1983

Strict Liability in Military Aviation Cases - Should It Apply

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IT HAS BEEN over 20 years since Dean Prosser spoke of "The Assault Upon the Citadel." It also has been many years since some courts began following § 402A, Restatement
of Torts (Second). During the period that the assault has raged, few, if any, manufacturers of products have survived unscathed. Among the wounded have been manufacturers of both military aircraft and their component parts. Courts have given scant attention, however, to the basic question of whether the doctrine of strict liability is an appropriate vehicle for imposing money judgments on the manufacturers of military hardware. This article will discuss the public policy reasons for and against applying the doctrine of strict tort liability to manufacturers of military aircraft, court decisions alluding to this issue, and alternative approaches.

Section 402A deals with the special liability of the seller of a product for Physical Harm to the User or Consumer and expressly provides:

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

2. The rule stated in Subsection (1) applies although
   a. the seller has exercised all possible care in the preparation and sale of his product, and
   b. the user or consumer has not bought the product from or entered into any contractual relation with the seller.


See id. See also Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974); Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir.), vacated, 423 U.S. 3 (1975).
I. THE RATIONALE FOR IMPOSING STRICT LIABILITY

Just as the history of modern flight progressed from the sands of Kitty Hawk to the planets and beyond, so the doctrine of strict product liability marches on. To determine whether the doctrine should be imposed on manufacturers of military aircraft under all circumstances, the underpinnings for the doctrine of strict tort liability must be examined closely.

The theoretical justifications for the doctrine of strict liability, though few in number, are interrelated. First, by placing a product into the stream of commerce, the manufacturer assumes a responsibility to protect the user from harm caused by a defect in the product. Second, the public interest in health and safety requires the manufacturer to bear responsibility for any harm caused by a defect in the product that is sold to the consumer. Third, by marketing the product, the manufacturer presumably represents to the public that the product is safe for use and assumes an obligation for breach of such representation. Fourth, the threat of liability gives an incentive to the manufacturer to produce a safe product. Fifth, the manufacturer is in the best position to bear the burden of loss because it can, through the use of liability insurance, spread the risk of loss among all consumers. Finally, manufacturers of products should stand behind their products when injury is caused by a defect in the product.

Given these justifications for the doctrine, a fundamental purpose for imposition of strict tort liability on manufacturers of products is to place the risk of loss on the party in the best
position to prevent defects. The ability of the manufacturer to protect itself by acquiring insurance that covers the cost of injuries resulting from defective products is another justification for imposition of strict tort liability. Manufacturers of military hardware, especially aircraft, however, are not necessarily as well situated, particularly in the area of design defects.

The “purchase” of a military aircraft differs significantly from the “purchase” of a product by an ordinary consumer. The development of the aircraft typically begins with an informal suggestion by the federal government, or the manufacturer, followed by design, mock-up, prototype, test work, and final production models. Design features dictated by the projected requirements of the aircraft often make this process one of compromise. Throughout the development, the purchaser works closely with the manufacturer in the design and testing of the aircraft. Contracts for production are entered into following successful testing of the prototypes. Finally, long after the first contact, the actual “purchase” of the aircraft is made. By that time the purchaser, which is usually the federal government or a foreign government, may be as knowledgeable about the design, test results and capabilities of the product as is its manufacturer.

Military manufacturers and government purchasers are treated differently in lawsuits brought to recover damages for injuries caused by product defects. The doctrine of sovereign immunity shields the government against claims by injured military personnel or the survivors of deceased servicemen.

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14 “The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).
16 Id. at 456. “The particular mission of a military aircraft of necessity, determines many of its design features. For the plane must be so designed and constructed as to be capable of performing its special mission.” Id.
17 Id.
Manufacturers, however, are not afforded similar protection.\footnote{See Whitaker v. Harrell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969), reh'g denied, 424 F.2d 549 (1970).}
The question becomes whether the manufacturer should bear the risk of loss alone when any culpability may be entirely that of its partner, the federal government.

A. Assumed Responsibility

As previously noted, the first justification for imposing strict tort liability on the manufacturer is that by putting the product on the market, the manufacturer has assumed the responsibility for harm caused by defects in the product.\footnote{See supra note 8 and accompanying text.} In the case of aircraft manufactured for the general public this may be true. The commercial manufacturer designs an aircraft which contains safety features and devices, including secondary and back-up systems. While the “target” purchaser of the aircraft is kept in mind during the design phase of the aircraft, there is little, if any, direct consultation between the manufacturer and the ultimate purchaser.

Military aircraft manufacturers, however, must consult with the branch of the armed service contracting for the aircraft. Various parameters, such as size, weight, range, payload and performance, are dictated by the branch of the armed service involved and figure prominently in the design of the aircraft. Although secondary or back-up systems may be recommended by the manufacturer, the federal government has the power to delete them from the final product.\footnote{See Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971). In Kropp, the court observed: Safety is one of the design features and, as such, is governed by these general design principles. It would be highly desirable, for example, that a plane . . . have a 'back-up system,' . . . in an attempt to insure 100% reliability of the plane's systems. However, weight and size are vital considerations, particularly in military craft. . . . For these and a variety of other reasons, back-up systems (although desirable from the standpoint of safety) are not feasible in every instance in the design and construction of a military craft. . . . This is not to say that designers are unconcerned with safety. Rather, they attempt to design as safe a plane as possible within the scope of its mission. Id. at 456.} Such safety systems may
not be essential to accomplishment of the federal government's primary goal of designing a safe aircraft while still fulfilling the mission parameters.  

Frequently, the manufacturer of military aircraft plays no more than a supporting role in the design process. Additionally, design considerations are fundamentally different from those associated with products sold to the general public. Therefore, while the manufacturer of military aircraft has indeed put an aircraft on the market, it does not follow that the manufacturer should be held solely responsible for all defects, especially those of design.

When the injury or death of an American serviceman results from an aircraft accident allegedly caused by a defect in the design of either a military aircraft or component, public policy militates against holding a manufacturer strictly liable for the resulting damages. This proposition is especially true where the government purchaser controlled the design of the product. On the other hand, plaintiffs seeking redress can argue persuasively that strict liability should apply to military product manufacturers in a case alleging that injury or death was caused by either a manufacturing defect or less persuasively, failure to include adequate warnings in applicable manuals published by the manufacturer, particularly if the military had no input in their publication. Similar policy considerations ought to apply in a case arising out of an accident involving either a military aircraft or component purchased by his government from the government of the United States.

B. Public Interest in Safety

Certainly, the importance of health and safety requires that a party injured by a defective product be compensated for damages suffered. Some courts have held that the responsibil-

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Id.


Obviously, different considerations apply in the case of a civilian bystander who is injured or whose property is injured by virtue of a military aircraft crash. Such concerns are beyond the scope of this article.
ity of a manufacturer for harm caused by its defective products is required by this public interest.\(^{26}\) It is also possible, however, that the injured party may be compensated by the government through either service disability benefits if a serviceman,\(^{26}\) or the Federal Tort Claims Act\(^{27}\) if a civilian.

A recognition of the realities of the military aircraft manufacturing process must temper the urge to impose the doctrine of strict tort liability. It is inconsistent with sound public policy to impose strict tort liability on manufacturers of military hardware for damages resulting from defects in product design when manufacturers have limited power to control the design process. Certainly, the imposition of liability would have a chilling effect on the manufacture of military hardware. Fewer manufacturers may be desirous of producing military hardware and costs of production would surely increase.\(^{28}\)

To impose strict tort liability on manufacturers in the name of safety works a severe injustice on such manufacturer's when rigid product specifications imposed by the manufacturer's prime customers are the cause of the design defect.\(^{29}\)

The policy considerations for imposition of the doctrine are heavily outweighed by the repercussions that would result from its imposition. Thus, the second rationale used to impose

\(^{26}\) See supra note 9.


\(^{29}\) In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), rev'd, 635 F.2d 987 (2d Cir. 1980), cert. denied sub nom, Chapman v. Dow Chem. Co., 50 U.S.L.W. 3487 (U.S. Dec. 14, 1981). The Second Circuit Court of Appeals stated: "But the government also has an interest in the suppliers of its materiel[sic]; imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure materiel [sic] without the exaction of significantly higher prices, or the attachment of onerous conditions, or the demand of indemnification or the like." 635 F.2d at 994. Plaintiffs alleged that the aggregate claims exceeded the total assets of the named defendants. Id. at 994.

\(^{28}\) See, In re "Agent Orange" Product Liability Litigation, 506 F. Supp. at 747, n. 5 (E.D.N.Y. 1979), rev'd, 635 F.2d 987 (2nd Cir. 1980), cert. denied sub nom, Chapman v. Dow Chem. Co., 50 U.S.L.W. 3487 (U.S. Dec. 14, 1981), (holding that the plaintiffs' claims were not governed by federal common law.) The Federal District court in In Re Agent Orange noted: "If potential liability increased dramatically, future war contractors might attach conditions to the use of their products, or balk at supplying the military with any products, whatsoever. Thus, the government's military capabilities might be affected by this litigation." 506 F. Supp. at 747, n.5.
the doctrine of strict tort liability provides no support for the inclusion of manufacturers of military aircraft and components within the scope of the doctrine.

C. Representation of Safety

The third justification for imposing strict tort liability on manufacturers is concerned with making the manufacturer uphold both express and implied representations as to the safety of the product which result from its sale.\textsuperscript{30} This rationale necessarily assumes that the purchaser bought the product as a result of representations made by the manufacturer. That is not generally the case, however, when military aircraft are purchased.

As was earlier pointed out, the aircraft purchaser is usually the government which often is involved in the design of the aircraft from the inception. Frequently, design compromises are made by and between the government and the manufacturer during the development phase of the project. Prior to the purchase of the aircraft, prototypes are tested to determine the suitability of their use for the prescribed purpose. Clearly, in such circumstances the purchaser of military aircraft does not solely rely upon the manufacturer's safety representations.

Additionally, it is unlikely that the ultimate user, a military pilot or crewman, relies on any representation of the manufacturer. The member of the armed forces who is using the product has received training as to the use of the product from his own employer. This training is continual in the case of military aircraft. The user of the product is highly skilled and sophisticated.\textsuperscript{31} Moreover, his decision to "use" the product is not based on his own expectations of safety. It simply does not logically follow that reliance by the purchaser or user on the safety of features over which the manufacturer may have no control should be used to impose strict tort liability

\textsuperscript{30} See supra note 10 and accompanying text.
on the manufacturer.

Likewise, the incentive to produce a safe product will not be increased through imposition of strict tort liability. This rationale is not applicable in cases involving manufacturers of military aircraft for at least two reasons. First, it necessarily assumes that the manufacturers otherwise would not produce a safe product. This assumption is clearly erroneous. There are civilian versions of many military aircraft which are sold to the public. Because the policy reasons for imposing the doctrine of strict tort liability are applicable in cases involving civilian versions of military aircraft, it simply does not follow that the manufacturer has no incentive to produce a safe product for the military. This conclusion is fortified by the fact that the civilian version of an aircraft may have safety features not present on its military counterpart. There is no sound policy justification for imposing liability on the manufacturer for the lack of a safety device in a military aircraft which the manufacturer's design personnel would have installed if they had been given a choice. The absence often is attributable solely to a decision made by persons other than the manufacturer.

The second reason that this rationale will not support imposition of the doctrine in the case of military manufacturers can be inferred from the first. No sound policy reason exists for holding strict liable a manufacturer that could not incorporate safety devices into the product even if it desired to do so. Moreover, it has been argued that since the government is involved deeply in inspection and testing, the manufacturer

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83 See supra note 11 and accompanying text.

84 The rationale also assumes that a manufacturer is compelled to produce a safe product by threat of liability which is not necessarily the case. See PROSSER, supra note 9, at 650.

85 Among the many examples of aircraft produced in both military and civilian versions are the following: the Boeing Model 737 in the military version is T-43A; the Beechcraft Super King Air 200 in the military version is C-12 and RU-21J; the Beechcraft Baron Model 95-B55 in the military version is T-42A Cochise; and the Bell Model 205 in the military version is UH-10H, EH-1H and HH-1H Iquois. JANE'S ALL THE WORLD'S AIRCRAFT 291, 276, 269, 278 (J. Taylor ed. 1980-81) [hereinafter cited as JANE'S].

would have no incentive to use greater care because of the governmental involvement in the matter.\textsuperscript{36}

D. Risk Allocation

The manufacturer, by purchasing liability insurance, generally can allocate the risk of harm equally among all purchasers.\textsuperscript{37} In the case of military aircraft, however, there is initially but one purchaser of the product, the federal government. Any increase in cost resulting from obtaining liability insurance would be passed on to the sole consumer. The amounts spent on defense each year would be increased, thereby placing an increased drain on the Federal fisc.\textsuperscript{38} The imposition of the doctrine of strict tort liability would require a decision to either increase the total amount spent on defense or decrease the number of products purchased. In so doing, the courts would indirectly affect the government’s discretionary power to make war by forcing a reevaluation of governmental decisions with regard to design.\textsuperscript{39}

The number of aircraft sold by the manufacturer to the government is limited.\textsuperscript{40} Therefore the risk is spread over fewer products, sold to a single purchaser, increasing the amount allocated to cover insurance costs for each item. These costs could be quite high because many of the aircraft remain in service for extended periods of time.\textsuperscript{41} In light of the foregoing, it can hardly be said that an “allocation of risk” will occur with regard to the sale of military aircraft. In reality what occurs is an increase in defense spending.

\textsuperscript{36} Challoner v. Day & Zimmermann, Inc., 512 F.2d 77, 84 (5th Cir. 1975), vacated, 423 U.S. 3 (1976).

\textsuperscript{37} See supra note 12 and accompanying text.

\textsuperscript{38} See supra notes 26-27.

\textsuperscript{39} Id. For a similar argument in a non-military setting see Hunt v. Balsius, 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977), aff’d, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

\textsuperscript{40} For example, of the aircraft listed in Jane’s, the armed services had accepted delivery of 19 T-43A, 117 C-12 and RU-21J, 70 T42-A Cochise and 1269 UH-1H Aircraft. Jane’s, supra note 34, at 295.

\textsuperscript{41} See, Jane’s, supra note 34, at 295. For example, two versions of the the B-52 are currently being used by the armed forces. It is estimated that 300 of those planes will be used for the remainder of the century.
E. **Stand Behind Products**

Finally, the business policy that manufacturers should stand behind their products has been used to support imposition of the doctrine of strict liability.\(^4\) The position of the manufacturer of military products, however, is different from that of a manufacturer of products sold to consumers in the "usual" course of business. The military manufacturer may be required by the government to produce a product that does not have all the secondary or safety features that the manufacturer believes are desirable. Certainly, the government has the ability to make such decisions by virtue of its broad war powers.\(^4\) While the manufacturer may request that certain safety features be placed on aircraft sold and delivered to the government, if the government rejects their inclusion, the manufacturer is then powerless to protect itself from liability should strict liability be imposed. To impose liability with knowledge of such a distinction in the method and manner of production works a manifest injustice and severely taxes the outermost limits of the doctrine.

F. **Summary**

An examination of the six most frequently cited reasons supporting the imposition of strict liability on manufacturers of products discloses that none provides a sufficient justification for imposing the doctrine in cases involving military aircraft or components, especially in the design context. The realities of the design process differ from the "usual" method of product development. When coupled with the unique market for military aircraft, the imposition of strict tort liability on the manufacturers of military aircraft is clearly suspect. Courts, therefore, should be willing to reject the application of

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\(^4\) See supra note 13 and accompanying text.

the doctrine, even in this day of consumer protectionism. Given the differences which exist between actions for injuries caused to military personnel by military products and the “typical” products liability action, there must be room for re-examination of the applicability of the doctrine in this area. To find such room, however, a careful study of the reported decisions either involving or discussing the application of strict liability to a manufacturer of military products is necessary.

II. COURT DECISIONS

Surprisingly, few decisions deal squarely with the question of whether strict tort liability should apply to manufacturers of military products. Of particular interest is Lindsay v. McDonnell Douglas Aircraft Corporation, an admiralty action which arose out of the crash of an F4B aircraft into the Gulf of Mexico during a training flight. On appeal, judgment in favor of the manufacturer was reversed and the cause remanded for reconsideration of the previously rejected strict liability claim.

Initially, the court observed that:

While the doctrine of strict liability in tort (often referred to as the doctrine of implied warranty) at its inception did not have the wide acceptance which would justify its incorporation into the general maritime law, it has gained general acceptance in the intervening years and has been incorporated in admiralty law.

We think now that the doctrine of strict liability in tort is part of the general maritime law and is thus available to this Plaintiff under the Death on the High Seas Act, which applies Federal Admiralty law.

We hold that the correct law to be applied in this case is expressed in Restatement (Second) of Torts § 402A (1965), as it is the best expression of the doctrine as it is generally applied, and for the additional reason that several federal courts

**460 F.2d 631 (8th Cir. 1972), rev’d, 331 F. Supp. 257 (E.D. Mo. 1971), on remand, 352 F. Supp. 633 (E.D. Mo.), aff’d, 485 F.2d 1288 (8th Cir. 1973).**

**460 F.2d at 640.**
have previously used that section in maritime cases [citations omitted].

The policy reasons, if any, for imposing the doctrine of strict liability on a manufacturer of military aircraft were not examined by the court in its analysis, probably because the argument was not advanced. The court limited its holding to an affirmation of the availability of strict tort liability in admiralty actions. While some courts may use Lindsay as a springboard for applying the doctrine to manufacturers of military aircraft, the holding should not be extended beyond the limited recognition that strict liability is available in general maritime law.

There are two decisions, however, which address the question of whether strict tort liability should be applied as a matter of public policy to the manufacturers of military hardware. The first decision is Foster v. Day & Zimmermann, Inc., in which the plaintiff received serious injuries as a result of the explosion of a hand grenade during a training exercise. The manufacturer of the ordnance contended that the doctrine of strict liability was not applicable because both the fuse and the grenade had been manufactured exclusively for and on behalf of the government. Additionally, neither the fuse nor the grenade had entered the stream of commerce. Although the court recognized that several of the justifications for imposition of the doctrine of strict tort liability were not present, it nevertheless allowed application of the doctrine.

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14 Id. at 636 (citations omitted).
15 Id. "We think now that the doctrine of strict liability in tort is a part of the general maritime law and it is thus available to this plaintiff under the Death on the High Seas Act, which applies federal admiralty law." Id.
48 502 F.2d 867 (8th Cir. 1974).
16 Id. at 871. The court noted:
The defendants urge that, even if Iowa law is controlling, it was not proper to apply strict liability under the facts present here. Their argument is based upon their belief that neither the fuse nor the grenade in question were placed in the stream of commerce since they were manufactured exclusively for and on behalf of the United States Government. Thus, they urge, one of the primary justifications for the doctrine of strict liability, that of the public's interest in insuring that only safe products are placed in the stream of commerce, is absent.

Id.
In making the grenade and its component parts defendants knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacturer of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces. It is true that the defendants here did not solicit the use of their product, yet they most certainly did reap the profits from its production.\(^8\)

There was no further discussion of the policy justifications for the imposition of the doctrine of strict tort liability on the manufacturers of ordnance.

In another matter involving the same defendant, *Challoner v. Day and Zimmermann, Inc.*,\(^5\) the Fifth Circuit faced the issue of whether the doctrine of strict liability should apply to the manufacturer of a military ordnance. In *Challoner* a howitzer shell exploded prematurely. The court again applied the doctrine of strict liability.

In one respect, defendants are no doubt correct; not all of the reasons that have justified the move to strict liability are present here. However, the most basic and primary justification for imposing strict liability is present. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are born by manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves," [citation omitted].\(^5\)\(^2\)

Thereafter, the court cited with approval the rationale adopted in *Foster*.\(^8\) In effect, both of these decisions adopted the rationale that the manufacturer is in a better position to spread the risk of loss caused by defects in products.

As was pointed out earlier in this article, however, this rationale does not justify the imposition of strict tort liability on manufacturers of military aircraft. The manufacturer cannot

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\(^8\) Id.

\(^5\) 512 F.2d 77 (5th Cir. 1975), vacated, 423 U.S. 3 (1976), on remand, 546 F.2d 26 (5th Cir. 1977).

\(^8\) Id. at 84.

\(^8\) Id. See supra note 48 and accompanying text.
spread the risk of loss among the buyers when there is but one buyer, the federal government. Any increase of costs to cover the increased risk of loss caused by application of the doctrine falls on that one buyer. Not only does this place a burden on the federal exchequer, but also upon the manufacturers of military equipment. Thus, while it is true that the foregoing decisions did adopt the doctrine of strict liability in situations involving the manufacturers of military equipment, the rationale employed in these decisions should be viewed with a jaundiced eye because it fails to recognize the economic realities involved.

An additional reason for questioning the applicability of the rationale underlying the Foster and Challoner decisions as justification for imposition of the doctrine of strict liability on manufacturers of military aircraft is that the government, as purchaser, often decides what safety features will be incorporated into the aircraft design. Thus, a manufacturer of a military aircraft may be required to produce an aircraft which does not have otherwise desirable safety features. When a manufacturer carefully produces an aircraft in accordance with government specifications, any defect existing in the product is often a result of a design consideration rather than defective manufacture. Although the court did not so hold, in Foster the primary issue presented was whether the manufacturer should be held liable for damages attributable to a defectively manufactured product. The plaintiff's claims, however, were not based on an assertion that a defect in design rendered the hand grenade unreasonably dangerous.

It is more difficult to advance policy reasons supporting rejection of the application of the doctrine of strict liability when actions and events occurring during the manufacturing or assembly process result in production of an unreasonably dangerous product. In that situation, a plaintiff might persuasively argue that the manufacturer is clearly culpable and

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54 See supra notes 26 and 27.
55 See Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974). "The government's specifications did not call for the defendants to assemble a defectively made grenade." Id.
should bear the cost of injuries caused by the unreasonably dangerous product. A manufacturer's culpability is less clear, however, when it has carefully manufactured a product pursuant to another person's defective plan or design.  

Critics will argue that the _Challoner_ court rejected the view that manufacturers who follow defective designs of another should not be held liable under a strict liability theory. Such contentions, however, cannot withstand careful scrutiny. In _Challoner_, the court held only that it was not error to instruct the jury that the defect in the product could arise from either a defect in manufacture or a defect in design.  

The decision should not be extended beyond that holding.

Finally, there is a distinction to be drawn between the situation involving manufacturers of military ordnance and that involving manufacturers of military aircraft. Military ordnance products may be used by persons other than the military such as governmental agencies. For example, governmental entities involved in law enforcement may use tear gas or smoke bombs which were manufactured for the military. It is highly unlikely, though, that such agencies would use military

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87 _See_ Challoner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir. 1975), _vacated_, 423 U.S. 3 (1976). The jury was instructed that a product defect could arise in two manners: (1) from some miscarriage in the construction or assembly process; or (2) from the design of the product. Defendants claimed the instruction created error because the design was exclusively in the control of the government, not the defendants. Defendants claimed no liability for injuries to others caused by a defective design arose unless the design was so glaringly dangerous that they should have known of the defective design. _Id._ at 82-83. _See_, e.g., Ryan v. Fenney & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321 (1924). The court rejected this argument stating:

The difficulty with this argument is that the cited cases which absolve defendants who follow defective designs of another were not decided under a strict liability theory. They involved attempts to demonstrate negligence and stand only for the proposition that there is no negligence in following the design of another unless the design is such that the defectiveness was sufficiently obvious to alert a reasonably competent technician to the danger.

In this case, it was not necessary to prove negligence. The theory alleged was strict liability which, unlike negligence, does not require that the defendant's acts or omissions be shown to have been the cause of the defect.

_Id._ at 83.
aircraft in pursuit of their duties.

The broader use of military ordnance may provide a sound policy reason for imposing strict liability in tort on the manufacturers of such products, even in cases involving defective design. Broad usage is not present, however, in the case of military aircraft which generally are used only by military personnel in the performance of military operations. Nevertheless, it can be argued that all matters involving military ordnance are different from the “typical” products liability claims.

For example, in Littlehale v. E. I. du Pont de Nemours & Co., the recovery was sought from the manufacturer of blasting caps. The plaintiff alleged that the manufacturer negligently failed to warn of inherent dangers in the use of the product. In determining there was no duty to warn, the court stated as follows:

In considering the applicable law, it is at least helpful to recognize this case for what it is not. It is not a case involving a product manufactured for sale or resale to the general public. It is not a case involving negligence in the manufacture, design or use of materials. It is not a case where the manufacturer had any freedom of choice as to manufacture, design, or use of materials. It is not a case where evidence has been submitted upon which foreseeability of the particular use involved herein could be predicated. It is not a case involving a product such as a heating brick, paint, agricultural or horticultural germicide or similar product, or other material which, while inherently dangerous in connection with certain uses, is not generally known to be so. It is a case where the product is manufactured during wartime in accordance with detailed specifications for use by a particular branch of the government, namely, Ordnance (or the Corps of Engineers as indicated on the containers); the user was as well or more fully informed of the hazards involved in the correct methods of use as was the manufacturer; the product, if not used by the originally intended user, was nevertheless used by an employee of the government — i.e., a civilian employee of the Navy; and no evidence has been offered

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upon which a jury could find that the particular use (or user) involved herein was foreseeable by the manufacturer.\textsuperscript{66}

Although the case arose in an action involving negligence, the logic is equally applicable in cases involving strict tort liability claims.\textsuperscript{69}

No reported decision has yet held a manufacturer of military aircraft strictly liable based on its status as manufacturer. In cases involving ordnance manufacturers, strict liability in tort has been applied primarily on the theory that the manufacturer is in the best position to assume and spread the risk of loss.\textsuperscript{61} Given the differences which exist between the "typical" products liability action and an action involving a product manufactured for military use, this rationale hardly seems to support imposition of the doctrine in most ordnance cases, much less in actions involving manufacturers of military aircraft.

It is unlikely that any court would readily hold that the doctrine of strict tort liability is per se inapplicable to a manufacturer of military hardware. Courts may be willing, however, to allow manufacturers of certain military hardware, such as aircraft and their components wider latitude with regard to defending such actions given the differences which exist between those manufacturers and the manufacturer of a "typical" product. In that regard, examination of alternatives which may be available to the manufacturer of military products, especially in the design area, is appropriate.

\textsuperscript{66} Id. at 801-03 (emphasis added).
\textsuperscript{69} Cf. Challoner v. Day & Zimmermann, Inc., 523 F.2d 77, 82-83 (5th Cir. 1975).
\textsuperscript{61} Id. at 84 n.2.

However, the most basic and primary justification for imposing strict liability is present. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves," Foster v. Day & Zimmermann, Inc., 8 Cir., 1974, 502 F.2d 867, 871, [sic] quoting Hawkeye-Security Insurance Company v. Ford Motor Company, 174 N.W. 2d 672 (Iowa, 1970) [sic], which takes the quote from the leading strict liability case of Greenbaum [sic] v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 700 [sic], 377 P.2d 897, 900 [sic] (1963).

\textit{Id.} at 84.
III. ALTERNATIVES FOR THE MANUFACTURER

A. Contractual Indemnity

Prior to Stencil Aero Engineering Corporation v. United States,\(^\text{62}\) which held that a third party indemnity claim was unavailable to a manufacturer despite the manufacturer's claims that the federal government was primarily liable for the malfunctioning system, several decisions suggested the use of contractual indemnity as an alternative basis for imposing liability upon the government in a third party action. Those cases arose under compensation acts which precluded tort indemnity by removing any underlying liability between the injured party and the potential indemnifier.\(^\text{63}\) Because an express contract to indemnify is rarely present in such situations, most defendants argue that an implied contract or an implied warranty of indemnification exists.\(^\text{64}\) This concept probably originated in Ryan Stevedoring Co., Inc. v. Pan At-

\(^{62}\) 431 U.S. 666 (1977). The result was limited to a decision involving the Federal Tort Claims Act. Such limitation should not be viewed as extending the holding to claims for indemnification in all instances. In that regard, see Barr v. Brezina Construction Co., 464 F.2d 1141, 1143 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

\(^{63}\) The exclusive liability section of the Federal Employee's Compensation Act (FECA), is 5 U.S.C. § 8116(c) (1976). FECA cases in which a third party defendant seeks indemnity against the government as a third party defendant parallel the military decisions are which discussed below. See, e.g., Travelers Ins. Co. v. United States, 493 F.2d 881, 887-88 (3d Cir. 1974); Wien Alaska Airlines Inc. v. United States, 375 F.2d 736, 737 (9th Cir.), cert. denied, 389 U.S. 940 (1967); United Air Lines, Inc. v. Wiener, 335 F.2d 379, 404 (9th Cir.), cert. dism'd sub nom., United Airlines Inc. v. United States, 379 U.S. 951 (1964). These cases also infer that the absence of underlying tort liability on behalf of the government is not a per se bar to the question of government indemnification and contribution in both the military and FECA contexts. See Dombrick, The Right to Collect Contribution or Indemnity From the United States When a Federal Employee or Serviceman Is Injured, 27 JAG J. 69 (Fall 1972). See also Note, Contribution and Indemnity Under the Federal Employee Compensation Act, 6 Tol. L. Rev. 273 (1971).

\(^{64}\) See supra note 63.
Atlantic Steamship Corp.\(^{65}\)

Ryan involved an action under the Longshoremen's and Harbor Worker's Compensation Act (LHWCA)\(^{66}\) arising out of the injury of a stevedore's employee while on board the shipowner's vessel. The shipowner had secured the stevedore to perform all such operations required by the shipowner's coastwise service during 1949; however, neither a formal stevedoring contract nor an express indemnity agreement was entered into between the shipowner and the stevedore.\(^{67}\) In compliance with the agreement, the stevedore loaded one of the shipowner's vessels. The loading of the hatch where the accident later occurred was supervised by the stevedore's hatch foreman while the shipowner's cargo officers, who had authority to reject unsafe stowage, simultaneously supervised the loading of the entire ship.\(^{68}\) Upon arrival of the vessel at its destination, the stevedore engaged in unloading the cargo, at which time the stevedore's employee was seriously injured.\(^{69}\)

Pursuant to his option under the LHWCA, the injured employee brought suit against the shipowner, alleging either that the unsafe stowage of the cargo established the unseaworthiness of the ship or that the shipowner was negligent in failing to furnish him with a safe place to work, or both.\(^{70}\) The shipowner filed a third party complaint against the stevedore, which the court later dismissed because a jury in a prior proceeding had returned a $75,000 verdict for the employee.\(^{71}\) The dismissal of the third party indemnity claim was reversed on appeal.\(^{72}\) After granting certiorari, the United States Su-
Supreme Court examined whether the exclusive liability provisions of the LHWCA precluded the shipowner's claim for reimbursement from the stevedore and, if not, whether such liability could exist without an express agreement of indemnity. Initially, the Court observed that the LHWCA did not expressly preclude or limit the shipowner's right to insure itself against such liability. Therefore, the Court concluded that although a third party is not subject to tort liability under the LHWCA, the third party could not avoid a voluntarily assumed independent contractual obligation to properly load the cargo. The Court further held that an express indemnity agreement was unnecessary after finding that the agreement between the shipowner and the stevedore necessarily included both the stevedore's obligation to stow the cargo and his obligation to stow it properly. According to the Court, a warranty of workmanlike service arose, the breach of which could not be defeated by the shipowner's failure to discover and correct such breach.

To fully understand Ryan one must look at the context in which it arose. Ryan was decided after several Supreme Court cases clarified the relationship between the vessel owner and stevedore. In the first of these cases, Seas Shipping Co. v. Sieracki, longshoremen were held to be "seamen" insofar as that status made them persons to whom shipowners owe an absolute duty to provide a seaworthy ship. This absolute duty was not founded on fault because of the unusual hazards associated with maritime service, the inability of the seaman to secure his own safety and the harshness of potential individual loss. The second case, Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., was a non-collision maritime injury

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*7 Id. at 125.*
*8 Id. at 130-31.*
*8 Id. at 133-35. The court was careful to limit its holding to a finding that the LHWCA did not preclude contractual recovery. The court did not reach the issue of whether or not the exclusivity clause of the LHWCA could bar a shipowner under comparable circumstances where there was no indemnity or service agreement, recognizing such would lead to the concepts of active-passive or primary-secondary tortious conduct. *Id.* at 133 n.6.
*9 328 U.S. 85 (1946).*
*7 342 U.S. 282 (1952).*
case in which the Court negated contribution from the shore-
side contractor employer as a joint tortfeasor despite the fact
that the unseaworthy condition was the result of the com-
bined fault of the shipowner and the stevedoring company.
The court reasoned that the rule concerning contribution
among joint tortfeasors was a matter for the legislature and
not the judiciary.

These cases combined to put the shipowner in the unenvi-
able position of being held liable for the entire amount of a
longshoreman's compensatory damage even where the un-
seaworthy condition was created wholly by the negligence of
the stevedoring company. Further, since the LHWCA elimi-
nated the longshoreman's recovery in tort against the steve-
doring company, the longshoreman had to seek tort redress
against the shipowner. Recognizing this dilemma, the Court in
Ryan fashioned an implied warranty of workmanlike perform-
ance and the resulting indemnification of the shipowner. 78

A comparison between the shipowner in the Ryan context
and the manufacturer of aircraft in the government contract
context is instructive. The shipowner's non-delegable, abso-
lute duty resulted from judicial determination, as has the
manufacturer's duty under the ever expanding doctrine of
strict liability. As with the stevedoring company, a corre-
sponding duty of indemnity should devolve upon the govern-
ment in instances in which it fails to perform reasonably its
contractual obligations. Most obviously, where the govern-
ment provides specifications, requirements or components, as
was alleged by the manufacturer in Stencel Aero, a warranty
akin to the stevedore's warranty of workmanlike service
should arise.79 In such a case, the government has agreed to
perform services for the benefit of the manufacturer for which
it otherwise would have been absolutely responsible. Critics of
such a theory will argue that the Ryan indemnity doctrine
must be limited to the maritime context, and several circuits

78 350 U.S. at 133. See supra note 65.
have so held. 80

Others will argue that the manufacturer's position is more closely aligned to that of the stevedore in Ryan since the Ryan court likened the warranty of workmanlike service to a manufacturer's warranty of the soundness of the manufactured product. 81 In reality, however, the government is the party in a position analogous to that of the Ryan stevedore since the breach of a warranty or the design defect in the product flows from the government's culpability and not that of the product manufacturer.

The Ryan indemnity doctrine is equitable and there are no reasons why it should not be applied and adopted to other situations when equitable relief is appropriate. Finally, the theory of contractual indemnity will not interfere with the doctrine announced in Feres v. United States. 82 In the first instance, contractual indemnity works outside the parameters of exclusive compensation schemes such as the Veteran's Benefit Act. 83 Secondly, federal rather than state law is applied in construing government contracts. 84 Thus, the "distinctively federal" relationship between the government and its suppliers of military hardware will not be influenced by state law. As to the question of military discipline, no court or government attorney can seriously contend that a contractual dispute between the government and its suppliers would undermine discipline in the armed services. Thus, the theory of contractual indemnity seems to present a viable alternative to the imposition of the doctrine of strict liability in matters in-

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84 Woodbury v. United States, 313 F.2d 291, 295 (9th Cir. 1963). See also Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).
volving military equipment.

B. The Equitable Credit

In Murray v. United States, a government employee was injured in a falling elevator located in a building owned by Murray but leased by the United States. The government employee received benefits under the FECA and then brought suit against Murray for his negligence as the owner. Murray filed two separate third party claims against the United States claiming a right to contribution and indemnity. The court held that the contribution claim was precluded by the FECA since, as a general rule, workmen's compensation statutes terminate the employer's common law tort liability by substituting a duty to pay a prescribed compensation which is not based on fault. The court noted that any inequity caused by the denial of contribution was mitigated by the rule recognized in that jurisdiction, which held that where one joint tortfeasor causes injury by compromising a claim, the other tortfeasor, who cannot obtain contribution from the tortfeasor who has "bought his peace," will be protected by reducing his tort judgment by one-half on the theory that the plaintiff sold one-half of his claim when he made the settlement. The court then stated:

In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of damages sustained by plaintiff assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured em-

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66 405 F.2d 1361 (D.C. Cir. 1968).
67 The contractual indemnity claim was dismissed as beyond the court's jurisdiction on the basis of the Tucker Act which limits the district court's jurisdiction in cases "not exceeding $10,000 in amount. . . ." Id. at 1366-67. The noncontractual indemnity claim was dismissed on the ground that the third party plaintiff's complaint could not fairly be read so as to state a claim for noncontractual indemnity. Id. at 1367.
68 Id. at 1364.
69 Id. at 1365. See Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962).
 employee is thus reduced in consequence of the employee’s compensation act, but that act gave him assurance of compensation even in the absence of fault.

Thus, the “Murray credit” was born in a modern attempt to adjust equitably the burden of the third party plaintiff.

The issue of the Murray credit continues to arise in the context of the LHWCA. There was a split of authority on the propriety of such a credit under the 1972 amendments to the LHWCA. Even those courts favoring the credit theory have suggested application of an “equitable credit” as opposed to the concededly arbitrary fifty percent reduction required by Murray. The Ninth Circuit, in Dodge v. Mitsui Shintaka Ginko K.K. Tokyo and Shellman v. United States Lines, Inc., has rejected credit theories on various grounds. Foremost, it was recognized that the existing inequity would not be solved by shifting it to the shoulders of the longshoreman whose recovery under the equitable credit theory, would be diminished in most instances where his employer was neg-

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**405 F.2d at 1365-66.**

**One article notes that an equitable credit in admiralty had been attempted some twenty years prior to the Murray decision. Coleman & Daly, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoreman’s and Harbor Worker’s Compensation Act, 35 Md. L. Rev. 351, 384 (1976) [hereinafter cited as Coleman & Daly]. In Baccile v. Halcyon Lines, 187 F.2d 403 (3d Cir. 1951), a harborworker proceeded against a shipowner who sought contribution from the harborworker’s employer whose negligence had concurred in causing the employee’s injuries. The Third Circuit allowed contribution from the employer but only to the extent of its workman’s compensation liability under the LWHCA. Id. at 404. However, in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 284-85 (1952), the Supreme Court found that no right to contribution existed in non-collision cases. It should be noted, however, that North Carolina, Pennsylvania, California and New York all have adopted equitable remedies for the third party plaintiff seeking reduction in its liability by virtue of an employer’s negligence. Coleman & Daly, supra, at 382-86; See, Cohen & Dogherty, The 1972 Amendments to the Longshoremen’s and Harbor Worker’s Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 19 N.Y.L.F. 587, 599-602 (1974). See also Coleman, The 1972 Amendments to the LHWCA: Life Expectancy of an Equitable Credit, 12 Forum 683 (1977).**


**528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976).**

**528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976).**
ligent. A subsidiary concern was that allowance of a credit in favor of the third party plaintiff would negate Congressional intent to eliminate, through the 1972 amendments to the Act, direct or indirect third party actions in longshoremen's injury cases. The Ninth Circuit also stated that amendment of the LHWCA, so as to remove any inequities, should be done by Congress and not the courts.

The Fourth Circuit analyzed each of these arguments in *Edmonds v. Compagnie Generale Transatlantique*, and concluded that a credit is permissible. The decision of the court of appeals however, was reversed by the Supreme Court on three grounds. First, the Court stated that the legislative conflict seen by the lower court was largely of its own creation. The Court concluded that Congress did not alter the judicially created rule holding the shipowner liable for all damages not caused by the longshoreman's negligence. While acknowledging that strong arguments exist for the imposition of a proportionate-fault rule as adopted by the lower court, the majority refused to adopt such a rule because of Congressional action in reliance on judicially-created law.

The dissent advanced a proportionate-fault rule in a strongly worded opinion which argued that the rule adhered to by the majority was unfair and unjust. The dissent suggested that the better approach would be to allow the injured longshoreman to recover damages for that portion of the injury for which the shipowner was responsible through its neg-

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84 528 F.2d at 672; 528 F.2d at 680.
89 Id. at 263.
90 Id. at 271.
91 Id. at 273.
92 Id. at 280. "Under the Court's rule, the longshoreman is guaranteed statutory compensation without regard to fault and is given a risk-free chance to obtain full damages if the ship owner is found negligent in even the slightest degree." Id.
ligence, with the balance of the damages to be recovered in the form of statutory compensation. Finally, the dissent chastised the majority for unnecessarily deferring to Congress in an area properly subject to judicial instruction.

Although the equitable credit imposed by the lower court was not adopted by the Court in Edmonds that result obtained simply because the majority felt that Congress had relied upon what it understood the law to be in 1972 when Ryan was legislatively overruled. The majority of the Court, while recognizing that an equitable credit would be applicable in the other situations refused to apply the principle in Edmonds solely because of the specific Congressional enactment. It is still unclear, however, whether an equitable credit will be imposed in situations where a manufacturer of military aircraft is saddled with liability for all of a serviceman’s injuries despite a finding that the government is partially or even primarily at fault. While the existence of the “Murray credit” was recognized in Stencel Aero, no attempt was made to apply it to the facts in that case.

Whether seeking application of the fifty-percent “Murray credit” or some kind of pro tanto “equitable credit,” the manufacturer will be met with arguments similar to those posited against the application of a credit in the LHWCA cases. Servicemen may argue that they will be penalized if damage recoveries against a manufacturer are reduced according to the United States’ proportionate fault. The serviceman, however, has no inherent right to recover from the manufacturer damages caused by torts attributable to the United States. Like the longshoreman, the serviceman receives the quid pro quo of no fault recovery in exchange for acceptance of a lesser amount in damages. Furthermore, the granting of an equitable credit in the LHWCA cases is not complicated by lien

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103 Id. at 280 n.5 (citing Coleman & Daly, supra note 90).
104 433 U.S. at 281.
105 Id. at 273. See supra note 65.
107 431 U.S. at 670.
108 See generally supra notes 83-86 and note 91.
problems. Although the U.S. Government is granted a lien for the recovery of expenses incurred in rendering medical care and treatment in cases involving third party liability,\textsuperscript{109} the LHWCA specifically excludes from its terms all such care and treatment rendered pursuant to the Veteran's Benefit Act for service-connected disabilities.\textsuperscript{110}

Finally, problems attending the application of an equitable credit in LHWCA cases, including circuity of actions and procedural problems of binding the third party,\textsuperscript{111} will not be present when the credit is imposed in military hardware cases. The rights of the government and servicemen will still be regulated by the Veteran's Benefit Act, while the common law action against a manufacturer will still be governed by tort principles. No overlap will occur. In effect, the plaintiff will recover compensation benefits under the Veteran's Benefit Act and still be free to pursue the manufacturer; however, any recovery against the manufacturer will be reduced by the percentage of fault attributable to the government.

C. \textit{Reliance on Government Specifications, Requirements or Components As a Possible Defense}

In negligence actions it is generally held that an independent contractor, or a manufacturer, is not liable to third persons for injuries received due to defective construction or manufacture if the construction was completed in accordance with plans and specifications submitted by the employer, and the design defect was not so obviously dangerous that a reasonable contractor would not follow the plans.\textsuperscript{112} This defense may provide little comfort to most manufacturers of military aircraft, since claims against them often involve theories of

\begin{footnotes}
\item[	extsuperscript{109}] 42 U.S.C. §§ 2651-2653 (1976).
\item[	extsuperscript{110}] 42 U.S.C. § 2651(c) (1976).
\item[	extsuperscript{111}] See Coleman, supra note 90, at 400-02.
\end{footnotes}
strict liability as well as negligence. There is some indication, however, that this rationale may be utilized in the strict liability context as well.

In *Sanner v. Ford Motor Co.*, the plaintiff was injured in a collision involving the army jeep in which he was riding. He brought suit against the defendant manufacturer of the vehicle alleging that the defendant should have installed safety belts in the vehicle. Summary judgment was granted in the trial court upon alternative bases, one being that the defendant manufactured the jeep in strict compliance with the government’s specifications. The appellate court affirmed, agreeing that the manufacturer was shielded from liability since it had no discretion with respect to the installation of seat belts and had adhered strictly to government specifications. Recognizing that the cases relied upon by the trial court involved negligence, the appellate court stressed that the underlying policy reasons for protecting the manufacturer from liability are equally pertinent in the strict liability context. The underlying policy reasons, expressed in the lower court opinion, shifted the emphasis from the more narrow “contract specification defense” to the broader “government contract defense.”

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118 381 A.2d at 806. “The M151A [vehicle] was manufactured by defendant Ford in strict compliance with contract plans and specifications owned by the United States Government. Plaintiff maintained that the vehicle should have had seatbelts and that the lack of such a safety device constituted a dangerous defect.” Id.
116 381 A.2d at 806. For a similar holding in military context, see Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S. 2d 400 (1980) aff’d, 79 A.D. 2d 117, 436 N.Y.S.2d 907 (1981) (holding that manufacturer of dough mixer who produced the mixer in compliance with military specifications during time of war had a complete defense to an action to recover for injuries under theories of negligence, strict liability or warranty).
115 381 A.2d at 806.
114 Littlehale v. E. I. du Pont de Nemours & Co., 268 F. Supp. 791, 802-05 n.15 (S.D.N.Y. 1966), aff’d, 380 F.2d 274 (2d Cir. 1967). The “contract specification” defense establishes a different test by which to judge the manufacturer who is not exercising full discretion over the method of manufacture whereas the latter can serve as a total insulation from liability.
the two defenses, the trial court stressed that allowing liability to attach to a contractor who followed government specifications would result in the contractor's raising the prices to cover such risks and that such reaction by the contractor would cause the Government's immunity from the consequences of its acts in the performance of "discretionary functions" to be of no value. 119

In Hunt v. Blasius Co., 120 the Illinois appellate court termed the issue as being whether liability is precluded in any respect in which a product complies with mandatory governmental specifications and requirements. 121 Relying on Littlehale 122 and Sanner, 123 the court concluded that the acts of a manufacturer, who had complied with government plans and specifications as to the manufacture and installation of a roadside sign, must be tested against a different standard from those of a manufacturer who has sole discretion over the manner in which the product is produced. 124 The theory underlying the court's holding was that competitive bidding might come to a halt should bidders fear legal action as a consequence of following government specifications; alternatively, bids might be inflated to cover potential liability. 125 Thus, according to the court, public policy mandated that bidders who comply strictly with government specifications be shielded from liability in all respects in which the product complies. 126

On appeal to the Illinois Supreme Court, the lower court holding, recognizing the applicability of the independent contractor rule 127 to the negligence count asserted by the plain-

119 364 A.2d at 47.
121 370 N.E.2d at 620.
124 370 N.E.2d at 621-22.
125 Id. at 621.
126 Id. at 621-22.
127 Id. at 620-21. Paul Harris Furniture Co. v. Morse, 10 Ill.2d 28, 40, 139 N.E.2d 275, 282-83 (1956), cited by the Court in Hunt, was dispositive on the application of independent contractor liability in negligence actions:

The general rule is that where an independent contractor is employed
tiff, was affirmed.\textsuperscript{128} No mention was made, however, of the
applicability of the rule to the strict liability claim. The court
merely stated that in the absence of any fact which would in-
dicate that the post supporting the roadside sign subjected
motorists to any unreasonable or unexpected risks a cause of
action predicated on strict liability could not be sustained.\textsuperscript{129}

In \textit{Spangler v. Kranco, Inc.},\textsuperscript{130} it was intimated that reason-
able behavior on the part of the manufacturer in relying upon
its customer’s industrial expertise and in following the cus-
tomer’s plans and specifications might not serve as a defense
for the manufacturer.\textsuperscript{131} Use of \textit{Spangler} as authority is weak-
ened by the context of the plaintiff’s complaint, however, be-
cause it was predicated upon a negligence theory of liability.
Nonetheless, when the plaintiff attempted to amend his theo-
dies of recovery at the appellate level to include breach of war-
tanty and strict liability the court stated, “the standard of
safety imposed on the manufacturer of a product is essentially
the same whether the theory of liability is labeled warranty or
negligence or strict tort liability and under our view of this
case the plaintiff fares no better in those additional alterna-
tive theories.”\textsuperscript{132}

Only one case, \textit{Challoner v. Day & Zimmermann, Inc.},\textsuperscript{133}
has rejected the applicability of the independant contract de-

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\textsuperscript{128} 384 N.E.2d at 371-72.
\textsuperscript{129} Id. at 372.
\textsuperscript{130} 481 F.2d 373 (4th Cir. 1973).
\textsuperscript{131} Id. at 375.
\textsuperscript{132} 512 F.2d 77 (5th Cir. 1975).
\textsuperscript{133} 370 N.E.2d at 619.

While we do not suggest that the foregoing principle should be applied
to construct or install any given work or instrumentality, and has done
the same and it has been accepted by the employer and the contractor
discharged, he is no longer liable to third persons for injuries received
as the result of defective construction or installation.
defense in the strict liability context. Some idea of the hurdles to be overcome by the manufacturer-defendant in order to receive the benefits of that defense in the strict liability context, however, can be ascertained. In Challoner, the manufacturer argued that the jury was not entitled to find it liable for a defect in product design since the design was exclusively within the control of the government. The court responded that:

[t]he difficulty with this argument is that the cited cases which absolve defendants who follow defective designs of another were not decided under a strict liability theory. They involved attempts to demonstrate negligence and stand only for the proposition that there is no negligence in following the design of another unless the design is such that the defectiveness was sufficiently obvious to alert a reasonably competent technician to the danger.

In this case, it was not necessary to prove negligence. The theory alleged is strict liability. A strict liability case, unlike a negligence case, does not require that the defendant's acts or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control.

Some courts no doubt will find this argument persuasive and refuse to apply the defense in the strict liability context. Nevertheless, its applicability in the negligence context is firmly rooted. Moreover, no concrete ground can be found for its lack of applicability to strict liability given the fact that the cases are different in nature.

IV. Conclusion

The basic policy justifications underlying the strict liability doctrine do not mandate the extension of the doctrine to manufacturers of military aircraft or their components. Although courts have held the doctrine of strict tort liability to be applicable to manufacturers of military ordnance, the deci-
sions have not squarely faced the question of whether strict tort liability should be imposed as a matter of public policy. Given the differences which exist between "typical" products liability actions and actions involving products manufactured for military use, no solid basis can be seen for imposing the doctrine on manufacturers of military aircraft, especially in a design context. While it is true that few, if any, courts would be willing to hold that the doctrine of strict tort liability is never applicable to a manufacturer of military hardware, it seems likely that the courts may become persuaded to allow greater leeway to such manufacturers with regard to defending the actions against them. Several alternatives available to the manufacturer have been mentioned. These include contractual indemnity, and equitable credit, and the reliance on government specifications and requirements. Each of these alternatives represents a viable defense for the manufacturer of military aircraft.
Comments, Casenotes and Statute Notes