



Aviation Law Section

A Publication of the Association of Trial Lawyers of America

Vol. 12, No. 2, Winter 2005

Letter from the Chair

Donald J. Nolan, Chicago, Ill.

Dear Section Members:

The 2005 Winter Convention was a huge success, and not just because the sun was shining and the sky was blue in Palm Springs, Calif. Congratulations to everyone who made the event possible. And thank you to ATLA's convention planners for choosing such a welcoming venue.

I extend my personal thanks to our officers and members who attended the Aviation Law Section business meeting and roundtable. It was great to see all of you, and I have it on good authority from ATLA staff that ours was one of the most productive sessions of the convention! Therefore, I would like to fill the rest of you in on what you missed.

First, members of my staff and ATLA are going to concentrate on promoting the Aviation Law Section List Server. As you know, the Section's List Server allows you to communicate with hundreds of other plaintiffs' lawyers who either work or have an interest in aviation litigation. By promoting our List Server and increasing both the number of subscribers and the flow of traffic, we can all become better informed about the latest issues and news concerning our highly specialized aviation practice area. The List Server is also a great place to get advice about a complexity in a particular case, or to get feedback on an expert. If you are not already using the List Server, please take a few moments to subscribe and encourage



other Section members in your office to do so as well. The goal is to have a dynamic, inclusive conversation that will benefit us all.

Secondly, plans are well underway for the CLE program, which we will present in Toronto on July 25, 2005 at the Annual Convention. This year's CLE features an all-star lineup with a program that, while tailored to aviation attorneys and mass tort lawyers, will also be informative and relevant to anyone who uses our nation's airports and airline industry. We hope to

have a full house for this program. So mark your calendars now, and encourage your associates to attend as well. Feel free to invite non-aviation attorneys to join you, as I am sure this will be one of the highlights of the education offerings in Toronto. Increased attendance means an increased presence for the Aviation Section within ATLA in general.

Finally, this portends to be a busy year on Capitol Hill in Washington, D.C. for plaintiffs' lawyers. We will continue to monitor legislative developments that could affect the plaintiff aviation law practice and we will keep you updated.

Enjoy the great articles inside this issue!

Sincerely,

Donald J. Nolan, chair of the Aviation Law Section

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Editor's Comment

Justin T. Green, New York, N.Y.

The summer's *Silkair* trial has received an incredible amount of attention. The verdict is quite a story and our lead article written by Steven C. Marks gives an insider's view of the events leading up to the historic result.

This issue also includes articles that will bring readers up-to-date on three important areas in aviation law. The first is an excellent update on expert testimony authored by Leane Capps Medford and Steven D. Sanfelippo, of Rose * Walker, L.L.P. The second is a primer on the Death on the High Seas Act, authored by Paul Edelman, a dean of the admiralty and maritime bars.



Finally, Dennis Nolan, of Kreindler and Kreindler, has contributed an article addressing recent decisions on the government contractor defense.

Submissions for the spring edition are due in March, but the sooner I receive them the better. I intend to publish articles from as many Aviation Law Section members as possible during my tenure as newsletter editor. I hope that you will forgive my nagging and begging for articles over the next several months.

Justin Green is the editor of the Aviation Law Section's newsletter.

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The *Silk Air* Decision: Plane Crash Victims Succeed in California Trial

by Steven C. Marks, Miami, Fla.

On July 6, 2004, a California state court jury unanimously found Parker Hannifin Corp. 100 percent liable for the *Silk Air* airplane crash which occurred on December 19, 1997 in Indonesia. Also, three of the 32 cases pending before the California state court were tried on the damages issues, and the jury awarded substantial damages. Steven C. Marks of Podhurst Orseck, P.A. in Miami, Fla., and Walter J. Lack and Kenneth L. Crowder of Engstrom, Lipscomb & Lack, PPC in Los Angeles, Calif., represented the families. William O'Connor and Mitchel Kallet of Kern and Wooley, LLP in Los Angeles defended Parker Hannifin. The case, tried before Los Angeles County Superior Court Judge Emily Elias, began on May 24, 2004.

SILK AIR CRASHES INTO MUSI RIVER

The *Silk Air* Boeing 737-300 aircraft was at cruise altitude at 35,000 feet traveling from Jakarta, Indonesia to Singapore when it suddenly left cruise altitude, rolled to the right, and entered a steep descent. It ultimately crashed into the Musi River at speeds near or even approaching the speed of sound. The wreckage scattered over a two-mile area with the elevator and portions of the tail section furthest from the main fuselage which ended up in the river.

The Indonesian government was principally involved in the investigation but requested the assistance of the National Transportation Safety Board (NTSB), Boeing, Parker Hannifin and others. The flight data recorder (FDR) and cockpit voice recorder (CVR) were recovered and analyzed. The authorities then determined that approximately 10 minutes before the crash the CVR stopped recording, and the FDR stopped recording approximately four minutes before the crash.

The plaintiffs theorized that the flight crew experienced an uncommanded rudder deflection at a high rate of speed causing the aircraft to go into a quick roll within seconds, resulting in the plane being inverted, and it was unrecoverable by the flight crew. Post-accident metallurgical examination of the servo-slides from the dual-concentric servo valve which comprises part of the Power Control Unit revealed numerous metallurgical anomalies including evidence supporting the plaintiffs' theory of a jammed rudder. A post-accident x-ray examination immediately following the crash showed that the servo-slides were in the neutral position as opposed to the extended position as advanced by the plaintiffs. However, the plaintiffs' experts explained that the post-accident position was irrelevant given the extent of the crash damage

and impact forces.

The Boeing 737 aircraft has been the subject of a great deal of controversy resulting in numerous investigations into the Power Control Unit (PCU) manufactured by Parker Hannifin. The PCU controls the deflection of the tail rudder through hydraulic inputs from the rudder petals. In 1991, a Boeing 737 operated by United Airlines (Flight 585) in Colorado Springs entered into a roll and subsequently crashed. While the investigation was still pending, another Boeing 737 operated by US Airways (Flight 427) went into an uncontrolled/uncommanded roll crashing in Pittsburgh, PA. During the same time period, numerous pilots were also reporting uncommanded and/or jammed rudders while flying early model 737s.

Several Airworthiness Directives were issued, including the implementation in early 1997 of an emergency procedure to deal with this situation should it occur in flight. Even though it was not admitted into evidence, there has been yet another crash involving a Boeing 737-300 aircraft operated by Flash Air which had a similar accident flight path as the three other Boeing 737 crashes where the Parker Hannifin PCU was implicated. While the investigation is ongoing, some of the experts who testified for the plaintiffs in the *Silk Air* matter believe, based upon their preliminary review, the Parker Hannifin PCU is the likely cause of the Flash Air disaster as well.

THE CALIFORNIA TRIAL: TWO SIDES LAY OUT THEORIES ON THE CAUSE OF CRASH

At trial, the plaintiffs called several experts: accident reconstructionist Don Sommer; radar expert Robert Cauble; Maximiliaan Vernij, a flight data recorder expert; computer animator and aerodynamics expert Dr. Kenneth Center, Dr. Donald Kennedy, an expert in aerodynamics and a flight path reconstructionist; piloting



Steven C. Marks

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expert Paul Dow; and Dr. Richard McSwain, a metallurgical expert. Finally, the plaintiffs called Dr. John Swiger as their expert economist.

Parker Hannifin advanced alternative theories at trial that the crash resulted from intentional actions of the flight crew, or that the flight crew was negligent in failing to recognize and timely respond to any uncommanded rudder deflection which might have occurred. Parker Hannifin believed that the servo-slides discovered in the neutral position following the crash conclusively established that there was no rudder deflection and that the missing information from the CVR and FDR were the result of the intentional disabling by one or both flight crew members.

Parker Hannifin submitted evidence that the flight captain recently experienced financial problems and was demoted from check airman to line pilot due to an incident which, in part, involved the disabling of a CVR. Consistent with Parker Hannifin's negligence theory, they submitted proof that the two Silk Air pilots on the accident flight were trained in this emergency procedure.

Parker Hannifin called its experts at trial: metallurgist Gary Fowler; Michael Marx, a former NTSB representative involved in some of the examinations following the crash; John Plaskis, a former FAA representative concerning certification and probabilities; FDR expert Duncan Schofield; John Nance, a piloting expert; and Robert Kedlac, an expert in aerodynamics and flight path reconstruction. As their economist, Parker Hannifin called George Miller.

Pursuant to federal statute, the court excluded from evidence any opinions from the investigative agencies including the NTSB which referenced suicide as the probable cause for the Silk Air crash. Parker Hannifin requested that Silk Air and Boeing appear on the verdict form for the purpose of the allocation of fault. After a six-week trial, the 12-person jury unanimously concluded that Parker Hannifin was 100 percent at fault under both strict liability and negligence theories.

DAMAGES IN THREE CASES

As for damages, one of the three cases tried to the jury on damages involved the death of Kenneth Wilson. Mr. Wilson was 43 years old at the time of the accident. His survivors included a wife of 19-years and two daughters who were 17 and 14 years old when the crash occurred. Mr. Wilson, an expert in heavy mechanics, was the assistant plant manager for a large Indonesian mining operation earning with benefits over \$60,000 per

year. The jury awarded \$4.5 million in economic loss to the family, \$6 million in non-economic damages to Mrs. Wilson, and \$3 million in non-economic damages to each of the daughters. The Wilsons' damages totaled \$16.5 million.

The second damage case involved the death of Mr. Soen Lay Heng. Mr. Soen, 41, left a wife and three children who were 12, 10 and six years old at the time of the accident. Mr. Soen ran his own printing company in Singapore doing high security printing such as currencies, stock certificates, bonds, and other financial instruments. The company he started existed for about four years at the time of the crash. While profits were relatively modest, the company saw extraordinary growth. Shortly before his death, Mr. Soen received a significant contract with the Indonesian Mint. The jury

awarded economic damages of \$5.5 million, \$6 million in non-economic damages to his wife, and \$3 million in non-economic damages for each of the three children for a total of \$20.5 million.

Merleen Tan Peck Jiang's death was the third and final damage case. Ms. Tan, a single 28-year-old woman, was working for Levi Strauss Asia in Singapore at the time of the accident. She earned about

\$55,000. She was survived by her two parents. She was the youngest of three daughters and the first in the family to obtain a college degree. The jury awarded \$600,000 in economic damages to her parents, and \$3 million in non-economic damages to each of her parents, totaling \$6.6 million.

In all three cases the jury awarded slightly more than counsel requested for economic damages and exactly what counsel suggested for non-economic damages. The total damages for the three cases \$43.6 million. The remaining 29 cases will receive the benefit of the liability finding and will have separate damage trials. There are approximately 53 other cases pending in the MDL Federal Court in Seattle and several other law firms are involved. The MDL Plaintiffs will obviously seek to get the benefit of the state court result but Parker Hannifin's position is that the MDL Plaintiffs will not be able to successfully argue collateral estoppel because they pursued a different theory of liability.

The court excluded from evidence any opinions from the investigative agencies including the NTSB which referenced suicide as the probable cause for the Silk Air crash.

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Courts Discuss Expert Testimony

by Leane Capps Medford and Steven D. Sanfelippo, Dallas, Texas

NEUROLOGICAL SCIENTIST UNQUALIFIED TO TESTIFY ON CAUSE OF PASSENGER'S STROKE

A sixty-eight-year-old passenger suffering from hypertension and a prior leg injury requested a wheelchair to exit the aircraft, but the wheelchair never arrived. The passenger walked with assistance from the aircraft to the parking lot. The passenger suffered a stroke and died one week later. The plaintiffs alleged that the passenger's stroke began before he exited the aircraft and that the failure to provide a wheelchair caused or contributed to the stroke. *Jordan v. Continental Airlines, Inc.*, __ So.2d __, 2004 WL 447348 (Ala. Civ. App. March 12, 2004). The airline contended that the passenger's stroke resulted from pre-existing conditions and that the failure to provide a wheelchair did not cause or contribute to the stroke. The airline moved for summary judgment on all the plaintiffs' claims. The airline's motion relied on the affidavit of a board certified neurologist, who testified that walking off the plane and through the airport did not cause, or contribute to, the passenger's stroke.

The plaintiffs relied on the expert testimony of a neurological scientist, William J. Ray, Ph.D., who was not a medical doctor, but a senior research biochemist at Merck and Co., Inc. Ray reviewed the passenger's medical records and eyewitness testimony. He concluded that the passenger's stroke began before exiting the aircraft and that the exertion of walking "exacerbated an already critical emergency cerebral situation." The trial court struck the scientist's affidavit, and found him unqualified to provide expert testimony on the medical cause of the passenger's death. Although the appellate court recognized that expert medical testimony is not limited to persons licensed to practice medicine, it affirmed the trial court's decision that the scientist lacked the necessary qualifications to testify on the cause of death. The appellate court also held that the scientist's opinions on the potential effect of immediate treatment were too speculative.

FIFTH CIRCUIT REVERSES SUMMARY JUDGMENT, TRIAL COURT IMPROPERLY WEIGHED CONFLICTING TESTIMONY

In *Murray v. Airborne Express/ABX Air, Inc.*, __ So.2d __, 2004 WL 2387540 (La. App. October 26, 2004), Murray, an aircraft mechanic, brought a workers' compensation claim for injuries to his head. Although he could not remember the event, he believed a metal pan on a belt



Leane Capps Medford

loader machine struck him on the head, causing him to be thrown onto the belt loader. Airborne contended that Murray was not injured at work and moved for summary judgment. It relied on the expert testimony of Robert Sterns, who testified that based upon "photography and appropriate measurements...followed up by mathematical reconstruction of impact forces," the incident could not have happened as Murray alleged.

Murray relied on the testimony of his wife. She stated that her husband came home from work with a blackened eye, he was disoriented and nauseated, and his shirt had distinctive markings on the right shoulder. She took the shirt to Airborne that evening to find the origin of the markings. At that time, a freight handler pointed out that the markings on the shirt appeared to match markings on the plane left by the rubber pad from the belt loader.

As a result of Sterns' testimony, the trial court granted summary judgment finding it did not believe Murray could show his injuries occurred at work. The Louisiana Court of Appeals for the Fifth Circuit reversed the decision. The court confirmed that the trial judge cannot make credibility determinations when it determines the merits of a motion for summary judgment. It held that the trial court improperly weighed the credibility of the evidence before it:

[b]y granting summary judgment, the trial court made credibility calls and factual determinations which are not appropriate in considering the merits of the motion. A summary judgment is not a substitute for a trial on the merits.

ALABAMA SUPREME COURT TWICE AVOIDS FORMALLY ADOPTING DAUBERT.

In a pair of recent cases, the Alabama Supreme Court twice avoided requests to formally adopt *Daubert* as the standard for admissibility of expert witness testimony in Alabama. In *Martin v. Dyas*, __ So.2d __, 2004 WL 1802979 (Ala. August 13, 2004), Martin filed a medical malpractice lawsuit against two physicians and a medical group. She retained Dr. Clark, a board-certified orthopedic surgeon, as her medical expert.

The defendants attempted to exclude Dr. Clark's testimony on the grounds that: (1) his expertise was not similar to that of the Defendants; (2) his proposed testimony was outside his area of knowledge, experience, and expertise;

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Courts Discuss Expert Testimony, continued from Page 5

and (3) his testimony was inadmissible under *Daubert*. The trial court excluded Dr. Clark without specifying its reason for doing so, and Martin appealed. The Alabama Supreme Court reversed and remanded the case, but in doing so, the court rejected the defendants' request that it formally adopt *Daubert* as Alabama law. It noted however, that the application of *Daubert* would have had no effect on the case since Dr. Clark's testimony would pass both the reliability and relevance prong of the *Daubert* test.

In *Vesta Fire Insurance Corporation v. Milam & Company Construction, Inc.*, __ So.2d __, 2004 WL 1909458 (Ala. August 27, 2004), a fire destroyed a video rental store. The store's insurers sued various contractors and subcontractors responsible for the construction or maintenance of the store. The insurers retained Jim Jones, an electrical engineering professor at the University of Alabama at Birmingham. The trial court granted the defendants' summary judgment and the insurers appealed. The contractors asserted on appeal that Jones' testimony should not have been considered by the trial court because his conclusions were "improperly speculative and without evidentiary support." The contractors asked the court to apply the tests for admitting expert testimony set out in *Daubert* and *Frye*, but the Alabama Supreme Court refused:

[W]e decline to adopt *Daubert* under the circumstances of this case. Our review of the record and of the arguments advanced by the defendants does not support the conclusion that the defendants are challenging the validity of the scientific principles relating to electrical engineering, nor do we read the defendants' arguments as attacking Jones's qualifications as an expert. Rather, the defendants assert that Jones's conclusions are improperly speculative and without evidentiary foundation. These are arguments that invoke a consideration of the admissibility of the evidence under the Rules of Evidence.

The court concluded that the issue could be determined based upon Alabama's current rules of evidence, without application of the *Daubert* test.

DOCTOR'S OPINION PROPERLY ADMITTED EVEN THOUGH PEER-REVIEWED STUDIES CONTRADICTED HIS CONCLUSIONS.

In *Roach v. PPG Industries, Inc., et. al.*, 2004 WL 2239806 (Ark. Ct. App. October 6, 2004)(not designated for publication), Roach was exposed to products containing benzene throughout his more than twenty years' experience

as an auto body repairman. Roach was diagnosed with acute myelogenous leukemia ("AML"), and eventually died from this illness. Roach's estate sued a number of manufacturers of products containing benzene. The estate alleged that Roach's AML was caused by his exposure to those products. In support of its claims, the plaintiff retained Dr. Philip Guzelian to testify on cytogenetics and the five and seven chromosome.

The manufacturers argued that Dr. Guzelian's testimony should be excluded because his testimony was based upon "unreliable science." For example, Dr. Guzelian said that his testimony was based upon peer-reviewed studies, but admitted there were other peer-reviewed studies he did not rely upon that supported an opposite conclusion. The trial court refused to strike Dr. Guzelian's testimony, and the Arkansas Court of Appeals affirmed. It held that Dr. Guzelian's testimony was supported by peer-reviewed studies, and the fact that there were other peer-reviewed studies that he ignored upon supporting an opposite conclusion went to the weight to be given to Dr. Guzelian's testimony and not to the admissibility of his opinion.

In a pair of recent cases, the Alabama Supreme Court twice avoided requests to formally adopt *Daubert* as the standard for admissibility of expert witness testimony in Alabama.

MICHIGAN SUPREME COURT OVERTURNS RECORD VERDICT BECAUSE EXPERT IS UNQUALIFIED.

In *Gilbert v. DaimlerChrysler Corporation*, 685 N.W.2d 391 (Mich. 2004), Linda Gilbert was the first female millwright to work at Chrysler's Jefferson North Assembly Plant in Detroit. Gilbert alleged that she was sexually harassed and suffered severe damages as a result. Gilbert retained Steven Hnat, a certified social worker and substance abuse counselor. Hnat testified that the harassment Gilbert endured caused irreversible changes to her brain chemistry, causing a relapse into alcoholism and development of a major depressive disorder. Hnat also testified that he reviewed Gilbert's medical records and the records read "like a preview of [Gilbert's] death certificate." After a six-week trial, the jury returned a verdict of \$21 million dollars.

On appeal, the Michigan Supreme Court held that the verdict was excessive and could not be affirmed. In order "to provide guidance for the new trial," the court provided an in-depth analysis of the trial court's gatekeeping function under Michigan Rule of Evidence 702, *Daubert*, and *Frye* and concluded that Hnat was unqualified to render these opinions. In doing so, the court rejected the idea that Hnat's qualifications should go to the weight of his testimony instead of admissibility:

[W]e reject the Court of Appeals' argument that "the 'mere fact' that Mr. Hnat 'is not a medical practitioner does not render him unqualified as an expert

witness” because “[a]ny limitations in” Mr. Hnat’s “qualifications are relevant to the weight, not the admissibility, of his testimony.” The Court of Appeals’ observation that one need not be a medical practitioner to testify as an expert is little more than a truism. And we do not disagree with the proposition that, in some circumstances, an expert’s qualifications pertain to weight rather than to the admissibility of the expert’s opinion. That is not to say, however, that *any* issue of qualification relates to weight rather than admissibility.

...
Here, according to plaintiff’s counsel, Mr. Hnat gave plaintiff a “prognosis” on the basis of his interpretation of records from medical and treatment facilities. The medical “prognosis” of a social worker who has no training in medicine and lacks any demonstrated ability to interpret medical records meaningfully is of little assistance to the trier of fact.

The court directed the trial court “to ensure that expert opinion testimony meets the purpose expressed in MRE 702—that of assisting the trier of fact through the introduction of reliable ‘scientific, technical, or other specialized knowledge.’”

THE TEXAS SUPREME COURT HOLDS OBJECTION TO EXPERT TESTIMONY MADE AFTER CROSS EXAMINATION OF EXPERT IS TIMELY.

In *Kerr-McGee Corporation v. Helton*, 133 S.W.3d 245 (Tex. 2004), certain oil and gas lessors brought suit against a lessee for breach of the implied covenant to protect the leasehold against drainage. The lessors argued that the lessee should have drilled a well on their leasehold to protect against drainage from a well on an adjacent property. The lessors retained Michael Riley, a petroleum engineer, to provide expert testimony to establish the amount of gas a hypothetical offset well would have produced.

At trial, Riley testified that the hypothetical offset well would have yielded the lessors a profit of \$2,149,299.60. During cross-examination, Riley admitted that he had no factual basis for the projection of the hypothetical well’s production. After cross-examination, the defendants moved for the first time to exclude Riley. The trial court denied the motion. The Texas Supreme Court found that a motion to strike made after cross-examination is sufficient to preserve a no-evidence complaint on appeal and that the trial court erred in allowing Riley to testify.

NEW YORK LOWER COURT APPLIES DAUBERT EVEN THOUGH ITS STANDARD NOT FORMALLY ADOPTED BY APPELLATE COURT

In *Frankson v. Brown & Williamson Tobacco Corp.*, 2004 WL 1433068 (N.Y. Sup. Ct. June 22, 2004) (not designated for publication), Brown & Williamson sought to introduce a 1950s document known as the “Brooks Memo” in support of its “state of the art” defense. It argued that the article, which contained quotations from distinguished scientists of the time regarding the absence of a link between smoking and health issues, should be admissible. The trial court found the document was offered as expert testimony and was inadmissible because there was no evidence that the scientists’ opinions were based upon work that “had been tested, peer reviewed, and published in peer-reviewed journals.” In a footnote, the court explained its reliance upon *Daubert*:

FRANKSON: The trial court noted that the *Daubert* standard was particularly important in this case because the manufacturers were in the best position to eliminate whatever dangers might be present in their products and consequently are expected to conduct themselves like experts in their field.

This Court is aware of the fact that the *Daubert* test has not been formally embraced by our Court of Appeals, however, it believes that it is within its discretion to apply it where, as here, the document contains the rankest of hearsay and its admission was sought on the ground that it provided a kind of “negative” notice to the defendants, that is, notice of the lack of a defect in their product, excusing their vigilance in correcting any flaws.

The trial court noted that the *Daubert* standard was particularly important in this case because the manufacturers were in the best position to eliminate whatever dangers might be present in their products and consequently are expected to conduct themselves like experts in their field. “The manufacturers are thus obligated to rely upon well found information ... [and] it behooved them to establish that their information was based upon solid, peer reviewed science rather than ‘off the cuff’ surmises, though the ‘cuffs’ may have adorned some distinguished wrists.”

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Death on the High Seas Act

by Paul S. Edelman, *New York, N.Y.*

Following the *TITANIC* disaster in 1912, it became obvious to Congress that recoveries for death on the high seas required some uniformity. Prior to the passage of the Death on the High Seas Act in 1920 (DOHSA), and after many revisions, there was little consistency. Naturally, the cases then all involved ship calamities. If one ship was involved, the law of the owner's domicile was applied.¹ When two vessels from the same state were involved, the state law applied.² If the vessels involved were of different states, the law of the vessel at fault was applied.³

In one case, where any of three state death statutes were involved, the court threw up its hands.⁴ This was another reason that led to the passage of the DOHSA. Congress felt the need to join other maritime nations and have a rational law to apply on the "high seas," construed then to mean seas beyond territorial waters, then three miles.

The Act, as passed, had several distinct features. Section 1 covered accidents causing death "beyond a marine league from the shore" (i.e., three nautical miles), or 6,080 feet, one-twentieth of a degree of latitude. Section 4 allows recoveries under foreign law, but following the filing of a limitation action by the United Kingdom-owned *TITANIC*, limitation for foreign vessels was disallowed. Section 7 states that DOHSA does not affect state remedies nor apply within the "territorial limits of any state." The suit was to be brought "in admiralty" and, unlike the Jones Act for crew members, which was also passed in 1920, DOHSA allowed recovery for all dependent classes, without priority to the nearer class.

As the law has developed since 1920, loss of accumulations has been recovered⁵ in addition to recovery for pecuniary loss. Some cases have allowed recoveries both under Section 1 and Section 4, where foreign law provides remedies in addition to pecuniary loss.⁶ For instance, both France and Italy permit recovery for not only economic losses, but moral damages, including loss of companionship and society.

Another controversial area involves deaths in foreign waters. Contrary to some legislative history, cases have applied DOHSA to foreign waters since they are beyond a marine league.⁷

The more recent Supreme Court decisions are restrictive. The court denied loss of society damages in *Zicherman v. Korean Air Lines*.⁸ The court denied pain and suffering prior to death in *Dooley v. Korean Air Lines*.⁹ Dooley left open whether the General Maritime Law will allow a survival action absent a statute to the contrary.¹⁰ Punitive damages are not recoverable in DOHSA aviation cases, now by statute.

The statute expanded DOHSA in commercial aviation accidents and did so retroactively to cover the TWA 800 disaster in 1996, which occurred eight miles off the coast. The statute added loss of care, comfort and companion-

ship in March 2000, but disregarded survival damages. State law is also available under the statute for accidents within the territorial sea of 12 miles. In 1988, responding to pressure induced by the Law of the Sea Convention (signed in 1994 by President Clinton, but not ratified) and the adoption of a 12-mile territorial sea by most nations, President Reagan issued the Territorial Sea Proclamation. The Proclamation extended the U.S. territorial sea to 12 nautical miles from the base lines of the United States and in this territorial sea, the United States exercises sovereignty and jurisdiction of the airspace.

By enacting the new remedies in 2000, it rendered moot the decisions holding that the TWA 800 tragedy, which occurred within the territorial sea, was not on the high seas.¹¹ The new statute was applied to a commercial helicopter case,¹² but state law will still not apply to DOHSA cases outside the territorial sea in aviation cases.¹³

DOHSA cases can be tried in state courts, presumably under state procedure, including jury trials under the *Tallentire* Case.¹⁴ Some Warsaw-DOHSA cases have allowed jury trials in federal court.¹⁵ The issue of removing a DOHSA case from state court to avoid a jury is discussed in *Baris v. Sulpicio Lines*.¹⁶

Endnotes

1. *Southern Pacific Co. v. DeValle DaCosta*, 190 Fed. 684 (1st Cir. 1911).
2. *THE HAMILTON*, 207 U.S. 398 (1907).
3. *LABOURGOGNE*, 210 U.S. 95 (1908).
4. *THE MIDDLESEX*, 253 Fed. 142 (D.C. Ma. 1916).
5. *National Airlines, Inc. v. Stiles*, 268 F. 2d 400 (5th Cir. 1959).
6. *Carnival Cruise Lines v. Red Fox Industries, Inc.*, 813 F. Supp. 1185 (E.D. La. 1993); *Heath v. American Sail Training Assn.*, 644 F. Supp. 1459 (D. R.I. 1986); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002 (S.D. N.Y. 1966).
7. *Cormier v. Williams/Sedco/Horn*, 460 F. Supp. 1010 (E.D. La. 1978) (Peruvian river); *Sanchez v. Loffland Brothers*, 626 F. 2d 1228 (5th Cir. 1980), cert. den., (1981) (inland Venezuelan lake); see also, *Howard v. Crystal Cruises*, 41 F. 3d 527 (9th Cir. 1994), cert. den., (1995).
8. 516 U.S. 217 (1996).
9. 524 U.S. 116 (1998).
10. *In re Air Crash Off Point Mugu, California*, 145 F. Supp. 2d 1156 (N.D. Ca. 2001).
11. *In re Crash off Long Island*, (S.D. N.Y. 6/2/98), aff(d., 209 F. 3d 200 (2nd Cir. 2000).
12. *Brown v. Eurocopter S.A.*, 111 F. Supp. 2d 859 (S.D. Tx. 2000).
13. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).
14. See, *Ledet v. United Aircraft Corp.*, 10 N.Y. 2d 258 (1981).
15. *In re Korean Airlines*, 704 F. Supp. 113 (D. D.C. 1988), reversed on punitive damages, 932 F. 2d 1475 (D.C. Cir. 1991). A jury was not allowed when Tallentire was tried on remand, 800 F. 2d 1390 (1986).
16. 932 F. 2d 1540 (5th Cir. 1991).

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Recent Decisions on the Government Contractor Defense

by Dennis J. Nolan, New York, N.Y.

More than a decade and a half has passed since U.S. Supreme Court Justice Antonin Scalia penned the majority opinion for a sharply divided United States Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The case introduced the common law "government contractor" or "Boyle" defense. While the "breathhtakingly sweeping" (*Boyle* at 516) decision failed to fashion clear-cut guidelines to assist lower courts, there have been surprisingly few recent cases dealing with the defense.

PENN. EASTERN DISTRICT: FOLLOWING NAVY SPECS. NOT SHIELD FOR CONTRACTOR WITH INADEQUATE SAFETY WARNINGS

In *Chicano v. General Electric Co.*, 2004 WL 2250990 (E.D. Pa. Oct. 5, 2004), Chicano, a sheet metal mechanic at a Navy shipyard, had installed ventilation duct work aboard the aircraft carrier U.S.S. Kitty Hawk. He spent approximately 40 percent of his time in the ship's boiler rooms, which housed giant turbines that were insulated or in the process of being insulated with Johns-Manville asbestos. Chicano died of mesothelioma from asbestos exposure.

GE, the manufacturer and supplier of the turbines under a Navy contract, moved for summary judgment arguing that as a government contractor, it enjoyed immunity under the government contractor defense.

The court first determined that the relevant state tort law conflicted with the federal interests in the procurement contracts because the liability cost of products liability suits arising out of the contract will be passed on to the government. Therefore, the government contractor defense applied if GE proved: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

The court concluded that the government established an extensive set of specifications for all aspects of the carrier's design, including the components and materials to be used in the turbines. It also determined that the Navy's knowledge of asbestos dangers exceeded even GE's at the time it manufactured the turbines.

However, the court held that a question of fact existed on whether GE satisfied the second prong of the defense. While GE demonstrated its turbine conformed with the Navy's specifications, it failed to include any warnings concerning the hazards of asbestos-containing materials in supplying the turbines. The Navy's specifications required cautions, warnings and safety notices when special hazards were involved. GE argued it was required to warn only of dangers inherent in the turbines it supplied.

But, the court stated that GE's duty to warn could not be limited because it knew of the danger from asbestos-containing insulation, even though it neither manufactured nor assembled the insulation with its turbine.

The court left it to the jury to decide whether the turbines were generic components or designed for a particular type of finished product, and whether GE could reasonably foresee that its turbines would be combined with asbestos-containing insulation, which together constituted a defective product.

This important case advances the proposition that a manufacturer is independently obligated to provide warnings about products which it may not have supplied or controlled in order to satisfy the government contractor defense.

NJ APPELLATE COURT: GOVT. CONTRACTOR DEFENSE APPLIES TO NON-MILITARY CONTRACTORS

The U.S. Supreme Court has not determined whether the government contractor defense applies to non-military contractors, despite a split among federal courts. The Superior Court of New Jersey, Appellate Division, in *Silverstein v. Northrup Grumman Corp.*, 367 N.J. Supr. 361, 842 A.2d 881 (2004), recently held that it does.

The postal worker plaintiff was injured while operating a "Long Life Vehicle" (LLV) jointly manufactured by Grumman and General Motors, that rolled over after being struck by another vehicle. The plaintiff sued Grumman and GM for defective design. The trial court granted summary judgment to the defendants based on the government contractor defense and, on appeal, the Appellate Division affirmed.

The U.S. Postal Service (USPS) sought bids for a new mail delivery truck to replace a Jeep-type vehicle which it used for many years and which was involved in numerous roll-over accidents leading to extensive litigation. The USPS prepared detailed performance specifications and sought written technical proposals from the manufacturers. After examining and testing a proposal vehicle, the USPS awarded the contract incorporating defendants' technical proposal and its own specifications. As part of the contract, the USPS required another vehicle, of the same overall design and materials as the successful proposal vehicle, which it would examine and test and could accept or reject. The USPS approved defendants' test vehicle and the first LLV's were put into service. Despite several rollover accidents, the USPS purchased additional LLV's.

In deciding whether the government contractor defense applied, the Appellate Division observed that the

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Boyle court grounded its displacement of state law in the discretionary function exemption of the Federal Tort Claims Act and rejected the *Feres-Stencel* doctrine. The doctrine is a federal common-law defense which screened military government contractors from liability in product liability actions which had been limited to torts arising out of military service. The Supreme Court's rejection weighed against limiting the defense solely to military contracts. The Court also examined case law and found that the U.S. Court of Appeals for the Third Circuit held the defense applicable to nonmilitary contractors and that a majority of federal courts concurred.

The court next determined that defendants qualified for the defense. On the first prong, the court concluded that defendants established the USPS' approval of reasonably precise specifications. While the USPS did not design the LLV, defendants incorporated its performance specifications into the final design reviewed, continuously tested, and ultimately approved by the USPS. The court found this "back and forth" dialogue over the specifications, the government's extensive experience with the vehicle under the contract and knowledge of LLV rollover accidents, established government approval of the design.

The court also found that the record "fully" supported the notion that the LLV conformed to the specifications, because the LLV produced was tested and accepted by the USPS. The USPS continued to use and order the vehicles over many years.

As to the third prong, the court noted that government contractors are not required to warn of risks known to the government. The government was well aware of the LLV's potential rollover problem, and the plaintiff could point to no material circumstances that amounted to a risk known to defendants and unknown to the USPS.

The court also rejected plaintiff's estoppel argument premised both on Grumman's purchase of liability insurance, showing that the defendants and the USPS contemplated that Grumman would be liable for product liability claims, and the defendants' ultimate marketing of the vehicle to private parties. The court stated that the purchase of insurance was not dispositive. Moreover, the LLV was not available in substantially similar form on the open market before development was complete, and therefore the post-development, non-government sales did not bear upon the *Boyle* analysis.

**EASTERN DISTRICT OF N.Y. BARS VIETNAM VET
CLAIMS AGAINST "AGENT ORANGE"
MANUFACTURERS**

In the case of *In re "Agent Orange" Product Liability Litigation*, 204 F.Supp.2d 404 (E.D.N.Y. Nov. 16, 2004),

Judge Jack B. Weinstein of the Eastern District of New York, addressed claims by Vietnam veterans against the manufacturers of "Agent Orange." Judge Weinstein concluded that plaintiffs' claims were barred by the government contractor defense. The opinion is an excellent primer on the application of the *Boyle* test to design defect claims and failure to warn claims.

The court observed that a *Boyle* defense's essence is, "the Government made me do it." It stated that the contractor must first show approval of reasonably precise specifications on a design defect claim, and *Boyle* provides no guidance. Examining a litany of cases, the court articulated that the government must have been involved in the design process, which can be evidenced by government experiments and tests of a predecessor product it is developing. Essentially, the government must actively participate in the design process. The second element on a design defect claim is that the product must conform to the government's specifications.

Judge Weinstein noted *Boyle's* silence on the level of performance required for courts to deem a contractor's

The U.S. Supreme Court has not determined whether the government contractor defense applies to non-military contractors, despite a split among federal courts.

performance to be in conformity. Simply put, the product conforms "when the government 'receive[s] what it sought'... [or] approves what it receives." Thus, satisfaction of the second element required "accurate conformity" with specifications or approval of the product. The third element on design defect claims is that the supplier must warn of dangers unknown to

the government. Judge Weinstein opined that in the military context, the government quite possibly has greater knowledge of dangers than the contractor because of its knowledge of products necessary in war and because the ultimate intended use of the product might not be revealed to the contractor. The court found that no juror could fail to find the government-approved precise specifications for Agent Orange, that the product conformed to the specifications, and that the government knew more about the dangers as it intended to, and did, use Agent Orange than all the defendants combined.

On the failure to warn claims, the court, utilizing the test articulated in *Densberger v. United Technologies Corp.*, 297 F.3d 66 (2d Cir. 2002), found no genuine issue of material fact that the government controlled the product markings and forbade placement of warnings on the barrels delivered; that the defendants conformed to the government's orders in this regard; and that the government knew more about the dangers in light of the product's intended and actual use.

Judge Weinstein danced around whether *Boyle* extended to manufacturing defect claims, which the U.S. Court of Appeals for the Second Circuit has not addressed (although the Southern District of New York and District of Connecticut have held that *Boyle* does not apply to such claims). Curiously, Judge Weinstein stated that he needed

only examine whether the product conformed to the government's specifications, because if the government approved the design and production method and was aware of manufacturing defects, it would be akin to a design defect claim. Here, the product not only conformed, but the government was aware of alternative manufacturing processes that could mitigate the presence of dioxin, an unnecessary toxic substance.

Compelling policy reasons led to the court's ruling. The court found that absent the defense, the government's cost of purchasing such materials would be drastically increased because suppliers would have to include in the price the cost of almost unknowable possible liability for future tort claims.

Judge Weinstein stayed the decision to allow additional discovery should plaintiffs wish to revisit the issues relating to the government contractor defense. Subsequently, he denied plaintiff's motion for reconsideration and lifted the stay. *In re "Agent Orange" Product Liability Litigation*, 2004 WL 2600008 (E.D.N.Y. Nov. 16, 2004).

WESTERN DISTRICT OF MICHIGAN DENIES SUMMARY JUDGMENT TO ANTHRAX MANUFACTURER

In *Anmend v. Bioport, Inc.*, 322 F.Supp.2d 848 (W.D. Mi. 2004), the district court denied summary judgment to manufacturers of anthrax vaccine administered to service members. The Department of Defense had awarded a series of contracts for the production and sale of vaccine, which plaintiffs claimed caused serious personal injuries and, in some cases, death. Following the *Boyle* analysis, the court found that plaintiffs raised an issue of fact on the first prong by showing that at the time the government purchased the vaccine, it was a stock product bought pursuant to contracts devoid of specifications.

The court also found a question of fact existed as to whether the vaccine complied with the government's specifications. Further, because plaintiffs' claims focused on defendants' production of a contaminated, unsafe vaccine and that defendants misrepresented the vaccine's risks, a question of fact existed as to whether the vaccine was dangerous and, if so, whether the government was either warned of those dangers by defendants or knew of them on its own.

COURTS DENY DEFENSE FOR SERVICE CONTRACTS

In *Jama v. United States Immigration and Naturalization Service*, 334 F.Supp.2d 662 (D.N.J. 2004), undocumented aliens detained at an INS facility operated by a private security company alleged that they were tortured, beaten and mistreated by guards. The District Court for New Jersey, ruling on defendants' summary judgment motion held that the

facility was not entitled to the government contractor defense. The court noted that the defense applies when a contractor is directed by the government to do the very thing that is the subject of the claim. Assuming arguendo that the defense applied to a sufficiently precise government services contract, the court found that the record "amply" supported plaintiffs' claims that the facility failed to conform to the contract requirements in all relevant areas, including its failure to obtain security clearance for many guards.

The Southern District of New York, in *Adorno v. Correctional Services Corp.*, 312 F.Supp.2d 505 (S.D.N.Y. 2004), also denied application of the defense in the context of a service contract. Female inmates of a confinement center operated by the defendant under a contract with the federal Bureau of Prisons, alleged that they were sexually assaulted by an employee who, plaintiffs asserted, was negligently hired, retained, trained, and supervised. The facility argued it performed its functions

in accordance with specifications, policies, and procedures required by, revised, and approved by the bureau. The court, assuming without deciding that the government contractor defense is available outside of the military context, held that the facility could not establish the requirements necessary for the defense's application. While the bureau issued required specifications, the specifications that were the subject of plaintiffs' claims were not mandated by the bureau. The facility was not even immune from plaintiffs' claims that the training regimen of the facility was inadequate because it was not barred by the contract from instituting more stringent training practices.

CONN. SUPERIOR COURT QUESTIONS GOVERNMENT CONTRACTOR DEFENSE FOR PUBLIC WORKS CONTRACTORS

In *Cunningham v. Northern Insurance Co. of New York*, 2004 WL 2166846 (Conn. Super. Sept. 8, 2004), the Court denied summary judgment to a contractor performing highway reconstruction work at the location of an accident pursuant to a contract with the Connecticut Department of Transportation (DOT). The contractor alleged the defense applied because the signing pattern used to control traffic in the construction zone was erected pursuant to DOT requirements. The court found that the contract described the signing patterns as "guidelines" for the placement of signs, not absolute requirements to be followed in all cases. As such, these guidelines established "minimum" distances for sign placement, suggesting that the contract would not be violated if greater distances were used.

The court, without deciding, questioned the applicability of the government contractor defense to state public

JAMA: The court noted that the defense applies when a contractor is directed by the government to do the very thing that is the subject of the claim.

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works contractors, especially in cases involving claimed compliance with safety requirements set forth in the contract. The court articulated three reasons. First, the *Boyle* defense applies only to design defect claims against government contractors who supply specially designed military equipment to the United States. Second, the limited rationale for the defense is that the discretionary decisions of federal policy makers on sensitive military procurement issues not second-guessed. Finally, the defense is available only to products made in accordance with quantitative specifications detailing particular requirements to be met in manufacturing military hardware, not to products compliant with qualitative remarks, goals and safety guidelines.

COURTS HOLDS THAT GOVERNMENT CONTRACTOR DEFENSE CREATES FEDERAL JURISDICTION

Several recent cases addressed the interplay between the government contractor defense and federal officer jurisdiction.

In *Fink v. Todd Shipyards*, 2004 WL 856734 (E.D. La. Apr. 20, 2004), a Navy shipyard worker alleged damages from exposure to asbestos contained within boilers and turbines. GE manufactured and supplied turbines for Navy ships under contracts between GE and the shipyards and/or the Navy. GE removed the case under "federal officer" jurisdiction pursuant to 28 U.S.C. § 1442 (a)(1). To qualify as a federal officer, GE had to demonstrate it acted under the direction of a federal officer, to raise a federal defense to the claims, and demonstrate a causal nexus between the claims and the acts performed as a federal officer. The court found that plaintiff met the first and third elements and then considered whether GE presented a federal defense. Noting

that a party must only prove that the defense presents a "colorable" applicability to plaintiff's claims, not prove it can sustain the defense, the court found that the decisions regarding the design and specifications of the turbines were considered by a government officer. This constituted a governmental exercise of discretionary function, and thus defendant had satisfied its burden.

Similarly, in the case *In re: Welding Rod Products Liability Litigation*, 2004 WL 1179454 (N.D. Ohio May 21, 2004), the defendant welding rod manufacturers asserted that federal officer removal was appropriate because they acted as military contractors when they provided the product to the plaintiffs and they acted under federal direction during the manufacturing process. The court stated that if the government demanded or approved reasonably precise specifications (or, on the failure to warn claims, warnings) for the welding rods, and the manufacturer conformed to these specifications or warnings, then the defendants were acting under a federal officer for jurisdictional purposes.

But the court noted that this was not a case where the basis for assertion of the defense was merely compliance with a regulation or that the contracts and specifications were silent on the central liability issues. The court found the government contractor defense was colorable given defendants' affidavits and documents, which allegedly showed the Navy's tight control over almost every aspect of the welding rods. *See also Miles, et al. v. Sewerage & Water Board of New Orleans*, 2004 WL 1794527 (E.D. La. Aug. 10, 2004) (motion to remand denied where defendant raised a "colorable" government contractor defense because it acted under the direct supervision and control of the U. S. Army Corps of Engineers).

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