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Torts--Airline's Inspection during Aircraft Manfacturing Process--Contributory Negligence

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TORTS — AIRLINE'S INSPECTION DURING AIRCRAFT MANFACTURING PROCESS — CONTRIBUTORY NEGLIGENCE

Plaintiff airline commenced an action in the District Court of the Northern District of Ohio, Eastern Division, against an aircraft manufacturer for negligence in design and manufacture of certain airplanes. It was alleged that the wing splice was susceptible to metal fatigue, resulting in complete destruction of the aircraft and the death of thirty-three passengers and three crew members. No questions of warranty are involved, since the purchase agreement, in effect, limited the liability of the manufacturer to that imposed upon it by law for negligence.

In the trial court, the defendant denied that it had failed to exercise ordinary care, and contended alternatively that the airline had assumed the risk of danger, or was guilty of contributory negligence. Evidence was introduced to show that the airline had several engineers, inspectors, pilots and other personnel present in its plant throughout the entire manufacturing process, and that these employees had full opportunity to see that the airplanes conformed to established specifications.

On the basis of this evidence, the district judge instructed the jury that it could consider whether or not the airline had assumed the risk of danger resulting from the defective wing joint, or was contributorily negligent in this respect. From a general verdict in favor of the manufacturer, as to each claim of damages, the airline appealed. On review, the Court of Appeals, Sixth Circuit, reversed the judgment entered by the district court and remanded the case for new trial, holding that the evidence presented was insufficient to warrant an instruction as to either assumption of risk or contributory negligence.[1]

As to assumption of risk, the court found that there was a complete lack of evidence that the airline had knowledge or appreciation of any risk of danger associated with the design or manufacture of the faulty wing splices. Also, there was no evidence that the danger was so obvious to airline personnel that they must be held to have appreciated that danger.

While conceding that the airline was not negligent with respect to maintenance of the airplanes after they were delivered, the manufacturer argued that since the airline did, in fact, undertake an independent inspection prior to the time of completion and delivery, it was guilty of contributory negligence if dangers existed which could have been discovered by the exercise of ordinary care. Noting that the manufacturer was unable to cite authority for this proposition, the court refused to apply such a theory of contributory negligence, in light of the undisputed facts of the case. The fact that the inspections were made in no way increased the

[1] Northwest Airlines v. Martin Co., 224 F.2d 120 (6th Cir. 1955).

risk of harm, particularly since there was no evidence that the aircraft manufacturer acted, or refrained from acting, in reliance upon the airline's inspection. That being so, the court was unable to say that these inspections contributed in any way to the damages which were sustained by the airline, and refused to penalize it for attempting to conform to a higher standard of care than that imposed upon it by law.

It is well settled that a manufacturer of chattels owes a legal duty to exercise reasonable care to inspect its product to discover defects, and in preparing the chattels for sale.[2] Furthermore, it is clear that one need not anticipate the negligence of another until he becomes aware of such negligence,[3] and that it is not contributory negligence to fail to look out for danger when there is no reason to apprehend any.[4] While thus recognizing that the airline was under no legal duty to make a detailed examination of the airplanes or defendant's manufacturing process, the court was faced with a situation where such an inspection had actually been made.

In its determination of the legal effect of such an inspection, with regard to contributory negligence on the part of the plaintiff, the court might well have reached its decision in terms of "shifting the risk." Had the airline simply relied on the manufacturer to produce a safe airplane, the risk of danger resulting from the defective wing joint would unquestionably have rested upon the manufacturer. The court was clearly unwilling to allow the defendant to shift this risk of harm, unless there was evidence of reliance by the manufacturer upon the inspection with respect to the airplanes generally or the king joint in particular. Where one undertakes an act which he has no duty to perform, and another reasonably relies upon that undertaking, the act must ordinarily be performed with ordinary care.[5]

In the leading case of *American Airways v. Ford Motor Co.*,[6] it is interesting to note that liability was found on grounds of breach of contract, where the defendant had agreed to repair propellers on the plaintiff's airplanes, and failed to exercise ordinary care to discover defects while doing so. Had the airline in the instant case based its action upon the purchase

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[2] Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913); Harper v. Bullock, 198 N.C. 448, 152 S.E. 405 (1930); RESTATEMENT, TORTS § 402 (1934).

[3] Baldridge v. Wright Gas Co., 154 Ohio St. 452, 96 N.E.2d 300 (1951).

[4] Standard Oil Co. v. Burleson, 117 F.2d 412 (5th Cir. 1941); S.S. Kresge v. Holland, 158 F.2d 495 (6th Cir. 1946); Phillips Petroleum Co. v. Hooper, 164 F.2d 743 (5th Cir. 1948).

[5] See Conowingo Power Co. v. Maryland, 120 F.2d 870, 874 (4th Cir. 1941); *cf.* RESTATEMENT, TORTS § 325 (1934).

[6] 10 N.Y.S.2d 816, 170 Misc. 721 (Sup. Ct. 1939), *aff'd mem.*, 258 App. Div. 957, 17 N.Y.S.2d 998 (1st Dep't 1940), *affirmed without opinion* 284 N.Y. 807, 31 N.E.2d 925 (1940).

agreement itself, rather than upon the negligence of the manufacturer, the question of contributory negligence might well have been avoided. The availability of such an approach would seem to depend, in the final analysis, upon the express terms of the contract in dispute.

Aside from the immediate impact of this case upon the rights and liabilities of the parties, which is by no means insignificant, the decision would appear to define more clearly the function of the court within the framework of such a factual controversy, and permit less speculation by the jury. In negligence cases, a primary function of the court involves the "determination of the preliminary question whether the evidence as to the facts which have occurred makes an issue upon which reasonable men may differ."[7] To warrant a finding of contributory negligence from the facts of the instant case, the trial judge must now find evidence not only as to the existence and scope of the airline's inspection, but also evidence that such inspection in some way increased the risk of harm, in the form of reliance thereon by the manufacturer.

Of perhaps even greater significance, however, is the impact of the decision upon the airline and aircraft manufacturing industries, and the legal relationships between them. It appears to be a common practice for airline personnel to be present during the manufacturing process of an airplane being purchased, to familiarize themselves with the technical characteristics and performance of the new aircraft, and to ascertain whether such airplanes conform to established specifications and safety standards. In so doing, the airline seemingly is acting not only in its own interests, but with regard to those of its passengers and the general public as well. If a manufacturer in the purchase agreement has limited his liability for defects in the aircraft to negligence, as seems to be the prevailing tendency, the airline would have little choice but to forego this inspection, should such inspection itself warrant a jury's finding of contributory negligence. It would seem that the court properly placed great weight upon these policy considerations, and the interest of the public affected thereby, in reaching its conclusion in the present controversy.

While the court places considerable emphasis upon the complex and intricate nature of the aircraft manufacturing process, its holding is nevertheless based upon familiar principles of negligence. As a result, it is conceivable that the concept of contributory negligence which emerges might well find further application in other cases involving such a buyer-seller relationship. In any event, the decision would appear to have a vital and far-reaching impact upon existing aviation law, with regard to the legal effect of an airline's inspection during an aircraft manufacturing process.

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[7] PROSSER, TORTS 191 (2d ed. 1955).