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Strict Liability and the Military Plaintiff

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STRICT LIABILITY AND THE MILITARY PLAINTIFF

The development of strict liability has destroyed the "citadel of privity,"[1] has nullified the doctrine of *caveat emptor*, and has created new protection for the consumer.[2] The question now may be asked whether this concept can be used to establish potent civil relief for another segment of the population—the soldier.

To date there is no definitive answer. An indication of what this answer may be, however, can be gleaned from several cases involving servicemen injured or killed by defective military products. These cases point out numerous defenses which are formidable obstacles to recovery. The defenses determine whether strict liability will be an effective remedy for the serviceman, or merely a toothless tiger.

Montgomery v. Goodyear Tire & Rubber Company,[3] provides a basis for an analysis of the attempted expansion of strict liability to encompass military products. In *Montgomery* the United States Navy airship Reliance, a two-engined dirigible, crashed into the ocean 16 miles off the coast of New Jersey, killing most of the servicemen aboard.[4] The personal representatives of eleven of the deceased servicemen brought actions against three non-governmental defendants for wrongful death under the Death on the High Seas Act.[5] They alleged that the manufacturer of the airship and the manufacturer of the fabric used for the airship's envelope were negligent because the seams of the balloon were

1. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

2. The liability of those who deal in products, which when defectively made cause injury or death has been extensively discussed elsewhere. For this definition of products liability, see McCune, *Maritime Products Liability*, 18 HASTINGS L.J. 831, 832 (1967). *See also* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Three different theories have been used to establish this liability. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (strict liability); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (warranty); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (negligence).

3. 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd sub nom.* Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777 (2d Cir. 1968), *cert. denied*, 393 U.S. 841 (1968).

4. Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777, 778 (2d Cir. 1968); Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 449 (S.D.N.Y. 1964). Other products liability cases involving servicemen include: Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969); Ulmer v. Hartford Accident & Indem. Co., 380 F.2d 549 (5th Cir. 1967); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966).

5. Whenever the death of a person is caused by a wrongful act, neglect, or default occurring on the high seas, the decedent's personal representative may maintain a suit for pecuniary loss against the vessel, person, or corporation which would have been liable if death had not ensued. 46 U.S.C. § 761 (1964).

improperly constructed. They also contended that the manufacturer of the dirigible's warning system was negligent because the warning bell did not sound when the balloon began to lose air. In addition to negligence they alleged a breach of the implied warranties of fitness and merchantability.[6] Finally they contended that the defendants were liable for their decedents' conscious pain and suffering under the state survival statute.[7]

In their motion for summary judgment the defendants answered that admiralty did not recognize an action for personal injuries and death against a supplier based on breach of implied warranty. Even if the action were recognized, they contended, privity of contract was a necessary requisite.[8] There had been much disagreement on these issues in the federal district courts.[9] The court appeared to rely on a recent Supreme Court decision which held that an implied warranty of workmanlike service based on a contract between a shipowner and a stevedore included liability without fault.[10]

Thus, the district court in *Montgomery* concluded that a cause of action for a breach of implied warranty of fitness and merchantability would lie in admiralty, because the theory of this warranty is similar to that of the warranty of workmanlike service—both attempt to allocate losses to the enterprise most capable of minimizing the risk.[11] Further, the court held that privity of contract was not required in an action for breach of implied warranty.[12]

The manufacturer of the warning system contended that the producer of a component part could not be held liable for a breach of implied warranty. The court agreed, relying upon *Goldberg v. Kollsman Instrument Corporation.*[13] In *Goldberg* the New York Court of Appeals had allowed a wrongful death action based on breach of warranty against the manufacturer of an airplane. It did not, however, permit the plaintiff's action against the manufacturer of the airplane's altimeter, holding that the plaintiff had an adequate remedy against the

6. These theories were used to assess liability in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 371, 161 A.2d 69, 76 (1960). See note 2 *supra.*

7. 231 F. Supp. at 449.

8. *Id.* at 452.

9. *Compare* Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962), *with* Middleton v. United Aircraft Corp., 204 F. Supp. 856 (S.D.N.Y. 1960).

10. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964). The unseaworthiness doctrine, a form of liability without fault, has also allowed recovery without proof of negligence. The shipowner's duty to a seaman to furnish a seaworthy ship is absolute, neither predicated on negligence nor satisfied by the exercise of due care. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

11. 231 F. Supp. at 454.

12. *Id.* at 455.

13. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

airplane manufacturer. Although noting that a federal court sitting in admiralty is not bound by a state court's decision, the court in *Montgomery* stated that "the similarity of facts in *Kollsman* and in the case at bar is so overwhelming that the reasoning of the case should be applied here."[14]

Since the Death on the High Seas Act only permits recovery for pecuniary loss,[15] the manufacturers contended that the plaintiffs could not recover for the decedent's conscious pain and suffering. This argument was rejected, however, since federal courts sitting in admiralty had previously allowed state survival actions for pain and suffering under the act.[16]

With the exception of the action for implied warranty against the manufacturer of the warning system, the defendants' motion for summary judgment was denied in all respects. Although it appears that *Montgomery* may significantly expand the liability of a manufacturer of military products, allowing recovery without proving fault, the subsequent disposition of the case weakens the force of the decision.

The claims against both the manufacturer of the fabric which covered the dirigible and the manufacturer of the warning device were dismissed at the conclusion of the plaintiffs' direct case. The plaintiffs had neither proved that the airship burst open in the air, nor that the accident was caused by a manufacturing defect, and judgment was entered for the manufacturer of the dirigible. On appeal, which reviewed only this failure of proof, the judgment was affirmed.[17] Although the survivors of the deceased servicemen did not recover, they did obtain a trial on the merits based on a theory of strict liability.

The *Montgomery* decision's effect upon the development of products liability in admiralty law has been discussed elsewhere.[18] Although the theory of liability is important, defenses asserted by manufacturers will also affect the serviceman's right to recover. In their motion for summary judgment and at the subsequent appeal, the manufacturers in *Montgomery* raised formidable objections which servicemen will have to overcome in any case of strict liability.

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14. 231 F. Supp. at 455.

15. 46 U.S.C. § 762 (1964).

16. 231 F. Supp. at 452. For a discussion of the application of state survival statutes in admiralty, see *Jurisdictional Problems of Maritime Tort Actions: Application of State and Federal Remedies*, 6 SAN DIEGO L. REV. 470 (1969).

17. Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777, 782 (2d Cir. 1968), *cert. denied*, 393 U.S. 841 (1968).

18. McCune, *Maritime Products Liability*, 18 HASTINGS L.J. 831, 837-38 (1967). For recent decisions determining the scope of products liability in admiralty, see Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217 (6th Cir. 1969); Krause v. Sud-Aviation, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969).

I. Defenses

A. Military Necessity

The manufacturers contended that the public policy considerations governing contracts between the United States and weapons suppliers preclude suits by injured servicemen against the suppliers. These considerations, they argued, included the necessity of superiority in the armaments race,[19] the requirement of immediate supply, and the sacrifice of safety research which necessarily accompanies accelerated development of new weapons systems.[20]

After reviewing these questions of national defense, the court stated:

> We recognize that in some cases, certain safety factors must be disregarded in order to explore new possibilities in weaponry. Similarly, it may be true that complete knowledge of all possible safety problems cannot be obtained because of the speed with which these weapons must be completed.[21]

However, the need to quickly manufacture the airship was no license for defective work. Thus, the plaintiffs could attempt to prove the manufacturers' liability for the death of these servicemen.[22] When there is insufficient time to manufacture a safe military product because of military necessity, it would be unjust to hold a manufacturer strictly liable. This defense, however, should not be a shelter for defective manufacture. The protection of servicemen from injury or death due to defectively manufactured products is vital to the national defense.

B. Governmental Control

The defendants in *Montgomery* further contended that they were not liable because agencies of the United States controlled the manufacture of the dirigible.[23] The proximate cause of the accident could not be determined until more specific information concerning the extent of governmental control and supervision of the manufacturing process was shown. For example, the court asked:

> Did Government personnel prepare the seams of the ship? Did Government direct, either by contract or through inspectors, the exact method to be used to seal the seams?[24]

The issue of governmental control was not resolved in *Montgomery*. The questions asked by the court, however, indicate concern about the nature of the specific acts performed by Government personnel. It

19. Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 450 (S.D.N.Y. 1964).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 451.
24. *Id.*

would be unfair to hold a manufacturer strictly liable when the United States completely controls the manufacturing process. It would appear, however, that a limited degree of governmental control should not automatically shift the manufacturer's responsibility to the United States.

C. Assumption of Risk

In *Montgomery* the manufacturers further argued that the Navy servicemen killed in the crash had assumed the risk[25] because they had volunteered for flight duty and had received a higher rate of pay. The court, however, rejected this argument and held that the decedents' knowledge of the hazard was a question of fact which had to be determined at trial. It is interesting to note what the court considered the relevant questions in determining assumption of risk:

> What were they told about their airship? When they decided and volunteered to fly, were they told they would fly aircraft in which safety factors were limited And if they knew this was an advanced design airship, were they made aware of a possible break in the seams?[26]

From the type of questions asked, it appears that the court would not allow the defense of assumption of risk unless the servicemen had specific knowledge of the particular hazard. Even if they did have such knowledge, it could be argued that it would be against public policy to penalize a serviceman for assuming a risk which benefits the national defense.

D. Governmental Immunity

1. *The Feres Doctrine*

On appeal it was noted that the manufacturers had also asserted the defense of governmental immunity according to the doctrine of *Feres v. United States*.[27] Since appellate review in *Montgomery* was limited to failure of proof, the court did not decide the validity of this defense. It is also unfortunate that the report of the case did not include the arguments by the defendants. Nevertheless, this defense may be a barrier to recovery since governmental immunity has prevented suits by servicemen against the United States. As a result the *Feres* decision provides a basis for understanding the legal effect of the interrelationships which bind the manufacturer, the serviceman, and the United States.

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25. For a discussion of the defense of assumption of risk in products liability cases, see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 839-40 (1966); Baker v. Rosemurgy, 4 Mich. App. 195, 144 N.W.2d 660 (1966).

26. 231 F. Supp. at 451.

27. 340 U.S. 135 (1950).

In *Feres* the United States Supreme Court reviewed three cases in which military personnel had been injured or killed by the negligence of other members of the armed forces. Suits were commenced pursuant to the Federal Tort Claims Act,[28] which allows suits against the United States for the torts of its employees. The Supreme Court held that the United States could not be held liable for the injuries or death of servicemen arising out of activities incident to their military service.[29] The Court stated:

> The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.[30]

Federal law provides that a serviceman who has been injured in the line of duty and has received a discharge other than dishonorable is entitled to Veterans Administration benefits, which include both medical care[31] and compensation.[32] Compensation may also be provided for the widow, children, and dependent parents of a serviceman killed in the line of duty.[33] The Supreme Court concluded that these statutory benefits provide an adequate remedy that precludes the serviceman from suing under the Federal Tort Claims Act.[34]

In *Montgomery* the Government contract included a provision by which the United States agreed to indemnify the manufacturer of the airship for any recovery against it.[35] As a result the practical effect of a recovery against the manufacturer of the dirigible would be the same as a serviceman's recovery against the United States—a result which is forbidden by the *Feres* doctrine.[36] It may be argued, how-

28. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964).

29. 340 U.S. at 144-45.

30. *Id.* at 140.

31. 38 U.S.C. § 610 (1964).

32. *Id.* § 310.

33. *Id.* § 321.

34. Feres v. United States, 340 U.S. 135, 145 (1950); *accord*, United States v. Lee, 400 F.2d 558 (9th Cir. 1968), *cert. denied*, 393 U.S. 1053 (1969); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960).

35. Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777, 778 n.1 (2d Cir. 1968).

36. However, it can be argued by analogy that the Supreme Court does not forbid a person from recovering indirectly where he could not recover directly. A longshoreman, injured on a ship, may sue the shipowner for unseaworthiness. The shipowner may be entitled to indemnity from the stevedoring company, which employed the longshoreman. Since the longshoreman is not permitted to sue his employer, although he is entitled to compensation from him, he will be able to obtain additional money by prosecuting an action against the shipowner. As a result the stevedoring company may have to pay more money than required by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964). For a discussion of this technique see Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1955); *accord*, Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959).

ever, that after 20 years the practical effect of the *Feres* doctrine should also be reevaluated. Federal benefits are based on the serviceman's ability to work;[37] thus, he is not entitled to recovery for pain and suffering. Because he does not receive money for private medical care, he must rely on Veterans Administration facilities.[38] Full compensation for the serviceman's injuries should be the most important consideration, not the liability of the United States for indemnity.

2. *Liability of a Component Part Manufacturer*

Where an agency of the United States is the manufacturer of the military product, another obstacle to recovery is presented. A case subsequent to *Montgomery* considered this problem and provided a significant solution.

In *Sevits v. McKiernan-Terry Corporation*,[39] a serviceman in the United States Navy was injured aboard the aircraft carrier U.S.S. Constellation near Okinawa. This aircraft carrier had been manufactured by the United States Navy. It appears that on August 19, 1963, a military airplane attempted to land on the carrier by hooking onto arresting cables on the flight deck. The plane failed to stop and crashed into the ocean killing the pilot.[40]

The serviceman on the flight deck was struck in the legs by a cable that had broken loose because of a defect in the arresting equipment. In a suit against the manufacturer of this equipment, the serviceman alleged a breach of an implied warranty of fitness for use arising out of the sales transaction between the manufacturer and the United States Navy.[41] On a motion to dismiss because of a failure to state a claim upon which relief could be granted the federal district court considered

> whether or not the implied warranties of fitness and merchantability are recognized in admiralty for injuries sustained in a maritime tort, and if so, whether they run against a component part manufacturer.[42]

Since the aircraft carrier was manufactured by the United States

37. *See* 38 U.S.C. § 314 (1964), *as amended*, (Supp. V, 1970); 38 C.F.R. § 4.1 (1970).

38. *See* 38 U.S.C. § 610 (1964).

39. 264 F. Supp. 810 (S.D.N.Y. 1966); Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967).

40. In the same accident which occurred in *Sevits*, the pilot of a military airplane was killed when he attempted to land on the aircraft carrier U.S.S. Constellation. The pilot's wife has initiated a suit for wrongful death under the Death on the High Seas Act. To date there has not yet been a trial on the merits. There has only been published the decision to deny plaintiff's motion to add an additional defendant. Craig v. United States, 284 F. Supp. 697 (S.D. Cal. 1967), *aff'd*, 413 F.2d 854 (9th Cir. 1969), *cert. denied*, 396 U.S. 987 (1970).

41. 264 F. Supp. at 811.

42. *Id.* at 812.

Navy, according to the *Feres* doctrine the injured serviceman could not recover from the United States. Unless a valid claim had been stated against the manufacturer of the arresting equipment, the plaintiff would not be able to recover for a breach of implied warranty.[43] Giving recognition to this fact, the court denied the defendant's motion to dismiss, holding that in the interest of justice and fairness the injured serviceman had a right to assert the theory of implied warranty against the manufacturer of the component part, but *only* in the limited situation where the manufacturer was shielded from liability by governmental immunity.[44]

According to *Sevits*, an important means of recovery has been created for servicemen. In this situation, where an agency of the United States manufactures the defective product, a serviceman is still precluded by *Feres* from suing the United States. According to *Sevits*, however, he may then proceed against the manufacturer of the component part. As a result, this limitation of the *Feres* defense may increase the liability of manufacturers of military products.

The serviceman in *Sevits* has not yet had a trial on the merits.[45] Until all the issues which were mentioned in *Montgomery* are actually decided at trial and reviewed by an appellate court, it is debatable whether a serviceman can recover in admiralty. Although the precedent value of the decisions in *Montgomery* and *Sevits* is limited, they both permitted military plaintiffs to maintain an action in strict liability against the manufacturers of military products.

II. Recovery Under State Law

Admiralty law may be applied if a maritime tort has been committed.[46] But, because injuries from defective products may occur within state boundaries, state law may be controlling. Since each state's products liability law varies, the law of the forum may also present an obstacle to recovery. A current case, which applies a state law rather than admiralty law, illustrates this problem.

A. The Whitaker Decision

In *Whitaker v. Harvell-Kilgore Corporation*,[47] an enlisted man in

43. *Id.* at 814. A later case held that the *Feres* decision barred an action when three servicemen in the United States Navy Air Reserve were killed in a helicopter crash. Ulmer v. Hartford Accident & Indem. Co., 380 F.2d 549, 550 (5th Cir. 1967).

44. 264 F. Supp. at 814.

45. Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967). The court granted a motion to dismiss for lack of *in personam* jurisdiction over the McKiernan-Terry Corporation.

46. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 41 (1957).

47. 418 F.2d 1010 (5th Cir. 1969), *petition for rehearing denied*, 424 F.2d 549 (5th Cir. 1970).

the United States Army was injured while undergoing basic training at Fort Benning, Georgia. On November 23, 1966, he was required to throw a live hand grenade as part of his military training. The grenade prematurely exploded, seriously injuring Whitaker.[48] He sued the manufacturer of the grenade and the manufacturer of the grenade's fuse for $750,000. Against both manufacturers, Whitaker alleged negligence in manufacture and inspection, breach of implied warranty of suitability, breach of express warranty, and strict liability in tort. Both manufacturers moved to dismiss for failure to state a claim upon which relief could be granted. After the federal district court sitting in Georgia entered an order dismissing the complaint, the plaintiff appealed.[49]

On appeal the defendants alleged that the serviceman was not entitled to a trial according to Georgia law[50] under any theory of products liability, including breach of warranty, strict liability in tort, and negligence. Whitaker did not have an action for breach of warranty because he had not satisfied Georgia's strict requirement of privity.[51] Georgia also did not follow strict liability in tort. The appellate court held, however, that the serviceman did have an action against these manufacturers for negligence.[52]

This decision indicates that the choice of forum may seriously limit the serviceman's right to recovery. Because of Georgia's conflict of laws rule, Georgia's law of products liability will determine the outcome of the case,[53] even though the product was manufactured in Texas. As a result, the doctrine of strict liability in tort, which has

48. *Id.* at 1012.

49. *Id.* at 1012-13.

50. *Id.* at 1015-18. The defense of sovereign immunity was asserted by the grenade manufacturer. *Id.* at 1015. The court's analysis of the defense is significant since servicemen will have to overcome it whether the suit is based on negligence or strict liability. The manufacturer operated the Lone Star Ammunition Plant at Texarkana, Texas. The United States owned the plant, including all the land, buildings, machinery and equipment. The manufacturer was required by the United States to make only a visual inspection of the component parts. Assembly of the grenades followed government specifications under the active surveillance of government inspectors. The manufacturer contended that on the basis of the above, it was an instrumentality of the United States and was thus protected by the doctrine of sovereign immunity.

The court rejected this argument and found that the manufacturer was not an agent of the United States. The court's decision was based on a provision in the contract specifically stating that the manufacturer was an independent contractor, and on Powell v. United States Cartridge Co., 339 U.S. 497 (1950), a previous case involving the same plant, in which the Supreme Court held that independent contractors still have managerial responsibility.

51. *Id.* at 1018.

52. *Id.*

53. *Id.* at 1017. Since the court of appeals only reviewed the lower court's order to dismiss, the final disposition of the case is yet unknown.

been adopted by Texas,[54] was not applied.

B. Negligence—A Forerunner of Strict Liability?

Negligence has proved a viable theory of recovery against the manufacturer of a military product. In *Boeing Airplane Company v. Brown*,[55] a member of the crew of a B-52 military jet bomber was killed when the airplane exploded and crashed near Tracy, California. An action for negligence was brought against Boeing Airplane Company, the manufacturer of the airplane, on behalf of the decedent's son.[56] Appling California law in accordance with Washington's conflict of laws rule, the federal district court sitting in Washington found that

> . . . Boeing was negligent in designing manufacturing and assembling the airplane with a defective and inadequate alternator drive and in supplying and delivering the airplane for use as it was then constructed, knowing it would be flown in such condition.[57]

Judgment was entered for the plaintiff for $26,000. On appeal the trial court's decision was affirmed.[58]

Although the manufacturer of the airplane was held liable, the *Boeing* decision was based solely on negligence. Thus, it has limited precedent value for holding strictly liable a manufacturer of a defective military product. At the time of this decision in 1961, however, California did not follow strict liability in tort; this theory of recovery only requires proof that the product was defective, and requires no proof that the manufacturer was negligent.[59] In 1963 California did adopt strict liability in *Greenman v. Yuba Power Products, Inc.*,[60] and it would appear reasonable that if *Boeing* had been decided 2 years later, the court would have applied strict liability according to the *Greenman* decision.

III. Conclusion

Montgomery,[61] *Sevits*,[62] and *Whitaker*[63] have attempted to expand

54. *Id.* at 1018. A federal district court, assuming jurisdiction on the basis of diversity of citizenship, must apply the substantive state law as determined by the forum state's conflict of laws rule. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

55. 291 F.2d 310 (9th Cir. 1961).

56. *Id.* at 312.

57. *Id.* at 313.

58. *Id.* at 319.

59. For a discussion of the development of products liability in California, see Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966).

60. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

61. Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd sub nom.* Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777 (2d Cir. 1968), *cert. denied*, 393 U.S. 841 (1968).

the doctrine of strict liability to include servicemen. Would such an expansion be desirable? It is relatively easy to pinpoint the conflicting interests, but difficult to strike a just balance. The manufacturer takes business risks and conforms to government specifications. In contrast, the serviceman is exposed to the continuing danger of death or great bodily injury due to defective products. With the development of sophisticated technology, however, the individual, civilian or military, needs more rather than less protection against the threat of defective products.

Clearly not all military products are advanced weapons systems. Trucks,[64] automobiles,[65] tires,[66] tools,[67] ladders,[68] and even carpets,[69] to mention but a few, are the same whether used by a civilian or by a serviceman. If one of these products injures a businessman or a housewife, for example, the manufacturer can be held strictly liable in most states.[70] It would appear to be unjust that a person would be barred from similar recovery solely because he is a serviceman. Even if special allowances are made for military necessity, it still appears that a large number of situations involving military products should come within the scope of strict liability.

The purpose of strict liability is not to impose unreasonable liability upon manufacturers, but to insure that injured persons, oftentimes powerless to protect themselves, receive compensation for the cost of their injuries resulting from defective products.[71] With the

62. Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966); 270 F. Supp. 887 (S.D.N.Y. 1967).

63. Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969), *petition for rehearing denied*, 424 F.2d 549 (5th Cir. 1970).

64. *See, e.g.*, Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

65. *See, e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

66. *See, e.g.*, Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

67. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

68. *See, e.g.*, Erickson v. Sears, Roebuck & Co., 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966).

69. *See, e.g.*, Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). However, certain civilian products have strong associations with military service. For cases dealing with these types of products, see Krause v. Sud-Aviation, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd*, 413 F.2d 428 (2d Cir. 1969) (helicopter); Block v. Urban, 166 F. Supp. 19 (E.D. Mich. 1965) (bow and arrow); Piercefield v. Remington Arms Co., 375 Mich. 85, 132 N.W.2d 129 (1965) (rifle).

70. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 15 (1966).

71. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

extension of products liability, the tragedies due to defective military products may be exposed to the glare of civilian scrutiny, rather than relegated to the bureaucratic caverns of the Veterans Administration.

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