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FEDERAL PRACTICE & PROCEDURE

DEVELOPMENTS IN FEDERAL PRACTICE & PROCEDURE

A. *Extending Immunity from Strict Liability for Design Defects*

In *McKay v. Rockwell International Corporation*,[1] the Ninth Circuit held that only under certain limited circumstances will a manufacturer of military equipment be held strictly liable for injuries to military personal on active duty caused by design defects in the equipment.[2] The court further held that a manufacturer is not liable for breach of a duty to test military equipment or to withdraw the equipment after continued use shows a pattern of injuries.[3]

Rockwell International Corporation (Rockwell) contracted with the Navy to design a supersonic reconnaissance aircraft, designated the RA-5C. The RA-5C was equipped with an ejection system that operated by means of a rocket thrust.[4] A parachute opens after ejection enabling the crewmen to descend safely to the ground.[5] Two navy pilots were killed while ejecting from RA-5C aircraft during unrelated training missions.[6] Autopsies indicated that their deaths probably occurred during ejection from the aircraft.[7] The widows of the two pilots killed in the

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1. 704 F.2d 444 (9th Cir. 1983) (per Sneed, J.; the other panel members were Hardy, D.J., sitting by designation and Alarcon, H., dissenting), *cert. denied*, 104 S. Ct. 711 (1984).

2. *Id.* at 451.

3. *Id.* at 453. The court did not relieve suppliers of military equipment of liability for defects in the manufacture of equipment. *Id.* at 451.

4. The aircraft were equipped with the HS-1A escape system, which was a modified version of an earlier escape system in use in the RA-5C aircraft. *Id.* at 446.

5. *Id.*

6. Navy Lieutenant Frank Carson was killed during a daytime mission on March 5, 1974. Navy Lieutenant Commander Malcolm McKay was killed during a night training mission on August 13, 1974. *Id.*

7. *Id.*

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crashes sued Rockwell, the designer and manufacturer of the RA-5C aircraft and its ejection system.[8]

The court began its analysis with an examination of strict liability under section 402A of the Restatement (Second) of Torts.[9] The majority concluded that in light of the *Feres - Stencel* doctrine[10] (under which the United States is immune from liability for injuries to members of the armed services) and the government contractor rule,[11] a supplier of military equipment[12] is immune from strict liability under section 402A for a

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8. The cases were consolidated for trial and the district court held that Rockwell was liable for the pilots' deaths because of defects in the aircraft's ejection system. Both the widows and Rockwell appealed. *Id.* at 447. The widows appealed the measure and amount of damages in their respective awards. Rockwell appealed, contending that military suppliers should not be liable to servicemen for injuries caused by defective military equipment. *Id.*

9. Restatement (Second) of Torts § 402A (1965) states:

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

10. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that the United States is not subject to liability under the Federal Torts Claims Act, 28 U.S.C. § 2674 (1976 & Supp. 1981) to a member of the armed services who is injured while on active duty. The scope of the United States' immunity was expanded in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). In that case, the Supreme Court held that the Federal Tort Claims Act precludes the government from indemnifying a third party for damages paid by the third party to a member of the armed services injured during military service.

11. The government contractor's rule was first set forth in Yearsley v. W. A. Ross Construction Co., 309 U.S. 18 (1940).The rule provides a defense to government contractors for acts done by the contractor in compliance with government specifications during performance of a contract with the United States. The defense has been broadened to cover design defects in military equipment. *See* Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (1980), Sanner v. Sanner, 144 N.J. Super. 1, 364 A.2d 43 (1976) and In Re Agent Orange Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y., 1982).

12. The court recognized that "military equipment" is a somewhat imprecise term and did not attempt to draw lines within which the term can be defined. The court did state, however, that the line lies somewhere between an ordinary consumer product purchased by the armed services and the ejection system of a RA-5C aircraft. 704 F.2d at

design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the government.[13]

The majority expressed concern that recognition of liability for military suppliers of defectively designed equipment would thrust the judiciary into military decision making. Such a position, the majority stated, would raise serious concerns about separation of powers and would have a deleterious effect on military discipline.[14]

The majority specifically held that the policy reasons for imposing strict liability under Restatement section 402A did not exist in the present case.[15]

The majority next considered whether liability may be premised under section 388[16] or section 399[17] of the Restatement

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451.

13. *Id.* The cases were remanded to the district court to determine whether the government set or approved reasonably detailed specifications for the ejection system. *Id.* at 453.

14. *Id.* at 449.

15. *Id.* at 451. The principal reasons for imposing strict liability on an accident producing activity have been identified as enterprise liability (when a product's price reflects the cost of injuries caused by use of the product, the price of the product will rise), market deterrence (to deter manufacturers from marketing unsafe products by encouraging the use of cost-justified safety features), compensation (to provide for the victims of accidents caused by defective products) and implied representation (by marketing a product, a supplier makes an implied representation that the product, if used as intended, will not be unreasonably dangerous and will meet the safety standard expected of similar products). *Id.*

16. Restatement (Second) of Torts § 388 (1966) states:

> Chattle Known to be Dangerous for Intended Use.
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is

(Second) of Torts. While stating that the Ninth Circuit has not adopted sections 388 and 399 as a basis for liability in admiralty,[18] the majority noted that even if it were adopted, the requirements for liability had been not met in these cases.[19]

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likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

17. Restatement (Second) of Torts § 339 (1966) states:

> Chattel Unlikely to be Made Safe for Use.
>
> One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

18. The district court determined that it had admiralty jurisdiction over these actions pursuant to the Death on the High Seas Act, 46 U.S.C. §§ 761-767 (1976), which reads as follows:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State. . .the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

The Act has been held applicable for death resulting from the crash of an aircraft on the high seas. King v. Pan American World Airways, 166 F.Supp. 136 (D.C. Cal. 1958), *aff'd*, 270 F.2d 355 (9th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960).

The court recognized that it had applied the principles of § 402A of the Restatement to admiralty. 704 F.2d at 447. However, the Ninth Circuit had not previously adopted §§ 388 and 399 of the Restatement as a basis for liability in admiralty. *Id.* at 453.

19. *Id.* The majority concluded that Rockwell had no duty under § 388 to warn the Navy of the system's dangerous condition because the Navy was engaged in a continuous process of evaluating the ejection system and was aware of injuries incurred while using the system. *Id.* The majority also found it questionable whether section 388 imposes a duty on a supplier to test a product for latent defects and stated that even if such a duty were created, there was no evidence that a breach of that duty proximately caused the deaths of the two aircraft pilots. *Id.* at 454. The majority also concluded that § 399 did not impose liability. *Id.* at 455. The majority observed that § 399 presumes that use of the equipment was improper and that the equipment's users were ignorant of its dangerous character. The majority refused to make such presumptions. *Id.* In addition, § 399 applies only when the equipment is not "reasonably safe." The Navy study conducted after the accidents at issue found the equipment reasonably safe and the majority re-

The majority recognized that military personnel should be assured that their survivors receive compensation, but declared that it was not for the court to increase that compensation through imposition of strict liability upon the suppliers of military equipment.[20]

Judge Alarcon, dissenting, disagreed with the majority's conclusion that the *Feres - Stencel* doctrine and the government contractor's rule would protect Rockwell from liability.[21] The dissent first noted that the *Feres - Stencel* doctrine is concerned exclusively with government liability and that neither *Feres* nor *Stencel* addressed, limited or precluded contractor liability to military personnel injured while using defectively designed and unsafe equipment.[22] The dissent contended that the opinions in *Stencel* and *In Re Agent Orange Product Liability Litigation*[23] impliedly recognized a cause of action against a military contractor.[24] It also challenged the majority's conclusion that indemnification will significantly increase the costs of military equipment. The dissent noted that the free market system could be relied on to insure that such increases will be minimized.[25]

The dissent reasoned that the government contractor defense, as recognized by the majority, would provide immunity to any contractor who secures the government's approval of its designs from liability for design defect.[26] The dissent noted that the majority ignored the element of compulsion,[27] which the

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fused to interfere in the Navy's evaluation of its weapons system. *Id.*

20. *Id.* The majority's holdings made it unnecessary for the court to consider the appeals by the widows regarding damages and interest. *Id.* at 455.

21. *Id.* at 456.

22. *Id.* In *Feres*, a serviceman's widow sued under the Federal Tort Claims Act alleging negligence by the deceased's commanding officer. 340 U.S. at 135. The Supreme Court concluded that the claim was outside the waiver of immunity contemplated by the Act. *Id.* at 146. In *Stencel*, a serviceman brought suit against both the supplier of an ejection seat in which he was injured and the United States. The supplier cross-claimed against the government for indemnification. 431 U.S. at 666. The Supreme Court, in granting the government's motion for dismissal and the cross-claim, agreed that *Feres* limited the government's liability. *Id.* at 673.

23. 506 F. Supp. 762 (E.D.N.Y., 1980) *reh'g denied*, 534 F. Supp. 1046 (E.D.N.Y., 1982).

24. 431 U.S. at 674; 506 F. Supp. at 774.

25. 704 F.2d at 458.

26. *Id.*

27. The element of complusion requires that the contractor be required by the government to do what was charged against it as negligence. Merritt, Chapman & Scott v.

Ninth Circuit had earlier held to be an "elementary" requirement of the government contractor defense.[28] The dissent also criticized the majority's treatment of *O'Keefe v. Boeing Company*[29] and *Boeing Airplane Company v. Brown.*[30] In *Brown*, the Ninth Circuit recognized that inspection and approval of design specifications and plans by the government constitute neither the direction or complusion necessary for the defense.[31] The dissent believed that the majority improperly dismissed *Brown* as not addressing the government contractor defense.[32] The dissent found *Brown* and *O'Keefe* to be "nearly identical" to the case herein and contended that they should be controlling.[33]

The dissent further noted that the majority's concern regarding the possible adverse effects contractor liability would have on military discipline creates no basis under *Feres* for barring such a suit.[34]

The dissent warned that the majority's extension of the contractor defense would only result in more unsafe and unreliable military equipment and would unnecessarily increase the dangers faced by military personnel.[35]

Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961).

28. 704 F.2d at 458.

29. 335 F.Supp. 1104 (S.D.N.Y. 1971).

30. 291 F.2d 310 (9th Cir. 1961).

31. *Id.* at 317. The *O'Keefe* court, which followed the Ninth Circuit's decision in *Brown*, stated that where responsibility for design rests with the government, the supplier's duty as a manufacturer is not altered where there is no showing that the supplier was totally oblivious of or aloof from the genesis of the design specifications. 335 F. Supp. at 1124.

32. 704 F.2d at 460.

33. *Id.*

34. *Id.*

35. 704 F.2d at 461. The dissent also addressed the appeals of the two widows regarding damages and prejudgment interest. Relying on Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962), the dissent would hold that the award should not be reduced by the amount of benefits received by the widows from the Veteran's Administration. 704 F.2d at 463. The dissent also would require the trial judge on remand to either award prejudgment interest or articulate his or her reasons for not doing so and to determine whether there was a basis for awarding damages for loss of services. *Id.*