a matter of law that the manufacturer knew of the defective condition and then asks whether a reasonably prudent manufacturer, knowing of this defective condition, nevertheless would have put it on the market. This determination requires balancing the utility of the product against the perceived risk of the product given the manufacturer's imputed knowledge of the defect. Dean Keeton takes a slightly different approach. He states:

A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed.\footnote{Keeton, \textit{supra} note 56, at 37-38.}

The California Supreme Court stepped into this definitional battle in early 1978 in the famous \textit{Barker} case.\footnote{\textit{Barker}, \textit{supra} note 49.} In the spring of 1978 the New Jersey Supreme Court, in an erudite opinion, sallied forth in \textit{Cepeda v. Cumberland Engineering Co.}\footnote{76 N.J. 152, 386 A.2d 816 (1978).} to do battle with the California Supreme Court on the definition of "design defect." \textit{Cepeda} involved a young man, Jose Cepeda, who was operating a plastic pelleting machine. His job was to hand feed multiple strands of plastic into the machine. The strands of plastic were then sucked up by the "nip-point" of two revolving rolls and carried to a rotating drum containing knives that cut the plastic into pellets. The obvious danger was that the operator's hands could be sucked up by the "nip point" of the two revolving rollers and that the operator's hand then would become pelletized. Therefore, the manufacturer installed a bolt-on "finger guard" that required a special tool for removal held only by the foreman of the shop. The manufacturer did not install an electronic interlock mechanism to prevent operation of the machine when the finger guard was removed. At the time of the accident, the plant was running on a three shift basis and the shop foremen were required to remove the finger guard in order to do maintenance on the machine, to
clean out jamups, and to change the color of the plastic being run. When Cepeda came to work on the day of the accident, the finger guard was not on the machine. Nevertheless, Cepeda started operating the machine, and continued to do so for three hours, at which time the accident occurred, causing Cepeda to lose four fingers on his left hand.

After discussing various issues concerning contributory negligence, the New Jersey Supreme Court concluded that it was foreseeable that the bolt-on finger guard would be taken off frequently for various maintenance activities and that knowledge of the potential danger of the machine design, as reflected by the evidence at the trial, was imputable to the manufacturer. Thus, the question became whether a reasonably prudent manufacturer with such prior knowledge would have put such a product into the stream of commerce after considering the hazards as well as the utility of the machine. Clearly this is the Wade-Keeton risk/utility analysis.

The Cepeda court went on to specify the factors that should be utilized in determining the risk/utility, i.e., the defectiveness of the machine. Again, borrowing from the Wade-Keeton analysis, the court set forth the following factors:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

\[67\] 76 N.J. 152, 386 A.2d at 821.
\[68\] 76 N.J. 152, 386 A.2d at 830.
\[69\] 76 N.J. 152, 386 A.2d at 826-27.
In effect, New Jersey thereby established a balancing test. On one side of the scale goes a traditional calculus of risk, namely, multiplying the magnitude of the expected harm by the likelihood of that expected harm given the nature of the product. On the other side of the scale are all of the factors listed, which may be characterized as the utility of the product, including alternative product designs and, arguably, the adverse consequences of those possible alternative designs. To implement its decision, the New Jersey Supreme Court set forth a model jury instruction to determine what constitutes a design defect:

A [product] is [in a defective condition unreasonably dangerous] if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market. It is not necessary to find that this defendant had knowledge of the harmful character of the [product] in order to determine that it was [in a defective condition unreasonably dangerous].

While New Jersey and California each spent some time in Cepeda and Barker, respectively, politely criticizing the other's approach, in effect each court has adopted as its primary method for defining “design defect” the Wade-Keeton risk/utility analysis. Even though New Jersey additionally adopted the Restatement 402A “unreasonably dangerous” standard and California, in contrast, adopted the consumer expectation test and shifted the burden of proof to the defendant manufacturer once the plaintiff demonstrated the design defect had proximately caused his injuries, the critical issue in a products liability design case will most often be determined by the risk/liability analysis. Considering the prominent positions of the New Jersey Supreme Court and the California Supreme Court in the development of products liability law in the United States, the significance of their fundamental agreement on the risk/utility analysis approach cannot be underestimated.

A uniform product liability law has been recently proposed that criticizes the Wade-Keeton approach and argues that the “utility” segment of the balancing process is too subjective. The uniform law proposes what it claims is a more objective method for estab-

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70 76 N.J. 152, 386 A.2d at 827.
lishing the other side of the balancing process. The proposed law will have an undetermined effect on the development of products liability law, particularly in view of the careful consideration that has gone into New Jersey's decision to accept the risk/utility analysis and in view of the recent adoption by many states of new products liability statutes.

B. Government Agencies as Party Defendants

(1) Negligence theories

The FAA is increasingly the target of personal injury, wrongful death and hull loss suits under the Federal Tort Claims Act. The key federal actor is generally an air traffic controller who, while attempting to guide an aircraft through the complex of federal airways to a safe landing, allegedly is negligent in discharging these duties. Although the cases are generally straightforward in that the principles involved sound in basic negligence and, therefore, turn heavily on the facts of each individual case, last year's decisions in this area assist in determining the types and quanta of proof necessary to establish a case against the government.

_Deweese v. United States_ involved Metro Commuter Airlines Flight 201 operating between Laramie, Wyoming, and Denver's Stapleton International Airport. On October 3, 1969, while descending toward Stapleton in "IFR" conditions, the commuter aircraft's left engine quit and the aircraft subsequently crashed. Liability was assessed against the government because the air traffic controller handling the flight was found negligent: (a) in failing to give adequate course guidance to the aircraft in accordance with applicable federal air regulations; (b) in failing to provide the aircraft with the latest information as to ceiling, visibility and appropriate altimeter setting; (c) in failing to give a proper missed approach procedure; and (d) in failing to hand off other traffic and give his undivided attention to the distressed aircraft.

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73 See text accompanying and authorities cited in note 17 supra.
75 14 Av. Cas. 18,459 (10th Cir. 1978).
76 Id. Of special interest in this case is the Tenth Circuit's discussion of computing damages using, among other things, inflation, discounting and future income taxes. Id. at 18,463-65.
Szilard v. United States involved the crash of a Piper PA28-140 while landing on runway 34 right at Van Nuys Airport in California. Judge Pierson M. Hall ruled first that the Piper, which was executing touch-and-go landings, encountered wing-tip vortices created by an Air National Guard C-130 departing on the parallel runway, 34 left. The judge also held that the crash was a result of the negligence of two air traffic control personnel in failing to space the activities of the two aircraft and in giving a wake turbulence warning which cautioned the Piper about possible turbulence on "lift off" instead of near 34 right's threshold.

In Martin v. United States, the Eighth Circuit Court of Appeals considered the United States' appeal of a district court decision determining liability against the United States in the amount of nearly $3,000,000 because of the negligence of air traffic controllers. The case involved the crash of a twin-engine Cessna about one nautical mile north of a runway at Grider Field in Pine Bluff, Arkansas. In Martin, the pilots missed one approach and, during their maneuvering for a second effort to land, the visibility at the airport decreased from 1 mile to 3/4 of a mile and the ceiling deteriorated from 300 feet to zero. The air traffic controllers were held negligent by the district court and this finding was affirmed by the Court of Appeals, stating that the FAA personnel failed to give the aircraft the current weather observation containing the deterioration of conditions as soon as was reasonably possible and that they had given the aircraft an erroneous altimeter setting which caused the pilots to believe they were 100 feet higher than they actually were.

Receiving from ATC an erroneous altimeter setting, however, is not necessarily a talisman for victory. In Owens v. United States, although the controller gave an altimeter setting of 30.32, which was 1,000 feet in error, post-accident photographs of the cockpit showed an altimeter setting of between 29.34 and 29.35. The
court concluded that the pilot had not used the erroneous altimeter setting and so rendered judgment for the government.\textsuperscript{22}

Furthermore, it must be remembered that air traffic control personnel should not be viewed as the guarantors of safety in our nation's airways. In \textit{Associated Aviation Underwriters v. United States},\textsuperscript{23} a Piper Aztec aircraft crashed near Cresson, Texas, killing all six travelers aboard. While vigorously argued for the plaintiffs, this case highlights the folly of flying in thunderstorms and expecting ATC to pull you, or your estate, out of the frying pan.\textsuperscript{24}

(2) \textit{Government immunity}

The Georgia Supreme Court has apparently concluded the confusion over \textit{Miree v. DeKalb County}.\textsuperscript{25} This now famous case concerns the crash, on February 26, 1973, of a Lear Jet shortly after takeoff from DeKalb-Peachtree Airport due to a power failure allegedly caused by the ingestion of a large number of birds swarming over the airport and the adjacent county garbage dump. The aircraft was destroyed and all aboard killed. Defendant DeKalb County moved to dismiss on the grounds that it was immune from suit under Georgia law. The district court\textsuperscript{26} granted the motion and the case went to a panel of the Fifth Circuit,\textsuperscript{27} to the Fifth Circuit en banc,\textsuperscript{28} to the United States Supreme Court,\textsuperscript{29} back to the Fifth Circuit,\textsuperscript{30} where it was finally certified to the Georgia Supreme Court in order to answer questions of Georgia law. The Georgia Supreme Court held that the county was immune from suit on the theories of negligence and nuisance and that the county was not liable on the theory that the plaintiffs were third-

\textsuperscript{22} Id. at 17,176.

\textsuperscript{23} No. CA-3-76-0435-C (N.D. Tex. 1978) (slip opinion, copy on file with authors).

\textsuperscript{24} See generally, e.g., Judkins, \textit{Weather Causation of Accidents, Small Aircraft Accident Litigation}, Phase II 11, 24, 30 (1974); FAA, \textit{Airman's Information Manual} 1-82 (1972) ("THE ONLY SAFE RULE FOR THUNDERSTORM FLYING IS TO STAY OUT OF THEM. . . ").

\textsuperscript{25} 15 Av. Cas. 17,341 (Ga. 1978).

\textsuperscript{26} In this case the court was the U.S. District Court for the Northern District of Georgia at Atlanta, Judge William C. O'Kelley presiding.

\textsuperscript{27} 526 F.2d 679 (5th Cir. 1976).

\textsuperscript{28} 538 F.2d 643 (5th Cir. 1976).

\textsuperscript{29} 433 U.S. 25 (1977).

\textsuperscript{30} 565 F.2d 1354 (5th Cir. 1978).
party beneficiaries of the federal grant agreement between the county and the FAA.91

But the king can yet do wrong. In Bowden v. United States,92 the government failed to answer an intervenor insurer’s complaint for over fifteen months. The insurer’s complaint sought compensation for funds it had paid an insured for the loss of an aircraft in a mid-air collision allegedly caused by the negligence of airport control tower personnel. The court opined that, although the United States occupies a somewhat privileged position under many of the rules of civil litigation in the federal courts, this privilege cannot be extended to absolving the United States from a fifteen month failure to make “even a colorable effort at complying with Rule 12(a), which governs the time for the filing of answers.”93 Accordingly, the court denied the United States’ motion for leave to file an answer out of the allowable time and granted the insurer’s motion for entry of a default judgment.94

IV. INTERNATIONAL DEVELOPMENTS: WARSAW CONVENTION95 CASES

The growing amount of international air travel96 increases the importance of the Warsaw Convention and its modifying protocols and agreements. The vast majority of international aviation cases involve issues specifically concerning those agreements.97 These

91 15 Av. Cas. at 17,344-46.
93 Id. at 17,203.
94 Id.
96 The factors influencing this increased activity include the United States’ newly announced “open skies” policy involving bilateral air service agreements, including one signed late in 1978 between the United States and West Germany. FLIGHT INT’L, November 11, 1978, at 1721.
97 Although not specifically dealing with the Warsaw Convention, international air carriers may be affected by the recent California case of Trans World Airlines, Inc. v. Alitalia-Linee Aeree Airlines, 85 Cal. App. 3d 185, 149 Cal. Rptr. 411 (1978). The trial court awarded TWA full indemnification against Alitalia and Lufthansa for damages paid by TWA to a shipper whose goods were damaged while being shipped sequentially aboard the three airlines’ aircraft to their destination. The evidence supported TWA’s contention that no damage to the cargo was noted when it transferred the goods to Alitalia. Regardless of the indemnity provisions of the IATA Interline Cargo Claims Agreement of 1852, the trial
cases have addressed issues of liability limitations, jurisdiction and definitional issues ostensibly in the name of furthering uniformity in procedures and remedies covering international air travel.98

A. Liability Limitations

In one of the most stunning developments in recent years, a California district court in In Re Air Crash in Bali, Indonesia,96 has concluded that wrongful death actions brought on behalf of the heirs of passengers killed in an international aircraft crash are not subject to the Warsaw Convention and its liability limitation.100

court apparently applied the federal common law rule that, where goods have passed through the hands of successive carriers in apparent good order, delivery at the destination of damaged goods raises a presumption that the damage occurred while the goods were under the control of the last carrier. 85 Cal. App. 3d at 189, 149 Cal. Rptr. at 413. The Court of Appeal agreed with appellants in their contention that the controversy was governed not by the common law principle but by the IATA Agreement, including the specified pro rata indemnification of reasonable expenses and attorneys' fees. The court affirmed the result reached by the trial court because Alitalia and Lufthansa had stipulated at trial that the court need not make any determination as to the ratio of the liability of each airline. 85 Cal. App. 3d at 190-91, 149 Cal. Rptr. at 413-15.

98 Two cases interestingly do not fall within these categories. First, in Cohen v. Varig Airlines, 15 Av. Cas. 17,112 (N.Y. App. Div. 1978), the defendant air carrier's employees allegedly refused to remove plaintiff passengers' luggage from its aircraft because of the expense, with the knowledge that the two days' wait for return of the baggage would have a significant impact on plaintiffs' trip. The court affirmed the trial court's finding of "willful misconduct" and allowed damages to the extent of the actual value of the baggage to plaintiffs but not including damages for emotional injuries. Id. at 17,115-17.

In a case involving "The Greyhounds Who Left The Driving To Delta" and purportedly identifying "The Lost Chord In The Warsaw Concerto," Dalton v. Delta Airlines, Inc., 14 Av. Cas. 18,425 (5th Cir. 1978), the Fifth Circuit construed Article 26 of the Warsaw Convention, which requires shippers to give an air carrier written notice of damage or delay of its goods within seven days. The goods were racing greyhounds that suffocated on an international flight. The court held that such an event constituted "destruction of goods" and that the shipper consignee of such goods need not give Article 26(3) notice because only damage or delay—not destruction—is covered by Article 26. The court characterized this as a "serious gap" in the Convention. Id. at 18,426-27.

100 The Warsaw Convention provides that carriers are liable for damages sustained by a ticketed passenger in the course of an international flight or while embarking or disembarking therefrom, but limited this liability to 125,000 Poincaire (1929-value) francs—approximately $8,300. Warsaw Convention, supra note 95, art. 22.

The Montreal Agreement of 1966 (Agreement C.A.B. No. 18900) raises the liability limit of certain international air carriers to $75,000 per person, and provides that air carriers in international travel will be liable up to this limit regardless of any fault or negligence. Kriendler, Demise of the Montreal Protocols, N.Y.L.J. (Aug. 18, 1978).
The case involved the April 22, 1974, crash of a Pan American 707 enroute from Hong Kong to Den Passar Airport on Bali, Indonesia. During its approach in darkness, the aircraft's crew became lost and "[i]nstead of retracing its path and climbing higher, the crew kept the craft at an inordinately low altitude for too long a period."

As a consequence, the aircraft crashed into a mountain located 37 miles north of the airport, killing all 96 passengers and the 11 crew members. A bifurcated trial was held and the jury determined the accident was caused by Pan Am's negligence but not by the wilful misconduct of the defendant airline. The jury rendered one verdict of $300,000 and one verdict of $651,500 for two decedents, respectively.

Following the jury verdict, plaintiffs moved to exclude all evidence concerning the contest of the contract of carriage between the airline and the passengers as well as evidence of the applicability of the Warsaw Convention on the grounds that such evidence was irrelevant and immaterial to the issues. The trial court held as follows:

1) The California wrongful death statute under which plaintiffs bring their case provides survivors with an independent cause of action arising upon the decedents' death and derived in no way from any cause of action belonging to the decedent.

2) Such cause of action is unaffected by any contract made by the decedents.

3) The Warsaw Convention, the Hague Protocol, and the Montreal Agreement provide air carriers with a basis contractually to limit liability. Air carriers may avail themselves of the limitation only if there is a contractual acceptance of that liability limitation, either actual or legal, by the party against whom the limitation is sought to be imposed.

4) Any evidence concerning the actual and legal delivery of a passenger ticket to the decedents, including physical delivery, timeliness of delivery, type size, and contents, is therefore irrelevant and immaterial to any issue before either the jury or the Court.

The significance of this case and the immediate need for appellate review cannot be overstated.

102 Id. at 17,407.
103 Id.
104 Id.
B. Jurisdiction

The much-discussed question of whether the Warsaw Convention creates a cause of action was presented to the Second Circuit Court of Appeals in Benjamin v. British European Airways. Because both plaintiff and plaintiff's decedent, who was killed in the crash of defendant's airliner in England, were Dutch citizens permanently residing in the United States, federal jurisdiction was invoked under 28 U.S.C. § 1331. The district court, relying on Second Circuit precedent of twenty-years' longevity, ruled that the suit did not "arise" under a treaty of the United States because that precedent clearly indicated that the Warsaw Convention does not create a cause of action, but only establishes conditions for a cause of action created by domestic law. A divided Second Circuit panel held that the long-standing precedent relied upon by the district court should no longer be followed, citing both the Warsaw Convention delegates' concern with creating a uniform law to govern air crashes and other common law jurisdictions' views that the only source of carrier liability lies in the Warsaw Convention. The dissent in Benjamins took issue with the proposition that the majority opinion promotes uniformity because, among other reasons, the right of action might not be exclusive.

In Finkelstein v. Trans World Airlines, Inc., a New York state court held that the Warsaw Convention provides the exclusive remedy to recover damages arising out of international air transportation, stating that a contrary holding would contravene the essential purpose of the Convention to regulate uniformly the

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105 572 F.2d 913 (2d Cir. 1978), cert. denied, ___ U.S. ___, 99 S. Ct. 1016 (1979) (noted in 44 J. Air L. & Com. 669 (1979)).


107 572 F.2d at 919.

108 Although presented with the broad issue decided in Benjamins, the Ninth Circuit noted that Benjamins was the rule in only a minority of jurisdictions and decided an analogous case on procedural grounds, Dunn v. Trans World Airlines, Inc., No. 771649 (9th Cir., filed Sept. 21, 1978).


110 15 Av. Cas. 17,379 (N.Y. Sup. 1978).
conditions of international air transportation. The court further stated that it need not follow contrary federal decisions.\textsuperscript{111}

Subject matter jurisdiction under the Convention was presented to another New York state court in \textit{Martin v. Air Jamaica}.\textsuperscript{112} The plaintiff had purchased a round-trip ticket for an international flight that landed in the United States enroute to its terminal point in Jamaica. The court held that where one point is listed as both the place of origin and ultimate destination, that point, and no intermediate stopping point, is the place of destination for purposes of determining jurisdiction under the Warsaw Convention.\textsuperscript{113}

C. Definitional

(1) \textit{Operations of embarking}\textsuperscript{114}

The lack of "control" by a defendant airline over an area in the terminal in which a plaintiff passenger was injured has recently been held in \textit{Upton v. Iran National Airlines Corp.},\textsuperscript{115} to determine the inapplicability of Article 17 of the Warsaw Convention. Plaintiffs in that case were in a public waiting area at Mehrabad International Airport, Teheran, Iran, when the roof of the main terminal collapsed. Although plaintiffs had received boarding passes and baggage checks at the ticket counter prior to the accident, the court held that the plaintiffs were not "embarking" because they had not proceeded to the restricted area reserved for departing passengers. The court applied the criteria from \textit{Day v. Trans World Airlines, Inc.}\textsuperscript{116} and rejected liability for the defendant airline for the entire period between the time the passenger entered the airport until he was on board the aircraft.\textsuperscript{117} Similarly, in \textit{Air Canada v. Smith},\textsuperscript{118} the court held that the appellant airline was not liable for injuries sustained in the airport's immigration and customs

\textsuperscript{111} \textit{Id.} at 17,380.

\textsuperscript{112} 15 Av. Cas. 17,320 (N.Y. Sup. 1978).

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} Warsaw Convention, supra note 95, art. 17.

\textsuperscript{115} 15 Av. Cas. 17,101 (S.D.N.Y. 1978).

\textsuperscript{116} 528 F.2d 31, 33 (2d Cir.), cert. denied, 429 U.S. 890 (1976).


\textsuperscript{118} 15 Av. Cas. 17,121 (Fla. Dist. Ct. App. 1978).
area that was under exclusive government control. This included
ownership and responsibility for a baggage cart over which appellee
allegedly tripped.

(2) Accident which caused the damage\(^{110}\)

Courts have defined the meaning of "accident" in a general con-
text\(^{120}\) as well as when required by Article 17 as a condition prece-
dent to liability under the Convention.\(^{121}\) The Third Circuit Court
of Appeals, in *DeMarines v. KLM Royal Dutch Airlines,*\(^{122}\) has
made the most recent addition to the latter group. Plaintiff alleged
that he suffered a rapid pressure change within his head allegedly
caused by the pressurization of the aircraft, which resulted in gar-
bled speech, numbness in his head and persistent loss of equilibrium.
The court approved the trial court's definition of an "accident" as
"an unusual or unexpected happening" and noted that insufficiency
of evidence presented that such an "accident" did in fact occur.\(^{153}\)

The proximate cause condition for applicability of Article 17
of the Convention was presented to the court in *Morris v. The Boe-
ing Co.*\(^{124}\) Plaintiffs sustained injuries incurred as a result of a "high
altitude decompression." The carrier, El Al Israel Airlines, Ltd.,
acknowledged that the decompression had taken place as a result
of the failure of an exhaust valve but opposed plaintiffs' motion
for summary judgment on the ground that plaintiffs had not estab-
lished that their injuries were proximately caused by the decom-
pression. The court denied the motion for summary judgment and
required plaintiffs to prove causation in this context.\(^{125}\)

(3) Aircraft for hire\(^{126}\)

The Austria Supreme Court, in a case recently reported in the

\(^{110}\) Warsaw Convention, *supra* note 95, art. 17.

\(^{120}\) *E.g.*, Ketona Chem. Corp. v. Globe Indem. Co., 404 F.2d 181, 185 (5th
Cir. 1968); Koehring Co. v. American Auto. Ins. Co., 353 F.2d 993, 996 (7th
Cir. 1965).

\(^{121}\) *E.g.*, MacDonald v. Air Canada, 439 F.2d 1402, 1404-05 (1st Cir. 1971);
F.2d 1240 (2d Cir. 1973).

\(^{122}\) 15 Av. Cas. 17,294 (3d Cir. 1978).

\(^{123}\) *Id.* at 17,295.

\(^{124}\) 15 Av. Cas. 17,241 (S.D.N.Y. 1978).

\(^{125}\) *Id.* at 17,242.

\(^{126}\) Warsaw Convention, *supra* note 95, art. 1(1).
United States, *Fischer v. Koller*, ruled on the applicability of the Warsaw Convention to a non-commercial, international flight. The casual nature of the arrangement for the flight is evidenced by the fact that three friends, including the defendant, agreed that defendant would pilot the aircraft, that one of the passengers invited a friend to go along, that only two of the three passengers were to pay for the flight, and that compensation was to be computed after the trip. Although the trip was planned to be a direct flight, enroute weather necessitated a return to the point of departure, after which the paying passengers paid the amount requested by the defendant pilot. After a weather improvement several days later, the direct flight took place but was cut short by the accident. The court held that the Warsaw Convention applied regardless of the fact that no tickets were issued to any passengers and without a discussion of whether the defendant pilot was a "carrier" under the Convention.

V. AVIATION INSURANCE

If the cases from the preceding year tell aviation insurance companies anything, it should be this: say what you mean more clearly. Although a recent Texas Court of Civil Appeals case was reversed, the first appellate opinion in *Bowie v. Ranger Insurance Co.* is noteworthy. Decedent Bowie's executrix sued Ranger on an insurance policy seeking recovery of $7,500 for damages to the aircraft in which Bowie was killed. Ranger denied coverage on the ground that at the time of the crash Bowie, the pilot, did not have a "valid" medical certificate because it had been fraudulently obtained from the FAA. While it appeared that Bowie had made misrepresentations to the FAA in obtaining his Class III medical certificate, the Texas Court of Civil Appeals held that the insurance policy, which required "[o]nly . . . pilots holding valid and effective pilot and medical certificates with rating as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight," was not void: the pilot had obtained his medical certificate by misrepresentation.

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127 15 Av. Cas. 17,186 (Austria 1977).
128 See Warsaw Convention, *supra* note 95, art. 3(2).
130 *Id.*
to the FAA, but there was no evidence that the misrepresentation was made by Bowie to Ranger. Furthermore, and of greater significance, the court noted that in any event the insurer was not induced to assume the risk by the insured's misrepresentations. Specifically, the court stated that Ranger did not examine Bowie for his medical conditions, asked him no questions concerning his heart condition, and no express language in the policy excluded coverage in the event the person piloting the aircraft had made a false statement to the FAA in procuring his pilot or medical certificate.131

Likewise, in National Indemnity Co. v. Demanes,132 the California Court of Appeals addressed a medical certificate clause almost identical to the one in the Bowie case and reversed the trial court's judgment for the plaintiff insurance company which had concluded that the insurer had no duty to defend or indemnify the administratrix of the decedent. The court held that the policy clause purporting to exclude coverage for the pilot whose medical certificate had lapsed was vague and ineffective. Noting that the clause appeared to designate the pilots who could operate the aircraft more particularly than to establish the qualifications thereof, the court reasoned that the insurer could have stated the exclusion clearly and it did not do so. Supporting its position the court stated "[a]s one commentator has put it: 'Courts have often reasoned that if the insurance company intends to exclude coverage when the pilot does not have a current medical certificate, why not at least use those words?""133 The court also held that the policy clause attempting to exclude coverage for injury or death to the named insured had low visibility as set out on the policy and was done in small print which rendered it ineffective in light of the fact that the co-owner was clearly covered in the policy as a passenger.

Another fascinating case from the state of California is Insurance Co. of North America v. Sam Harris Construction Co.134 Sam Harris Construction Company owned a pressurized Piper Navajo which it sold on April 14, 1972. On April 19, 1972, it can-

131 Id. at 17,184.
133 86 Cal. App. 3d at 159, 150 Cal. Rptr. at 118-19; see also Davis, Aviation Insurance Exclusions, 37 J. AIR L. & COM. 337, 338 (1971).
celled its insurance coverage which, among other things, protected against liability for injury or destruction of property "arising out of the . . . maintenance . . . of the aircraft," but only applied to "occurrences or accidents which happened during the policy period." 125

The trial court entered judgment in favor of the insurer, ruling that, because the seller was not insured at the time of the crash, there were no obligations under the policy. 126 The California Supreme Court reversed, with directions to enter judgment for the seller, declaring that the insurer had a duty to defend in the negligence action. Noting that the wording in the policy suggested that "accidents" were distinguishable from "occurrences" and that in the absence by reference to the insured sellers' reasonable expectation of coverage, the court held that the sellers' own negligence maintenance during the policy period was an "occurrence" that the seller could reasonably have expected to be covered, even though the accident did not happen until after the policy period had expired. 127

As an interesting note for internal corporate purposes, several House and Senate bills were introduced to Congress to provide a deduction for amounts placed in a reserve for product liability losses and expenses and for amounts paid to captive insurers. 128 A Department of Commerce Task Force recommended that tax deductions be allowed for reserves for product liability claims. The Administration, however, did not support this position. Instead, it favored a proposal which would allow business to extend the carryback period from three to ten years for net operating losses attributable to product liability losses. 129 The Senate Finance Subcommittee on Taxation and Debt Management held hearings on these issues as did the House Ways and Means Subcommittee on Miscellaneous Revenue Measures but no further action was taken until a Senate floor amendment was added to the Revenue Act of 1978 allowing that portion of a net operating loss attributable to

125 22 Cal. 3d at 411, 583 P.2d at 1336, 149 Cal. Rptr. at 292-93.
126 Id.
127 22 Cal. 3d at 412-13, 583 P.2d at 1336-37, 149 Cal. Rptr. at 293-94.
a product liability loss to be carried-back (at the election of the taxpayer) an additional seven years (current law allows three). Thus, a product liability loss is now eligible for a ten year carry-back plus the seven year carry-forward of current law. Additionally, forthcoming Treasury Regulations will provide that reasonable amounts may be accumulated to pay future losses without a penalty tax on unreasonable accumulated earnings. The provision is effective for losses incurred in taxable years beginning after September 30, 1979.

VI. EVIDENTIARY AND PROCEDURAL MATTERS

A. Forum Non Conveniens

Arising out of the Tenerife disaster, the case of Bouvy-Loggers v. Pan American World Airways, Inc. involves an innovative legal stratagem. Bouvy-Loggers was commenced in the United States District Court for the Southern District of New York by a Dutch citizen seeking a determination of liability and damages for the wrongful death of plaintiff's Dutch decedent who was killed in the Pan Am-KLM 747 collision on Santa Cruz de Tenerife, Canary Islands, on March 27, 1977.

On January 18, 1978, defendants proposed and plaintiff accepted a stipulation in which Pan Am and KLM agreed not to contest liability for compensatory damages and plaintiff agreed to waive any claim for punitive damages. This, of course, removed any issue as to liability and left only the damages issue for trial. Furthermore, under New York choice of law rules, the court would apply the law of the decedent's domicile, The Netherlands, to the wrongful death action. Given this scenario, defendants moved for an order of dismissal on the grounds of forum non conveniens.

After noting that a plaintiff's choice of forum should normally

\[\text{140} \text{ Pub. L. No. 95-600, } \S \text{ 371, 92 Stat. 2859 (1978).}\]

\[\text{141} \text{ Id.}\]

\[\text{142} \text{ 15 Av. Cas. 17,153 (S.D.N.Y. 1978) [hereinafter cited as Bouvy-Loggers].}\]

\[\text{143} \text{ While the strategy is here employed by the defense, it is reported that the device was first suggested by an aviation plaintiff's attorney after the Paris air disaster litigation.}\]

\[\text{144} \text{ Bouvy-Loggers, supra note 142, at 17,154.}\]

\[\text{145} \text{ Id. at 17,156 n.3.}\]
not be disturbed," the court set forth: (a) the principle that "[a]n action may be properly dismissed . . . when the convenience of the parties and the ends of justice weigh heavily against the retention of jurisdiction" and; (b) the factors to be considered in applying the principle. While plaintiff addressed each of the enumerated factors, the court concluded that the contacts relied upon by plaintiff to uphold jurisdiction were relevant only if defendants' liability was in question; but, in view of the January 18th stipulation regarding liability, "there is no longer any issue regarding liability in this case." As a consequence, the court determined that New York was not the appropriate forum for continuing the case.

Before granting a dismissal for forum non conveniens, however, the court searched for another forum where the action could be brought. This was readily provided by the defendants who willingly agreed to submit to jurisdiction in The Netherlands and to consider the statute of limitations as having been tolled since the initiation of the action in New York. With satisfactory solutions to these problems, the court granted defendants' motion to dismiss in the following creative manner:

Accordingly, defendants' motion to dismiss the Bouvy-Loggers complaint on the ground of forum non conveniens is granted subject to the following conditions: (1) that defendants voluntarily appear in an action to be commenced by plaintiff in The Netherlands; (2) that defendants concede liability for compensatory damages and plaintiff agrees not to seek punitive damages in any such action; (3) that all discovery conducted in the instance action on the issue of compensatory damages by utilized in The

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148 The factors to be considered include the accessibility of the sources of proof, the availability of compulsory process over unwilling witnesses, the cost of obtaining willing witnesses, 'and all other practical problems that make trial of a case easy, expeditious and inexpensive.' The public interest is also an important consideration. Of particular relevance in this regard are the administrative burden on a forum that has minimal contact with the controversy and the necessity of the application by such forum of foreign law. The interest another forum may have in the controversy should also be taken into account.

Bouvy-Loggers, supra note 142, at 17,154 (citations omitted).
149 Id.
150 Id. at 17,155.
Netherlands subject to the orders of Dutch courts; and (4) that the statute of limitations be considered as having been tolled from the date this action was commenced until the entry of an order dismissing the complaint.\footnote{Id.}

B. Accident Reports and Investigators' Testimony

Keen v. Detroit Diesel Allison\footnote{569 F.2d 547 (10th Cir. 1978) [hereinafter cited as Keen].} and Seymour v. United States\footnote{15 Av. Cas. 17,141 (W.D. Tex. 1978) [hereinafter cited as Seymour].} are concerned with the use of accident reports and investigators' testimony at trial. Their interest is as much for what they do not say as for what they do say.

In Keen, the Tenth Circuit was faced with a verdict below for defendant United States in part based on the testimony of air safety investigators employed by the National Transportation Safety Board (NTSB) and FAA.\footnote{The Court did not indicate whether the testimony was live or by way of deposition. If the testimony was live, the court never addressed issues raised by 49 C.F.R. § 835.5(a) (1978), which provides: Testimony of [National Transportation Safety] Board employees may be made available for use in actions or suits for damages arising out of accidents through depositions or written interrogatories. Board employees are not permitted to appear and testify in court in such actions. The use of Board employees as expert witnesses from other sources.} The issue of the degree to which NTSB employees or similarly employed government personnel may or may not testify in light of the prohibitory language of 49 U.S.C. § 1441(e)\footnote{49 U.S.C. § 1441(e)(1976).} and 49 C.F.R. § 835.3(b)\footnote{49 C.F.R. § 835.3 (1978) reads as follows: (a) Section 701(e) of the FAA Act and Section 304(c) of the Safety Act preclude the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. The purpose of these sections would be defeated if expert opinion testimony of Board employees, which is reflected in the ultimate views of the Board expressed in its report concerning the cause of an accident, were admitted in evidence or used in private litigation arising out of any accident, and the investigators' opinions thus become inextricably entwined in the Board's determination. Furthermore, the use of Board employees as experts to give opinion testimony would impose a serious administrative burden on the Board's investigative staff. Litigants should obtain their expert witnesses from other sources.} was not one...
previously considered by the Tenth Circuit. Accordingly, the *Keen* court reviewed the split in authority between the Second Circuit, which broadly construes the bar of section 1441(e), and the Third and Fifth Circuits, which narrowly construes section 1441(e). Convinced that the purpose of the statute is to prohibit use of the report of the Board, thus prohibiting testimony on the ultimate issue, the probable cause of the accident, the court held it was not error to permit "the NTSB accident investigator and the FAA maintenance supervisor to testify relative to that which they observed at the accident scene and the manner in which they conducted their investigations."

In *Seymour*, the district court was asked for a preliminary ruling on the admissibility of several government reports regarding the crash, including one from the NTSB. Armed with the authority of the Fifth Circuit’s opinion in *American Airlines, Inc. v. United States*, which authorized the introduction of one graph plotting the “indicated” altitude of the flight and one document explaining a flight recorder’s readout, both of which were prepared by government investigators, the district court in *Seymour* authorized the admission of the entire NTSB “factual” report.

Moreover, regarding the reports prepared by the United States Army in connection with this accident, the court made no men-
tion whatsoever of the substantial number of Army regulations which have an intent similar to Section 1441(e); namely, to limit use of such reports. Instead, the court analyzed the documents in relation to Palmer v. Hoffman,\textsuperscript{163} which denied the admissibility of an accident report prepared by a defendant railroad. The Seymour court reasoned that since plaintiff was seeking admission of the documents, defendant United States, whose employees had prepared them, could not be heard to challenge their trustworthiness. Accordingly, the court deemed admissible the United States Army Collateral Investigation and the United States Army Aircraft Accident—Technical Report.\textsuperscript{164} Needless to say, this case is highly significant in prosecuting or defending (as a manufacturer) a military accident because there is no hint of the district court's accepting any of the government's claims to privilege concerning these reports.

C. Attorney's Fees

Assume you represent Pass-Thru Corp. whose sole function is to wholesale, distribute, or retail a given product manufactured by Multi Corp. Assume further that (a) one of the products Pass-Thru transmitted is defective; (b) Pass-Thru had no independent duty to inspect the product; (c) your state allows noncontractual implied indemnity, and (d) Pass-Thru and Multi Corp. are named defendants in a complaint for personal injuries caused by Multi Corp's product. As counsel for Pass-Thru, what can you do? Obviously, you can tender Pass-Thru's defense to Multi-Corp. and, if the tender is not accepted, look to Multi Corp. for Pass-Thru's attorneys' fees. It is patent that Multi Corp.'s decision to accept this tender of defense will turn solely on the question of who must bear the attorneys' fees. If Pass-Thru's attorney's fees is defending against plaintiff's complaint are subject to indemnification by attorneys' fees by accepting Pass-Thru's tender. If the attorneys' fees are not subject to indemnification, however, Multi Corp. most likely will reject the tender because, it does not lose anything by so doing, and it gains the prospect of an extra contributor to a settlement pot.

California and Florida each addressed this problem in 1978.

\textsuperscript{163} 318 U.S. 109 (1943).

\textsuperscript{164} Seymour, supra note 153, at 17,142.
Interestingly, each court was faced with one co-defendant that had successfully defended itself against plaintiff's allegations at trial and had sought indemnification, including attorneys' fees, from its manufacturing co-defendant against which liability had been assessed. In *Pender v. Skillcraft Industries, Inc.*, Dade Wholesale Products, Inc., which sold a defective clamp-on lamp that contributed to a child's electrocution, was exonerated of liability on all possible theories but was effectively penalized by the lower court's denial of Dade Wholesale's cross-claim for indemnification. The appellate court explained the issue and its holding:

Ordinarily one would expect Dade Wholesale to be pleased with this [exoneration of liability]; however, in reality, Dade Wholesale is being penalized. If Dade Wholesale was found to be liable it would be entitled to indemnification not only for the judgment against it but also for attorney's fees and court costs. . . . But since Dade Wholesale successfully defended itself in the main action, the lower court judge held that it must bear its own costs of litigation. We perceive no rational justification for such an illogical result.

If a retailer would clearly have been entitled to indemnification of attorney's fees and court costs if it had lost in the main action and had a judgment rendered against it (for passive negligence, breach of implied warranty, or strict liability), then it will be equally entitled to such indemnification in the event that it should successfully defend itself in the main action. 166

Conversely, in *Davis v. Air Technical Industries, Inc.*, the California Supreme Court characterized an almost identical set of facts in which the defendant retailer was likewise exonerated by the trier of fact in "a products liability action of the garden variety."168 The California Supreme Court held:

[In ordinary products liability cases, a manufacturer is not liable for attorney's fees incurred by an indemnified party solely in defense of alleged wrongdoing on its part. Davis defended exclusively against allegations of his own negligence, he is not entitled to recover attorney's fees.169

166 Id. at 17,253 (citation omitted); see Insurance Co. of N. America v. King, 340 So.2d 1175 (Fla. Dist. Ct. App. 1976).
167 22 Cal. 3d 1, 582 P.2d 1010, 148 Cal. Rptr. 419 (1978).
168 22 Cal. 3d at 7, 582 P.2d at 1013-14, 148 Cal. Rptr. at 422-23.
169 22 Cal. 3d at 6, 582 P.2d at 1012-13, 148 Cal. Rptr. at 421-22.
Presumably there may exist some argument that if Davis had been forced to defend against Air Technical's liability, Davis might be entitled to that portion of his attorney's fees attributable to that defense. In any event, given the present reading of *Davis* by the California Bar, it appears that, absent contractual obligations to the contrary, tenders of defense down the chain of products distribution will be unavailing in California, with a concomitant increase in litigation complexity and costs. Based on *Pender*, Florida seems to have overcome this problem innovatively.

D. Comparative Fault

The equitable concept of comparative fault—once merely an academic curiosity—is now an operative fact of aviation litigation in the substantial majority of United States jurisdictions.\(^{170}\) Several interesting developments in the practical applications of comparative fault arose in 1978, particularly in California. In *American Motorcycle Ass'n v. Superior Court*,\(^{111}\) the California Supreme Court determined that principles of comparative negligence, introduced in *Li v. Yellow Cab Co.*\(^{199}\) to apportion responsibility between a negligent plaintiff and a negligent defendant, should be utilized as a basis for apportioning liability among multiple negligent tortfeasors pursuant to a comparative indemnity doctrine. One month later, the court considered the case of *Daly v. General Motors Corp.*\(^{120}\) and concluded that comparative fault principles should be applied to apportion responsibility between a strictly liable defendant and a negligent plaintiff in a products liability suit.

Two months thereafter, the California high court was confronted with an issue that synthesized its decisions in *American Motorcycle* and *Daly*; namely, whether *Li*’s comparative fault principles should be utilized as the basis for apportioning liability between two tortfeasors, one whose liability rests upon strict products liability doctrine and the other whose liability derives, at least in part, from

\(^{170}\) See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 739, 575 P.2d 1162, 1170, 144 Cal. Rptr. 380, 388 (1978) [hereinafter cited as *Daly*].

\(^{171}\) 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) [hereinafter cited as *American Motorcycle*].

\(^{172}\) 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (California’s seminal comparative fault case in which the California Supreme Court judicially adopted a pure comparative negligence system) [hereinafter cited as *Li*].

\(^{173}\) *Daly, supra* note 170.
negligence theory. Considering the court's rulings in *American Motorcycle* and *Daly*, it should be no surprise that in *Safeway Stores, Inc. v. Nest-Kart*\footnote{21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978).} the court concluded that liability should be apportioned between two tortfeasors in conformity with the comparative fault findings rendered by the jury at trial.\footnote{22 California's intermediate level of appellate courts also addressed some intriguing comparative fault issues in 1978. For those unfamiliar with current California law the most startling is *Baxter v. Scottish Rite Temple Ass'n*, 86 Cal. App. 3d 492, 150 Cal. Rptr. 511 (1978). Therein, a jury rendered a $333,000 verdict for plaintiff and apportioned negligence as follows: plaintiff—25%, plaintiff's employer—60%, defendant—15%. Applying one of the rules announced in *American Motorcycle*, supra note 171, the appellate court held that because plaintiff's employer was immunized under California's workers' compensation laws, the defendant who was 15% responsible for the injury to which plaintiff himself had contributed would have to pay 75% of the jury verdict. The court reasoned that a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of plaintiff's damages, diminished only in proportion to the amount of negligence attributable to the person recovering. 86 Cal. App. 3d at 496, 150 Cal. Rptr. at 513-14; see *American Motorcycle*, supra note 171, and *Li, supra* note 172.}

Unlike California, New Jersey took a different view of the applicability of comparative principles to a strict products liability case. In *Cartel Capital Corp. v. Fireco*,\footnote{175 Two additional cases of interest are *Arbaugh v. Proctor & Gamble Mfg. Co.*, 80 Cal. App. 3d 500, 145 Cal. Rptr. 608 (1978), holding that, while the doctrine of comparative negligence has not altered the rule preventing a third party tortfeasor from obtaining indemnification from an employer, the third party should be required to reimburse a negligent employer or his carrier for benefits paid only to the extent that such benefits have exceeded the proportionate share of damages attributable to the employer's negligence, and *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978), holding (i) that defendant Sears was entitled to bring cross-defendant International Harvester into the action by cross-complaint, even though cross-defendant was not named by plaintiff, and that hence, the trial court erroneously granted cross-defendant's motion for judgment on the pleadings, and (ii) that a settling concurrent tortfeasor may continue to pursue his right of partial indemnity asserted by a presettlement cross-complaint against a party not named by plaintiff and (iii) that, therefore, defendant had a right to pursue its cross-complaint and its appeal after it settled with plaintiffs.} a New Jersey appellate court construed New Jersey's comparative negligence statutes and held that comparative fault principles were not applicable to strict liability actions. It will be interesting to see if the New Jersey Supreme Court alters this minority point of view.\footnote{176 The majority of states which have addressed the problem, either by statute or judicial decree, have extended comparative principles to strict products liability. Of the more than 30 states which have adopted some form of comparative

Of the three decisions besides Cartel, supra note 176, that have declined to apply comparative negligence to strict liability, two have relied on state comparative negligence statutes that are expressly confined to "negligence" actions. Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976) (Nebraska's "slight-gross" comparative negligence statute); Kirkland v. General Motors Corp., 521 F.2d 1353, 1357-58 (10th Cir. 1974) (noting the limiting language in the Oklahoma statute but holding that driving while intoxicated was product misuse barring recovery); see Kinard v. Coats Co., 553 P.2d 835, 837 (Colo. App. 1976). At least four jurisdictions have applied comparative negligence statutes to strict liability actions, despite language arguably limiting the statute application to negligence. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 602-03 (D. Idaho 1976); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 681-83 (D.N.H. 1972); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 64 (1967); Busch v. Busch Constr., Inc., 2 Prod. Liab. Rep. (CCH) § 8,086 (Minn. 1977). Finally, one court has judicially extended a "pure" form of comparative fault to the traditional strict liability defense of "product misuse," despite the existence of a statutory scheme of "modified" comparative negligence. General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351-52 (Tex. 1977).


Contra, Levine, Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault, 14 San Diego L. Rev. 337, 346 et seq. (1977). Among other commentaries urging such a role are: Brewster, Comparative Negligence In Strict Liability Cases, 42 J. Air L. & Com. 107, 109-17 (1976); Epstein, Products Liability: Defenses Based on Plaintiff's Conducts, 1968 Utah L. Rev. 267, 284; Feinberg, The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d, 42 Ins. Couns. J. 39, 52 (1975); Levine, Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty, 52 Minn.
ing in *Kohr v. Allegheny Airlines, Inc.*,¹⁷⁸ concerning the legal morass¹⁷⁹ stemming from the September 9, 1969 mid-air collision over Fairland, Indiana between an Allegheny Airlines DC-9 and a private plane flown by a student pilot. First, the court decided that the United States was not entitled to share with Allegheny in the $1,000,000 contribution from the private aircraft's owner.¹⁸⁰ Second, and of more general interest, the court, which in *Kohr I* had proclaimed the existence of a federal common law of comparative negligence in aviation matters,¹⁸¹ ruled that the district court "did not err in the determination that under Indiana state law Allegheny's contributory negligence [22 percent as fixed by


Furthermore, in August 1977, the National Conference of the Commissioners on Uniform State Laws ("Conference") approved adoption of the Uniform Comparative Fault Act ("Act") by a vote of forty states to eight. The Act is the distillation of approximately five years of discussion, analysis, and contribution by a special committee and a review committee of the Conference. Pertinent to this issue the Act provides:

Section 1. [Effect of Contributory Fault.]

(a) In an action based on fault to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. . . .

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.

While lacking any legislative sanction, the Act points in the direction of a general national trend. As such, section 1 is revealing in two notable respects: in its clear definitional expression in subsection (b) that comparative principles are to be applied to cases of "strict tort liability," and in its substitution of the broad generic term "fault," in subsection (a), as including both negligence and strict liability. *See* U.S. Dep't of Comm., Options Paper on Product Liability and Accident Compensation Issues, 43 Fed Reg. 14,613 (1978); U.S. Dep't of Comm., Draft Uniform Product Liability Law, 44 Fed. Reg. 2,996 (1979) (Model Products Liability Act).

¹⁷⁸ 586 F.2d 53 (7th Cir. 1978) [hereinafter cited as *Kohr II*].
¹⁸⁰ *Kohr II*, supra note 178, at 56-57.
¹⁸¹ *Kohr I*, supra note 179, at 403.
the jury] in causation debars recovery from the government for the loss of its DC-9." The court reasoned: "In view of the Supreme Court's views, we are not free to extend Kohr [I] to an action under the Federal Tort Claims Act. The law referred to the Act is, as Richards holds, state law."

E. Choice of Law

Choice of law rules continually present their labyrinthine challenges to the aviation legal specialist. As usual, 1978's decisions in this thorny and somewhat ethereal area significantly affected the rights of the parties involved. In several Tenerife cases that the Judicial Panel on Multidistrict Litigation transferred to the Southern District Court in New York, Judge Robert Ward was called on to determine the applicability of punitive damages statutes both to a wrongful death action and to several personal injury suits. In each case, Judge Ward utilized an interest analysis and looked to the particular issue (viz., the availability of punitive damages) to determine which state had the strongest interest in having its law applied. Under both Massachusetts law (for the wrongful death case) and under California law (for the personal injury cases), the court determined that the Supreme Court of these jurisdictions recognized that the interest in regulation of conduct in tort cases is primarily local in character and is the concern of the jurisdiction in which the conduct occurred. Consequently, the court looked to the law of Spain inasmuch as the Canary Islands are Spanish possessions and determined that no punitive damages were provided for wrongful death or personal injuries arising from a crash of this sort. Accordingly, the court dismissed the punitive damages claims.

182 Kohr II, supra note 178, at 58.
184 Richards v. United States, 360 U.S. 1, 8-10 (1962).
185 Kohr II, supra note 178, at 58; see Bowen v. United States, 570 F.2d 1311, 1317 (9th Cir. 1978).
Melville v. American Home Assurance Co. is the final dramatic episode in a fascinating legal saga concerned with the demise of Joseph Marvel ("Jay") Scott, a member of a wealthy and respected Wilmington, Delaware, family. The report of the aircraft crash that killed Jay Scott is detailed in the excellent district court opinion. Plaintiff Melville was the sole beneficiary of a $500,000 accident insurance policy purchased by the insured, Jay Scott. Following the insured's death in the bizarre crash, a diversity action was commenced in the federal court in the Eastern District of Pennsylvania to recover the insurance proceeds. The principal defense asserted by American was that Jay Scott had committed suicide by intentionally interfering with the pilot's use of the dual controls in the Piper Cherokee Arrow in which he was the sole passenger. The policy excluded coverage when death occurred by reason of suicide.

Jay Scott had been a lifelong citizen of Delaware. He had purchased the Insurance policy from the Delaware offices of Johnson & Higgins, an insurance broker whose main office is in Philadelphia. The broker had placed the order by phone with American and an oral binder was effected by American's New York office. American consequently issued the policy and posted it in New York. It was sent to the broker's Philadelphia office, through which it eventually reached Scott in Delaware. Scott met his death in Delaware, the locale where most of the facts relevant to the question of accident or suicide occurred.

Because of the nature of the claim and the defense in this case, the district court was required to utilize Pennsylvania's conflict rules in choosing among the Pennsylvania, Delaware and New York presumptions against suicide. Since the differences between the New York presumption, on the one hand, and those of Pennsylvania and Delaware, on the other hand, would have a significant effect on the outcome of the trial, a conflict in terms of choice of

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185 584 F.2d 1306 (3d Cir. 1978).
186 584 F.2d 1306 (3d Cir. 1978).
187 A previous action had been commenced in New York state court, but had been dismissed on the ground of forum non conveniens. In the instant action, diversity of citizenship existed because Melville was a citizen of Pennsylvania at the time of suit, and American is a New York corporation with its principal place of business in New York.
law was presented. Normally, the beneficiary of an accident insurance policy has the burden of pleading and proving an accident; however, New York prescribes a presumption against suicide that imposes on the party contending that violent death was self-inflicted (American) the burden of pleading and persuasion as to that contention. Pennsylvania has no such strong presumption against suicide, for Pennsylvania law provides that it is merely permissible for the fact-finder to infer, based on common understanding of human nature, that death was not self-inflicted. The district court concluded that New York’s interest outweighed the other two states’ interests and applied New York law. The jury returned a verdict for plaintiff in the amount of $500,000. American appealed. The Third Circuit Court of Appeals, in an analytical *tour de force* reversed the lower court opinion because the Circuit Panel concluded Delaware law should have been utilized.

F. Jurisdiction

*Ladd v. KLM Royal Dutch Airlines,* involving defendant airline’s motion to dismiss for lack of personal jurisdiction a complaint based upon the Tenerife disaster, may have substantial adverse consequences for future airline defendants if the court’s implications are fully realized. In *Ladd,* a Tennessee domiciliary commenced a wrongful death action in Tennessee as administratrix of the estate of a Pan Am stewardess killed at Tenerife. KLM contended it was not subject to service of process in Tennessee be-

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192 443 F. Supp. at 1082.

193 No Delaware case addresses itself to the presumption against suicide in suits involving accidental death insurance policies. Following the command of *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941), the district court applied Pennsylvania’s conflicts rule that when a sister state’s law is unknown or unclear it is presumed to be the same as Pennsylvania’s. *In re Trust of Pennington,* 421 Pa. 334, 219 A.2d 353, 356 (1966). For purposes of this appeal, the Third Circuit viewed Delaware's and Pennsylvania's presumptions against suicide as identical.

194 An interesting sidelight of this case is the Third Circuit’s approval of the admission of Airworthiness Directives (AD’s) relating to the Piper Cherokee Arrow’s stabilator as exceptions to the hearsay rule under Fed. R. Evid. 803(8). *See also* text accompanying and authorities cited in note 161 *supra.*

195 15 Av. Cas. 17,321 (S.D.N.Y. 1978) [hereinafter cited as *Ladd.*]
cause: (a) it is a Dutch corporation with its principal place of business in The Netherlands; (b) it is not authorized to fly into any place within Tennessee; (c) it is not authorized to do business in Tennessee and pays no taxes there; and (d) it has none of the other traditional jurisdictional contacts with Tennessee.\footnote{106}{KLM had no office or bank account in Tennessee; it did not own, lease, or have any interest in any real property in that jurisdiction; none of its directors, officers, or executives resided there; and KLM had no agent or agent for service of process in Tennessee.}

In opposition, plaintiff pointed to the facts that (a) KLM has out-of-state toll free numbers in six of Tennessee's major urban centers; (b) as part of its national marketing program, KLM advertises in magazines that circulate in the state\footnote{107}{The court specifically mentioned The Wall Street Journal and The New Yorker. \textit{Ladd, supra} note 195, at 17,323.} and supplies posters, brochures and other promotional material to Tennessee travel agents; (c) KLM sales representatives make regular business trips to contact Tennessee travel agencies and Tennessee groups likely to have travel plans; and (d) apparently very important to the Court, KLM tickets are actually sold by a large number of travel agents in Tennessee.\footnote{108}{There are eighty-five travel agents in the state approved by the International Air Transport Association. All of these agents have authority to issue tickets on behalf of those airlines from which they have received airline identification plates. A ticket issued in the name of any such airline may provide that a portion of the transportation be furnished by KLM. Moreover, KLM has issued its own airline identification plates to more than sixty Tennessee travel agencies. These agencies can not only issue tickets which include transportation on a KLM aircraft, but also, through use of the plate on blank Air Traffic Conference ticket stock, can issue tickets in KLM's name and airline code number. The dollar volume of those tickets issued in Tennessee in KLM's name alone amounted to $323,304 in 1976 and $238,019 in 1977.} The court concluded that KLM sought, in a continuous and systematic manner to benefit from the sale of tickets to Tennessee residents and succeeded in this effort.\footnote{109}{\textit{Id.}} Accordingly, the court denied KLM's motion to quash, ruling it had sufficient "minimum contacts" with Tennessee so that it would not "offend traditional notions of fair play and substantial justice" to require KLM to defend this action in Tennessee and, portentously for future airline litigants, the court stated "[t]hat the sales [had] been consummated by travel agents residing in Ten-
nessee, and not through persons on KLM's own payroll is not significant for these purposes. . . .

Jurisdictional issues of interest to the travel agency and airline segments of our industry were ruled on in *Viking Travel, Inc. v. Air France*\textsuperscript{201} and *Caceres Agency, Inc. v. Lufthansa German Airlines*.\textsuperscript{202} These cases each hold that no private right of action exists in favor of travel agents against air carriers for alleged rebating violations of section 403(b) of the Federal Aviation Act because, while the travel agents are within the class the Act is designed to regulate, they are not within the class the Act is designed to protect, that is, the users of air transportation.\textsuperscript{203} Additionally, *Viking Travel* also holds that the CAB does not have primary jurisdiction of an antitrust complaint that charges various air carriers and travel agents with having conspired to utilize an unlawful and discriminatory rebate system in violation of the properly filed tariff. The court stated that when the question is not the reasonableness of the tariff, but a violation of such tariffs or the manner in which they are applied, the doctrine of primary jurisdiction is inapplicable.\textsuperscript{204}

G. Attorney-client Privilege

A case of signal importance to the aviation-accident bar in terms of accident or product defect investigations was handed down by the Eighth Circuit Court of Appeals *en banc* in early 1978. In *Diversified Industries, Inc. v. Meredith*,\textsuperscript{205} the court held that an investigative report prepared by a law firm was entitled to the attorney-client privilege in subsequent antitrust litigation against the company by a customer who claimed that its employees had been bribed to purchase inferior copper.\textsuperscript{206} The court analyzed

\textsuperscript{200} Id.

\textsuperscript{201} 15 Av. Cas. 17,224 (E.D.N.Y. 1978) [hereinafter cited as *Viking Travel*].

\textsuperscript{202} 15 Av. Cas. 17,238 (S.D.N.Y. 1978).

\textsuperscript{203} Id.; *Viking Travel*, supra note 201, at 17,227.

\textsuperscript{204} *Viking Travel*, supra note 201, at 17,235.

\textsuperscript{205} [1978] 1 TRADE CAS. ¶ 61,879 (8th Cir. 1978) [hereinafter cited as *Diversified Industries*].

\textsuperscript{206} Id. at 73,690. The report had been prepared after a request from the board of directors of Diversified, a scrap copper company, and dealt with Diversified's possible establishment of a "slush" fund to bribe purchasing agents of companies with whom Diversified had dealt. During the proxy litigation involving Diversified before the instant complaint had been filed, facts surfaced
two tests for determining whether an attorney-client privilege existed as to the investigative report—the control group test and the subject matter test. After identifying the weaknesses of the two tests, the court promulgated a "modified" subject matter test whereby the attorney-client privilege would be deemed applicable to an employer's communication if:

1. The communication was made for the purpose of securing legal advice;
2. The employee making the communication did so at the direction of his corporate superior;
3. The superior made the request so that the corporation could secure legal advice;
4. The subject matter of the communication is within the scope of the employee's corporate duties; and
5. The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. We note, moreover, that the corporation has the burden of showing that the communication in issue meets all of the above requirements.

indicating that Diversified may have established and maintained such a fund. Id. at 73,682-83.


In this test, an employee's statement is not considered a corporate communication unless the employee "is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has the authority." 210 F. Supp. at 485. It is the most widely used test. Virginia Elec. & Power Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397, 400 (E.D. Va. 1975).

Although it predominates, the control group test has come under increasing criticism. See, e.g., Kobak, The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Court, 6 Ga. L. Rev. 339 (1972); Weinschel, Corporate Employee Interviews and the Attorney-Client Privilege for Corporate Clients, 12 Ind. & Com. L. Rev. 873 (1971); Note, 39 Fordham L. Rev. 281 (1970); Note, 22 Syracuse L. Rev. 759 (1971); but see, e.g., Note, 84 Harv. L. Rev. 424 (1970).


In this test, an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation "where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." 423 F.2d 487, 491-92 (7th Cir. 1970).

Diversified Industries, supra note 205, at 73,685.
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