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Pennsylvania Supreme Court Directs a New Approach to Product Liability Claims

The Pennsylvania Supreme Court recently dramatically altered the approach of Pennsylvania state courts to product liability litigation. In *Tincher v Omega Flex, Inc.*, a non-aviation case, the Court rejected and overruled more than three decades of precedent and adopted a "composite" liability standard incorporating negligence principles. This new standard allows a plaintiff to proceed under either a "consumer expectations" or a "risk/utility" theory of product defect. So holding, the Court rejected the negligence/strict liability dichotomy that had become the bedrock of Pennsylvania products liability law and instead found that "the theory of strict liability as it evolved overlaps in effect with the theories of negligence and breach of warranty."

Under the consumer expectations test, a product is not "defective if the ordinary consumer would reasonably anticipate and appreciate the dangerous condition of the product and the attendant risk" of which a plaintiff is complaining. Under the risk/utility test, a product is defective if a reasonable person "would conclude that the probability and seriousness of harm caused by the product outweigh the burdens and or costs of taking precautions." As a practical matter, this decision creates a heavily fact-based standard of liability that has opened the door to introduction at trial of previously excluded negligence evidence. The decision has left many unanswered questions (such as what a plaintiff must prove to satisfy these two tests, the applicability of negligence based defenses such as state-of-the-art and comparative negligence, the impact of the new analysis on strict liability failure to warn claims, and the appropriate instructions now to be provided to juries) that will be developed and answered as trial and appellate courts are asked to implement the Supreme Court's new guidance. ***Tincher v Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).**

Third Circuit to Address Effect of Type Certification on Product Liability Claims and FAA Preemption's Applicability to General Aviation Product Liability Claims

After nearly seven years, and a tortured history in the Middle District of Pennsylvania, two issues in Sikkelee v. Precision Airmotive Corp. are before the Third Circuit Court of Appeals: 1) Is an FAA grant of a type certificate conclusive evidence that the design of the certificated part met the standard of care?; and 2) Does federal preemption as outlined in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), apply in a general aviation products liability context? In the decision from which this appeal arises, the district court, somewhat surprisingly, held that the issuance of a type certificate for an engine was sufficient proof of compliance with federal design regulations and, despite acknowledgement that *Abdullah*'s applicability in this context leaves gaps in the regulatory scheme, did not disturb its earlier decision to apply *Abdullah* in the general aviation context.

On appeal, plaintiff-appellant is arguing that the district court's holding regarding the type certificate amounts to blanket immunity for the certificate holder and that Abdullah's preemption holding, which is that the federal government has preempted the field of aviation safety, should be read narrowly to pertain only to commercial operations. Plaintiff-appellee Lycoming argues in opposition that 1) allowing a jury to find a violation of the standards of care embodied in the federal regulations where the FAA has previously issued a type certificate confirming compliance with those regulations would circumvent the standards themselves; and 2) the design and certification of aircraft components falls squarely within the entire field of air safety as defined in *Abdullah*. Plaintiff-appellant may file a reply brief by April 13, after which oral argument will be scheduled. ***Sikkelee v. Precision Airmotive Corp.*, No. 4:07-cv-00886, 2014 U.S. Dist. LEXIS 126204 (M.D. Pa. Sept.10, 2014), appeal pending *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir.).**

Community Spotlight

Ginger was a one-and-a-half-year-old Briard abandoned in rural North Carolina that was showing signs of aggressive behavior, which led to a decision by animal control to put her down. A Greensboro, North Carolina shelter intervened to save her and, while bathing and examining her, the shelter's vet discovered she wasn't aggressive by nature, but pregnant. Funding ran out, and despite the vet's finding, Ginger needed to find a home quickly or she would be put down.

Ginger, Bob's son Connor, and Bob

Luckily for Ginger, Pilots N Paws stepped in and found her a home in West Virginia. With the help of volunteer pilot and Aviation Group chair Bob Williams, Ginger was safely transported to her new home.

No Montreal Convention Accident Where Passenger Slipped on Trash in Aisle

In *Vanderwall v. United Airlines, Inc.*, a passenger brought common law negligence and Montreal Convention claims to recover for a torn ACL sustained when she slipped on a piece of plastic wrap in the aisle as she returned from the lavatory during a flight from Houston, Texas to London, England. The cabin lighting was dimmed to allow for sleeping at the time of the incident. Plaintiff testified that she did not see the wrapper when she left her seat to use the lavatory, and that she had substantial experience flying on commercial flights. The court granted United's motion for summary judgment, holding that the incident did not constitute a Montreal Convention "accident" because it was not "unexpected or unusual" for trash to be present on the floor of an aircraft during a long international flight. The record showed that there was not an exorbitant amount of litter on the floor, and that the flight attendants complied with airline and industry standards for walking the cabin to collect trash. The court dismissed the negligence claims as preempted by the Convention. ***Vanderwall v. United Airlines, Inc.*, 2014 U.S. Dist. LEXIS 8494 (S.D. Fla. Jan. 26, 2015).**

No Recovery under Montreal Convention for Failure to Provide Seat with Extended Leg Room or Give Safety Announcements

The *pro se* plaintiff commenced litigation to recover for emotional injuries, alleging breach of contract and "discrimination under a kaleidoscope of federal statutes" arising out of Turkish Airlines' failure to provide him with an exit row seat or a seat with extra leg room, or to provide any information regarding safety during the flight or illuminate the seat belt sign prior to landing. The court found as a preliminary matter that the Montreal Convention applied to and preempted both the breach of contract and federal discrimination claims. The court then granted Turkish Airlines' motion to dismiss for failure to state a claim under the Montreal Convention because the plaintiff did not allege an Article 17 "accident," as the failure to assign the plaintiff a new seat with more leg room was neither unexpected nor unusual, or a "bodily injury," as he allegedly suffered only emotional injury. ***Naqvi v. Turkish Airlines, Inc.*, 2015 U.S. Dist. LEXIS 21239 (D. D.C. Feb. 23, 2015).**

Claims Arising Out Of Misdelivery of Marijuana Preempted

The plaintiff asserted claims for invasion of privacy, negligent infliction of emotional distress and negligence against FedEx arising out of a package of marijuana that was mislabeled by FedEx and delivered to her. Immediately upon receipt of the package, the plaintiff contacted the police, who expressed concern for the plaintiff and her child, and requested that FedEx refrain from disclosing the actual delivery address. Although the plaintiff and her daughter were not injured, they alleged fear and anxiety as a result of the three men coming to the house to retrieve the misdelivered package.

The First Circuit Court of Appeals affirmed the district court's dismissal of the plaintiff's claims on the ground that they were preempted by the Airline Deregulation Act. The First Circuit applied a two-part inquiry focused on 1) whether the plaintiff's claim was predicated on a "law, regulation or other provision having the force and effect of law," and 2) whether the claim was sufficiently "related to" FedEx's prices, routes or services to warrant preemption, and found that these claims arising out of FedEx's mislabeling and misdelivery of a package satisfied the inquiry. In so holding, the First Circuit held that it was irrelevant that the plaintiff was not the customer for whom the service was undertaken. ***Tobin v. Federal Express Corp.*, 775 F.3d 448 (1st Cir. 2014).**

Comment Period Open for FAA's Proposed UAS Regulations

On February 23, 2015, the FAA issued a Notice of Proposed Rulemaking for the regulation of commercial operation of small Unmanned Aerial Systems (UAS). UAS advocates breathed a sigh of relief, as the proposed regulations are not as onerous as had been feared, particularly insofar as they require neither airworthiness certification, nor traditional pilot's licenses and medical certificates. They do, among other things, require registration of the UAS and a newly created operator's certificate that focuses on aeronautical knowledge, and restrict operations to daylight, line-of-sight, 100 mph or less and an altitude of 500 feet or less above ground level.

About halfway through the sixty-day public comment period (which ends April 24, 2015), the docket presently contains well in excess of 1,000 comments by commercial and private operators of manned aircraft, UAS operators and enthusiasts, educators, and concerned individuals without any apparent aviation background. The comments largely favor the proposed regulations, with much of the debate focused on the propriety of the daylight, line-of-sight and altitude restrictions. Comments from non-aviation professionals express concerns about enforcement, liability and insurance, and privacy – *including a threat to shoot UAS down with a 12-guage shotgun!* Absent at this time are comments from certain large aviation stakeholders, such as the Air Line Pilots Association, which has been a prolific commenter on applications for Certificates of Authority to operate UAS, pursuant to Section 333 of the FAA Modernization Act. Such groups may be waiting until the end of the comment period to have the last word. **80 FR 9544 (February 23, 2015), Docket ID FAA-2015-0150.**

Speaking Engagements

- Denny Shupe will present at the 8th Annual McGill Conference on International Aviation Liability and Insurance, to be held April 17-18, 2015, in Montreal, Canada. He is part of a panel exploring "Flying Over Conflict Zones: The Legacy of Malaysian Airlines Flight 17" on Friday, April 17.

- Bob Williams, Barry Alexander, and Denny Shupe are speakers at the 2015 Aviation Insurance Association Conference on May 2 in Colorado Springs, Colorado. Bob's presentation will focus on state-by-state variation in insurance law, and how it can impact aviation claims. Denny and Barry will be discussing the lessons to be learned by aviation insurers and practitioners in the wake of the recent dispute over $750 million in additional insurance coverage between BP and Transocean/its insurers, and the Texas Supreme Court's ruling.

- Bob Williams is a panelist at ACI's 7th National Forum on Defending and Managing Aviation Claims & Litigation, which runs June 1-2, 2015 in New York, New York. He will examine "UAS (Unmanned Aerial System): Material Developments with FAA Regulations, Insurance Coverage Issues with Use of UAS, User Capabilities/Products on the Market, and Understanding the Nuances with the Certification Process for UAS Commercial Usage" on Monday, June 1.

- Jon Stern will be a panelist at the ABA's National Institute on Aviation Litigation in New York on June 4, 2015. His panel will address helicopter safety and litigation of helicopter accidents.

- Denny Shupe discussed "Duty stations! Crisis control, insurance and liability" at the International Air Transport Association (IATA) Legal Symposium in Seoul, South Korea on Friday, February 27. The conference took place February 25-27.

- Barry Alexander spoke at the 2015 Embry-Riddle Aviation Law and Insurance Symposium on January 29, 2015. He discussed "'Let Me Be Clear: BP is Responsible For This Leak; BP Will Be Paying the Bill' - Why the President Spoke Too Soon and Aviation Insurers Should be Paying Attention!" The Syposium was held January 28-30 in Orlando, Florida.

FAA Issues Final Rule on Safety Management Systems

On March 9, 2015, the FAA's Final Rule requiring that all certificate holders under Part 121 of the Code of Federal Regulations (U.S. domestic passenger and cargo operators) implement Safety Management Systems ("SMS") became effective. Under this rule, carriers must implement SMS by 2018. As the FAA itself has stated, "SMS is the formal, top-down, organization-wide approach to managing safety risk and assuring the effectiveness of safety risk controls." According to the FAA, SMS promotes a safety culture to improve the airline's overall performance, using four key components—Safety Policy, Safety Risk Management, Safety Assurance and Safety Promotion. The FAA estimates that the rule will cost airlines $224.3 million over 10 years. In addition to that cost, carriers have rightly voiced concerns as to whether the data collected as part of SMS could be protected from disclosure pursuant to Freedom of Information Act requests or civil discovery. Time will tell if/how SMS, and the extra data collected, will impact airline liability for passenger incidents/accidents. **80 FR 1308 (January 8, 2015) , Docket ID FAA-2009-0671.**

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