

MONSANTO CO. - STURGEON SPILL

AGENT ORANGE DOCUMENTS

Exhibits to Dow's Reply Memo
in Supp. of Mot. for Summ. Jgmt.
on Gov't. Contract Defense R-4

EXHIBITS TO DOW CHEMICAL'S
REPLY MEMO IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
ON GOV'T. CONTRACT DEFENSE

5/2/83 #121

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

In Re:

"Agent Orange"

MDL No. 381

Product Liability Litigation

----- x

EXHIBITS TO DEFENDANT THE DOW
CHEMICAL COMPANY'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT ON THE GOVERNMENT
CONTRACT DEFENSE

RIVKIN, LEFF, SHERMAN & RADLER
ATTORNEYS AND COUNSELLORS AT LAW
100 GARDEN CITY PLAZA, GARDEN CITY, N.Y. 11530

FILED

UNITED STATES COURT OF APPEALS APR 20 1984

FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

JANICE McKAY, Executrix of the Estate
of LT. CDR. MALCOLM WAGNER McKAY,
Deceased,

Plaintiff-Appellant,

vs.

ROCKWELL INTERNATIONAL CORPORATION,
a Delaware corporation,

Defendant-Appellee.

Nos. 81-5540

81-5541

D.C.# CV75-3672 DWW

MARIE CARSON, Administratrix of the
Estate of FRANK J. CARSON, Deceased,

Plaintiff-Appellant,

vs.

ROCKWELL INTERNATIONAL CORPORATION,
a Delaware corporation,

Defendant-Appellee.

Nos. 81-5542

81-5543

D.C.# CV76-576 DWW

OPINION

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding
Argued and Submitted October 5, 1982

Before: SNEED, and ALARCON, Circuit Judges,
and HARDY*, District Judge

*Honorable Charles L. Hardy, United States District Judge
for the District of Arizona, sitting by designation.

1 SNEED, Circuit Judge:
2
3

4 These are consolidated wrongful death actions
5 arising out of two unrelated crashes of RA-5C naval aircraft in
6 the waters off the coast of Florida. The widows of the two Navy
7 pilots killed in the crashes seek damages from Rockwell
8 International Corp. ("Rockwell"), the manufacturer of the RA-5C
9 aircraft and its ejection system. The district court held that
10 Rockwell was liable for the pilots' deaths because of defects in
11 the aircraft's ejection system. Both the widows and Rockwell have
12 appealed.

13 In this case we confront the question under what
14 circumstances, if any, the doctrine of strict liability in tort,
15 as set forth in section 402A of the Second Restatement of Torts,
16 should be extended to cover manufacturers of military equipment
17 that proves to be defective in design and injures members of the
18 armed forces who are on active duty. We also must address the
19 question whether, under the circumstances of this case, sections
20 388 and 389 of the Second Restatement impose liability on
21 Rockwell. For the reasons set forth below we reverse the judgment
22 of the district court and remand for further proceedings.

23 I.
24

25 FACTS
26

 Rockwell, under contract with the United States Navy,
began development in the mid-1950s of an aircraft capable of

1 sustained flight at altitudes of up to 75,000 feet, and with a
2 potential speed of two and a half times the speed of sound. In
3 the early 1960s, the Navy decided to redesign the aircraft as a
4 supersonic carrier-based reconnaissance aircraft, designated the
5 RA-5C "Vigilante." The RA-5C was put into use by the Navy in 1962
6 and was used extensively in Vietnam.

7 Both the RA-5C aircraft involved in the accidents out of
8 which these cases arise were equipped with the HS-1A escape
9 system. This system was a modified version of an earlier escape
10 system in use in the RA-5C aircraft. The HS-1A system operated by
11 physically restraining the crew in their seats, and then ejecting
12 them ballistically into the airstream by means of a rocket
13 thrust. After ejection, a drogue chute would initiate the opening
14 of a 28 foot parachute to enable the crewmen to descend safely to
15 the ground.

16 On March 5, 1974, Navy Lieutenant Frank Carson was killed
17 during a daytime training mission when the RA-5C aircraft he
18 piloted caught fire and he was forced to eject from the aircraft.
19 Navy Lieutenant Commander Malcolm McKay was killed on August 13,
20 1974, after ejecting from a burning RA-5C aircraft during a night
21 training mission. Autopsies of the two pilots revealed that their
22 deaths were probably caused by injuries sustained during ejection.

23 Plaintiffs filed civil actions in the United States
24 District Court for the Central District of California, seeking
25 recovery of damages for the death of plaintiffs' decedents under
26 theories of negligence, breach of warranty, and wrongful death.

The cases were consolidated for trial and, after an evidentiary hearing, the district court determined that it had admiralty jurisdiction over the actions pursuant to the Death on the High Seas Act, 46 U.S.C. §§ 761-767.^{1/} The district court found that Rockwell properly was liable for the design of the HS-1A escape system under the principles of tort law set forth in sections 388, 389, and 402A of the Second Restatement of Torts. The court declined to impose liability under these principles for the design of the RA-5C aircraft. It entered judgment in favor of plaintiff Carson for \$385,703.00 and in favor of plaintiff McKay for \$325,850.00. Carson and McKay seek review of the measure and amount of damages awarded in their respective judgments. Rockwell also appeals, contending that military suppliers should not be liable to servicemen for injuries caused by defects in military hardware.^{2/} Our disposition of Rockwell's appeal makes it unnecessary to address the appeals of Carson and McKay.

II.

LIABILITY UNDER SECTION 402A OF THE
SECOND RESTATEMENT OF TORTS

The district court, as stated above, held that Rockwell was liable under section 402A of the Second Restatement of Torts for defects in the design of the HS-1A escape system.^{3/} We applied the principles of this section in admiralty in Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129 (9th Cir. 1978). But in Pan-Alaska we did not hold that strict liability applies for all purposes and for all defendants.^{4/} Section 402A is not a federal statute. It should be applied only

1 when the purposes it seeks to serve dictate its application. When
2 that is not the case it has no independent force. To apply it
3 merely because it is there is to abdicate judicial responsibility.

4 Mindful of this responsibility, we conclude that only
5 under the limited circumstances we shall enumerate below should a
6 manufacturer be held strictly liable in tort for injuries to a
7 serviceman on active duty caused by design defects in military
8 equipment.

9 A. Feres-Stencel Doctrine

10 We commence our analysis with Feres v. United States, 340
11 U.S. 135 (1950). In that case the Supreme Court held that the
12 United States is not subject to liability under the Federal Tort
13 Claims Act, 28 U.S.C. § 2674, to a member of the armed forces who
14 sustains an injury while on active duty. The scope of
15 governmental immunity was broadened recently in Stencel Aero
16 Engineering Corp. v. United States, 431 U.S. 666 (1977). There,
17 the Court held that the Federal Tort Claims Act precludes the
18 United States from indemnifying a third party for damages paid by
19 it to a member of the armed forces who is injured during military
20 service. The Stencel Court explained that allowing indemnity
21 would subject the United States to varying degrees of liability,
22 depending on the situs of the accident, would require the United
23 States to pay indirectly to the serviceman what the Veterans'
24 Benefits Act forbids it to pay directly, and would interfere with
25 military discipline. Id. at 672-73.

26 Thus, under the circumstances of these cases, the United

1 States would be immune both from direct tort liability as well as
2 from the obligation of indemnifying Rockwell for damages it might
3 be required to pay.

4 **B. Government Contractor Defense**

5 Given the immunities of the United States in cases such
6 as these, the question arises whether a supplier of military
7 equipment should be required to shoulder directly and immediately
8 the entire burden of the liability to an injured serviceman. Some
9 courts, when confronted with this issue, have relied on the
10 so-called government contractor defense.^{5/} This rule, first
11 articulated by the Supreme Court in Yearsley v. W. A. Ross
12 Construction Co., 309 U.S. 18 (1940), protects a government
13 contractor from liability for acts done by him while complying
14 with government specifications during execution of performance of
15 a contract with the United States. See Myers v. United States,
16 323 F.2d 580, 583 (9th Cir. 1963). The rule has been applied when
17 the United States is immune from suit. Dolphin Gardens, Inc. v.
18 United States, 243 F. Supp. 824, 827 (D. Conn. 1965).

19 While the government contractor defense covered at first
20 only construction projects, it has recently been applied by
21 several courts to military equipment design defect cases.^{6/} See
22 Note, 23 B.C.L. Rev. 1025, 1055-64 (1982). For example, in Sanner
23 v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), aff'd,
24 154 N.J. Super. 407, 381 A.2d 805 (1977), cert. denied, 75 N.J.
25 616, 384 A.2d 846 (1978), the court held that when a manufacturer
26 produces a jeep in compliance with government specifications, the

1 manufacturer cannot be held strictly liable for defects in the
2 government's design specifications. Similarly, in Casabianca v.
3 Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (1980), the
4 manufacturer of kitchen equipment made for the Army and in
5 accordance with Army specifications was held not to be subject to
6 liability for defects in the equipment. Finally, in In Re Agent
7 Orange Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y.
8 1982), the court approved a government contractor defense for
9 manufacturers of a chemical defoliant where the government set or
10 ratified performance specifications for a product, the
11 manufacturer met those specifications, and warned the government
12 of known dangers from using the product. Id. at 1055. See also
13 Littlehale v. E.I. DuPont de Nemours & Co., 268 F. Supp. 791
14 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967) (no duty to
15 print warnings on blasting caps where not required by Navy
16 specifications).

17 The reasons for applying the government contractor
18 defense to suppliers of military equipment with design defects
19 approved by the government parallel those supporting the
20 Feres-Stencel doctrine. First, the Supreme Court emphasized in
21 Stencel that the United States cannot be directly or indirectly
22 liable to servicemen injured by defective military products.^{2/}
23 But holding the supplier liable in government contractor cases
24 without regard to the extent of government involvement in fixing
25 the product's design and specifications would subvert the
26 Feres-Stencel rule since military suppliers, despite the

1 government's immunity, would pass the cost of accidents off to the
2 United States through cost overrun provisions in equipment
3 contracts, through reflecting the price of liability insurance in
4 the contracts, or through higher prices in later equipment sales.
5 See In Re Agent Orange Product Liability Litigation, 506 F. Supp.
6 762, 793-94 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2d
7 Cir. 1980); Dolphin Gardens, Inc. v. United States, 243 F. Supp.
8 824, 827 (D. Conn. 1965); Note, 55 N.Y.U. L. Rev. 601, 618
9 (1980). As the Court explained in Stencel:

10 To permit [petitioner] to proceed . . . here
11 would be to judicially admit at the back door
12 that which has been legislatively turned away
13 at the front door. We do not believe that the
14 [Federal Tort Claims] Act permits such a result.

15 432 U.S. at 673 (quoting from Laird v. Nelms, 406 U.S. 797, 802
16 (1972)).

17 Second, to hold military suppliers liable for defective
18 designs where the United States set or approved the design
19 specifications would thrust the judiciary into the making of
20 military decisions. Although judges must decide cases arising
21 from fields of endeavor of which they know little, their otherwise
22 omniscience confronts its limits in military matters. At this
23 point, it must be acknowledged, separation of powers becomes a
24 proper concern. See In Re Agent Orange Product Liability
25 Litigation, 534 F. Supp. at 1054; Montgomery v. Goodyear Tire &
26 Rubber Co., 231 F. Supp. 447, 450 (S.D.N.Y. 1964); see also
Morrison v. Larsen, 446 F.2d 250, 253 (9th Cir. 1971); Aero Corp.
v. Department of the Navy, 493 F. Supp. 558, 567 (D.D.C. 1981).

1 Trials on design defects where government specifications are at
2 issue would "involve second-guessing military orders, and would
3 often require members of the Armed Services to testify in court as
4 to each other's decisions and actions." Stencel, 431 U.S. at
5 673. These trials would raise concerns about their effect on
6 military discipline, id., as well as on national security.^{8/}

7 Third, it should be noted that in setting specifications
8 for military equipment, the United States is required by the
9 exigencies of our defense effort to push technology towards its
10 limits and thereby to incur risks beyond those that would be
11 acceptable for ordinary consumer goods. A supplier is frequently
12 unable to negotiate with the United States to eliminate those
13 risks. As one court put it:

14 Where, as here, manufacturers claim to have
15 been compelled by federal law to produce a
16 weapon of war without ability to negotiate
17 specifications, contract prices or terms, the
18 potential for unfairly imposing liability
19 becomes great. Without the government contract
20 defense a manufacturer capable of producing
21 military goods for government use would face
the untenable position of choosing between
severe penalties for failing to supply products
necessary to conduct a war, and producing what
the government requires but at a contract price
that makes no provision for the need to insure
against potential liability for design flaws in
the government's plans.

22 In Re Agent Orange Product Liability Litigation, 506 F. Supp. at
23 794. See generally Tobak, A Case of Mistaken Liability: The
24 Government Contractor's Liability for Injuries Incurred by Members
25 of the Armed Forces, 13 Pub. Cont. L.J. 74 (1982); Note, 23 B.C.L.
26 Rev. 1025 (1982).

1 Finally, a government contractor defense provides
2 incentives for suppliers of military equipment to work closely
3 with and to consult the military authorities in the development
4 and testing of equipment. The defense therefore encourages fixing
5 the locus of responsibility for military equipment design with
6 more precision than is possible under a system where the
7 government contractor rule is not allowed.

8 While conceding that the government contractor defense
9 can apply to military products, plaintiffs-appellants argue that
10 it should not apply to these cases. As they see it, the defense
11 is only available where the specifications in the contract leave
12 no discretion to the supplier in the formulation of the product's
13 design. They rely on O'Keefe v. Boeing Co., 335 F. Supp. 1104
14 (S.D.N.Y. 1971), and on Merritt, Chapman & Scott Corp. v. Guy F.
15 Atkinson Co., 295 F.2d 14 (9th Cir. 1961), to support this
16 assertion.^{9/} Plaintiffs-appellants' reliance is misplaced.

17 In O'Keefe, the court rejected Boeing's claim that it was
18 not liable for an alleged defect in a B-52 because of the
19 involvement of the United States in the development of the
20 aircraft. 335 F. Supp. at 1122-24. But the discussion of the
21 design discretion issue in O'Keefe was dictum, since the court
22 found that the design was not defective. Moreover, the O'Keefe
23 dictum is not compatible with the later Stencel holding.

24 Notwithstanding its insistence that "compulsion" is an
25 essential element of the government contractor defense, Merritt,
26 Chapman is distinguishable. It held that a subcontractor who

1 built a faulty cofferdam in a dam project can be held liable for
2 damage caused by the collapse of the cofferdam. The government
3 contractor claim was rejected because the contract with the United
4 States left the design, materials, and method of construction
5 entirely to the discretion of the subcontractor. The United
6 States merely set the height requirement for the cofferdam. Id.
7 at 15-16.

8 Under these circumstances, Merritt, Chapman properly
9 precludes the government contractor rule. When only minimal or
10 very general requirements are set for the contractor by the United
11 States the rule is inapplicable. The situation is different where
12 the United States reviewed and approved a detailed set of
13 specifications. This is precisely what may have happened in the
14 present cases. See R.T. at 1303-04, 1309-10, 1486-87.

15 It is at this point that the Feres-Stencel doctrine comes
16 sharply into focus. The United States has limited its liability
17 to service personnel injured while on active duty. It is
18 consistent with this limitation to construe the government
19 contractor rule so as to avoid imposing on the contractor
20 liability properly attributable to acts of government: The
21 narrower the scope of this rule the greater the extent of this
22 "misplaced" liability. While to narrow the rule aids members of
23 the armed services and their dependents, it also imposes
24 indirectly burdens on taxpayers and/or inflation bearers which the
25 Feres-Stencel doctrine precludes. It follows that the scope of
26 the government contractor rule, when applied in cases involving-

1 military personnel, should be drawn somewhat more broadly than the
2 dictum in Merritt, Chapman might suggest.

3 To summarize, we hold that under the Feres-Stencel
4 doctrine and the government contractor rule, a supplier of
5 military equipment is not subject to section 402A liability for a
6 design defect where: (1) the United States is immune from
7 liability under Feres and Stencel, (2) the supplier proves that
8 the United States established, or approved, reasonably precise
9 specifications for the allegedly defective military equipment, (3)
10 the equipment conformed to those specifications, and (4) the
11 supplier warned the United States about patent errors in the
12 government's specifications or about dangers involved in the use
13 of the equipment that were known to the supplier but not to the
14 United States. The imposition of this duty to warn of known
15 defects is necessary to enable the United States to balance the
16 risks and benefits inherent in the use of the equipment. Cf. In
17 Re Agent Orange Product Liability Litigation, 534 F. Supp. at
18 1055; Note, 23 B.C.L. Rev. at 1074-85.

19 We recognize that the term "military equipment" is
20 somewhat imprecise, and that at some point lines will have to be
21 drawn. We need not do so here. The line, however, lies somewhere
22 between an ordinary consumer product purchased by the armed forces
23 - a can of beans, for example - and the escape system of a Navy
24 RA-5C reconnaissance aircraft. The latter falls within the term
25 while the former does not.

26 We also note that the rule enunciated here does not

1 relieve suppliers of military equipment of liability for defects
2 in the manufacture of that equipment. To hold otherwise would
3 remove the incentive from manufacturers to use all cost-justified
4 means to conform to government specifications in the manufacture
5 of military equipment.

6 C. Policy Considerations in the Imposition of Strict Liability

7 The reasons for imposing strict liability as set forth in
8 section 402A are inapplicable when the elements of our holding
9 exist. See Note, 23 B.C.L. Rev. at 1080-85. Courts and
10 commentators have identified four principal reasons for imposing
11 strict liability on an accident producing activity - enterprise
12 liability, market deterrence, compensation, and implied
13 representation of safety.^{10/} See Note, 33 Stan. L. Rev. 535,
14 536 & n.7 (1981). We shall consider each.

15 1. Enterprise Liability

16 Under the enterprise liability rationale, when a
17 product's price reflects the cost of accidents caused by the use
18 of the product, that price will rise. Increased prices will then
19 discourage consumers from purchasing risky products, and thereby
20 lower accident costs to society. See Klemme, The Enterprise
21 Liability Theory of Torts, 47 U. Colo. L. Rev. 153, 158 (1976).
22 Cf. Pan-Alaska Fisheries, 565 F.2d at 1135.

23 However, the rationale rests on two assumptions. These
24 are that consumers underestimate the risks involved in a product's
25 use, and will therefore overconsume the product unless the
26 products price reflects the cost of accidents, and that demand for

1 a product is elastic - that is, that it will decrease as the
2 product's price rises. Note, 33 Stan. L. Rev. at 537 & n.8.

3 Neither of these assumptions applies in the usual case to
4 sales of military equipment to the government. First, the armed
5 forces are aware of most, although sometimes not all, the risks
6 involved in using military equipment. They undertake a constant
7 program of testing and evaluating such equipment. Higher prices
8 would not affect significantly their awareness of the safety risks
9 involved in the use of the equipment. In addition, within broad
10 limits demand is not elastic for military equipment. Rather,
11 government purchases of military equipment are planned in advance,
12 and are based on considerations of military and political
13 strategy, as well as on the government's assessment of the risks
14 and benefits involved in the use of the equipment. Thus,
15 including the cost of accidents in the price of sales to the
16 military would probably have little or no effect on product
17 sales. Meeting adequately the needs of national defense, not
18 accident costs, is the ultimate standard by which purchases of
19 military equipment must be measured.

20 2. Market Deterrence

21 A second reason for imposing strict liability is to deter
22 manufacturers from marketing unsafe products by encouraging the
23 use of cost-justified safety features. See W. Prosser, The Law of
24 Torts § 4, at 23 (4th ed. 1971). The safer the product, the
25 argument runs, the lower the cost of accidents. This should
26 reduce the product's price which, in turn, should increase the

1 sales of the product.

2 But in the case of military equipment, as noted above,
3 the demand for such equipment is quite inelastic. Moreover, the
4 government, the sole purchaser of most military equipment, has
5 both the ability to recognize safety problems in military
6 equipment and to negotiate with suppliers to remedy those
7 problems. It constantly balances the safety of the article
8 against the imperatives of national defense. Strict liability
9 would no doubt increase defense costs but would do little not
10 already being done to increase the use of safety features in
11 military equipment. See In Re Agent Orange Product Liability
12 Litigation, 506 F. Supp. at 793. Increased defense costs, on the
13 other hand, will diminish either other expenditures, public or
14 private, or the level of national defense, if the level of total
15 expenditures for that purpose were to be held constant..

16 3. Compensation

17 A third justification for strict liability is that it
18 provides compensation for victims of accidents caused by defective
19 products. Restatement (Second) of Torts § 402A, comment c. In
20 the case of injured military personnel, however, the Veterans'
21 Benefits Act provides what the Supreme Court called "a generous
22 military compensation scheme," and "a swift, efficient remedy."
23 Stencel, 431 U.S. at 672-73.^{11/} Thus, the serviceman or his
24 family will not go uncompensated, unlike the case of an ordinary
25 consumer injured by a defective product. It is true, of course,
26 that strict liability would increase that compensation, but it can

1 hardly be said that any such increase was anticipated at the time
2 of enlistment.

3 4. Implied Representation

4 Finally, it has been reasoned that by marketing a
5 product, a supplier makes an implied representation that the
6 product, if put to its intended use, will not be unreasonably
7 dangerous and will meet the safety standard expected of similar
8 products. If the product proves to be defective, consumers should
9 receive compensation for the disappointment of their reasonable
10 expectations of safety. Note, 33 Stan. L. Rev. at 544;
11 Restatement (Second) of Torts § 402A, comment 1.

12 Members of the armed forces are not ordinary consumers
13 with respect to military equipment. Their "reasonable
14 expectations of safety" are much lower than those of ordinary
15 consumers. They recognize when they join the armed forces that
16 they may be exposed to grave risks of danger, such as having to
17 bail out of a disabled aircraft. This is part of the job. The
18 Nation sometimes demands their very lives. This is an immutable
19 feature of their calling. To regard them as ordinary consumers
20 would demean and dishonor the high station in public esteem to
21 which, because of their exposure to danger, they are justly
22 entitled.

23 D. Application of Our Holding to the Facts of These Cases

24 The application of our holding to the facts of these
25 cases requires that we reverse and remand the judgments below. It
26 is clear, and we so hold, that in these cases the United States is

1 immune from liability for the design of the HS-1A ejection system
2 under Feres and Stencel. Moreover, the district court held that
3 the defect in the system was its design, not its failure to
4 conform to government specifications. Finally, there is no
5 allegation that Rockwell failed to warn the United States of
6 dangers known to Rockwell but not to the Navy.

7 The present record, however, does not permit us to say
8 with assurance that the United States set or approved reasonably
9 detailed specification for the HS-1A system. On the one hand,
10 Rockwell alleges that the United States was deeply involved in the
11 process of designing and approving the system. On the other hand,
12 plaintiffs-appellants contend that the United States did little
13 more than send Rockwell a letter asking them to come up with a new
14 ejection system and agree to purchase Rockwell's completed
15 design.^{12/}

16 We remand these cases to the district court to determine
17 whether the United States set or approved reasonably detailed
18 specifications for the HS-1A ejection system. If the district
19 court finds that the involvement of the United States was limited
20 in the manner the plaintiffs-appellants assert - that is, if the
21 United States neither set specifications for the system (other
22 than general outlines of what type system it required) nor
23 approved Rockwell's final reasonably detailed specifications (by
24 examining and agreeing to a detailed description of the workings
25 of the system) - then Rockwell is subject to strict liability
26 under the rule set forth in section 402A. We note that Rockwell,

1 the supplier, has the burden of proving by a preponderance of the
2 evidence that the United States established, or approved,
3 reasonably precise specifications for the ejection system.

4
5 III.

6 LIABILITY UNDER SECTIONS 388 AND 399
7 OF THE SECOND RESTATEMENT OF TORTS

8 The district court also found that Rockwell was liable
9 under Restatement (Second) of Torts §§ 388 and 389 for breach of a
10 duty to "test, measure or evaluate the dynamics of the ejection
11 process on the head, helmet, and neck of the ejecting crewman,"
12 and to withdraw the HS-1A system after "continued use [showed] . .
13 . that a pattern of neck injuries was developing." We reverse.

14 We commence by observing that this court has not yet
15 adopted sections 388 and 389 as a basis for liability in admiralty
16 in this circuit. But even if we had, these sections would not
17 support the district court's holding. First, many of the
18 arguments discussed in Part II apply with equal force here. For
19 example, the high incidence of government evaluation of the safety
20 of military equipment places it in a position quite different from
21 that of an ordinary purchaser or consumer. Also the
22 socio-economic justifications for strict liability, as set forth
23 above in Part II-C, continue to be inapposite when liability under
24 these sections is considered. In addition, as explained below,
25 the requirements for liability under sections 388 and 389 have not
26 been met.

A. Section 388

Under section 388, a supplier of a "dangerous chattel" is

1 liable to those whom the supplier should expect to use the chattel
2 if (1) the supplier knows or has reason to know that the chattel
3 is or is likely to be dangerous; and (2) it has no reason to
4 believe that users will realize the danger; and (3) it fails to
5 warn the users of the chattel's dangerous condition.^{13/} All
6 three criteria must be satisfied for liability to attach under
7 section 388. Dougherty v. Hooker Chemical Corp., 540 F.2d 174,
8 178 (3d Cir. 1976). Here both the second and third requirements
9 for liability are lacking.

10 The Navy, the principal user of the HS-1A system, was
11 aware of any injuries incurred while using the system. It
12 "realized the danger"; it was engaged in a continuous process of
13 evaluating the system, and of exchanging information on its
14 performance with Rockwell. See, e.g., R.T. at 1342-44. Thus,
15 there was no reason for Rockwell to believe that the Navy was
16 unaware of problems with the HS-1A system, and Rockwell therefore
17 had no duty to warn the Navy about the system's "dangerous
18 condition."^{14/} See section 388, comment k; see also Strong v.
19 E. I. DuPont de Nemours Co., 667 F.2d 682, 687 (8th Cir. 1981).

20 In reaching its conclusion the district court relied on
21 the following assumptions: Rockwell had a duty to test the HS-1A
22 system; Rockwell failed adequately to test the system; testing
23 would have revealed that the system was dangerous; Rockwell would
24 then have been obliged to warn the Navy about these dangers and to
25 withdraw the system from the market; and warning and withdrawal
26 would have prevented the accidents. These assumptions are flawed.

1 First, it is questionable whether section 388 imposes a
2 duty on a supplier to test a product for latent defects. See
3 Lockett v. General Electric Company, 376 F. Supp. 1201, 1208 (E.D.
4 Pa. 1974), aff'd mem., 511 F.2d 1393 (3d Cir. 1975); see also
5 Sears, Roebuck & Co. v. Marhenke, 121 F.2d 598, 600 (9th Cir.
6 1941). To impose on Rockwell a duty to test for latent defects
7 would cause it to become a virtual guarantor of the proper
8 performance by the Navy of its duties. And neither the text nor
9 the comments to section 388 indicate that there is a duty under
10 that section on the part of a supplier to withdraw a product from
11 the hands of the user, particularly when that user is the Navy of
12 the United States.

13 Second, even if there were such duties, the record does
14 not show that breach of the duties proximately caused the injuries
15 at issue in this case. There is no evidence that the Navy would
16 have removed the system from its existing RA-5C aircraft had the
17 Navy been aware of the possibility of the type of accident with
18 which we are concerned. Indeed, the Navy evaluated the system
19 subsequent to the accidents and found, on balance, that it was
20 "safe-for-flight." Exhibit 112 (United States Navy, A-4, A-5, &
21 A-6 Aircraft Escape System Neck Injury Investigation, Nov. 12,
22 1974), at ¶ 13. Moreover, a warning directly to crews of the
23 RA-5C aircraft, assuming that they are the "users" of whom section
24 388 speaks, would not have prevented the accidents here, since the
25 crews had no choice but to fly aircraft equipped with the HS-1A
26 system. Under these circumstances the pilots had no alternative

1 to using the system in the case of a midair accident.15/

2 B. Section 389

3 Section 389 provides plaintiffs-appellants no better
4 support. Under it, a supplier of a chattel who has informed the
5 person to whom the chattel has been supplied of its dangerous
6 propensities may be held liable to persons who are ignorant of the
7 dangerous character of the chattel if the supplier is aware that
8 the chattel is unlikely to be made reasonably safe before being
9 put to its expected use.16/

10 One difficulty in applying section 389 to the facts of
11 these cases is that it presupposes that use by the Navy of the
12 chattel, as supplied by Rockwell, was improper. This we cannot
13 say without assuming the role of naval officers. As we pointed
14 out above, the Navy evaluated the system after the accidents at
15 issue here and continued its use. Section 389 also presupposes
16 that the pilots, the "persons who are ignorant of the dangerous
17 character of the chattel," would not fly if they knew the
18 "dangerous character" of the "chattel." This cannot be assumed.
19 Naval pilots are required to fly as ordered. The alternative to
20 ejection following an accident usually will be death.17/

21 Finally, section 389 only applies when a chattel is not
22 "reasonably safe." But, to repeat, the Navy's post-accident study
23 found that the HS-1A system was reasonably safe. It is not for us
24 to interfere in the Navy's evaluation of its own weapons systems.
25 See Aero Corp. v. Department of the Navy, 493 F. Supp. 558, 567
26 (D.D.C. 1981).

1 Military personnel frequently have been sent to their
2 deaths by the incompetence of others. Hardly a page of history
3 lacks an example or two. We do not suggest that is the case
4 here. However, should it be so those who serve the United States
5 in an active military capacity are assured their survivors will
6 receive some compensation. We merely hold that it is not for this
7 court to increase that compensation in the mannner
8 plaintiffs-appellants suggest.

9 The judgment of the district court is reversed and these
10 cases remanded for proceedings consistent with this opinion.

11 These holdings, to repeat, make it unnecessary for us to
12 consider the appeals by the plaintiffs-appellants.

13 REVERSED and REMANDED.

14 "Judge Alarcon dissents and may file a separate
15 statement at a later date"
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FOOTNOTES

1. Plaintiffs-appellants contend that jurisdiction should also be based on general maritime law, see *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), which allows litigants in a wrongful death action to recover for loss of society, comfort, and care. See *Sea Land Services v. Gaudet*, 414 U.S. 573 (1974). We need not address this contention since we do not reach the damages issue in this case, and, apart from damages, the relevant law is the same under general maritime law as under the Death on the High Seas Act.

2. Plaintiffs-appellants claim that the district court erred by refusing to award them prejudgment interest, by misapplying the collateral source rule and thereby wrongly reducing the award of damages, and by declining to award compensation for the loss of services and society. Rockwell contends that the district court erred in its findings of fact, evidentiary rulings, and opinion format.

3. Section 402A states:

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

4. Strict liability does not apply to every accident-producing activity. See, e.g., Restatement (Second) of Torts § 402A, comment k (unavoidably unsafe products); *La Rosa v. Superior Court*, 122 Cal. App. 3d 741, 176 Cal. Rptr. 224 (1981) (used products); *Pena v. Sita World Travel, Inc.*, 88 Cal. App. 3d 642, 152 Cal. Rptr. 17 (1978) (services); *Silverhart v. Mount Zion*

1 Hospital, 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971)
2 (sales-service hybrid).

3 5. Rockwell preserved its right to rely on the government
4 contractor defense by asserting it in a motion for summary
5 judgment.

6 6. Most of the cases cited by plaintiffs-appellants in which a
7 court held a manufacturer liable to a serviceman involve
8 manufacturing, rather than design defects. See, e.g., Foster v.
9 Day & Zimmerman, 502 F.2d 867 (5th Cir. 1974); Whittaker v.
10 Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969); Montgomery
11 v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964).
12 In other cases relied on by plaintiffs-appellants, the parties
13 failed entirely to raise the contractor issue. See, e.g., Stencel
14 Aero Engineering Corp. v. United States, 431 U.S. 666 (1977);
15 Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Renner
16 v. Rockwell International Corp., 403 F. Supp. 849 (C.D. Cal.
17 1975), vacated, 587 F.2d 1030 (9th Cir. 1978).

18 7. The recent decision of the Supreme Court in Lockheed Aircraft
19 Corp. v. United States, 103 S. Ct. 1033 (1983), does not detract
20 from the Feres-Stencel doctrine's rationales.

21 In Lockheed, a civilian employee of the Navy was killed
22 in a crash of a C-5A aircraft manufactured by Lockheed, and flown
23 by the Air Force. The United States paid death benefits to the
24 employee's survivors under the Federal Employees' Compensation Act
25 (FECA). The survivors then sued Lockheed, and Lockheed impleaded
26 the United States as a third party defendant for indemnification
purposes. The Court held that FECA does not bar such an indemnity
action against the United States.

27 The Court distinguished the Feres-Stencel doctrine from
28 Lockheed. The Court explained that while the United States had
29 waived its immunity from an indemnity action based on an injury to
30 a civilian employee who had been compensated under FECA, the
31 United States still enjoyed sovereign immunity under Feres-Stencel
32 from an indemnity action based on an injury to a serviceman. 103
33 S. Ct. at 1037-38 n.8.

34 8. Also, allowing liability would, as the Stencel court feared,
35 subject the United States indirectly to paying for damages to
36 injured servicemen, where the amount of damages would vary
depending on the applicable law. 431 U.S. at 672.

37 9. Plaintiffs-appellants also rely on Montgomery v. Goodyear Tire

1 & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964). That case, as
2 noted above, involves a manufacturing, not a design defect.
3 10. For convenience, we subsume the most important justifications
4 for strict liability into four categories, based on the usage of
5 the Oregon Supreme Court. See, e.g., Tillman v. Vance Equipment
6 Co., 286 Or. 747, 752-54, 596 P.2d 1299, 1302-03 (1979). For a
7 fuller list of the possible rationales for strict liability, see
8 Henderson, Extending the Boundaries of Strict Products Liability:
9 Implications of the Theory of the Second Best, 128 U. Pa. L. Rev.
10 1036 (1980); Owen, Rethinking the Policies of Strict Products
11 Liability, 33 Vand. L. Rev. 681 (1980).

12 Some commentators include among the principal
13 justifications for imposing strict liability the reduction of
14 transaction costs by relieving the plaintiff of the problem of
15 proving negligence or warranty violations. See, e.g., Schwartz,
16 Forward: Understanding Products Liability, 67 Calif. L. Rev. 435,
17 459-60 (1979). Other authorities maintain that the burden of
18 proving negligence is not significantly more difficult than than
19 of strict liability. See, e.g., Sachs, Negligence or Strict
20 Product Liability: Is There Really a Difference in Law or
21 Economics?, 8 Ga. J. Int'l & Comp. L. 259 (1978).

22 11. The Veterans' Benefits Act may not provide full compensation
23 for a loss in a situation similar to the present case. For
24 example, veterans' benefits do not compensate for loss of
25 companionship or services. But many of these benefits are also
26 unavailable under the Death on the High Seas Act. Moreover,
compensation under the Veterans' Benefits Act is not reduced by
the high transaction costs present in ordinary products liability
litigation. Stencel, 431 U.S. at 673. See Note, 23 B.C.L. Rev.
1025, 1083-84 (1982).

12. The district court did not make a factual finding on this
issue in denying Rockwell's motion for summary judgment on the
government contractor defense, R.T. at 25, or in its opinion.
Plaintiffs-appellants are mistaken in their assertion to the
contrary.

13. Section 388. Chattel Known to be Dangerous for Intended Use.

One who supplies directly or through a third person a
chattel for another to use is subject to liability to those whom
the supplier should expect to use the chattel with the consent of
the other or to be endangered by its probable use, for physical
harm caused by the use of the chattel in the manner for which and
by a person for whose use it is supplied, if the supplier (a)
knows or has reason to know that the chattel is or is likely to be
dangerous for the use for which it is supplied, and (b) has no

1 reason to believe that those for whose use the chattel is supplied
2 will realize its dangerous condition, and (c) fails to exercise
3 reasonable care to inform them of its dangerous condition or of
the facts which make it likely to be dangerous.

4 14. It is necessary here to distinguish between the Navy, the
5 principal user of the HS-1A system, and plaintiffs-appellants'
6 decedents, who were "secondary users," or "ultimate consumers" of
7 the system. In the case of section 388, a warning to the Navy
would have been sufficient to relieve Rockwell of liability for
injury to a Navy pilot. Section 388, comment n. Cf. Dalke v.
Upjohn Co., 555 F.2d 245, 247-48 (9th Cir. 1977).

8
9 15. The district court found that both aircraft were out of
control, and were flying at speeds in excess of 400 knots.

10
11 16. Section 389. Chattel Unlikely to be Made Safe for Use.

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

18 17. But see § 389, comment d (railroad is liable to soldier for
19 accident caused by defective track even though soldier was ordered
20 to take train over the track). The example in comment d is based
21 on Bryson v. Hynes, 268 F. 290 (4th Cir. 1920), a case which is
not law in this circuit, and which is unlikely to be followed by
modern courts, especially after the Feres and Stencel decisions.

FILED

APR 21 1983

PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

1 JANICE MCKAY, Executrix of the Estate of Lt. CDR. MALCOLM
MCKAY, Deceased, Plaintiff-Appellant and Cross-Appellee v.
2 ROCKWELL INTERNATIONAL CORPORATION, INC., A Delaware
corporation, Defendant-Appellee and Cross-Appellant. Nos.
3 81-5540, 81-5541; MARIE CARSON, Administratrix of the Estate of
FRANK J. CARSON, Deceased, Plaintiff-Appellant and
4 Cross-Appellee v. ROCKWELL INTERNATIONAL CORPORATION, INC., A
Delaware corporation, Defendant-Appellee and Cross-Appellant.
5 Nos. 81-5542, 81-5543.

6
7 ALARCON, Circuit Judge, dissenting.

8 I respectfully dissent. Neither the Feres-Stencel
9 doctrine nor the government contractor defense protects
10 Rockwell from liability in this case. As demonstrated by the
11 discussion below, a remand on this issue is unnecessary and the
12 district court's finding of liability should be affirmed. To
13 the extent that the damage awards have been reduced for failure
14 to apply the collateral source rule, the decision should be
15 reversed and the original amounts awarded.

16 Finally, the failure to grant prejudgment interest or
17 damages for loss of services in discussed and instructions for
18 the consideration of these issues on remand are given.

19 FERES-STENCEL

20 The majority's reliance on these opinions for
21 authority in this context is misplaced. Neither opinion
22 addresses, limits, nor precludes contractor liability to
23 military personnel who are injured while using defectively
24 designed and unsafe equipment.

25 The Feres case involved a claim brought by a
26 serviceman's widow under the Federal Tort Claims Act

1 (hereinafter the FTCA). She alleged that her husband's death
2 resulted from the negligence of his commanding officers.

3 In affirming the district court's dismissal of the
4 action, the Supreme Court noted that the purpose of the FTCA
5 was to "waive immunity from recognized causes of action, not to
6 visit the government with novel and unprecedented
7 liabilities." Feres, 340 U.S. at 142. Because no American law
8 had ever "permitted a soldier to recover for negligence,
9 against either his superior officers or the Government he is
10 serving," id., the Court concluded that the widow's claim was
11 outside the waiver of immunity contemplated by the FTCA.

12 In Stencel, a serviceman brought suit against both
13 Stencel Aero Engineering Corp. (hereinafter "Stencel"), the
14 supplier of the ejection seat in which he was injured, and the
15 United States. The serviceman claimed that his injury was the
16 result of the defendants' individual and joint negligence.
17 Stencel then cross-claimed against the Government for
18 indemnification of any liability it might suffer as a result of
19 the serviceman's claim. The Government, in response, moved for
20 dismissal of both the tort and the cross-claim citing Feres for
21 authority. The motion was granted and the Supreme Court
22 affirmed.

23 The Court agreed that Feres controlled and limited the
24 government's liability to the amounts provided in the statutory
25 benefit packages. Because Stencel's indemnification claim
26 would have pushed the government's liability above this upper

1 limit, it also was prohibited. To hold otherwise, the Court
2 concluded, "would be to judicially admit at the back door that
3 which has been legislatively turned away at the front door. We
4 do not beleive that the [Federal Tort Claims] Act permits such
5 a result." Stencel, 431 U.S. at 673, (quoting Laird v. Nelms,
6 406 U.S. 797, 802 (1972)).^{1/}

7 It is apparent from a reading of these opinions that
8 the Feres-Stencel doctrine is concerned exclusively with
9 government, not contractor, liability. As stated in In re
10 Agent Orange Product Liability Litigation, 506 F. Supp. 762
11 (E.D.N.Y. 1980) reh. den., 534 F. Supp. 1046 (E.D.N.Y. 1982)
12 (hereinafter, "Agent Orange"), "[t]o the extent that
13 plaintiff's complaints seek recovery against the defendant
14 chemical companies, of course, the Feres doctrine has no
15 application." Id. at 772 (emphasis added); see also 1 Jayson,
16 Handling Federal Tort Claims § 155.02 at 5-66 n.9 and 5077 n.24.

17 In this case, Mrs. McKay and Mrs. Carson have filed
18 neither a direct claim nor a claim of indemnification against
19 the Government. As such, their claims reside outside the
20 previously defined area of concern expressed in Feres-Stencel
21 and Agent Orange.

22 More significant than the doctrine's failure to
23 preclude Rockwell's liability, however, is the Stencel
24 opinion's implied recognition that a cause of action against a
25 military contractor is proper. The Court states in footnote
26 eight that prohibiting indemnification of Stencel is not unfair

1 because it "no doubt had sufficient notice so as to take this
2 risk [i.e., being held liable without indemnification by the
3 Government] into account in negotiating its contract for the
4 emergency eject system at issue here." Stencel, 431 U.S. at
5 674. This statement implies (1) the Court was aware of
6 Stencel's liability for the ejection seat and declined to
7 restrict or preclude it, 2/ and (2) the Court recognized that
8 contractors like Stencel are aware of their possible liability
9 in this context and have already set their bid prices to
10 reflect this risk. Here too, the Court declined to restrict or
11 preclude this practice. Consequently, limiting the risk which
12 supports this added cost, as the majority has done, merely
13 results in a windfall to suppliers like Rockwell and Stencel
14 who have existing contracts.

15 Under the majority's analysis, however, such a result
16 is not discussed. To the contrary, it is assumed that current
17 military contracts do not contain this type of compensation.
18 Rather, the majority fears that contractors will, if held
19 liable for unsafe designs, begin passing these liability costs
20 on to the Government. This will be achieved, the majority
21 suggests, through later sales and cost overrun provisions.3/
22 Such contractual indemnification, the majority concludes is (1)
23 precluded by the Feres-Stencel doctrine, and (2) going to
24 significantly increase the costs of military equipment.
25 Neither conclusion is correct.

26 With regard to the first conclusion, it is simply not

1 supported by the opinions themselves. The Feres opinion does
2 not even mention the issue, and footnote eight of the Stencel
3 opinion recognizes that most military equipment contracts
4 already reflect this cost to some extent. The Stencel
5 opinion's failure to condemn this practice reflects the Court's
6 appreciation for the realities which control in a free market
7 system. If contractors are subject to products liability, then
8 that factor will be reflected in their overall cost of doing
9 business. This cost, of course, will ultimately dictate the
10 price charged to customers.

11 There is, however, no reason to believe that these
12 costs are common, in amount and frequency, between all military
13 equipment suppliers. Those with proven safety records may be
14 able to secure liability insurance at much lower rates than
15 less careful suppliers. Presumably, such cost savings enable
16 these manufactures to make lower bid prices and be more
17 competitive. Because the Military is free to pursue and accept
18 these lower bids, they help sharpen competition and keep the
19 overall cost of bids down. Those manufacturers who do suffer
20 liability, because of unsafe equipment, will be unable to pass
21 on these costs freely due to the lower bids of their safer
22 competitors. This analysis also demonstrates the error in the
23 majority's second conclusion, i.e., products liability in this
24 context will translate into significantly higher equipment
25 costs to the Military.

26 While there is no doubt that some of these liability

1 costs will find their way into overall bid costs, this is to a
2 certain extent inevitable. The free market system, however,
3 insures that this cost transfer will be minimized. Just as
4 some manufacturers are better at minimizing the cost of
5 overhead, others will be better at producing safe designs and
6 avoiding liability. Bid price competition and the cost of
7 liability provide incentives to minimize both. Footnote eight
8 of the Stencel opinion concedes this system's existence and
9 recognizes that one way or another, all costs incident to
10 manufacture get passed on to the customer, whether or not it is
11 the Government. As long as our economy continues as a free
12 market system this court should refrain from denying its
13 realities.

14 The above analysis, of course, does not apply to all
15 government contractors, for not all of them contract at arms
16 length with the Government. In those situations where
17 compulsion exists, in one form or another, the contractor
18 should be immune from suit. Public policy, however, requires
19 that this immunity be extended only in those cases where
20 liability will not encourage safer design or lower costs.

21 GOVERNMENT CONTRACTOR DEFENSE

22 In its analysis of this defense, the majority has
23 chosen to disregard the aforementioned public policy
24 limitation. The four elements of the defense summarized in the
25 opinion too easily allow contractors to shift responsibility
26 for the safety of their designs on to the Government. Under

1 the majority's four part test, any contractor who submits
2 designs to the Military and secures approval for them is immune
3 from unsafe design liability. This goes too far.

4 The Ninth Circuit has already analyzed the government
5 contractor defense in Merritt, Chapman & Scott Corp. v. Guy F.
6 Atkinson Co., 295 F.2d 14 (9th Cir. 1961). In that case, this
7 court held that "[i]t is elementary that compulsion must exist
8 before the 'government contract defense' is available." Id. at
9 16, (emphasis in original). This compulsion requirement,
10 however, is dismissed by the majority. Under that analysis,
11 Merritt is found inapplicable because of the simplicity of the
12 construction specifications involved in that case. Why the
13 detail of the specifications should, by itself, negate the
14 compulsion requirement, is not explained. By failing to do so,
15 however, the majority glosses over what this circuit has
16 recognized to be an "elementary" requirement of the defense.

17 The question of compulsion is fundamentally distinct
18 from a project's complexity. A contractor can be required to
19 make blasting caps in the exact manner provided in military
20 specifications during time of war, see Littlehale v. E.I. du
21 Pont de Nemours & Co., 268 F. Supp. 791, 801-802 (S.D.N.Y.
22 1966), aff'd, 380 F.2d 274 (2d Cir. 1967) or be given free
23 reign to design a complex airplane like the B-52. See Boeing
24 Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961) and O'Keefe
25 v. Boeing Company, 335 F. Supp. 1104 (S.D.N.Y. 1971). Merritt
26 recognizes the distinction between these situations and

1 endorses the extension of immunity only in those cases where
2 behavior has been compelled.

3 Merritt does not stand alone in this respect. All of
4 the cases relied on by the majority, which apply the defense,
5 found some factor which compelled the contractor to act as they
6 did. In Casabianca v. Casabianca, 428 N.Y.S. 2d 400 (1980),
7 the subject bakery dough mixer had been built "in or about 1942
8 or 1943 for the United States Army in accordance with the
9 Army's specifications for use in field kitchens during World
10 War II." Id. at 401. Later, after having been installed in
11 the plaintiff's pizza parlor, the machine injured the
12 plaintiff's son. In dismissing the son's claim against the
13 manufacturer, the court held that "a supplier to the military
14 in time of war has a right to rely upon such specifications
15 [i.e. those provided by the military] . . ." without fear of
16 liability. Id. at 402. (Emphasis added). The court then
17 expressly limited the extension of this immunity to contracts
18 performed under "time of war" restrictions. Id.

19 The approval of the government contractor defense in
20 the In re Agent Orange Products Liability Litigation, 506 F.
21 Supp. 762 (E.D.N.Y. 1980), reh. den., 534 F. Supp. 1046
22 (E.D.N.Y. 1982) opinion, also involved manufacturers who
23 alleged that they were compelled during "time of war" to
24 produce supplies according to specifications developed and
25 provided by the Military. 506 F. Supp. at 794-95. 4/
26 Although that case has yet to come to trial, the court

1 established the elements of the government contractor defense
2 which the chemical companys must prove. There, the court
3 stated, that "one of the elements of the defense is that the
4 product in issue be one for which the government established
5 the design and specific characteristics." 534 F. Supp. at
6 1056. Furthermore, "if it should appear that the contract set
7 forth merely a 'performance specification', as opposed to a
8 specified product, then the government contract defense would
9 be far more restricted than as described here." Id. It is
10 clear from these statements that the Agent Orange court
11 recognizes and requires control or compulsion as an element of
12 the defense.

13 In Sanner v. Ford Motor Co., 144 N.J. Supp. 1, 364
14 A.2d 43, aff'd, 154 N.J. Super. 407, 381 A.2d 805 (1977), cert.
15 denied, 75 N.J. 616, 384 A.2d 846 (1978) another form of
16 compulsion was presented. There, the contractor merely built a
17 vehicle according to plans and specifications provided to it by
18 the Military. The court found that "defendant had no
19 discretion with respect to the installation of seatbelts and
20 since it strictly adhered to the plans and specifications owned
21 and provided by the government, Ford is protected from
22 liability." Id. at 806 (emphasis added).

23 Each of these cases demonstrate, in one way or
24 another, the compulsive nature of the Government's behavior or
25 direction when its contractor is immune. Only then will the
26 contractor's behavior be the result of governmental discretion
and direction. Consequently, only then should the contractor

1 share in the Government's immunity.

2 In this case, Rockwell has not even alleged it was
3 compelled to produce this ejection system. Furthermore, the
4 only specifications which Rockwell adhered to were initially
5 produced by its own design staff. Whether the Military
6 subsequently ratified these designs should not alter Rockwell's
7 primary responsibility for their content and adequacy. This
8 case is unlike Sanner or Casabianca where the contractor merely
9 followed plans and specifications provided and developed by the
10 Military. Rather, this matter more clearly resembles the
11 situation described in Agent Orange where the Military merely
12 provides "performance specifications". As such, the government
13 contract defense should be "far more restricted" than that
14 described by the majority. See Agent Orange, 539 F. Supp. at
15 1056.

16 More specifically, Rockwell's posture reflects that of
17 Boeing, in Boeing Airplane Company v. Brown, 291 F.2d 310 (9th
18 Cir. 1961) (hereinafter Brown) and O'Keefe v. Boeing Company,
19 335 F. Supp. 1104 (S.D.N.Y. 1971) (hereinafter O'Keefe). In
20 O'Keefe, Boeing was sued for negligent design of the tail
21 support structure in the B-52 bomber. In response, Boeing
22 argued the government contractor defense. The court then
23 conceded that "ultimate responsibility for the design and use
24 of the B-52 bomber rests and has always rested with the United
25 States government." 335 F. Supp. at 1124. Nevertheless, the
26 court went on to say that "this fact, in itself, neither

1 exonerates the defendant, nor has it in any way altered the
2 defendant's duty as a manufacturer in this case where there has
3 been no showing that the defendant was totally oblivious of
4 and/or aloof from the genesis of the design
5 specifications . . . " Id.

6 The majority discusses this conclusion but dismisses
7 it as dictum.⁵ Nevertheless, it is based on the holding in
8 Brown. There, a defectively designed alternator disintegrated
9 and caused the B-52 in which it was installed to crash. In
10 this case Boeing also attempted to avoid liability by shifting
11 primary responsibility for the defect on to the Government.
12 They argued, according to the court, that:

13 the Air Force was negligent in its entire
14 course of conduct in approving the design
15 for the alternator drive prior to manufacture,
16 supervising its manufacture, monitoring the
17 qualification and production testing, and
18 accepting the completed aircraft. Appellant
19 predicates this view on the assumption, for the
20 purpose of argument, that the design of the
21 alternator drive was defective. If the
22 design was defective, it is contended, the
23 Air Force, in view of its continual contact
24 with the project, was negligent in its failure
25 to discover the defect and require its
26 correction.

1 291 F.2d at 316-17. Although Boeing did not specifically label
2 this argument "the government contractor defense", clearly its
3 content demonstrates its essential similarity to that defense.

4 The Ninth Circuit, however, was no more impressed with
5 the argument at that time than it should be now. The court
6 recognized that inspection and approval do not constitute
7 direction or compulsion. Therefore, Boeing was responsible for
8 its own actions and design decisions despite the Government's
9 approval. 6/ As long as Boeing continued as the source or
10 genesis of the design, the negligence of that design remained
11 its own responsibility.

12 The majority, however, does not even address this
13 earlier decision by the Ninth Circuit. Instead, it is
14 dismissed in footnote six, ante, as being a case which fails to
15 discuss the contractor issue. The above excerpt demonstrates
16 that this is not the case. Furthermore, the two Boeing cases
17 are significant in that they are nearly identical to the case
18 at bar. All three involve contractors who supplied negligently
19 designed complex weapons systems which were approved and tested
20 by the Military. In each, the courts held that responsibility
21 for the designs remained with the manufacturer despite military
22 approval. Furthermore, unlike the other cases which involved
23 supply contracts entered into either during time of war or
24 pursuant to government supplied plans and specifications, these
25 cases involved contracts made pursuant to "performance
26 specifications". The above mentioned similarities and

1 distinctions demonstrate that Brown and O'Keefe rather than
2 Sanner and Casabianca should control here.

3 The majority is also concerned about possible
4 deleterious effects this type of contractor liability would
5 have on military discipline. Although the Stencel opinion
6 expressed some concern for that issue, Justice Marshall's
7 dissent in that case clearly demonstrated its boundaries. He
8 recognized that a contractor, sued by a civilian, might "cross
9 claim against the Government. In that hypothetical case, . . .
10 there would be the same chance that the trial would 'involve
11 second guessing military orders, and would . . . require
12 members of the Armed Services to testify in court as to each
13 other's decisions and actions'. Ante at 673. Yet, there would
14 be no basis, in Feres or in the Tort Claims Act, for concluding
15 that the suit is barred because of the nature of the evidence
16 to be produced at trial." Stencel, 431 U.S. at 676-77.
17 (Marshall, dissenting). Clearly then, if Marshall's
18 hypothetical suit is not blocked by discipline concerns, then
19 the far more attenuated suit at issue here is also unblocked by
20 this concern.

21 Finally, the majority suggests that to treat military
22 personnel "as ordinary consumers would demean and dishonor the
23 high station in public esteem to which, because of their
24 exposure to danger, they are justly entitled." Ante. at 18.
25 While all can agree that military personnel are entitled to the
26 high honor and esteem in which they are held, I take issue with

1 the majority's description of its source.

2 Military personnel are honored and esteemed because
3 they are willing to fight for their country and risk their
4 lives doing so. They are not so respected because they are
5 sometimes forced by their calling to use unsatisfactory or
6 unsafe equipment. It is the Military's, Rockwell's and this
7 court's duty to insure that our servicemen are provided with
8 reliable and safe equipment. Just as the Military can make any
9 parachute packer take one that he has just folded and make him
10 jump with it, the court should require that Rockwell stand
11 behind the products for which it voluntarily contracts and
12 provides at a profit. To extend the contractor defense in the
13 way the majority suggests will only result in more unsafe and
14 unreliable equipment. To do so would unnecessarily increase
15 the danger which our military personnel face so
16 patriotically.^{7/}

17 THE REMAND

18 Applying the holdings and reasoning of O'Keefe, Brown,
19 Merritt and Agent Orange to the instant case demonstrates that
20 a remand on the issue of liability is unnecessary. As
21 mentioned earlier, although Rockwell raised the government
22 contractor defense in a motion for summary judgment, it failed
23 to put on evidence in support of that defense at trial.
24 Rockwell does not point to any testimony or evidence in the
25 record which shows that it was compelled by the Military to
26 build the ejection system in a particular manner.^{8/} On the

1 other hand, the district court opinion is replete with
2 references which demonstrate that the trial judge found
3 Rockwell, not the Military, to be the designer of the ejection
4 system.^{9/} Furthermore, Rockwell's reliance on Kropp v.
5 Douglas Aircraft, 329 F. Supp. 447 (E.D.N.Y. 1971) for a
6 description of their ejection seat design process demonstrates
7 that they are not entitled to the defense. In Kropp, the
8 design process was described as beginning "rather informally
9 with an idea or suggestion which may emanate either from the
10 manufacturer or the Government, usually the latter." Id. at
11 456. This description closely parallels the "performance
12 specification" situation described in Agent Orange. There, the
13 court held that the government contractor defense was "far more
14 restricted." See Agent Orange, 539 F. Supp. at 1056. It also
15 reflects Boeing's behavior in O'Keefe, where a failure to show
16 "the defendant was totally oblivious and/or aloof from the
17 genesis of the design specifications in the first place"
18 precluded the defense. See O'Keefe, 335 F. Supp. at 1124.
19 Finally, Brown shows that inspection and approval of a design
20 by the Military does not in any way dismiss the primary
21 responsibility of the contractor who creates the design. See
22 Brown, 291 F.2d at 317.

23 The purpose of the remand, proposed by the majority,
24 is to discover whether or not the Government set or approved
25 "reasonably detailed specifications for the HS-1A system."
26 Ante at 18. As shown by the discussion above, however, it is
compulsion, to follow Government plans, not Government approval

1 of contractor plans which entitles Rockwell to immunity. Even
2 if we assume, arguendo, that a detailed set of plans created by
3 Rockwell were submitted and then approved, the lack of
4 compulsion would prevent the Government from assuming
5 responsibility for the safety or adequacy of Rockwell's
6 design. Because Rockwell has failed to prove or allege that it
7 was compelled to produce the RS-1A system, a remand is
8 unnecessary. Without evidence of the compulsion element, the
9 Ninth Circuit has held and should continue to hold as a matter
10 of law, that the defense is unavailable. See Merritt, 295 F.2d
11 at 16. If the majority continues to insist on a remand, then,
12 in addition to the four elements set out in the opinion,
13 Rockwell should be required to prove, as a fifth element of the
14 defense, that it was compelled by the government to produce the
15 ejection system in a manner which failed to protect the
16 crewman's head and neck from injury.

17 While I believe that a remand on the liability issue
18 is unnecessary, I do believe that other issues, not discussed
19 by the majority, require reversal and further consideration by
20 the district court. In the interest of judicial economy, I
21 will discuss them at this time.

22 THE DAMAGES ISSUE

23 The district court concluded, in both cases, that the
24 amount of Rockwell's liability was to be reduced by the V.A.
25 benefits each widow was receiving. The trial judge concluded
26 that "[p]laintiffs should not be permitted to recover the

1 'lost' military retirement while presently collecting that
2 retirement in the form of V.A. pension." District court
3 opinion at 14. The conclusion is incorrect.

4 The Ninth Circuit has recognized the "well established
5 rule that a tortfeasor's liability is not reduced by funds or
6 services received by the injured person from a source
7 collateral to the tortfeasor. The tortfeasor should not be
8 required to compensate twice for the same injury, [see Brooks
9 v. United States, 337 U.S. 49, 53-54, 69 S.Ct. 918, 93 L.Ed.
10 1200 (1949)] but he should not have the benefit of payments to
11 the injured person which he did not make." Gypsum Carrier,
12 Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962).

13 Therefore, the question before us is whether Rockwell can be
14 considered th source of the V.A. benefits being received by
15 Mrs. McKay and Mrs. Carson.

16 The benefits at issue are distributed pursuant to 38
17 U.S.C. §§ 410-417 (1979) (Dependency and indemnity compensation
18 benefits). Funds for these benefits are by Congressional
19 appropriation and other than general payment of taxes, Rockwell
20 makes no specific contribution to these funds. Therefore, the
21 Government, not Rockwell, is the source of these benefits.

22 Rockwell contends, however, that its contractual
23 relationship with the Government prohibits this conclusion and
24 cites City of Salinas v. Souza & McCue Construction Co., 66 C.
25 2d 217, 57 Cal.Rptr. 337, 424 P.2d 921 (1967) (hereinafter
26 "Souza") for support. The contention has no merit.

1 The Souza opinion is inapplicable to Rockwell's
2 situation for two reasons. First, because a public-entity
3 defendant was involved, Souza restrained application of the
4 rule. The court reasoned that "the collateral source rule is
5 punitive in nature (United Protective Workers v. Ford Motor
6 Co., 223 F.2d 49, 54 (7th Cir. 1955); 2 Harper & James, Law of
7 Torts, § 22.22 p. 1345; Fleming, The Collateral Source Rule and
8 Lors Allocation in Tort Law, 54 Cal.L.Rev. 1478, 1482-1484)",
9 and that "the levying of punitive damages against a public
10 entity has not been authorized." Souza, 66 C.2d at 228.
11 Second, Souza involved a breach of contract action. In such
12 cases, the recovery "is intended only to restore the injured
13 party to the position he would have occupied in the absence of
14 the breach." Id. at 227. Therefore, set-offs which limit
15 recovery to the benefit of the bargain are not objectionable.
16 In tort cases, however, no such limitation applies. To
17 restrain the collateral source rule in this context "would
18 negate the deterrent effect of an award against a tortfeasor."
19 Id. Consequently, both factors which restrained application of
20 the collateral source rule in Souza do not apply here.
21 Rockwell, despite its contractual relation with the Government,
22 is not a public entity, and its liability stems from tortious
23 conduct, not contract breach. Rockwell's other arguments in
24 favor of set-off are equally unpersuasive.

25 First, Rockwell argues that the collateral source rule
26 only applies to contributory benefits. The cases upon which

1 Rockwell relies, however, have only applied this requirement to
2 situations where there is a government defendant which is
3 already paying benefits to the plaintiff.^{10/} The
4 contribution requirement in these cases protects government
5 defendants from double liability. Such protection is
6 unnecessary in Rockwell's situation. Furthermore,
7 Feres-Stencel insures that the Government's liability is
8 limited to the V.A. benefits being paid.

9 Second, Rockwell argues that the V.A. benefits
10 represent a payment by a tortfeasor prior to litigation and
11 should be deducted.^{11/} The district court, however, did not
12 find that the Government was negligent with respect to the
13 ejection seat design.^{12/} Consequently, the Government is not
14 a joint-tortfeasor with respect to Rockwell's present liability
15 for unsafe design.

16 Rockwell's final contention is that V.A. benefits are
17 equivalent to those provided under the Federal Employment
18 Compensation Act and are therefore, set off under Witt v.
19 Jackson, 57 Cal.2d 57, 73, 17 Cal.Rptr. 369, 366 P.2d 816
20 (1961). The holding in Witt, however, was limited to
21 California workmen's compensation benefits and only applies
22 when the employer is a concurrent tortfeasor. See De Cruz v.
23 Reid, 69 Cal.2d 217, 222-23, 70 Cal.Rptr. 550, 443 P.2d 193
24 (1968); Arbaugh v. Proctor & Gamble Mfg. Co., 80 Cal.App.3d
25 500, 145 Cal.Rptr. 608 (1978). As has been discussed earlier,
26 the district court did not find the Government to be a

1 concurrent tortfeasor with respect to the ejection seat
2 design. Therefore, Witt does not apply and it is unnecessary
3 to decide whether or not V.A. benefits are equivalent to
4 workman's compensation.

5 In sum, Gypsum Carrier, supra, states the general rule
6 in this circuit. Despite Rockwell's arguments, there is no
7 reason why it should not be applied in this case. The V.A.
8 benefits presently being paid to Mrs. Carson and Mrs. McKay
9 stem from a source "wholly independent" of Rockwell. As such,
10 they are a collateral source, and the district court erred in
11 concluding otherwise. The district court ruling on this issue
12 should be reversed and the original sum awarded.

13 PREJUDGMENT INTEREST

14 The damages awarded to plaintiffs do not include an
15 amount for prejudgment interest. "In admiralty, prejudgment
16 interest must be granted unless peculiar circumstances justify
17 its denial;" Dillingham Shipyard v. Associated Insulation Co.,
18 649 F.2d 1322, 1328 (9th Cir. 1981). "The determination of
19 whether peculiar circumstances exist warranting the denial of
20 prejudgment interest is left to the sound discretion of the
21 trial court." Edinburgh Assur. Co. v. R.L. Burns Corp., 669
22 F.2d 1259, 1263 (9th Cir. 1982). Failure to articulate why
23 prejudgment interest is not to be awarded is an abuse of
24 discretion. Id. Under these authorities, the failure to
25 either award plaintiffs prejudgment interest or articulate
26 reasons for not doing so was an abuse of discretion by the

1 district court. Upon remand, the trial judge should either
2 "determine at what rate and from what time prejudgment interest
3 should be awarded," Edinburgh, supra at 1263, or articulate why
4 he has not done so.

5 LOSS OF SERVICES

6 The damages awarded to plaintiffs did not provide for
7 loss of services. This measure of damage is distinct from loss
8 of society and is recoverable under DOHSA. See Mobil Oil Co.
9 v. Higginbotham, 436 U.S. 618, 622 reh. denied, 439 U.S. 884
10 (1978); Solomon v. Warren, 540 F.2d 777, 788-90 (5th Cir.
11 1976), cert. dismissed, 434 U.S. 801 (1977). (Loss of services
12 herein called "loss of nurture".) Loss of services is
13 compensable because it is capable of being valued. "Guidance
14 of a parent in matters material, moral, and spiritual is of a
15 definite practical and financial value and is subject to
16 pecuniary estimate." Moore-McCormack Lines v. Richardson, 295
17 F.2d 583, 593 n.9a (2d Cir. 1961), cert. denied, 368 U.S. 989
18 (1962); Bodden v. American Offshore, Inc., 681 F.2d 319, 329
19 (5th Cir. 1982). Consequently, it was error for the district
20 court to grant an award which did not include an amount for
21 loss of services or an explanation why they were excluded. On
22 remand, the trial judge should determine whether there is a
23 factual basis for loss of services in these cases:

24 Under DOHSA the wrongful death of a parent
25 standing alone is an insufficient predicate
26 to support recovery by a child of the loss

1 of parental nurture, and in order to recover
2 this item of damages the evidence must show
3 that the deceased parent was fit to furnish such
4 training and that training and guidance had
5 actually been rendered by the parent during
6 his or her lifetime to their children.

7 Solomon v. Warren, supra at 788; see Petition of Risdale &
8 Anderson, Inc., 291 F. Supp. 353, 358 (D. Mass. 1968) (factors
9 to consider).

FOOTNOTES

1
2
3
4
5 1/ The use by the majority of this quotation at page 9, ante
6 may lead to a misinterpretation or mislead others as to the
7 Supreme Court's holding. There, the usage of the quote implies
8 that the Stencel opinion disapproves of contractors passing on
9 their costs through later sales and cost overrun provisions.
10 In fact, the quoted language merely refers to indemnity suits.

11
12 2/ The Agent Orange opinion comports with this analysis.
13 There the court stated that the "Feres-Stencel doctrine bars
14 defendant's attempt to seek contribution or indemnity from the
15 United States based on any recovery plaintiffs may obtain for
16 injuries. . . ." Agent Orange, 506 F. Supp. at 774. This
17 acknowledgement that plaintiffs might recover from a military
18 contractor within an analysis of Stencel implies that such a
19 recovery is not barred by that opinion.

20
21 3/ The majority fails to explain how liability costs can be
22 legitimately included within the ambit of a cost-overrun
23 provision.

24
25 4/ It should be noted that the court in Agent Orange denied a
26 motion for summary judgment based on these compulsion

1 allegations. Instead, the court required defendants to prove
2 at trial that this compulsion in fact occurred. Agent Orange,
3 506 F. Supp. at 795-96. See also Jenkins v. Whittaker Corp.,
4 551 F. Supp. 110 (D. Haw. 1982), where the court noted that the
5 Agent Orange ruling "should be limited to cases involving the
6 manufacture of 'weapons during wartime.'" Id. at 114. Also,
7 because the atomic simulator at issue was not "designed under
8 the urgency of wartime," the Agent Orange holding was
9 "inapposite to the case at bar." Id.

10
11 5/ The majority fails to explain why the dictum in O'Keefe is
12 less meritorious than the dictum in Agent Orange upon which it
13 so heavily relies.

14
15 6/ See Jenkins v. Whittaker Corp., supra, note 4 where the
16 court "ORDERS that Whittaker will be prohibited from arguing to
17 the jury that Whittaker cannot be held liable for design . . .
18 because Whittaker followed the plans and specifications of the
19 government. . . ." 551 F. Supp. at 114-15.

20
21 7/ See Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th
22 Cir. 1974) (where the court stated:

23
24 In making the grenade and its component parts
25 the defendant knew that it was made for military
26 personnel and that it was to be used by them.

1 We believe the public interest in human life
2 and health requires the protection of the law
3 against the manufacture of defective
4 explosives, whether they are to be used by
5 members of the public at large or members
6 of the public serving in our armed forces.

7 Id. at 871; see also Challoner v. Day & Zimmermann, Inc., 512
8 F.2d 77 (5th Cir. 1975).

9
10 8/ See, footnote 4, supra where defendants in the Agent Orange
11 case were required to prove, among other things that (1) the
12 military developed and provided exact specifications for the
13 product, and (2) that they were compelled to produce Agent
14 Orange in this manner by the war time provisions of federal law.

15
16 9/ See District Court Opinion at 10 "Rockwell designed,
17 developed, tested, and manufactured a system . . . known as the
18 FS-1 system . . ." also, "the many neck injuries that had been
19 experienced by crewman who had activated the HS-1A and the
20 similar preceding FS-1 escape system must have brought notice
21 to Rockwell, as designer and manufacturer, . . ." at 12.
22 (emphasis added).

23
24 10/ Rockwell relies primarily on: Helfend v. Southern Cal.
25 Rapid Transit District, 2 Cal.3d 1, 13-14, 84 Cal.Rptr. 173,
26 181 (1980); United States v. Brooks, 176 F.2d 482 (4th Cir.

1 1949); and Overton v. United States, 619 F.2d 1299 (8th Cir.
2 1980).

3
4 11/ The rule which Rockwell relies on requires that the
5 payments be in "settlement." See Donham v. United States, 536
6 F.2d 765, 775 n.12 (8th Cir. 1976), aff'd sub nom., Stencel
7 Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).
8 Furthermore, the Donham footnote is based on the reasoning in
9 Murray v. United States, 405 F.2d 1361 (1968). This reasoning
10 was rejected by the Ninth Circuit in Dodge v. Mitsui Shintaku
11 Ginko K.K. Tokyo, 528 F.2d 669, 671-72 (9th Cir. 1975), cert.
12 denied, Mitsui Shintaku Ginko K.K. Tokyo v. Dodge, 425 U.S. 944
13 (1976). There, this court noted that the Murray approach had
14 been rejected by the Second Circuit and that it was contrary to
15 the great weight of authority.

16
17 12/ There was some suggestion in the district court opinion
18 that the Navy had been negligent in its apparent failure "to
19 live up to its duty to vigilantly inspect, maintain, and repair
20 these high performance airplanes." District Court Opinion at
21 9. With regard to the ejection seat, however, that was "quite
22 another matter." Id. "It seems clear to the Court that the
23 design of the escape system is all-important . . . maintenance
24 of the system is of lesser importance." Id. at 12. Finally,
25 "the court finds that the condition of the HS-1A ejection
26 system involved . . . had not substantially changed between the

1 time they were installed by Rockwell and the time they were
2 deployed by decedents." Id. at 14.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26