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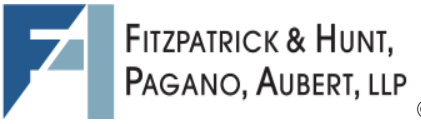

PREDATORS & THEIR PREY: HOW TO COUNTERSTRIKE PLAINTIFF'S REPTILE ATTACK

By: Suzanne N. McNulty

In the natural world, many animals live by eating others. Predators may stalk quietly or camouflage themselves and then attack. Sharp teeth, powerful jaws, fangs or stingers, as well as muscle strength, powerful hearing and eyesight helps predators get the job done.[1] When a crocodile is concerned about its safety, it will gape to expose the teeth and yellow tongue. If this doesn't work, the crocodile gets a little more agitated and typically begins to make hissing sounds. Some species try to bite immediately. Some use their heads as sledgehammers and literally smash an opponent. The main weapon in all crocodiles is the bite, which can be extremely strong. [2]

Attention getting? Maybe. Overly dramatic? Yes. The premise upon which the Reptile Theory is based, is just that. Its purpose is to grab or "hi-jack" the jury's attention, to sweep them away from the real issues in the case as a way of extracting a higher award – one based on emotion and fear versus rational logical thinking. This article will explain what the Reptile Theory is, how it is used by plaintiffs' counsel and what defense counsel can do to effectively combat its effect.

The Reptile Theory – What is it?

In order to defeat reptilian tactics, one must first understand how they can be used to overpower a defendant's case. Attorneys experienced in defending against high risk personal injury claims are (or should be) well versed in these trial tactics based on Don C. Keenan's (former professional theatrical director) and David Ball's (plaintiff attorney) book, Reptiles: The 2009 Manual of the Plaintiff's Revolution, adopted and advocated by plaintiff attorneys around the country.[3] The theory is based on the belief that you can prevail at trial by speaking to, and scaring, the primitive parts of jurors' brains, the part of the brain they share with reptiles.[4] It is a strategy for obtaining large jury verdicts by causing jurors to perceive the defendant's alleged conduct as a threat to their own personal safety and the safety of their families and community, rather than deciding the case based upon the specific dispute between the plaintiff and the defendant.

Like Ball and Keenan, who have devoted their careers in promoting this theory, Dr. Bill Kanasky (Ph.D. in Clinical Psychology), premier expert on the other side, has published numerous articles debunking the theory and developing counter-attack strategies. To better implement attack techniques, it is helpful to understand the Reptile Theory's component parts which Dr. Kanasky describes as follows:

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[1] The Animal Kingdom – Predators And Prey (https://www.sanctuaryasia.com/photography/photofeature/9772-the-animal-kingdom-predators-and-prey.html)
[2] Wikipedia/Reptile (https://en.wikipedia.org/wiki/Reptile)
[3] Gregory Kendall, *Challenging Use of "Reptile Theory" Tactics at Trial Through Motions in Limine Requires a Case Specific Approach* (November 2019), p. 1.
[4] Scully Mansukhani, *Plaintiffs' Bar Embraces Reptile Strategy and Defense Bar Responds* (October 2013), p. 1.

- The "reptile" or "reptile brain" is a primitive, subcortical region of the brain that houses survival instincts.
- When the reptile brain senses danger it goes into survival mode to protect itself and the community.
- The courtroom is a safety arena.
- Damages enhance safety and decrease danger.
- Jurors are the guardians of community safety.
- "safety rule + danger = reptile" is the core formula.[5]

The "safety rule + danger = reptile" formula states that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by a defendant, awakening survival instincts, which results in jurors awarding damages to a plaintiff to protect themselves and society.[6] **"**The linchpin of the theory is the brain's stimulus-response reaction to danger. … that exposing a safety rule violation (stimulus = danger) triggers jurors' automatic survival instincts to protect themselves and the community (response = award damages)."[7] Once the reptile brain is triggered, the juror loses the ability to think rationally and based on a desire to save him/herself and the community from danger, the juror responds in a punitive manner based on purported culpability that is untethered to the proper legal standard of care and the actual harm to the plaintiff.

Many have criticized the theory on grounds that equating a certain part of the human brain to the reptile brain, is based on pseudoscience. However, as defense counsel, whether the science part of the theory is valid is of less importance than whether it works. And it does work, in certain cases, although some believe that it has been over-hyped and is nothing more than the deployment of good-old fashioned lawyering techniques that have been in existence since the birth of American jurisprudence.

The Reptile Theory – Just a Repackaging of the Impermissible "Golden Rule" Arguments?

As defense counsel argue, the Reptile Theory is nothing more than long-held impermissible "Golden Rule" arguments, recast in a creative and new way. Golden Rule arguments ask a jury not to decide according to the evidence, but according to how its members might wish to be treated by asking jurors to "put themselves in the plaintiff's shoes."

Golden Rule arguments have been prohibited by courts for decades on well-established grounds. As the Court in *Loth v. Truck-A-Way Corp* states: "The only person whose pain and suffering is relevant in calculating a general damage award is plaintiff. How others would feel if placed in the plaintiff's position is irrelevant. It is improper, for example, for an attorney to ask jurors how much 'they would "charge" to undergo equivalent pain and suffering. This so-called "golden rule" argument ... is impermissible.'"[8] In *Zibell v. Southern Pacific Co.,* the California Supreme Court explained that "[i]t is, of course, improper for the jury to attempt to measure the

[5] Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, For The Defense (April 2014), p. 16.
[6] *Id.*
[7] *Id.*
[8] *Loth v. Truck-A-Way Corp.* (1998) 60 Cal. App. 4th 757, 764-765.

damage occasioned by the injury and the sufferings attendant upon it, by asking themselves what sum they would take to endure what plaintiff has endured, and must endure."[9]

Indeed, the Reptile Theory is another version of the prohibited Golden Rule argument and improperly purports to require the "safest possible choice" in all circumstances regardless of what the actual standard of care requires. For the same reasons that Golden Rule arguments are prohibited, so must reptile evidence and arguments. Despite this, many judges still do not see it this way. Therefore, defense counsel must be pro-active and educate the court as to what reptilian-type evidence looks like and why it should not be permitted in the courtroom. This starts with knowing how to effectively respond to the reptile during the pre-trial discovery phase of a case.

How to Prevent the Reptile from Taking Hold – Defendant's Deposition

One of the earliest and most critical phases in which the reptile will rear its ugly head is at defendant's deposition; therefore the planning and preparation of the defense should focus on the defendant's anticipated testimony starting from the first meeting.[10] At defendant's deposition the reptile plaintiff will begin building the framework to use at trial. The common plaintiff's reptile building blocks are: (1) establish that a safety rule exists that protects a plaintiff and the jurors; (2) prompt a safety director to admit that the company violated the rule, putting both the plaintiff and the jurors in danger; and (3) admit that people and companies should be responsible for their actions, allowing the jury to punish the defendant for threatening their safety.[11] Plaintiff's counsel will continue to hammer the above themes throughout all phases of trial from voir dire to opening statement to witness testimony, and lastly and most importantly, plaintiff's closing statement.

Having that said, what can be done to defeat the reptile during deposition and trial examination? As a witness, once the plaintiff's attorney starts establishing safety rules, your antennae should go up. Safety rules are almost always accompanied by the words "needlessly" or "unnecessarily". For example, you may be asked: "You would agree with me that failing to look both ways before pulling into an intersection *needlessly* endangers the public and community?"[12] Questions that relate to "needlessly" or "unnecessarily" endangering the "public" or "community" are the buzzwords to signal that the reptile is in play.[13]

Or, the very common and dangerous ploy used by plaintiff lawyers is to trap the unwary into a "yes" response to the question: "Safety is always a top priority, right?"[14] Most witnesses

[9] *Zibell v. Southern Pacific Co.* (1911) 160 Cal 237, 255.
[10] Kanasky Jr., Chamberlin, Eckenrode, Campo, Loberg and Parker, *Preventing Amygdala Hijack During Witness Testimony*, For The Defense (June 2018), p. 20.
[11] John R. Crawford and Benjamin A. Johnson, *Strategies for Responding to Reptile Theory Questions*, For The Defense (December 2015), p. 71.
[12] Tyler J. Derr, *Recognizing and Defeating the Reptile: A Step-by-Step Guide*, 3 Stetson Journal of Advocacy and The Law 29 (2016), p. 5.
[13] *Id.*
[14] Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, *supra.* at 21 and Kanasky and Eckenrode, Video CLE Webinar: *Preventing Amygdala Hi-Jack at Deposition in the Reptilian Era* PowerPoint presentation, slide 73.

would be tempted to agree. In fact, to not agree, makes the witness feel foolish or bad – of course, safety is a priority. But, the question is – is it always a top priority? No, it's not. As Dr. Kanasky cautions, the witness should not, and cannot, answer yes to this question as it is simply not true. Many corporate websites are not helpful in that they actually provide the "safety-rule" for plaintiff's counsel, leaving the defense witness more vulnerable to the reptile attack. One such example: "We are committed to the pursuit of excellence in all our products and services and strive to meet or exceed our customers' expectations for quality, integrity, delivery, reliability – and safety – our number one priority." Being able to use such representations from defendant's own website only makes it easier for plaintiff to establish the "safety-rule" part of the reptile framework, while making it harder on the defendant to defeat it.

Company safety is a priority but so is quality, efficiency, employee/customer satisfaction, effectiveness and, yes, profit.[15] A witness should not allow himself/herself to get sucked into prioritizing. All these factors feed off one another and they are all important. So, when defendant is confronted with the "safety priority" question, the answer should be a simple and shame-free "no". If the plaintiff's lawyer wants to follow up, he/she can do so and, if required, the deponent can explain consistent with the above other factors that are also important and critical to a company's well-being. And, in fact, the weighing of these other factors (efficiency, productivity and profit) is consistent with what a jury, if properly instructed, should be doing pursuant to product liability legal tests and standards.

For example, in a strict product liability case, jurors may be instructed to use a risk-utility test to determine whether a defendant should be held strictly liable for an alleged defectively designed product. The risk-utility test requires jurors to weigh the risk of a product's design against its benefits to arrive at a determination as to whether the product is, in fact, defective. Under this test, the focus is on the "feasibility" of an alternative safer design, which takes into consideration multiple factors and balances those against the risk of danger in not implementing the "safer alternative." These factors include: 1) The usefulness and desirability of the product – its utility to the user and to the public as a whole; 2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury; 3) The availability of a substitute product which would meet the same need and not be as unsafe; 4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; 5) The user's ability to avoid danger by the exercise of care in the use of the product; 6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions; and 7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[16]

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[15] Kanasky and Eckenrode, Video CLE Webinar: *Preventing Amygdala Hi-Jack at Deposition in the Reptilian Era* PowerPoint presentation, slide 74.

[16] J. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. Law Journal 825, 837–38 (1973). Wade's factors have been adopted and relied upon by numerous jurisdictions throughout the country. Further, when assessing the utility of a product, the following factors may also be relevant: "1) the appearance and aesthetic attractiveness of the product; 2) its utility for multiple uses; 3) the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and 4) the collateral safety of a feature other than the one that harmed the plaintiff." American Law of Products Liability 3d § 28:19, at 28–30 through 28–31 (1997).

The point is – while safety is a factor – there are many other factors that come into play in determining whether a product is "defective." Plaintiff cannot be permitted to superimpose invalid reptile rules of liability over and above the law, *i.e.*, well-established legal tests, standards and principles laid down by the Courts and legislature.

Plaintiff lawyers will also attempt to establish "safety above-all-else" rules by way of hypothetical questions. These types of safety questions are more specific and often take the form of an if-then statement, for example: "Would you agree that if by placing safety device technology on all table saws that your company makes, then you could prevent the type of injury that happened to my client and that happens to thousands of people every year?"[17] These questions are especially dangerous because a reptile plaintiff's attorney can skillfully pick certain factors and then suggest the safest course of action to a witness. "These deceptive questions are effective because they provide just enough information to lure witnesses into providing an absolute answer, thus setting the stage for the 'gotcha moment.' Therefore, a defense witness' ability to detect these precarious questions persistently is vital to defense counsel's ability to defend a client effectively later in the case."[18]

As Dr. Kanasky states: "The very best way to respond to reptile safety questions is quite simple on the surface: be honest. If a witness can first develop the cognitive skills to understand consistently the true meaning and motivation of a reptile plaintiff attorney's question, the honest answer will always be some form of 'it depends on the circumstances.'"[19] By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer such as the following:

- "It depends on the circumstances."
- "Not necessarily in every situation."
- "Not always."
- "Sometimes that is true, but not all the time."
- "It can be in certain situations."[20]

These answers are highly effective for several reasons. They are honest and accurate answers. Again, questions that lack adequate specificity cannot be answered in absolute terms so these "sometimes" type of responses are truthful. Additionally, these responses put intense pressure on a reptile plaintiff attorney to ask a defendant's witness "what does it depend on?" This then provides the defendant's witness an opportunity to deliver a persuasive narrative to a jury, the last thing that a reptile plaintiff attorney wants.[21] Of course, the company's "story" or "narrative" will need to be carefully developed and practiced by the deponent should it become

[17] Kanasky Jr., Chamberlin, Eckenrode, Campo, Loberg and Parker, *Preventing Amygdala Hijack During Witness Testimony*, *supra.* at 16.
[18] Bill Kanasky, *Debunking and Redefining the Plaintiff Reptile Theory*, For The Defense (April 2014), pp. 21 and 76.
[19] *Id.* at 76.
[20] *Id.*
[21] *Id.*

necessary to provide further explanation. This will take time and effort to develop and will the subject of preparatory meetings with defense counsel.

In response to reptile questions, some adhere to the belief that the defense witness should duel with opposing counsel. "Specifically, a witness is instructed to use a preemptive strike of sorts by anticipating where the questioner will go and proactively inserting a defense-oriented explanation before the questioner can complete his or her line of questioning. The goal of this technique is to disrupt opposing counsel's series of leading questions to prevent being 'trapped' by the questioner later down the line. These deliberately evasive maneuvers were born in the political arena and are referred to as 'pivoting' or 'beating them to the punch.'"[22] Dr. Kanasky strongly disagrees with this approach for several reasons.

First, "pivoting" usually involves not answering the question, therefore causing the witness to appear evasive and untrustworthy. Juries don't like this and will become distrustful of the defendant's position. As Dr. Kanasky states: "Pivoting techniques are acceptable in political debate because voters fully expect it from sly politicians. However, sworn testimony is very different from political debate, and juror decision making is very different from voter decision making. Jurors expect honesty and truthfulness from defense witnesses, not active avoidance of challenging questions."[23]

Second, even if a witness is extremely savvy and has undergone extensive deposition and preparation training, confrontation between an experienced attorney – which pivoting requires – and a fact witness is a mismatch that almost always favors the attorney.[24] Most cases, and particularly products liability aviation cases, are complex beyond what a witness can or should be expected to appreciate. "While the witness may have unique knowledge of certain facts, the attorney is in a better position to understand the 'big picture' of the case, the relevant law, and the total body of evidence collected from other sources. In addition, the attorney has exclusive knowledge of his or her carefully crafted strategy to advance the case to its best advantage. This disparity in knowledge is one factor that contributes to the vulnerability of the inexperienced witness. In many instances, without adequate preparation, a witness may not recognize the significance of a given question or line of questions, or how the answers to these questions may or may not contribute to the development of the case."[25] Furthermore, once the witness attempts to go toe-to-toe with opposing counsel, there is a greater risk that an emotional response will be triggered, compounding the negative effect the "pivoting" testimony may have. In addition, the more detailed and longer type of response which pivoting often requires, provides additional opening for opposing counsel to exploit and may also open the door to damaging testimony. Simply put, the risk is too great.

Third, except in rare circumstances, there is simply no reason to provide opposing counsel with the defense story which the pivoting answer usually provides. To give opposing counsel a preview, only allows the plaintiff's attorney more time and ammunition to strengthen

[22] Kanasky Jr., Chamberlin, Eckenrode, Campo, Loberg and Parker, *Preventing Amygdala Hijack During Witness Testimony*, *supra.* at 15.
[23] *Id.* at 15-16.
[24] *Id.* at 17.
[25] *Id.*

its case against your defenses. Don't put your side at a disadvantage by providing insights on how you intend to defend the case at trial. The best time to tell the defense story – to provide details and explanations – is during the far more controlled environment of the defense presentation at trial, when counsel can provide softball pitches during direct examination in response to which you can calmly and clearly explain as necessary.

The testimony of the defendant in a discovery deposition is perhaps one of the most critical pieces in the defense of almost any claim in civil litigation.[26] There is an old axiom frequently overheard from attorneys in this business: "You can't win a case at deposition, but you sure can lose it."[27] This is certainly true. "Errors during a discovery deposition can range from the mild (*e.g.*, an inappropriate emotional response such as anger), to the severe or even catastrophic (*e.g.*, inadvertently admitting to a breach of accepted standards of care)."[28]

Suffice it to say, the net effect of a poor discovery deposition on the overall evaluation of the claim is significant. Adding to the importance of the company's witness deposition is that juries always place the greatest weight on the testimony from each party in a case, as opposed to any expert witness. Many claim professionals and attorneys make the mistake of putting too much weight on the credentials and presentation of the defense expert witnesses, believing that superiority over the plaintiff's experts equates to a decided advantage.[29] However, juries know experts are paid for their opinions and, in poll after poll of juries that have deliberated on such cases, the testimony of the expert witnesses is rarely a big deciding factor.[30] At the end of the day, the testimony of the defendant and the plaintiff are without question the most important at trial.[31]

Use of Motions in Limine to Combat the Reptile

Once discovery has been completed, the defense attorney must then do what he/she can to keep the reptile out of the courtroom. Motions in limine – evidentiary motions which request the judge to rule on the admissibility of certain evidence before the trial even begins – are a good tool. However, judges have been reluctant to grant such motions based on a lack of understanding of what the theory is and, in some cases, disagreement over whether such evidence is admissible. In *Walden v. Maryland Cas. Co.*, the Court denied defendant's reptile motion in limine, stating that "the Court will not categorically prohibit a form of trial strategy, particularly given the absence of any reason to believe the Reptile Theory is likely to rear its head here (or that the Court would be able to identify it if it did.)"[32] (See also, *Baxter v. Anderson*, "Again, the Court cannot exclude in advance these types or arguments without hearing the specific context in which these arguments are made.")[33]

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[26] *Id.* at 19-20.
[27] *Id.* at 20.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Walden v. Maryland Cas. Co.* (Dec. 10, 2018) U.S. Dist. Court, D. Mont., No. CV 13-222-M-DLC, WL 6445549 at *3.
[33] *Baxter v. Anderson* (Jan. 1, 2018) U.S. Dist. Court, M.D. La., No. 16-142-JWD-RLB, WL 259918 at *5.

Reptile motions in limine are generally denied because they lack specificity as to what the attorney is requesting should be excluded. In many cases, judges have either called the motion premature or too vague. "Defendants complain about amorphous and ill-defined concepts rather than specific evidence which they believe plaintiff will introduce or arguments which they believe plaintiff might make," the Court states in denying a "reptile theory" motion in a car accident case.[34] "The court is being asked to rule on abstract and generalized hypotheticals."[35]

Therefore, in order to obtain the highest likelihood of success, the motion should adequately explain and educate the judge as to what the Reptile Theory is; state with specificity the questions or testimony that is anticipated; and cite controlling case law to support the reptile exclusion.[36] Point out to the court examples of the reptile questions like: "Should a corporation ever needlessly endanger the public?"; "Should safety be the highest priority?" or "Should a company put profit over people?" The motion should make very clear that these types of questions, which are not based on any actual statutes, regulations or relevant legal standards of care, should not be allowed. Citations to jury instructions setting forth the proper legal tests and standards should be included. Further, it should be pointed out that under basic evidentiary rules, reptile evidence is inadmissible on grounds that it is irrelevant and/or its probative value is substantially outweighed by the substantial danger of undue prejudice, confusing the issues, or misleading the jury.[37]

As both the Reptile and Golden Rule theories essentially have the same purpose – an attempt to introduce the same type of prejudicial evidence – the motion in limine should mesh the two theories together. Explain to the court that the Reptile Theory is essentially a repackaging of the Golden Rule "community consciousness" and "send a message" arguments that are prohibited in virtually every state and federal court in the country.[38]

Even if you follow the above recommendations, the motion may be denied since many judges would prefer to wait and see what the evidence is and then rule at that time. In such case, however, a good motion in limine will have educated the judge so that when such evidence or testimony surfaces at trial, the judge will be in a better position to recognize it and rule in your favor. Even if your motion is denied, you have put the issue in play and the court will hopefully be more receptive to your objection.

Opening and Closing Statements

This is where the reptile attorney can directly address the jury and therefore provides the best chance to appeal to the jurors' reptile brains. The closing statement is particularly important

[34] Amanda Bronstad, *Are Defendants Tipping Scales on the 'Reptile Theory?'*, (November 2019), p. 3.
[35] *Id.*
[36] Tyler J. Derr, *Recognizing and Defeating the Reptile: A Step-by-Step Guide*, *supra.* at 8-9.
[37] See Federal Rules of Evidence 402, which does not allow for the admissibility of irrelevant evidence, and 403 which provides that the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Each state has its own equivalent evidentiary rules.
[38] Gregory Kendall, *Challenging Use of "Reptile Theory" Tactics at Trial Through Motions in Limine Requires a Case Specific Approach, supra*. at 2.

as this is the time for the reptile, who may have creeped into your case, to bite. To illustrate, below is a good example of a closing statement in a case in which plaintiff, employee of a pool and spa contractor, suffered severe injuries when a propane fueled pool heater exploded. The jury rendered a verdict in favor of the plaintiff for $3 million. Defendant appealed on various grounds, including its contention that plaintiff's counsel committed misconduct by urging the jury to base its verdict on protecting the community. Plaintiff's counsel started off his argument by telling the jury members that acting as a juror is an important civic duty. He continued:

"Your voice really is going to have an impact. [¶] ... You are the voice. You are the conscience of this community. You are going to speak on behalf of all the citizens in Riverside County and, in particular, Coachella Valley. [¶] You are going to make a decision what is right and what is wrong; what is acceptable, what is not acceptable; what is safe, and what is not safe. You are going to announce it in a loud, clear, public voice. And that is going to be the way it is."

Plaintiff's counsel went on to state that "[t]hese courtrooms, these courthouses, exist for one reason: It's to keep the community safe. Period. That is the sole function of courtrooms, and it's why the state spends so much money on courtrooms. [¶] In the criminal part of the system, the jury identifies criminals and gets rid of them .... It's a matter of public policy, public safety. [¶] On the civil end of things, same function it's all about keeping the community safe. You identify bad conduct, negligent conduct. You don't send anybody to jail, but you announce what it is, and everybody is going to live by it. And in the civil end, you, the jury, tells the wrongdoer, 'You are going to compensate the person you hurt.' [¶] ... And you are going to tell the wrongdoer, 'If you do this stuff in our community, you are going to pay.'"[39]

Although the Court agreed that telling the jury that its verdict had an impact on the community and it was acting to keep the community safe was improper, the appellate court upheld the verdict due to defendant's failure to timely object to the remarks at the time of trial or request a curative admonition. This outcome was unfortunate since the Court clearly recognized that such arguments are improper stating: "The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Martinez v. State*[40] … [a]n attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality. *Cassim v. Allstate Ins. Co."*[41]

The lesson to be learned here is that if these types of arguments are made during plaintiff's closing statement, defense counsel must make sure to object at that time or otherwise forfeit this argument on appeal

Conclusion

The importance of a jury can be immeasurable. In criminal cases, the fate of a defendant's life (or death) is in their hands. "Never doubt that a small group of thoughtful

[39] *Regalado v. Callaghan* (2016) 3 Cal. App. 5th 582, 597-98.
[40] *Id.* at 598, citing *Martinez v. State* (2015) 238 Cal. App. 4th 559, 556.
[41] *Id.,* citing *Cassim v. AllState Ins. Co.* (2004) 33 Cal. 4th 780, 796.

concerned citizens can change the world. Indeed, it's the only thing that ever has." – Margaret Mead.

Although the jury does not hold the same "life or death" power in a civil case, a jury's determination in non-criminal matters nonetheless can forever affect the parties involved. In short, a jury's power is immense. And, power can be a very appealing intoxicant that plays very nicely into the reptile attorney's hands. Showing the danger is only the first step of the formula. The second step is convincing jurors that they have the power to reduce or eliminate the danger. The reptile approach can provide jurors with the feeling that they actually get to make a change in the world – which provides some jurors with a sense of power they may not otherwise ever have in their lives. Understandably, some jurors can easily get caught up in the power they possess to make a change. Therefore, defense counsel must do everything necessary to ensure that this misplaced motivation does not corrupt the jury's determination resulting in an award of damages exceeding what is just and proper under the law.

Therefore, to the extent permitted by the court, defense counsel should not hesitate to explain the Reptile Theory to the jury, unveiling it for what it is – a psychological ploy, used to manipulate, to obtain a higher verdict. Painting the plaintiff's attorney as a puppeteer trying to control the minds and wills of the jurors, is likely to create some distrust and, hopefully, anger. No one likes to think that they are not in control of their own decisions.[42] Just because plaintiff's counsel appeals to our fear doesn't mean that all other switches in our brain shut-down and we become zombie-like creatures ready to do whatever we are asked.

Simply put, we are not reptiles; we are human beings capable of using logic and reason to arrive at the right decision. Anything less is disrespectful and pointing this out could result in juror backlash against such manipulation, a desired result. In the end, a thoughtful, well-reasoned and persuasive story – absent any manipulation and deception – should win the day.

Regardless of whether you believe the Reptile Theory has validity, it can have very strong teeth. Therefore, to successfully defend these cases, it is important to understand the reptile strategy and be able to identify when a plaintiff lawyer is implementing it. When preparing your witness for deposition or trial testimony, the witness should be aware of reptile tactics and be prepared for and trained in techniques for countering such strategies. As ABC counsel we are here to help you every step of the way through this process.

[42] Tyler J. Derr, *Recognizing and Defeating the Reptile: A Step-by-Step Guide*, *supra.* at 11.

THE POLITICAL QUESTION DOCTRINE: TWO RECENT CASES HIGHLIGHT THE INCONSISTENT APPLICATION OF THIS DEFENSE

By: Christopher S. Hickey

The political question doctrine relates directly to the U.S. Constitution's separation of powers among the three branches of government – the judiciary, executive and legislative. The doctrine excludes from judicial review those controversies which concern policy choices and value determinations constitutionally assigned to Congress or the Executive Branch. Because political questions are nonjusticiable, lawsuits that concern such issues must be dismissed.

Historically, this doctrine was limited in application to suits against government actors and entities, especially the U.S. government. However, paralleling the expansion of military operations since 1990 and the military's increasing reliance on private companies to not just manufacture military equipment but to participate in the theatre of operations, federal district courts began analyzing the defense in the context of individual tort claims against private military contractors. These suits have provided significant challenges for the judiciary and the outcomes, unfortunately, continue to be disparate and confusing.

Two recent cases, both involving variants of the same type of military helicopter, illustrate the varying treatment this doctrine has received. In 2017, a federal court in San Diego, California, denied summary judgment in *Fontalvo v. Sikorsky Aircraft Corporation*, a case concerning a CH-53E landing gear accident, because it believed the defense could only apply if a jury first decides a military decision caused claimant's injuries.[1] In other words, the defense cannot be decided in a pre-trial summary judgment motion because the parties dispute whether a military decision was a causal factor in the accident. In 2020, a Texas appellate court ruled just the opposite. In *Preston v. M1 Support Services*, a case concerning the crash of a MH-53E helicopter, the case was dismissed pre-trial because a jury could not resolve the dispute "without inquiry into military judgments."[2] The court was not concerned with what a jury would ultimately find to be the military's role in the accident, only that a reexamination of military decisions would be required to adjudicate the case.

The *Preston* decision is more in line with the rationale for the political question doctrine - prohibiting judicial inquiry into certain executive and legislative decisions. The *Preston* court by dismissing the case, prevented such an inquiry whereas the *Fontalvo* court's logic suggests a jury should inquire and make findings related to the military's judgment. With the recent growth of cases being brought against military contractors, it is hoped that the *Preston* case represents the analysis used in future cases but since even that decision is currently under appeal, the verdict, as they say, is still out.

[1] 2017 WL 4922814 (Sikorsky ultimately obtained a defense verdict after a three-week trial in May 2018).
[2] 2020 WL 1057330 (Tex. CA 4th)

Origins of the Political Question Doctrine

Before taking a closer look the judicial opinions from the *Fontalvo* and *Preston* cases, it is first necessary to review the origins of the political question doctrine to understand the tools the courts are using to decide these cases in the context of military contractors.

The political question doctrine is a common law doctrine that dates to the Supreme Court's first articulation of the concept of judicial review in the 1803 case *Marbury v. Madison*.[3] In that case, the Supreme Court was deciding whether or not it could order the executive branch to deliver a commission issued by the outgoing president appointing a political foe to the new president as a federal district court judge. According to John Marshall, the Chief Justice at the time, this raised a political question. When is an issue a political question? According to the Justice Marshall, they are issues "which are, by the constitution and laws, submitted to the executive [or legislative]."[4] The resolution of such issues "can never be made in this court." As to the *Marbury* dispute, the Court explained that "[T]he President is invested with certain important political powers…and being entrusted to the executive, the decision of the executive is conclusive."[5]

Over the next 150 years, the doctrine was discussed sparingly in case law and limited to questions concerning the Constitution or a national interest. These cases included such issues as the proper method for amending the Constitution,[6] apportionment of congressional districts,[7] and the Guarantee Clause.[8] In most cases, the Supreme Court fell back on the reasoning of Chief Justice Marshall's *Marbury* decision to avoid injecting itself into what were essentially disputes between political leaders. The political question doctrine during this time period seems to have been limited to only those matters where the president or Congress is entrusted by the Constitution with unrestricted discretion and where the political powers at issue "respect the nation, not individual rights."[9]

It was not until 1962, in the landmark case of *Baker v. Carr*, that the Supreme Court finally gave more definition to Chief Justice Marshall's line of thinking. According to the *Baker* Court, suits are nonjusticiable under the political question doctrine when they are "inextricable" from one of six factors:[10]

1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, or
2) a lack of judicially discoverable and manageable standards for resolving it, or
3) the impossibility of deciding without an initial policy

[3] 5 U.S. 137 (1803)
[44] *Id.* at 170
[5] *Id*. at 166.
[6] *Coleman v. Miller*, 307 U.S. 433 (1939)(mode of amending Constitution is a political question for Congress)
[7] *Colegrove v. Green*, 328 U.S. 549 (1946)(apportionment of Congressional districts to be decided by Congress)
[8] *Luthor v. Borden*, 48 U.S. 1 (1849)(guarantee of a republican form of government is to be resolved by President and Congress)
[9] *Marbury*, 5 U.S. at 166.
[10] *Baker v. Carr*, 369 U.S. 186, 217

determination of a kind clearly for nonjudicial discretion, or

4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, or

5) an unusual need for unquestioning adherence to a political decision already made, or

6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question

Essentially, these factors distill down to (1) concerns for the separation of powers, (2) the presence of applicable judicial standards, and (3) prudential concerns. Much like Chief Justice Marshall's reasoning, the first factor holds that under the separation of powers, certain decisions have been exclusively committed to the executive and legislative branches of government and are therefore not subject to judicial review. The Court in *Baker* found the first test requires a ''discriminating analysis of the question posed, in terms of the history of its management by the political branches, of its susceptibility in the light of its nature and posture of the specific case, and of the possible consequences of judicial action.''

The second Baker factor considers whether the Supreme Court has the competence to analyze certain issues. If not, then suits arising from these issues may be unsuitable for judicial resolution. The argument for nonjusticiability is not just that an issue is complicated – courts work through complicated issues all the time. Rather, it is that no standard exists on which to base a decision. Tort cases are usually not dismissed under this factor because as many courts have found, the principles of tort law may still allow for judicially manageable standards.

The first two tests are not mutually exclusive in that the second test may strengthen the applicability of the first test. For example, a court may be ill-equipped to ascertain the reasonableness of military actions (factor two) precisely because it is the executive branch, not the judicial branch, that has governed all military actions throughout the nation's history (factor one). Thus, the first two tests have been argued separately and, at times, together to dismiss certain suits.

Whether considered separately or together, the first two factors have been the most persuasive and most commonly used. The Supreme Court, itself, has suggested the six factors are listed in order of importance.[11] While the first two tests have been the subject of substantial litigation, case law discussing the remaining four factors is sparse. When they are discussed, courts typically analyze these four factors, jointly, or even as simply one factor while offering little analysis other than courts should be prudent when faced with issues that could concern multiple branches of government.

[11] *Vieth v. Judelirer*, 541 U.S. 267, 278 (2004)

Application of the Political Question Doctrine to Military Contractors

Based upon the factors articulated in *Baker*, courts subsequently found cases nonjusticiable on political question grounds when resolving the case would require the court to weigh in on military procedures or judgment. For example, the political question doctrine was applied in cases concerning the adequacy of training procedures used by the National Guard, standards for intercepting aircraft entering U.S. airspace, or determining the necessity of simulating battle conditions.[12] While these military-related cases arose with some regularity during the *Baker* era, the doctrine was limited to suits against government actors and entities. That is, the actual defendant was a coordinate branch of the U.S. government and not a private entity. As with *Marbury* in 1803, the cases continued to concern a national interest rather than individual rights.

Beginning in the 1990s, however, federal district courts began to extend the doctrine to individual tort cases against military contractors. The first notable example of the political question doctrine dismissing a tort lawsuit was in a 1993 case concerning the accidental deaths of six US. Marines struck by a Maverick AGM-65D missile during Operation Desert Storm. Plaintiffs claimed a manufacturing defect caused the missile to deviate from its intend target. The court found that the political question doctrine applies to plaintiffs' claims and dismissed the action because the case "necessarily requires inquiry into military strategy and…orders to…ground troops" and such decisions are "indubitably within the province of the Executive."[13] *Baker* factor number one.

With the increase in military operations in Afghanistan and Iraq post-9/11, incidents resulting in the injury or death of U.S. service members and military contractor employees became, unfortunately, more common. As a result, suits against military contractors have become a fixture of the judicial landscape and provided the courts with numerous opportunities to expound on the political question doctrine in the context of tort actions against military contractors.

The outcomes in these cases have varied and while there does not appear to be uniform treatment or criteria, there has at least been some commonality on how judges analyze this doctrine. In fact, a test for application of the doctrine appears to have emerged in the federal judiciary's Fifth, Ninth and Eleventh districts. As explained by the Ninth Circuit in 2017, analysis of a political question issue "requires a two-part analysis. First, we must determine whether resolving this case will require the court to evaluate a military decision. Doing so requires us to consider what Plaintiffs must prove to establish their claim, *keeping in mind any defenses [defendant] will raise*. If step one reveals that determining [defendant]'s liability will require the court to evaluate a military decision, step two requires us to decide whether that military decision is of a kind that is unreviewable under the political question doctrine."[14]

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[12] *Gilligan v. Morgan*, 413 U.S. 1 (1973)(training procedures); *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991)(intercepting aircraft); *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997)(simulating battle conditions).
[13] *Bentzlin v. Hughes Aircraft Co*., 833 F.Supp. 1486 (C.D. Cal. 1993)
[14] *Cooper v. Tokyo Elec. Power Co., Inc.*, No. 15-56424, 2017 WL 2676775, at *15 (9th Cir. June 22, 2017)

This second step, determining if the military decision is unreviewable, requires an analysis of the six *Baker* factors. As with most political question cases no matter the context, it is the first two *Baker* factors that are most important to the analysis. Case law discussing the remaining four factors in the context of military contractors is non-existent. The first *Baker* factor — constitutional commitment to a coordinate branch of government — has become the most applicable to cases involving military contractors. The key for this factor is the degree of control the military exercises (not just has, but exercises) over the contractor's actions and behavior. In a case that arose from an accident during a fuel convoy mission in Iraq in 2004, the Eleventh Circuit, in considering this first Baker factor, was most persuaded by the fact the military had "plenary control" over these fuel convoys. Although the accident involved the private contractor's truck, driven by contractor's employee, rolling over and hitting a soldier, the contractor's actions were, per contract, controlled by the military and military regulations. Because of this level of control, the court reasoned that "military judgments governed the planning and execution of virtually every aspect of the convoy in which [plaintiff] was injured." It would, therefore, be "impossible to make any determination regarding [defendants] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is precisely this kind of scrutiny that the political question doctrine forbids."[15] Where such control does not exist, the courts typically will allow the tort action to go forward.[16]

The second *Baker* factor has also been applied to private military contractors but to a lesser degree. The Supreme Court has held that courts may not have the competence to analyze professional military judgments and thus suits arising from these judgments may be unsuitable for judicial resolution. Courts appear more likely to hold this factor warrants dismissal when the court cannot evaluate the claims using ordinary tort standards used in the civilian context.[17] For Example, a court may find that it is ill-equipped to ascertain the reasonableness of certain military actions that require a trade-off between safety and combat effectiveness or it is unable to apply normal tort standards of care due to the large degree of military control. Evaluating plaintiff's claims, therefore, would require the court to develop and apply new standards.

Despite the emergence of a test and some principles for evaluating political question issues, uniform treatment remains elusive. To illustrate the continued disparity among the cases, we need only look to two recent decisions. Both cases concerned incidents involving variants of the same type of military equipment, the Sikorsky CH-53E heavy-lift helicopter. Both cases required examination of military decisions concerning the use of a type of electrical wire known as "Kapton," a product whose use, repair and replacement was totally controlled by the government. Despite these similarities, one court denied a motion to dismiss pursuant to the political question doctrine and the other case affirmed dismissal. To parse out how these two courts came to opposite conclusions when faced with roughly the same issue, we must look more closely at the facts of each case and written decisions handed down by each court.

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[15] *Carmichael v. Kellogg, Brown & Root Services*, 572 F.3d 1271, 1281-83 (11th Cir. 2009)

[16] *McMahon v. Presidential Airlines, Inc*., 502 F.3d 1333 (11th Cir. 2007)(defendant had "ultimate responsibility of ensuring safety of flights…the military's duties were relatively discrete.")

[17] *Carmichael*, 572 F.3d at 1289.

FONTALVO v. SIKORSKY AIRCRAFT CORPORATION

Facts of the Case:

Fontalvo v. Sikorsky Aircraft Corporation concerned a U.S. Marine killed in an accident involving a CH-53E heavy-lift helicopter at Marine Corps Air Station Miramar (North of San Diego) on March 17, 2011. The Marine was underneath a CH-53E Super Stallion preparing it for flight when the landing gear retracted after he forcibly removed a stuck landing gear safety pin from the left main gear.[18]

According to the Navy's investigation report, the landing gear had been inappropriately energized to retract because of an errant transfer of current between two wires whose insulation coating, made of "Kapton," had deteriorated down to bare wire. The investigation also concluded the Marine, a helicopter airframe Quality Assurance Representative, was a duty expert regarding the landing gear systems and should have recognized the danger of a removing a stuck safety pin. The investigation further found a significant training issue with respect to the Navy's maintenance publications and the Marine Corps' training related to landing gear safety pins.

Evidence developed during the case showed that the Navy had been aware of Kapton wire degradation problems for more than thirty years before the accident. In fact, in a 2009 report, the Navy expressly acknowledged and accepted the risk of "an inadvertent landing gear retraction while the aircraft is on the ground." The very scenario that resulted in the *Fontalvo* accident. For various reasons beyond the control of defendant, including funding shortfalls, the Navy postponed resolving the wiring problem and continued to operate helicopters with known wire degradation issues and even continued to require the manufacture of CH-53E helicopters with Kapton wiring. The manufacturer the CH-53E helicopter, Sikorsky, even recommended on two occasions, in 1981 and 1986, that the Navy modify the CH-53E design requirements to eliminate the use of Kapton. The Navy rejected Sikorsky's recommendation both times.

Sikorsky filed a motion for summary judgment arguing, in part, that this case implicates political questions because adjudication of the case will require the court to examine military judgments and decisions, including: Navy decisions to proceed with production of the subject aircraft using Kapton wiring despite the Navy's own studies and reports concluding that Kapton was not appropriate for Naval aircraft; the various measures considered and initiated by the Navy to replace Kapton wiring from 1980 through the date of the accident; the adequacy of warnings and training of servicemen who were exposed to the hazards of Kapton wiring; as well as decisions on how best to allocate limited funding to address the problem.

Further, the evidence demonstrates the government had plenary control over use of Kapton in the manufacturer of the CH-53E helicopter, maintenance, training and efforts to replace the problematic wire. Any assessment of the contractor's liability will necessarily entail examination of multiple Navy judgements and decisions related to the Kapton problem as well as legislative decisions concerning the lack of funding necessary to address Kapton issues. Thus, adjudication of the case implicated the first two *Baker* factors: the claims and defenses directly challenged decisions solely within the discretion of the executive and legislative branches (the

[18] A landing gear safety pin is designed to mechanically prevent an aircraft's landing gear from retracting while the aircraft is on the ground but is removed prior to flight so that the landing gear can be retracted after takeoff.

first *Baker* factor) and these decisions, such as the safety and combat effectiveness tradeoffs made by the Navy in proceeding with the use of Kapton, lacked judicially manageable standards (the second *Baker* factor). The inextricable political questions that the court would be forced to examine made this case, it was argued, non-justiciable and subject to dismissal. The court did not agree.

Court's Ruling on the Political Question Doctrine:

The court recognized the Ninth Circuit had established a two-step test for evaluating political question issues which required, first, a determination of whether resolving this case will require the court to evaluate a military decision, and, second, whether that military decision is of a kind that is unreviewable under the political question doctrine. However, despite, the lengthy evidence of military decisions related to Kapton, the court never got past the first part of the Ninth Circuit's test.

With regard to step one, the court reasoned that since plaintiffs were alleging not only defective Kapton wiring but also defective *routing* of the wire, a jury could determine fault without implicating the Navy's control over the Kapton issue. That is, the jury could find the cause of the accident to be how the wires were routed rather than the fact some of the wire's Kapton insulation was degraded to the point that bare wire was visible. In the court's interpretation of the political question doctrine, dismissal is required "*only if* the military actually engaged in a discretionary choice about the equipment that *caused* Fontalvo's accident."[19] It did not matter to the court that the jury will be asked to evaluate a military decision (the use and continued use of Kapton) because, ultimately, the jury could decide Kapton had nothing to do with the cause of the accident. According to the court, since it is unknown if resolving this case will require the reexamination of a military decision, the court "cannot say at this point that this case is nonjusticiable."[20]

The court's analysis ignored the fact that defendant will raise the Navy's Kapton decisions as a defense regardless of what theory of liability plaintiffs ultimately put forth or what the jury actual determines to be the cause of the accident. As the Ninth Circuit instructed, step one of its test requires a court "to consider what Plaintiffs must prove to establish their claim, *keeping in mind any defenses [defendant] will raise*."[21]

The ruling seems to also ignore the basic purpose of the political question doctrine: to prevent inquiry into judgments made by the executive or legislative branches of government that are constitutionally committed to those political departments. The court, here, took the approach that the jury should inquire into military decisions it is precluded from inquiring into and should determine if one of those decisions caused the accident. The court did not explain what it would do should the jury find Kapton to be the cause of the accident. Possibly, the court would have conducted a political question analysis post-trial to determine if the case is to be dismissed notwithstanding the verdict.

This *Fontalvo* court's approach is not unique, though. The Fifth Circuit has set forth a two-step test similar to the Ninth Circuit's. In the case of *Lane v. Halliburton* (like the *Carmichael* case,

[19] 2017 WL 4922814 at *22
[20] *Id*. at *23
[21] *Cooper v. Tokyo Elec. Power Co., Inc.*, 2017 WL 2676775, at *15 (9th Cir. June 22, 2017)

resulting from a fuel convoy accident in Iraq), the court acknowledged that "some of the allegations" could draw the court into consideration of military decisions as to what constituted adequate force protection for the fuel convoys at issue.[22] However, like the *Fontalvo* court, the Fifth Circuit determined that plaintiffs had presented other allegations "sufficiently plausible" to establish the defendant contractor's liability without forcing the court, or a jury, to reexamine the Army's force protection decisions.[23]

Because the court found that adjudication of the case does not necessarily require the reexamination of a military decision, its ruling includes no analysis of the *Baker* factors. Step two of the Ninth Circuit's test was not necessary. Had the court analyzed just the first *Baker* factor, it is hard to fathom a conclusion other than the Kapton issue presenting an inextricable political question. Not only was the Navy's plenary control of this issue demonstrated but prior case law is clear that the trade-off between safety and combat effectiveness is not a decision that can judicially reexamined. The court would have become entangled in evaluating decisions constitutionally committed to the executive branch.

PRESTON V. M1 SUPPORT SERVICES

Facts of the Case:

This case arises from the January 8, 2014, crash of a United States Navy MH-53E Sea Dragon helicopter off the coast of Virginia during a minesweeping exercise. The crash, which the Navy determined was related to Kapton wiring issues, resulted in the deaths of three servicemembers and serious injuries to two others.

M1 Support Services, L.P. ("M1") performed maintenance on the subject helicopter. M1 contracted with the Navy to perform phase maintenance on MH-53E Sea Dragon helicopters in two Navy squadrons. "Phase maintenance" refers to recommended service occurring at regular intervals based on flight hours. Work was performed in accordance with a document called the "Performance Work Statement." Pursuant to the contract, M1 was to "provide organizational level ("O-Level") maintenance support…in a manner that meets or exceeds" Navy instructions.

The Performance Work Statement required that all work done by M1 be "in accordance with applicable publications, technical directives, instructions, standards, and procedures contained in pertinent manuals utilizing blueprints, drawings, or schematics" as provided by the Navy. It also included "Directives and Instructions," which referenced various military procedures, manuals, guidelines, and publications.

The Navy informed M1 of Kapton wiring issues in Sea Dragon and Super Stallion helicopters and that the technical manuals for the helicopters would eventually be modified to account for those issues. However, by January 2014, the Navy still had not made those modifications. Thus, at the time of M1's last Phase maintenance performed on the subject helicopter, the Navy did not require inspection of the Kapton wiring.

[22] 529 F.3d 548, 560 (5th Cir. 2008)
[23] *Id*. at 563

The Navy's investigation concluded the accident was caused by the ignition of fuel as a result of the degradation of "[Kapton] insulation covering electrical wiring within the aircraft." The Navy's report noted that "inspection of internal wiring bundling" is not specifically required by Navy maintenance cards. Like the *Fontalvo* accident, the report recommended a "one-time safety inspection" of CH-53E/MH-53E helicopters for chaffed wiring.

As to M1, plaintiffs' complaint alleged it had a duty to inspect and replace degrading Kapton wiring. M1 filed a motion for summary judgment based, in part, on the political question doctrine. The trial court granted M1's motion concluding the Navy had plenary control over M1's maintenance on the Sea Dragon helicopter. Thus, M1's maintenance decisions were *de facto* Navy decisions. Plaintiffs' claims are, therefore, nonjusticiable. Plaintiffs appealed.

Court's Decision on the Political Question Doctrine:

The Second Appellate District of Texas affirmed the trial court's dismissal of the case pursuant to the political question doctrine because adjudicating the "claim and defenses in this case will implicate important decisions made by the Navy."[24]

Like the *Fontalvo* court, the *Preston* court acknowledged that a political question inquiry is a two-step process. "To determine how to apply the political question doctrine against a private military contractor, the initial consideration is whether adjudicating the claim will require reexamination of a military decision."[25] Where the two courts differed is in their opinion of where to look for military decisions. The *Fontalvo* court opined that only a military decision that related to plaintiffs' claims was relevant whereas in *Preston* the court specifically found that a "proportionate-liability defense may inject a nonjusticiable political question into a case." Similarly, "a contributory-negligence defense may require reexamination of military decisions if it requires considering the fault of a military decision-maker."[26]

Here, the court found relevant military decisions in the maintenance decisions made by M1 because M1 operated under the Navy's control. Thus, M1's decisions were *de facto* Navy decisions. The fact that M1 may have retained a certain level of discretion over its actions, is not important to the political question inquiry because causation defenses often require a court to "disentangle the military's and contractor's respective causal roles." In other words, if the political question doctrine precludes inquiry into a military decision, it doesn't matter whether that decision is related to plaintiff's claim or the contractor's defense. Either way, the case cannot go forward because the adjudication of the case requires that military judgment be reexamined.

Having concluded that the case requires the reexamination of military decisions, the court turned to the "discriminating analysis" of those decisions (i.e. whether any military decision is of a kind that is unreviewable under the *Baker* factors). Like many federal cases, the court

[24] Although analyzed pursuant to Texas' political question doctrine, the court made clear that "looking at the facts through the *Baker* lens…does not change the analysis." 2020 WL 105733, *11.
[25] *Id.* at *9.
[26] *Id*.

acknowledged that the key to this second step is "to what extent the military controlled not only what M1 did but also how and when it did it."[27] Here, the court concluded the Navy maintained "plenary control over at least some of the decisions" implicated in the case's claims and defenses, to wit:

- the Navy decided the content of all maintenance cards;
- the Navy decided not to require inspection of Kapton issues;
- the Navy decided against such inspections because of funding considerations;
- the Navy decided to continue to use Kapton wiring despite knowledge of its many deficiencies;
- the Navy decided to continue to operate the MH-53E even with knowledge that the Kapton issues onboard the helicopters were not being addressed.

The court concluded that proportionate-liability requires the evaluation of all these decisions: the "fact-finder cannot decide respective degrees of fault as between a military contractor…and the military without evaluating the decisions made by each."[28]

While the court's ruling does not identify the specific *Baker* factor that places these military decisions beyond the power of the court to decide, it confirms that under Texas law, it is the first two *Baker* factors that are important and that the "trial court's findings and conclusions of law" did not "reach beyond the limits of *Baker*."[29] Thus, the court concluded the claim is nonjusticiable and, therefore, the district court correctly dismissed it.

CONCLUSION

Though these two cases diverged greatly in their outcomes on very similar facts, neither is an anomaly. Both lines of though in these courts' rulings can be traced to other court opinions discussing the political question doctrine. What they both mainly teach is there is no formula to help predict when and how a court will apply the political question doctrine. That being said, a criteria for application of the doctrine in the context of military contractors appears to be coalescing despite the varied outcomes that have occurred. Generally, courts seem more likely to find the political question doctrine applicable when (1) the military largely controls the contractor's actions; (2) the plaintiff's claims do not lend themselves to normal tort standards; (3) comparative negligence on the part of the government appears to be significant, and (4) the plaintiff is a military member.

[27] *Id.* at *9.
[28] 2020 WL 105733 at *10 (quoting *Harris v. Kellogg, Brown & Root Services, Inc*., 724 F.3d 458, 474 (3d Cir. 2013)
[29] *Id*. at 12.

"ARISING OUT OF" THE STREAM OF COMMERCE: SUPREME COURT TO PROVIDE CLARITY ON SPECIFIC JURISDICTION IN UPCOMING FORD MOTOR CASES

By: Jean M. Cunningham and Dane Bryant

The question of what "minimum contacts" establish specific personal jurisdiction within a forum has vexed courts and product liability litigants for decades. It is well-settled that sufficient minimum contacts exist when an out-of-state defendant purposefully avails itself of the privileges, benefits, and protections of the forum state, and the litigation arises out of or relates to those purposeful activities.[1] Seemingly straightforward in its initial formulation, the concept of whether a lawsuit "arises out of or relates to" a defendant's in-forum contacts has been shaped and reformed into a split among the lower courts. The disagreement revolves around whether a causal connection between the lawsuit and forum-specific contacts is required. For product liability cases involving out-of-state manufacturers whose products were sold and caused injury in the forum state, adding further confusion is the lingering "stream of commerce" theory that has enabled plaintiffs to cast a wide net to satisfy specific jurisdiction. Many courts argue that the theory is obsolete if a causal connection standard is applied under the "arise of out or relate to" requirement of specific jurisdiction. Parts I and II of this article provide an overview of the stream of commerce theory's history, its relationship to the broader jurisdictional requirements, and the Supreme Court's various attempts to clarify and limit it. From fractured tests to differing interpretations of its applicability, the theory's winding history illustrates the frustration that many product defendants have faced over the years with the wide and confusing net that the theory casts.

The time for clarity may finally be afoot. The Supreme Court has granted certiorari for two consolidated cases, *Ford Motor Company v. Montana Eight Judicial District Court*[2] and *Bandemer v. Ford Motor Company*,[3] both of which involve product liability actions. The question presented to the Court by these cases is "[w]hether the 'arise out of or relate to' requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts."[4] As such, the cases present the perfect opportunity for the Supreme Court to define the required connection needed for specific jurisdiction, and to once and for all issue a definitive decision on stream of commerce jurisdiction. Parts III and IV of this article provide a detailed explanation of how the stream of commerce may culminate under the *Ford* cases. These cases present the potential to finally render stream of commerce obsolete; however, the Supreme Court's history provides a track record of loopholes for the theory's survival.

Regardless, the Supreme Court's decisions in the *Ford* cases will likely fundamentally alter the landscape of personal jurisdiction with critical consequences for defendants involved in

[1] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-76 (1985).
[2] 395 Mont. 478 (2019)
[3] 913 N.W.2d 744 (Minn. 2019).
[4] *See* Brief for Petitioner, Ford Motor Company v. Montana Eight Judicial District Court, 140 S. Ct. 917 (2020), (Nos. 19-368, 19-369), 2020 WL 1154744.

the manufacturing and distribution of transient products such as aircrafts. By rejecting stream of commerce and adopting an explicit requirement for direct causal connection, the Court can finally end rampant forum shopping and provide product liability defendants with greater predictability as to where and how they may be subject to suit.

I. The Evolution of "Stream of Commerce" Personal Jurisdiction.

The early days of personal jurisdiction analysis involved cut and dried, geographically bound inquiries into a defendant's contacts with a forum state.[5] A defendant either had to be a resident of the forum or the defendant's actions giving rise to the litigation had to have occurred within the forum State to be subject to that State's jurisdiction.[6] In other words – physical presence was key. As the world quickly globalized, that rule proved to be untenable. People became more transient and companies began conducting business and shipping their products across the globe. This ultimately led to the "stream of commerce" theory of personal jurisdiction. In its purest form, the stream of commerce theory holds that specific jurisdiction may exist where a defendant's product makes its way into the forum state and causes injury, even where the defendant lacked intention or awareness that the product was present in the forum. Courts ultimately questioned how stream of commerce jurisdiction relates to the prong of minimum contacts requiring that the lawsuit "arise out of or relate to" a defendant's contacts with the forum state.

The Origins of the Stream of Commerce Theory.

World-Wide Volkswagen v. Woodson[7] first pronounced the stream of commerce theory in 1980. There, the plaintiffs were involved in a motor vehicle accident and brought suit alleging a product defect against the vehicle manufacturer, distributor, and dealership in Oklahoma state court.[8] The vehicle was purchased in New York, but the incident occurred in Oklahoma.[9] Defendants were citizens of New York who contested personal jurisdiction in Oklahoma.[10] The Court declared that, under the Constitution, it may be reasonable for a state to assert jurisdiction over a nonresident manufacturer when it places "its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[11]

Thus, the Court planted roots for stream of commerce jurisdiction. However, the Court ultimately ruled that the defendants were not subject to jurisdiction in Oklahoma because, other than the plaintiff's unilateral activity of driving the vehicle into the state, the defendants lacked any other connection with the forum.[12]

The Court broadly defined the stream of commerce as the distribution networks that manufacturers utilize to "serve, directly or indirectly the market for its product in other States,"

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[5] *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).
[6] *Id.* at 714.
[7] 444 U.S. 286 (1980).
[8] *Id*. at 288.
[9] *Id*.
[10] *Id*. at 288-89.
[11] *Id*. at 297-98.
[12] *Id*. at 298.

which was lacking here.[13] But, *World-Wide's* holding did not elaborate on the quality and quantity of contacts that would lead an out-of-state defendant to reasonably anticipate being haled into the forum's court.

Asahi's Fractured Tests for Stream of Commerce Jurisdiction Create Confusion

Seven years later, the Supreme Court in *Asahi Metal Industry v. Superior Court of California, Solano City*[14] attempted to apply the stream of commerce theory but was split by plurality on how to apply it to facts involving products that defendant Asahi placed into the stream of commerce in Taiwan, and eventually made their way to California causing an injury.

While the members of the Court unanimously agreed that there could be no specific jurisdiction, Justice O'Connor and Justice Brennan both won the support of four Justices and wrote separate opinions with two competing tests for stream of commerce jurisdiction: Justice O'Connor's "stream of commerce plus" test and Justice Brennan's "mere foreseeability" test.

Justice O'Connor's "stream of commerce plus" test holds that "the defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[15] Rather, the defendant must also engage in "additional purposeful actions directed at the forum" that "indicate an intent or purpose to serve the market in the forum state."[16]

In contrast, Justice Brennan's opinion rejected the notion that additional conduct on the defendant's part was required. It did, however, require regular and foreseeable delivery of products to the forum state.[17] For Justice Brennan, "as long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."[18]

Asahi's competing tests created a challenging task for lower courts trying to apply the differing standards. And neither test truly focused on the "arising out of or related to" prong of minimum contacts. Thus, lower courts became splintered on how to analyze the issues of stream of commerce jurisdiction.

The Supreme Court's Attempt to Clarify Stream of Commerce Jurisdiction

After nearly twenty-five years of confusion surrounding the applicability of the stream-of-commerce tests, the Court attempted clarity in 2011. On the same day that year, the Supreme Court issued two opinions, *Goodyear Dunlop Tires Operations v. Brown*[19] and *J. McIntyre*

[13] *Id.* at 297.
[14] 480 U.S. 102 (1987).
[15] *Id*. at 111-12.
[16] *Id*. at 112.
[17] *Id*. at 117.
[18] *Id.*
[19] 564 U.S. 915 (2011).

Machinery. Ltd. v. Nicastro,[20] that began to narrow the scope of stream of commerce jurisdiction.

In *Goodyear*, the Supreme Court held that the theory could not be utilized to exercise general jurisdiction.[21] Instead, it may only be used in assessing minimum contacts for specific jurisdiction.[22] Unfortunately, *Goodyear* failed to resolve which of the two tests in *Asahi* should be followed.

The Court also attempted to refine the stream of commerce theory of specific jurisdiction in the *Nicastro* case but again failed to reach a consensus. There, a plaintiff was injured in New Jersey while operating a metal-cutting machine manufactured by J. McIntyre Machinery, Ltd. in England.[23] Apart from the machine's presence in New Jersey, the plaintiff's arguments for establishing personal jurisdiction rested on the defendant's heavy marketing of its products in the United States generally.[24]

While all justices agreed that specific jurisdiction was not present, the Court still was split as to which *Asahi* test to apply. Justice Kennedy's plurality applied the "stream of commerce plus" test and held that, although the defendant may have purposefully directed its product to the United States, the defendant manufacturer did not engage in "conduct purposefully directed" at New Jersey, where at most, four products ultimately reached New Jersey.[25] This showed a lack of "intent to invoke or benefit from the protection of New Jersey's law."[26] Although Justice Kennedy's opinion attempted to narrow the scope of stream of commerce, it still failed to command a majority leaving an inherent unpredictability in how the courts would apply the decision going forward. Nevertheless, the Court did agree that under either stream of commerce test, "a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant."[27]

II. Shifting the Inquiry Away from Stream of Commerce toward a Causal Nexus.

The Supreme Court's most recent specific jurisdiction decisions of *Walden v. Fiore*[28] and *Bristol-Myers Squibb v. Superior Court of California, San Francisco County, et. al*[29] further narrowed the scope of contacts subjecting a defendant to specific jurisdiction. Although neither decision directly addressed the stream of commerce theory, both have rendered it closer to obscurity by refocusing on the connection between a defendant's purposeful, forum-specific contacts and the specific harm suffered.

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[20] 564 U.S. 873 (2011).
[21] *Goodyear*, 564 U.S. at 926-28.
[22] *Id.* at 926-28.
[23] *Nicastro,* 564 U.S. at 878.
[24] *Id.*
[25] *Id*. at 886.
[26] *Id*. at 881-82.
[27] *Id*. at 888.
[28] 571 U.S. 277.
[29] 137 S. Ct. 1773.

In *Walden v. Fiore*, the Court enunciated several principals of specific jurisdiction that many lower courts rely heavily upon in rejecting the stream of commerce theory. There, plaintiff was a Nevada resident who sued the defendant over an alleged improper seizure of money as the plaintiff attempted to board a plane from Georgia to Nevada.[30] The defendant was a Georgia resident, who acted in Georgia, and had no other connection with the forum state of Nevada.[31] In rejecting specific jurisdiction, the Supreme Court emphasized that due process permits the exercise of specific jurisdiction only where the defendant's "suit-related conduct" creates a "substantial connection" with the forum state and the claims "arise out of contacts that the defendant *himself* creates with the forum."[32] Moreover, a "defendant's relationship with a plaintiff or third-party, standing alone, is an insufficient basis for jurisdiction"[33] and "mere injury to a forum resident is not a sufficient connection to the forum."[34] Because the defendant's alleged wrongful conduct occurred outside the state, and the only connection to the forum were the plaintiffs, specific jurisdiction could not be exercised.[35]

With these principles in mind, the Supreme Court *in Bristol-Myers Squibb Co. v. Superior Court of California*[36] turned further toward requiring a causal nexus with the forum state to establish jurisdiction. There, the Supreme Court emphasized that even where a corporation purposefully avails itself of a forum, it will not be subject to specific jurisdiction if the plaintiff's claims did not "arise out of relate to" those purposeful contacts. More than 600 plaintiffs, most of whom were not California residents, sued the defendant pharmaceutical company, alleging that its drug, Plavix, caused damage to their health.[37] The plaintiffs brought claims for product liability, negligent misrepresentation, and misleading advertising.[38] The defendant engaged in substantial business activities in California, including research and laboratory facilities that employed around 250 sales representatives, a small-state government advocacy office, and had sold almost 187 million Plavix pills in California, resulting in more than $900 million in revenue.[39] Despite these contacts with the forum, the Court made clear that a defendant's general connections with the forum are not enough to assert specific jurisdiction.[40] The Court emphasized that "there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state."[41]

Relying on its holding in *Walden*, the Supreme Court held that no specific jurisdiction existed because even though the defendant sold Plavix in California, "all the conduct giving rise to the nonresidents' claims occurred elsewhere."[42] The defendant did not develop Plavix in

[30] *Walden,* 571 U.S. at 279-81.
[31] *Id.*
[32] *Id.* at 284.
[33] *Id*. at 286.
[34] *Id*. at 290.
[35] *Id.*
[36] 137 S. Ct. 1773.
[37] *Id*. at 1778.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 1781.
[41] *Id.* (alterations in the original).
[42] *Id*. at 1782.

California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on Plavix's regulatory approval in California.[43] Thus, the claims did not "arise out of or relate to" the defendant's conduct within the State.

Although the Court did not specifically address the stream of commerce theory of jurisdiction, the Court did reject the California Supreme Court's "sliding scale approach" recognizing that such approach is "difficult to square with [Supreme Court] precedents."[44] Specifically, the Court held that under the California approach,

> the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.[45]

The Supreme Court emphasized that what is needed – and what is missing here – is a connection between the forum and the specific claims at issue."[46]

III. Ford Motor Cases Reinforce Need for Clarity Surrounding Stream of Commerce Jurisdiction and the "Arise out of or Relate to" Prong.

Although it did not outright disavow stream of commerce jurisdiction, *Bristol-Myers Squibb* pointed the Supreme Court in the right direction of explicitly requiring some connection between the defendant's forum-specific actions and the lawsuit. Notwithstanding, the *Bristol-Myers Squibb* decision led to a two-fold split among jurisdictions: (1) the extent of a causal connection required between a defendant's in-state conduct and the plaintiff's claims to satisfy the "arise out of relate to" prong of specific jurisdiction[47] and (2) whether the stream of commerce theory remains a viable means of asserting specific jurisdiction.[48]

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[43] *Id*. at 1778.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *See e.g*., *Ford Motor Company v. Montana Eight Judicial District Court*, 395 Mont. 478 (2019)(holding no causation is required); *Menken v. Emm*., 503 F.3d 1050, 1058 (9th Cir. 2007)(holding plaintiff cannot establish personal jurisdiction over a defendant unless "he show[s] that he would not have suffered an injury 'but-for' [the defendant's] forum-related conduct."); *Harlow v. Children's Hospital*, 432 F.3d 50, 62 (1st Cir. 2005)(holding that a connection stronger the "but-for" causation is required); *Myers v. Casino Queen, Inc.,* 689 F.3d 904, 912-13 (8th Cir. 2012)(holding that an unspecified causal connection is required.).
[48] *Compare Montgomery v. Airbus Helicopters, Inc.,* 2018 WL 1164671 (rejecting stream of commerce theory of specific jurisdiction), *Shuker v. Smith & Nephew, PLC*, 2018 WL 1096185 (3d Cir. Mar 1., 2018)(rejecting the stream of commerce theory and noting that the Supreme Court has "twice-rejected" the theory), *and Venuti v. Continental Motors, Inc.* 2018 WL 312532 (Utah Ct. App. Jan. 5, 2018) *with Lindsley v. Am. Honda Motor Co.* 2017 WL 3217140 (E.D. Pa. July, 28, 2017) *and Everett v. Leading Edge Foils, LLC*, 2017 WL 2894135 (E.D. Wis. July 7, 2017).

Now, the Supreme Court has granted certiorari for two consolidated cases, *Ford Motor Company v. Montana Eight Judicial District Court*[49] and *Bandemer v. Ford Motor Company*.[50] that have the potential to resolve both points of discord among lower courts.

Ford Motor Co. v. Montana Eighth Judicial presents a clear example of the existing circuit split on causation and stream of commerce. There, a Montana plaintiff drove a 1996 Ford Explorer on a Montana highway when one tire's tread separated, causing the vehicle to crash, resulting in the driver's death.[51] The plaintiff sued Ford for design-defect, failure to warn, and negligence. Ford moved to dismiss the action for lack of personal jurisdiction.[52]

In this case, Ford assembled the subject vehicle in Kentucky and later sold it to a dealership in Washington and a consumer in Oregon.[53] The subject vehicle arrived in Montana only after a series of transactions that did not involve Ford or a Ford dealership.[54] Therefore, Ford contested the "arising out or relating to" prong of specific jurisdiction, focusing its argument away from the stream of commerce onto causation.[55] It argued that plaintiff's claims arose out of or related to Ford's alleged wrongful conduct – designing, manufacturing, selling, etc. the subject vehicle – all of which occurred entirely outside the forum. Thus, Ford's in-state activity was unrelated to the specific claims at issue.[56]

The Montana Court, however, explicitly adopted Justice O'Connor's stream of commerce plus theory and rejected Ford's attempt to move away from it.[57] Although Ford did not design, manufacture, or sell the subject vehicle in Montana, the court found that Ford generally placed its products into the stream of commerce with the expectation that Montana residents would purchase them.[58] The court also found that Ford engaged in additional activities "establishing its intent to serve the market."[59] Ford advertised, was registered to do business, operated subsidiaries, maintained employees, and had 36 dealerships in Montana.[60] Moreover, the court emphasized that Ford sold automobiles, specifically Ford Explorers – the type of vehicle at issue – and parts in Montana and also provided automotive services such as repair and replacement, in Montana.[61]

The court recognized that reconciling the stream of commerce theory with the "arise out of or relate to" prong of specific jurisdiction "presents a challenging legal inquiry" and that the "defendant's forum-related activities did not directly result in the plaintiff's use of the product in

[49] 395 Mont. 478 (2019).
[50] 931 N.W.2d 744 (Minn. 2019).
[51] *Ford Motor Company*, 385 Mont. at 483.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 480.
[55] *Id*. at 488-89.
[56] *Id*.
[57] *Id*. 487-88.
[58] *Id*. at 488.
[59] *Id*.
[60] *Id*.
[61] *Id*.

that forum."[62] Nevertheless, the Montana Court rejected that due process required a direct, causal connection, and instead held that the claims only need to "relate to" the defendant's in-state activities, where the defendant purposefully availed itself under the stream of commerce plus theory.[63] Indeed, although recognizing the split among jurisdictions, the court adopted the minority view that no causal connection is required, instead all that is required is a connection "sufficient enough to not offend due process."[64]

Relying upon *World-Wide Volkswagen,* the court held that "when a company engages in design, manufacture, and distribution of products specifically designed for interstate travel, it is both fair and reasonable to require the company to defend a lawsuit in a state where the product caused injury."[65] Applying this standard, the court held that the plaintiff's claims related to Ford's in-state activity because "[a] nexus exist[ed] between the [decedent's] use of the Explorer and Ford's in-state activity."[66] The court emphasized that Ford advertises, sells, and services other vehicles in Montana and "makes it convenient for Montana residents to drive Ford vehicles."[67] Further, the court noted that "Ford could have reasonably foreseen the Explorer – a product specifically built for travel – being used in Montana."[68] Lastly, the court dismissed that *Bristol-Myers Squibb* or *Walden* had any impact on its approach because *Bristol-Myers Squibb* only concerned nonresident plaintiffs not injured in the forum, and that the plaintiff's claims in the present case had a relationship to Ford's in-state activities, which was absent in *Walden*.[69]

Ultimately, *Ford Motor Co. v. Montana Eighth Judicial* illustrates the strenuous path that many courts take to cast the broad stream-of-commerce net over defendants while ignoring a true causal nexus between the harm and the defendant's forum-specific contacts.

Additionally, the Minnesota Supreme Court in *Ford v. Bandemer*[70] came to a similar conclusion. There, plaintiff was a passenger of a 1994 Crown Victoria that crashed and allegedly caused a brain injury due to a faulty airbag.[71] Plaintiff sued Ford for products liability, negligence, and breach-of-warranty.[72] Similar to *Ford v. Montana*, Ford designed the vehicle in Michigan, assembled it in Canada, and sold it in North Dakota in 1993.[73] The vehicle was then bought and sold several times without Ford's involvement, and at the time of the incident, the vehicle was with its fifth owner who registered the vehicle in Minnesota in 2013. [74] Ford moved to dismiss the complaint for lack of personal jurisdiction arguing the same points as in *Ford v. Montana*.[75]

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[62] *Id*. at 489.
[63] *Id*.
[64] *Id*.
[65] *Id*. at 491.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*. at 491-92.
[70] 931 N.W.2d 744 (Minn. 2019).
[71] *Id*. at 748.
[72] *Id*.
[73] *Id*. at 757.
[74] *Id*. at 758.
[75] *Id*. at 748.

This court also rejected Ford's attempt to move away from stream of commerce. Instead, it looked to other forum contacts unrelated to the subject vehicle to exercise personal jurisdiction over Ford. It held that Ford had purposefully availed itself of Minnesota's jurisdiction because it collected data on how its vehicles perform through Ford dealerships, used that data to inform improvements and train mechanics, sold over 2,000 1994 Crown Victoria vehicles in Minnesota, and over 200,000 other ford vehicles between 2013 and 2015, and conducted direct-mail advertising and marketing in Minnesota.[76] The court held that Ford's data collection, marketing, and advertising "demonstrate[d] that its delivered its product into the stream of commerce with the intention that Minnesotans purchase such vehicles."[77]

This court also rejected that due process requires a causal connection between the defendant's in-state contacts and a plaintiff's claims.[78] To exercise jurisdiction, the court emphasized that it must consider Ford's contacts "in the aggregate" not individually, and took a "totality of the circumstances" approach to cast the wide stream-of-commerce net.[79] The court held that *Bristol-Myers Squibb's* rejection of a "sliding scale approach" was distinguishable because *Bristol-Myers Squibb* involved an injury occurring outside the forum to nonresident plaintiffs.[80] Therefore, a connection between the forum and plaintiff's claims could not be found despite defendant's contacts with the forum.[81] The court held that Ford's contacts, including Ford's sales of other 1994 Crown Victorias and other Ford vehicles, data collection for vehicle design, and advertising and marketing "related to" plaintiff's claims, because his claims, including defective design, concern more than the subject vehicle.[82] Further, the court held that Ford's sales, marketing, and research satisfied the requirement that "there is an affiliation between the forum and the underlying controversy, [an] activity or an occurrence that takes place in the forum State" as stated in *Bristol-Myers Squibb*, because the accident and injury occurred in Minnesota, the vehicle was registered in Minnesota, and the plaintiff was a Minnesota resident whose injuries were treated in Minnesota.[83]

Ultimately, the Supreme Court's acceptance of these *Ford* cases proves the need for more clarity and a definitive test on whether direct causation is required, and whether the stream of commerce can ultimately remain a viable theory of specific jurisdiction.

IV. Conclusions

The Supreme Court's prior attempts at clarity in *Walden* and *Bristol-Myers Squibb* have left open various avenues for plaintiffs to continue perpetuating splits of authority on the true extent of the causal nexus required for specific jurisdiction, and the viability of the stream of commerce theory as a result.

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[76] *Id*. at 751.
[77] *Id*. at 750-51.
[78] *Id*. at 752-53.
[79] *Id*. at 754.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 754-55.
[83] *Id*. 754.

The current standards adopted in the *Ford Motor* cases keep stream of commerce alive and subject defendants to suit in any forum where they advertise or sell products, even if those actions in the forum had nothing to do with the particular product that injured the plaintiff. Under either stream of commerce test announced in *Asahi*, a defendant may be haled into court based on "unconnected activities in the forum" rather than the defendant's activities giving rise to the episode in suit.

But, the stream of commerce theory has never commanded a majority and is simply inconsistent with the Court's most recent decisions in *Walden* and *Bristol-Myers Squibb*. As *Walden* and *Bristol-Myers Squibb* teach, specific jurisdiction depends on "an activity or occurrence that takes place in the forum State" that must derive from "the very controversy that establishes jurisdiction."[84] By hearing the *Ford Motor* cases which flout this principle, the Supreme Court now has the opportunity to reject the competing stream of commerce tests in favor of the more direct causal connection needed between a plaintiff's claims and a defendant's "suit related" contacts advocated for in *Bristol-Myers Squibb*. Product liability defendants will be provided much needed clarity on where and how they are subject to suit if the Supreme Court rises to the occasion and ends the decades long chronicle of the stream of commerce theory.

[84] *Id*. at 1780.

PTSD & THE AVIATION CASE

By: Suzanne N. McNulty

Introduction

It's no wonder that we confront Post Traumatic Stress Disorder (PTSD) on a frequent basis in the defense of aviation cases. The National Institute of Health (NIH) includes "plane crashes" in its definition of the type of "traumatic incidents" that may trigger PTSD.[1] And, the variety of plaintiffs claiming PTSD in an aviation case are many: crash survivors/eyewitnesses, first responders (firefighters, police, EMTs and the like), flight attendants, and, even pilots. Accordingly, to effectively defend a case involving PTSD, aviation defense lawyers and their clients need to understand both the legal and medical side of this illness. To serve this purpose, this article will provide the reader with a better understanding of the disorder and how courts treat it, including a discussion regarding the recoverability of PTSD damages under the Montreal Convention and the consequent effect this has on aviation manufacturers. Of importance, this article will also provide guidance on how best to defend a PTSD case.

What is PTSD?

The best place to start is with developing a better understanding of this disorder. There are two broad areas for assessment of PTSD: 1) the nature of the event or stimulus; and 2) the key areas of symptomology.[2] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V),[3] written by the American Psychiatric Association provides the authoritative criteria for diagnosing PTSD. To meet DSM-V's criteria, four characteristic system clusters must be present for at least one month after an exposure to a *traumatic event* that involves actual or threatened death, serious injury or sexual violence. The four clusters are identified as: 1) re-experiencing (recurrent thoughts, nightmares, flashbacks, distress); 2) avoidance (efforts to avoid external reminders – people, places, activities, objects, thoughts – associated with the event); 3) negative alterations in cognitions or mood (exaggerated negative beliefs, fear, horror, anger, guilt, shame, estrangement/detachment); and 4) hyperarousal (anger, irritability, difficulty concentrating, reckless/destructive behavior). Further, depression, impatience, distrust, disillusionment, withdrawal and sleep disturbances are also hallmark indicators of PTSD.[4]

The "Traumatic Event"

Unlike garden-variety mental conditions, which can develop from any of life's stressors, PTSD results only from exposure to a *traumatic* event.[5] How traumatic must an event be to support a PTSD diagnosis? Cases, articles and publications of every kind almost always include the "plane crash" as an example. PTSD can result from a variety of traumatic incidents … such

[1] Please see Appendix A to this article for the full NIH definition.
[2] Frances Codd Slusarz, *Workplace Stress Claims Resulting from September 11th* (2002) 18 Labor Lawyer 137, 140.
[3] Due to its length, the full text of DSM-V follows this article as Appendix A.
[4] Romanucci and Kurtz, *The Invisible Injury of PTSD* (2014) 50 Trial 30, 31 and The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V).
[5] Frances Codd Slusarz, *supra.* at 141.

as mugging, rape, torture, being kidnapped or held captive, child abuse, car accidents, train wrecks, plane crashes, bombing or natural disasters.[6]

Disaster workers who are exposed to a traumatic event, such as a plane crash, have a 16.7% rate of PTSD.[7] This high rate compares to a 7% to 9% lifetime average across all professions.[8] Survivors of plane crashes have been found to exhibit increased depression, anxiety, intrusive thoughts, avoidance, and somatization, with 93% of survivors initially reporting at least four symptoms of PTSD, and 54% meeting full criteria for PTSD.[9] "Even after as severe an experience as an aviation accident, many of the victims who develop psychological distress experience a considerable diminishment of symptoms over the following year. This is not true for all persons who develop distress, however, as exemplified by the fact that after a year, 41% of the aviation accident survivors exhibited one or more symptoms of PTSD, and 10% to 15% still met criteria for PTSD."[10] It is clear that aviation accidents are ripe territory for PTSD claims.

What Events Do the Courts Consider When Determining What Is "Traumatic" Enough to Justify a PTSD Finding?

In *Guzman v. Boeing*,[11] plaintiff was awarded $2.2 million for PTSD and major depressive disorder as a result of a rapid decompression incident which caused the aircraft to drop suddenly and the oxygen masks to be deployed. The plane was brought under control by the pilot and landed safely in Miami approximately 30 minutes later.

The Court, in denying one of Boeing's post-trial motions to reduce the reward, found there was substantial evidence from which the jury could find that the decompression incident was a harrowing event: "Ms. Guzman testified that there was a big, loud, explosion in the plane and that she felt like she had been kicked in the stomach or the chest…The plane started falling very quickly and was shaking and rolling…There seemed to be smoke, and she felt wind coming into the plane, which indicated to her that there was a hole…Ms. Guzman thought that she was going to die…[A] flight attendant testified that it sounded like a bomb explosion on board — there was a hiss, a gust of air, and the oxygen masks came down. Passengers panicked and were crying and asking if they were going to die."[12] The Court found that there was ample evidence to support the jury's verdict that the event experienced by plaintiff met the "traumatic" requirement.

In analyzing what qualifies as "traumatic", courts may consider the expected versus unexpected nature of the event. For example, in *Anthony v. Fairfax County Dept. of Family*

[6] Chelsie King Garza, *Mental Anguish: The Overlooked Element of Damages* (2013) 51 Houston Lawyer 14,16.
[7] Romanucci and Kurtz, *The Invisible Injury of PTSD* (2014), 50 Trial 30, 31.
[8] *Id.*
[9] Stewart, M.D. and Brutman, M.D., J.D., 6 Attorneys Medical Advisor §44:82, Other accidents – Aviation (March 2020 update).
[10] Betty Brutman, M.D., J.D., 6 Attorneys Medical Advisor §44:94, Duration of the Distress Following Accidents (March 2020 update).
[11] *Guzman v. The Boeing Company* (2019) 366 F. Supp. 3d 219.
[12] *Id.* at 231.

Services,[13] plaintiff social worker, went to a daycare center to take emergency custody of two children. As plaintiff approached the center, relatives of the children tackled plaintiff, causing her to fall and sustain injuries. Plaintiff testified she was "terrified" when the women pushed her off the porch. However, she also testified she regularly met with angry clients in "low-class areas" and was an experienced social worker.[14] The Court in finding insufficient evidence to support PTSD explains: "[T]he types of precipitating events that give rise to purely psychological compensable injuries are consistently described as shocking, frightening, traumatic, catastrophic and unexpected. *See Hagood* [citations omitted] (electric flash and noise similar to a shotgun blast deemed sufficient); *see also Daniel Const. Co. v. Tolley* (the explosion of 100 pounds of dynamite without warning while the employee was unloading concrete in a mine shaft nearby deemed sufficient); *Hercules, Inc. v. Gunther* (an explosion that killed two people and threw the employee in the air deemed sufficient); *Dunn* (the death of a severely burned patient cared for by an EMT deemed insufficient)."[15]

Defendant's medical expert, when testifying about plaintiff Anthony's alleged PTSD stated:

> "[T]he condition of the original trauma didn't measure up to the criteria described in the latest diagnostic and statistical manual of mental disorders, in that the trauma must be trauma, it cannot be just stress. The world is filled with all types of daily stresses. The traumatic event has to be life threatening, has to be of a catastrophic-potentially catastrophic nature; it has to cause intense amount of biologic reactivity."[16]

In his response to what types of events meet the criteria, defendant's expert responded:

> "[L]ife threatening events, being held hostage, being held at gunpoint, being subject to some unexpected catastrophe like a severe automobile accident, a plane crash. And the word unexpected is very important because in the normal range of our activities, we kind of expect certain things to happen. And I felt that one of the factors in Ms. Anthony's case that mitigated against PTSD as a diagnosis, is that what happened to her was not out of the range of experience of a social worker in Child Protective Services. You go into that situation with the anticipation that these are problematic situations, potentially aggressive situations, and Ms. Anthony, indeed, had been with Child Protective Services for some nine years. So that when an individual has an expectation of certain things occurring, it mitigates against the development of a PTSD reaction, which is, indeed, the reaction to something unexpected happening-something terrifying happening.

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[13] *Anthony v. Fairfax County Dept. of Family Services* (2001) 36 Va. App. 98.
[14] *Id.* at 103.
[15] *Id.* at 104. In *Chesterfield County/Fire Dept. v. Dunn* (1990) 9 Va. App. 475, plaintiff EMT's PTSD worker's compensation claim was disallowed since, as required by Virginia's worker's compensation laws, plaintiff failed to prove: (1) an identifiable incident; (2) that occurred at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change…[T]here was no proof of an obvious sudden mechanical or structural change in Steven Dunn's body. *Id.* at 476.
[16] *Anthony v. Fairfax County Dept. of Family Services* (2001) *supra.* at 104.

> When one looks at the event in isolation, it is unfortunate and obviously stressful, but not, as I previously stated, traumatic-particularly for somebody who works in that context daily."[17]

The Court's reasoning in *Anthony* arguably may provide the basis for rejecting PTSD claims by first responders such as firefighters, police, paramedics/EMTs since such vocations involve responding to some disturbing and grisly accident scenes (like the site of a plane crash). Like *Anthony* above, it could be argued that first responders "go into that situation with the anticipation that these are problematic situations" and therefore such scenes should not be "traumatic -- particularly for somebody who works in that context daily." As the *Anthony* Court states, if an individual "has an expectation of certain things occurring, it mitigates against the development of a PTSD reaction."[18]

In juxtaposition with this however, is the DSM-V's diagnostic criteria for PTSD, which provides that one way the "traumatic event" requirement can be met, is by "[e]xperiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse)." Consistent with the DSM-V's diagnostic criteria, first responders can, in many jurisdictions, obtain workers' compensation benefits for PTSD related injuries. For example, Washington is one of the latest states to allow emergency first responders to claim workers' compensation benefits for mental conditions such as PTSD.[19] "Our firefighters, police officers and other first responders are exposed to a level of trauma on the job that the average person doesn't face, and it can take a heavy toll … [we] need to address it through the workers' compensation system so that they get the support they need and deserve."[20]

Although the "firefighter's rule" bars recovery by first responders from bringing tort lawsuits for injuries against members of the public who they are employed to protect, there are exceptions to this rule.[21] If one of the firefighter's rule exceptions applies and the first responder's lawsuit is permitted to proceed, then the requirement that the first responder be subjected to "repeated or extreme exposure" should provide a basis upon which to challenge the public safety officer's PTSD claim. Specifically, it would be a unique and rare set of facts and circumstances that would support a finding that "repeated exposure" was caused by any one defendant.

Recovery for PTSD Under the Montreal Convention

The Montreal Convention, successor to the Warsaw Convention, as most know, establishes limits on carrier liability for international flights. Under the Montreal Convention, Article 17, "[t]he air carrier is liable for damage sustained in case of *death or bodily injury* of a

[17] *Id.* at 104.
[18] *Id.* at 105.
[19] Greg Tourial, *Washington State to Allow First Responders to Claim Workers' Comp for PTSD*, CQ Roll Call, 2018 WL 1476910 (March 27, 2018).
[20] *Id.*
[21] The subject of the firefighter's rule is beyond the scope of this article. However, for a comprehensive analysis of the application of the firefighter's rule, please see Aircraft Builders Council, Inc.'s Law Report article: *The Smouldering Firefighter's Rule* (Fall 2019).

passenger upon condition only that the *accident*[22] which caused the death or injury took place onboard the aircraft or in the course of any of the operations of embarking or disembarking."[23] (emphasis added)

Most jurisdictions allow recovery for emotional/mental PTSD-related injuries absent any physical injury. However, such is not the case for passenger claims arising under the Montreal Convention. In *Eastern Airlines v. Floyd,* the United States Supreme Court held that plaintiffs may not recover under the Montreal Convention for purely mental injuries unaccompanied by physical injuries.[24] Recovery under the Convention is limited to "death, physical injury or physical manifestation of injury."[25] This rule laid down by the *Floyd* Court, sounds simple, but it's not. Introduce physical injury into the equation, in addition to the emotional PTSD-type injuries, and whether a plaintiff can recover under the Convention becomes complicated resulting in different recovery outcomes from jurisdiction to jurisdiction. Further adding to the complexity is the assertion by some that PTSD can cause physical changes to the brain structure, *i.e.*, that PTSD "has a physical basis which includes alteration in brain chemistry, physiology and the neurological system."[26]

In *Doe v. United Air Lines, Inc*.,[27] Jane Doe, a minor, asserted claims against United Air Lines alleging sexual assault by another passenger. While the plaintiff presented no signs of physical injury, plaintiff submitted a report from her doctor stating that plaintiff's PTSD involved depression, anxiety, feelings of estrangement and an inability to manage her emotions.[28] The report also stated that scientific research had tied some of these symptoms to specific changes in the brain and nervous system.[29]

The Court engaged in a lengthy analysis of legal precedent on this issue relying in part on *Bobian v. CSA Czech Airlines,*[30] a case in which plaintiffs, after experiencing severe turbulence during flight, asserted that they suffered emotional distress causing biochemical and structural changes to their brain. The Court in rejecting this claim stated: "Plaintiffs apparently hope that by recharacterizing PTSD in terms of its effects on the brain, they can escape the controlling effect of *Terrafranca's*[31] rejection of claims for PTSD and other purely emotional injuries. But their argument proves far too much. Given that all human thoughts and emotions are in some fashion connected with brain activity, and therefore at some level 'physical', to accept

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[22] The Supreme Court has defined "accident" under the Convention as "an unexpected or unusual event or happening that is external to the passenger. *Air France v. Saks* (1985) 470 U.S. 392, 405. The definition "should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id.*

[23] The Convention for Unification of Certain Rules for International Carriage by Air (Montreal Convention), May 28, 1999, Article 17.

[24] *Eastern Airlines, Inc. v. Floyd* (1991) 499 U.S. 530, 552.

[25] *Id.*

[26] *Doe v. United Air Lines, Inc,* (2008) 160 Cal. App 4th 1500, 1510.

[27] *Id.*

[28] *Id.* at 1508.

[29] *Id.*

[30] *Bobian v. CSA Czech Airlines* (D.N.J. 2002) 232 F. Supp. 2d 319.

[31] See *infra.* at 8.

[p]laintiff's argument would be to break down entirely the barrier between emotional and physical harms that the [Warsaw] Convention[32] requires us to maintain."[33]

Adopting the reasoning of the *Bobian* Court, the Court in denying plaintiff Jane Doe's claim states: "The majority rule, as disclosed by our survey of case authority, is that alterations in an individual's body and behavior intrinsically or characteristically associated with mental distress do not constitute bodily injury under the Warsaw Convention."[34]

Following suit, most courts do not permit plaintiffs to circumvent the Convention's bodily injury requirement by asserting that PTSD *sua sponte* causes change to the brain structure which, in turn, constitutes "bodily injury."

However, the Montreal Convention does allow for the recovery of psychic/emotional injuries associated with PTSD in certain circumstances. While the historical legal context of the Warsaw Convention and the draft revisions of the Montreal Convention support that purely emotional injury was not meant to be compensable under the Convention, the negotiating history offers no guidance for determining whether emotional damages can be recoverable when they are preceded, accompanied, or followed by a physical injury.[35] Accordingly, Courts have had to step in to fill the gap resulting in an evolution of decisions ultimately resulting in the current mainstream view that mental injuries are recoverable but only if they are *caused by physical injuries*. Thus, the carrier is not liable when the plaintiff suffers mental injuries *solely* because of the traumatic event – because those mental injuries are not causally related to the physical injuries.[36] "To hold otherwise would open the door to 'illogical results', such that a passenger who sustained mental injury but no bodily injury would be unable to look to Article 17 for relief whereas a co-passenger who suffered the same mental injury yet fortuitously pinched his little finger in his tray table while evacuating and thereby suffered an unrelated bodily injury would be able to hold the carrier liable."[37]

In *Jack v. Trans World Airlines, Inc.,*[38] plaintiffs experienced an aborted takeoff, crash and fire. Some passengers alleged both emotional distress and physical injuries, while others only emotional injuries. The Court examined many different approaches for recovery for emotional distress under Article 17 before adopting one that allowed recovery for emotional distress but only to the extent *that it flowed from the bodily injury*. The Court found that this approach would prevent inequities between two similarly situated passengers where both had suffered emotional distress, but one received a minor physical injury and the other received none

[32] Article 17 of the Montreal Convention is identical to its predecessor, the Warsaw Convention, and precedents discussing this Article of the Warsaw Convention are generally also applicable to the Montreal Convention. *Kruger v. Virgin Atlantic Airways, Ltd.* (2013) 976 F. Supp. 2d 290, 301.
[33] *Doe v. United Air Lines, Inc.* (2008) 160 Cal. App 4th 1500, 1512.
[34] *Id*.
[35] Easton, Trock and Radford, *Post-Traumatic "Lésion Corporelle": A Continuum of Bodily Injury Under the Warsaw Convention*, 68 Journal of Air Law and Commerce 665, 672 (Fall 2003).
[36] *Hamblin v. British Airways PLC* (2010) WL 11626906 *6. (Not reported in Fed. Supp.)
[37] *Ehrlich v. American Airlines, Inc.* (2d Cir. 2004) 360 F.3d 366, 386.
[38] *Jack v. Trans World Airlines, Inc.* (N.D. Cal. 1994) 854 F. Supp. 654.

at all. Under this approach, neither would be able to recover for emotional distress, assuming that the minor injury did not, in and of itself, result in emotional distress.[39]

To illustrate further, *In Re Air Crash at Little Rock, Arkansas,*[40] the Eighth Circuit reviewed a $6.5 million jury verdict in favor of plaintiff passenger for a claim arising out of the Warsaw Convention. The passenger suffered physical injury (punctured leg, tradumatic quadricep tendonitis), PTSD and depression. The District Court found that plaintiff adequately established a nexus between her physical injuries and mental injuries sufficient to justify a $6.5 million verdict. The Eighth Circuit disagreed:

> "While we agree that the physical injuries to Lloyd's [plaintiff] legs may have caused some of her emotional damages, we also agree with American's contention that Lloyd's physical injuries did not 'cause PTSD sufficient to sustain the principal component of an award of $6,500,000.' Instead, in accordance with the 'flowing from' rule we announce today, we find that Lloyd can recover only emotional damages which flow from the injuries to her legs and the smoke inhalation. In this regard, the evidence shows that the bulk of Lloyd's mental injuries did not result from these physical injuries. First, Lloyd testified in a deposition that her knee injuries did not cause her PTSD. Second, her expert witness, Dr. Harris, testified that the experience of being in the crash was the cause of Lloyd's mental injuries. When asked, on cross-examination, whether Lloyd would have suffered PTSD if she had not injured her legs, Harris replied, 'Yes. I think it was so horrible on that flight, she thought she was going to die, I think she would have had it without the knee injury.' Finally, the district court's reasoning suggests that it also believed the accident, and not the physical injuries, caused Lloyd's PTSD, stating, 'the knee and calf injuries, the smoke inhalation, were all part of a terrifying accident, which led to [Lloyd's] PTSD.' [¶] Therefore, under the *Floyd* interpretation of the Warsaw Convention, we must draw a line between mental injuries flowing from physical injuries suffered in the crash and mental injuries directly caused by the accident. At the bottom line, Lloyd's evidence at trial was simply not sufficient to establish a $6.5 million connection between her relatively insignificant physical injuries and her very significant PTSD and depression."[41]

Based on the above, the Court conditionally affirmed the judgment of the District Court, subject to plaintiff's acceptance of a remittitur for judgment in the amount of $1.5 million.[42]

In arriving at the above approach, along the way, courts have provided further guidance in this nebulous area by defining under what circumstances emotional injuries are <u>not</u> recoverable even when both physical and emotional injuries are present. For example, while as shown above, emotional injuries to the extent caused by physical injury are recoverable under

[39] Easton, Trock and Radford, *supra.* at 693.
[40] *In Re Air Crash at Little Rock, Arkansas* (8th Cir. 2002) 291 F.3d 503.
[41] *Id.* at 510-11.
[42] *Id*. at 517.

Article 17 – the reverse is not true – emotional injury that manifests itself in physical injury is not recoverable.

To illustrate, in *Terrafranca v. Virgin Atlantic Airways, Ltd.*,[43] plaintiff suffered PTSD and anorexia caused by a bomb threat during flight. In accordance with the airline's protocol, the Captain informed the passengers of the threat and the plane landed safely in London. The plaintiff, in seeking recovery for her PTSD attempted to get around the U.S. Supreme Court's decision in *Floyd* that an air carrier cannot be held liable under Article 17 "when an accident has not caused a passenger to suffer death, physical injury or physical manifestation of injury." In so doing, rather than claim that PTSD was the physical manifestation of the injury, plaintiff instead relied on her weight loss as the actual physical manifestation of the injury. The Court, in rejecting plaintiff's claim, concluded that "the text of Article 17 requires 'bodily injury' as 'a precondition to recovery' and that the plaintiff 'must demonstrate direct, concrete, bodily injury as opposed to mere manifestation of fear or anxiety.' Since the plaintiff's claims of post-traumatic stress disorder complicated by anorexia and weight loss were found to be purely psychic, they did not qualify as 'bodily injuries' under Article 17."[44]

In *Turturro v. Continental Airlines,*[45] plaintiff's pocketbook was stolen prior to boarding a flight to Costa Rica. The pocketbook contained plaintiff's medication, Xanax, which plaintiff regularly took to treat panic attacks, anxiety and nervousness. Despite plaintiff's repeated requests to disembark, the airline refused, causing, among other things, plaintiff to feel terrified, dizzy, nauseated and short of breath. The plane returned to the gate after plaintiff contacted the police from the aircraft. Upon disembarkation, some fellow passengers greeted plaintiff with hisses and jeers. As a result of the incident, plaintiff claimed she suffered "embarrassment, humiliation, loss of liberty, psychological injury, pain, suffering emotional distress and mental anguish. She also claimed that she suffered post traumatic stress, psychological injury and pain, and that she continued to suffer physical manifestations after her release from the hospital, including "insomnia, restlessness, inability to concentrate, and unexplained aching in her arms and legs."[46]

In denying plaintiff's claim, the Court reasoned that "*Floyd* bars recovery for 'physical manifestations' of emotional distress where the accident causes 'no direct physical injury but rather merely terrifies the passengers *(even when the terror later leads to physical symptoms, such as weight loss)'* (emphasis added)…to the extent that plaintiff throughout her ordeal did not receive any physical wounds, impacts, or deprivations, or any alteration in the structure of an internal organ, then any subsequent shortness of breath, sleeplessness, or inability to concentrate may safely be characterized as psychosomatic and is not compensable.'"[47]

As the above cases hold, in order to recover for emotional injuries 1) the physical injury must first, precede the emotional injury; and 2) be shown to have arisen solely from the physical injury itself.

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[43] *Terrafranca v. Virgin Atlantic Airways, Ltd.* (3d Cir. 1998) 151 F.3d 108.
[44] Easton, Trock and Radford, *supra.* at 681.
[45] *Turturro v. Continental Airlines* (S.D.N.Y. 2001) 128 F. Supp. 2d 170.
[46] Easton, Trock and Radford, *supra.* at 682.
[47] *Turturro v. Continental Airlines*, *supra.* at 178.

Over the last decade there has been an increase in PTSD claims in all types of cases and, most certainly, in aviation cases. As amply demonstrated above, the plaintiff faces difficult hurdles in recovering PTSD-type damages against the airlines under the Montreal Convention's Article 17. It only stands to reason then, that where plaintiff can't get what it wants from one defendant, it will be motivated to seek from another. In other words, in this scenario, plaintiffs' counsel will be more likely to actively identify, and file suit against, airframe and component part manufacturers to whom the Montreal Convention limitations are inapplicable. Even without this additional incentive, PTSD is prevalent in many cases against component manufacturers -- the Montreal Convention notwithstanding. Therefore, it is important to be prepared and ready to defend this aspect of the typical aviation case.

Defending Against PTSD

As a way of ramping up damages, particularly where there is no physical injury, plaintiff's lawyers will be even more motivated to allege PTSD whenever possible. And, the potential recovery for shock-related damages can be compelling when a jury is confronted with a traumatic event, especially like that of a plane crash. It's the defense counsel's job, therefore, to hold plaintiffs' counsel and their experts to the standards of proof consistent with accepted medical diagnostic criteria in both analyzing plaintiffs' symptoms and arriving at a diagnosis. This is particularly important in the case of PTSD since – unlike physical injuries – PTSD involves subjective symptoms that are difficult to identify objectively. **"**A solid defense against PTSD claims requires understanding the diagnostic criteria and understanding the specific types of professionals that are qualified to make such a diagnosis. Focusing on these two premises, the defense plan begins with a technical approach to discovery by the attorney, followed by detail-oriented methodology from PTSD experts."[48]

In order to evaluate and validate plaintiff's claim against accepted diagnostic tools in the medical field, defense counsel must obtain discovery specific to plaintiff's claimed symptoms. In addition to medical records this should include: educational/employment records, incident/police reports, social media postings, witness statements and depositions of those close to the individual (family, friends, co-workers, etc.) who will provide valuable information regarding plaintiff's symptoms, impairments and ability or inability to function in the real world. Of course, plaintiff's deposition will be essential before which defense counsel will first want to obtain as much information about the plaintiff as possible in order to conduct a thorough cross-examination as to both plaintiff's alleged "trauma-related" symptoms and any such pre-existing symptoms unrelated to the incident. It is also important to be able to cross-examine the plaintiff on any self-reported complaints and symptom which are inconsistent with plaintiff's treating physician's treatment or diagnosis or the plaintiff's expert's PTSD findings and opinions.

Given the subjective nature of the illness, it is a good idea to conduct a video deposition of the plaintiff which may prove to be particularly useful in facilitating the defense experts' evaluation. In addition, presenting the video to a focus group and obtaining the layperson's

[48] Mahedy, Woodward and Kendall, *Supported by Evidence of Simply Opportunistic Defending Against the Growing Trend of PTSD Claims in Aviation Cases* (April 2017) 59 No. 4 DRI for the Defense 71, at 4.

reaction may provide invaluable information as to whether plaintiff is genuine or feigning PTSD symptoms.

Only after the necessary discovery is obtained, can the defense lawyer then go on to the next important step – that of determining whether plaintiff's symptoms actually fall within medically accepted diagnostic criteria for PTSD. The defense expert should thoroughly cross reference all the relevant medically accepted symptoms and apply them rigidly to the established diagnostic criteria. "Although DSM-V diagnostic criteria are well known in the relevant medical and scientific communities, the degree to which treatment providers or expert witnesses actually adhere to those criteria in litigation varies widely. … Some diagnose PTSD based on a 'look and feel approach'"[49] to the benefit of the plaintiff. "For instance, doctors frequently 'diagnose' PTSD in the days after a motor vehicle accident, based on only a few subjective complaints…. [¶] The DSM-V criteria for PTSD demonstrate that a PTSD diagnosis requires more than mere exposure to trauma and more than one or two particular symptoms."[50]

Instead, DSM-V requires *the presence of one (or more) or two (or more) symptoms in four categories* of behavior, in addition to the "traumatic" event requirement. (See Appendix A to this article for the full text of DSM-V.) DSM-V also specifies the required duration of the criteria; that the disorder causes clinically significant distress or impairment in social, occupational, or other areas of functioning; and that the disturbance not be attributable to the psychological effects of a substance (*e.g.*, medication, alcohol) or another medical condition.[51]

Accordingly, defense counsel must take necessary steps to exclude from evidence any testimony by plaintiff experts who fail to identify the required one or more symptoms falling into each of the required four categories. Therefore, retaining a defense expert who knows how to analyze the facts and determine the validity and severity of the PTSD diagnosis is key. The right PTSD expert should be one who takes an objective approach for diagnosing PTSD that is well accepted in the medical community. Tests such as "the Personality Assessment Inventory and the Minnesota Multiphasic Personality Inventory are designed to measure both the presence and severity of a person's subjective psychological symptoms and response biases that could indicate distortion or exaggeration of symptoms for secondary gain (such as financial compensation)."[52] Some plaintiff experts will ask plaintiff a series of open ended questions (like, do you re-live this incident over and over again in your thoughts), to form the basis for a positive PTSD diagnosis. This biased approach invariably will lead plaintiff down the path to a positive PTSD diagnosis (regardless of a plaintiff's actual condition). Such methods, lacking in rigor and credibility, are not acceptable and should be attacked for the "junk science" they are.

Furthermore, some plaintiff experts will try to show PTSD by the scientifically unproven theory that PTSD causes physical changes in the brain that can be picked up by DTI (diffusion tensor imaging) or PET (positron emission tomography). This is neither an acceptable way to

[49] Mahedy, Woodward and Kendall, *Id.* at 6.
[50] Mahedy, Woodward and Kendall, *Id.* at 3.
[51] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) published by the American Psychiatric Association.
[52] Mahedy, Woodward and Kendall, *Supported by Evidence of Simply Opportunistic Defending Against the Growing Trend of PTSD Claims in Aviation Cases*, *supra.* at 5.

diagnose PTSD nor is the premise upon which it is based – that PTSD causes actual detectable brain damage – accepted by the scientific community.[53] Any such approach should be aggressively challenged through cross-examination and motion practice.

By taking the scientific technical approach, the defense expert may be able to rule out PTSD and, more importantly, poke holes in plaintiff's expert's diagnosis sufficient to defeat the plaintiff expert's PTSD diagnosis at trial.

Although a subject of substantial import worthy of an article unto itself, defense counsel may attempt to show that surviving a disaster can actually make a person stronger and more well-adjusted. That traumatic events eventually result in positive change is known as "post-traumatic growth." Two psychologists, Richard Tedeschi and Lawrence Calhoun, coined the term based on findings that, borne from struggle with a major life crisis or a traumatic event is positive change, including discovering new possibilities in life, developing deeper relations or finding a greater appreciation of life.[54] Defined another way, "post-traumatic growth (PTG) or benefit finding is a positive psychological change experienced as a result of adversity and other challenges in order to rise to a higher level of functioning."[55] However, how one responds to a traumatic event will vary from person to person. For example, optimists may be better able to focus attention and resources on the most important matters, and disengage from uncontrollable or unsolvable problems.[56]

This is not to say that defense counsel should attempt to mitigate a plaintiff's PTSD claim by trying to show post-traumatic growth; nonetheless counsel should be aware of this theory. Before making PTG part of the defense counsel's strategy, it should be thoroughly understood and amply demonstrated by the evidence.

Conclusion

Defense counsel must do what they can to expose those PTSD claims that are falsely asserted. This can be difficult and can sometimes even backfire as such attempts may be interpreted as unsympathetic to a plaintiff who experienced a traumatic event but does not have the symptoms sufficient to support a PTSD diagnosis.

It is far better to attack plaintiff's alleged PTSD, if possible, by showing that plaintiff's symptoms, when compared against the medically accepted PTSD criteria, fall short. This technical approach, if supported by the underlying facts and claimed injuries should, in the long run, be more effective and shield defense counsel from appearing insensitive to plaintiff's claims. After all, science is science and challenging a PTSD diagnosis based on methodically showing that the pieces (alleged symptoms) simply do not complete the medical accepted criteria of the PTSD puzzle, is a cleaner (and likely more successful) path to take.

[53] Mahedy, Woodward and Kendall, *Id.* at 6.
[54] Priscilla Alvarez, *The Post-Traumatic Psychology of Disaster Survivors*, The Atlantic Magazine (December 6, 2016).
[55] Wikipedia, "Posttraumatic growth", p. 1.
[56] Wikipedia, "Posttraumatic growth", *Id.* at 4.

Beyond pure aviation law, as defense counsel for our ABC insureds, we also spend time guiding our clients through those other areas of law with which aviation industry intersects. Defending against PTSD claims is but one example. Because challenging both the medical and legal aspects of this disorder is multi-faceted and subject to differing outcomes, we recommend that you seek assistance of ABC counsel.

APPENDIX A

DSM-V Diagnostic Criteria for PTSD

Note: The following criteria apply to adults, adolescents, and children older than 6 years. For children 6 years and younger, see the DSM-5 section titled "Posttraumatic Stress Disorder for Children 6 Years and Younger" (APA, 2013a).

A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:

   1. Directly experiencing the traumatic event(s).

   2. Witnessing, in person, the event(s) as it occurred to others.

   3. Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.

   4. Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse). **Note:** Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

B. Presence of one (or more) of the following intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred:

   1. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s). **Note:** In children older than 6 years, repetitive play may occur in which themes or aspects of the traumatic event(s) are expressed.

   2. Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s). **Note:** In children, there may be frightening dreams without recognizable content.

   3. Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring. (Such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings.) **Note:** In children, trauma-specific reenactment may occur in play.

   4. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

   5. Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

C. Persistent avoidance of stimuli associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following:

   1. Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).

2. Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).

D. Negative alterations in cognitions and mood associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:

1. Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia, and not to other factors such as head injury, alcohol, or drugs).

2. Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world (e.g., "I am bad," "No one can be trusted," "The world is completely dangerous," "My whole nervous system is permanently ruined").

3. Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.

4. Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).

5. Markedly diminished interest or participation in significant activities.

6. Feelings of detachment or estrangement from others.

7. Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).

E. Marked alterations in arousal and reactivity associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:

1. Irritable behavior and angry outbursts (with little or no provocation), typically expressed as verbal or physical aggression toward people or objects.

2. Reckless or self-destructive behavior.

3. Hypervigilance.

4. Exaggerated startle response.

5. Problems with concentration.

6. Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).

F. Duration of the disturbance (Criteria B, C, D and E) is more than 1 month.

G. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

H. The disturbance is not attributable to the physiological effects of a substance (e.g., medication, alcohol) or another medical condition.

Source: APA, 2013a, pp. 271–272.

The NIH Definition of PTSD

Post Traumatic Disorder (PTSD) is described on the National Institute of Mental Health (NIMH) website. The National Institute of Mental Health is one of 27 components of the National Institutes of Health, the Federal government's principal biomedical and behavioral research agency. NIH is part of the U.S. Department of Health and Human Services. (www.nimh.nih.gov/about/index.cfm) The NIMH describes PTSD as follows:

[PTSD] is an anxiety disorder that can develop after exposure to a terrifying event or ordeal in which grave physical harm occurred or was threatened. Traumatic events that may trigger PTSD include violent personal assaults, natural or human-caused disasters, accidents, or military combat.... [¶] PTSD was first brought to public attention in relation to war veterans, but it can result from a variety of traumatic incidents, such as mugging, rape, torture, being kidnapped or held captive, child abuse, car accidents, train wrecks, plane crashes, bombings, or natural disasters such as floods or earthquakes. (www.nimh.nih.gov/Healthlnformation/ptsdmenu.cfm) *Anthony v. McNeil*, No. BC348064, 2007 WL 4843025 (Cal. Super., Los Angeles County Aug. 21, 2007).

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