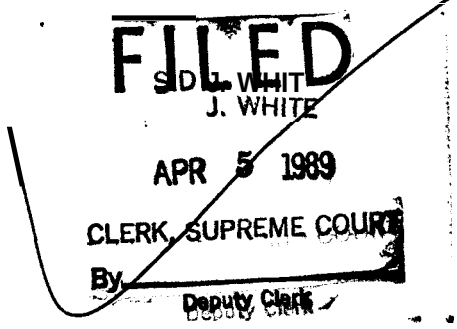
O/a 6-8-89

Eastern Airlines vs. King

REPLACEMENT COPY

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 73,395




CHARLES KING,

Petitioner,

vs.

EASTERN AIRLINES, INC.,

Respondent.

_____/

BRIEF OF AMICUS CURIAE
PRODUCT LIABILITY ADVISORY COUNCIL
IN SUPPORT OF RESPONDENT, EASTERN AIRLINES, INC.

Edward T. O'Donnell, Esq.

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE
Counsel for Amicus Curiae
Product Liability Advisory Council
Southeast Financial Center
Suite 4500
200 South Biscayne Boulevard
Miami, Florida 33131-2387
Telephone: (305) 358-5100

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

Statement of amicus' identity and reasons for appearance.

The membership of the Product Liability Advisory Council (PLAC) includes manufacturers of automotive, industrial, farm and mining equipment. This case concerns us because the majority opinions in the Court of Appeal[1/] nullify critical reforms the Supreme Court has achieved in recent years which are of broad significance to manufacturers and every other business which serves the general public.

For example, PLAC members are subject to claims for punitive damages or related theories. Often those controversies arise from accidents which -- like the one in this case -- are a consequence of unavoidable risk or, at most, negligence by employees which does not show any moral failing. The Supreme Court has responded to that problem by reiterating the stringent nature of the requirements for punitive awards. Chrysler Corp. v. Wolmes, 499 So.2d 823 (Fla. 1986) and American Cyanamid Co. v. Roy, 498 So.2d 859 (Fla. 1986).

The belief that one somehow is entitled to collect even when the accident does not produce a physical injury is another problem in product liability law. The Court dealt with that question in Champion v. Grey, 478 So.2d 17 (Fla. 1985) and Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985).

---

1/ We will refer to the District Court of Appeal of Florida, Third District as "the Third District".

The precedent the Third District has set in this case, however, would permit what are essentially the same claims to go forward because they bear the different labels of intentional infliction of mental distress or the tort of "outrage" rather than "punitive damages" or "negligence".[2/]

More particularly, PLAC is concerned that the Third District's opinion in this case will pave the way for others in which trial judges and intermediate appellate court refuse to subject claims of "outrage" to the close scrutiny the extraordinary nature of that cause of action demands. Further, the precedent would encourage the lower court to ignore the complexities of modern mass production and design work when the claim is based upon an assertion of risk, or to shrug off the question of the character of the risk as a routine jury matter rather than the threshold issue of law which it is under both McCarson and the Restatement of Torts, Second.

## STATEMENT OF THE CASE

1. Procedural History: To minimize repetition, amicus adopts the procedural history which will appear in the brief submitted by Eastern Airlines.

---

2/ For authority that "outrage" is the same tort as the intentional and infliction of mental distress, see Prosser and Keaton, the Law of Torts, page 63. We will use the shorter term for brevity; we refer to the concept discussed in McCarson and the Restatement of Torts, 2d § 46.

**Statement of Facts**: Relying upon adjectives and a prosecutorial tone rather than analysis, the Complaint gives the impression that Eastern was indifferent as to whether its own airplanes crash.

The sparse factual allegations, however, show something far less lurid and improbable.

Because of negligence by mechanics, the engines on an Eastern flight to Nassau failed but, after a period of gliding, the crew was able to start one engine again and land safely at Miami. (Complaint paragraph 11)

As amicus understands the matter, it is undisputed that:

(a) The passengers who are plaintiffs in this case were not injured [3/] and, as a result, they are not entitled to monetary damages for negligence under Supreme Court precedent, cf. Brown v. Cadillac Motor Car Division, 468 So.2d 903 (Fla. 1985)

(b) Eastern would have no reason to intend to subject its customers to such an experience or to risk the destruction of its own crew and airplane.

The plaintiff's claim (Count III), nevertheless, is couched in terms of the tort of "outrage". More particularly, it depends upon the premises that (1) Eastern was charged with notice of a severe risk that its mechanics would forget to replace devices

---

3/ Other passengers, apparently, claim to have suffered physical injuries of some nature during these events. They have brought suit in a separate case and their rights are not at issue in this appeal.

called "O-rings" when they worked on engines and (2) the Company's inability to eliminate the possibility of that error constituted "atrocious" conduct, wholly unacceptable in any community.

## S OF ARGUMENT

The mi takes ter mechanics allegedly made in t past s g : and E tern h be held responsible if that negli led to sical ies

But i i a ar diff ent thi to gc t Eastern intended, that t ani shoul make th error -- in ai : to make its n airplanes uns -- d al at h Cc ny inten or t least r zi t the mecha mistakes ould .nf. al distress up n Mr King . s y chose t rea or tolerate that r . Yet each of those ements uld be d spensable to this l . under the p l set fo i the Restatem . and McCarson.

The standard se in McCarson is, rc y speaki that t vro must be s ave t ized d never tolera it. N ling i the laint reaches t r el

Once an engine , there c y is a danger in s terms that is not he stion e. l nt t depen upon re er of tl sk tl a rticular a :plane -- even ny an in Ea tern' fleet - ul crash. The sole specific egation -- that of twelve p episodes in

## ARGUMENT

### I. THE SUPREME COURT ALREADY HAS ESTABLISHED THE KEY POINT IN THIS CASE -- THAT THE CLAIM THE PLAINTIFF ASSERTS IS LIMITED TO THE UNUSUAL INSTANCE WHERE A DEFENDANT IS GUILTY OF GENUINE EVIL, NOT MERE MISJUDGMENT OR CARELESSNESS.

A. A complaint can satisfy McCarson only if the alleged conduct is significantly "more atrocious" than that required for punitive damages.

Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277(Fla. 1985) stresses that the standard for "outrage" is even higher than that for punitive damages:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community ... (pp. 278-279, citing Restatement (Second) at Torts § 46 (1965).

Indeed, the Court quoted Section D of the Restatement of Torts § 46 to emphasize that point:

> ... it has not been bad enough that the defendant has acted with an intent which is tortious or even criminal or that he has intended to inflict emotional distress or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort... (p. 278)

It also is important that the adjectives which emphasize the rare and unforgivable nature of the Defendant's acts take the place of specific substantive elements. (See McCarson pp. 278-279 and Restatement of Torts 2nd § 46, in particular.) It follows that

these extraordinary requirements are not mere limitations on damages but, instead, the very essence of the tort.

B. The Complaint does not justify punitive damages, much less meet the higher standard the Court has set for the new tort. This situation is different in nature from those few in which the Florida courts actually have found that the requirements for the tort were satisfied.

In McCarson, for instance, the insurance adjuster conducted a cold-blooded campaign, rationally calculated to save money for his employer. In contrast, when a mechanic negligently fails to put O-rings in an engine, his employer - Eastern Airlines - suffers a ruined engine and a risk, by the plaintiff's own theory, that the Company's crew and an airliner worth many millions of dollars will fall to their destruction.[4/]

Common sense tells us that those errors were a serious matter. But the same common sense says that no rational business would intend such a result or consciously subject itself to that risk.

The parties undoubtedly will explore other recent punitive damage precedent in detail. We add only that the leading commentator on punitive damages argues, logically, that unless the defendant benefits from the conduct in question its conduct

---

4/ Note that if the risk exists, it is far less severe than the plaintiff assumes and nothing in this case provides a basis for a conclusion that the risk is severe enough to justify a claim for the tort of outrage.

can be deemed so morally deficient that it can justify punitive damages to punitive damages. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products -- 5 Journal of Products Liability 341.[5/] If the mechanics' mistakes would not justify punitive damages, they necessarily cannot meet the more rigorous standard for "outrage".

## 11. COUNT III IS DEFICIENT, AS A MATTER OF PLEADING, BECAUSE IT DOES NOT ALLEGE ANY FACTS OTHER THAN REPEATED HUMAN ERRORS BY EASTERN MECHANICS.

In his dissent, King **v.** Eastern Airlines, Inc., 536 So.2d 1023, 1034 (Fla. 3d DCA 1987) en banc opinion) Chief Judge Schwartz points out that there are no facts to support the plaintiffs assertion that Eastern acted recklessly. Judge Davis made the same observation in the course of dismissing the related federal case, In Re Eastern Airlines, Inc., 629 F.Supp. 307, **311.** In the following pages, PLAC will point to the gaps in the Complaint which led the judges to that conclusion.

### A. An allegation of "twelve" mistakes by mechanics proves nothing when it stands in isolation.

The only factual allegation (paragraph 18) is that Eastern was aware of "at least" twelve instances in which an engine

---

5/ This brief will cite the Journal of Product Liability printing of the Owen article rather than the original University of Chicago printing.

failed because of mechanics' negligence concerning "O-rings". The Plaintiff then begs the question by asserting that this is enough to constitute an "overwhelming" likelihood of death or injury and that the repetition of those mistakes on the part of mechanics shows utter indifference to safety by their employer.

In essence, then, the plaintiff's argument is that Eastern mechanics as a group made that mistake so often that the Company was guilty of unforgivable cynicism in not taking a "simple" step to eliminate the possibility. Yet he does not provide any of the factual allegations which are indispensable to that claim.

To use the imagery of McCarson, (p. 279) some who heard the Complaint's incomplete version of the controversy might exclaim "outrageous" but a responsible person could say only "the pleading does not tell enough to allow me to make such a judgment."

The plaintiff himself says that some such human mistakes are inevitable and that while they constitute negligence, they do not rise to the level of recklessness or intentional wrong.[6/]

The first question must be in what period of time the "twelve instances" occurred. An allegation, or even proof, that there were twelve such failures during a single Eastern work shift at the Miami Airport would be disturbing. If there had been twelve instances over a period of some months, however, the statement would be less impressive. It would suggest a far lower

---

6/ See Plaintiff's brief to the Court of Appeal, (pp. 8-9)

risk because -- simply enough -- the failures occurred less often. Cf. Johnson v. Husky Industries, Inc., 536 F.2d 645, 651 (6th Cir. 1976) (three prior claims made over a nine-year period concerning injuries from inhaling carbon monoxide fumes from charcoal briquettes burned indoors not sufficient to create a jury issue as to punitive damages); Turney v. Ford Motor Co., 94 Ill. App. 3rd 678, 686, 418 N.E.2d 1079, 1086 (1981) (six tractor rollovers in ten years not sufficiently frequent to create a punitive damage question). The Complaint says nothing on this point. For all the reader can tell, the "failures" occurred over a period of many months. Or they may include every one of those mistakes which has occurred over the sixty years Eastern has been in business.

The severity of the risk, moreover, depends upon more than counting instances of negligence in a particular time frame. The Complaint also must provide a basis for deciding whether the moral aspect of that conduct rises to the extreme levels McCarson requires. To make that assessment the jurors would need to know how many O-rings there are in a particular jet engine and at least the approximate number of those repetitions which occurred during the relevant period of time -- whatever that may be -- as all of Eastern's mechanics worked on all of its airplanes. Cf. Owen, ibid at 369.

The point, of course, is that if the nature of an O-ring and its role in an engine is such that mechanics who work for a large

airline must remove or replace them thousands - even millions - of times a year, the probability that some of those mechanics will forget or make a mistake necessarily grows larger. Thus, the occasional human mistake is far less surprising or shocking than it seems when the plaintiff takes those past mistakes out of context and castigates them in dramatic language. Cf. Owen 370

Similarly, the jury would have to know how many engine repairs were done successfully, as opposed to the twelve failures, if they are to judge the risk.[7/] There is no showing -- or even an allegation -- whatsoever on that point in the complaint either.

The plaintiff's briefs below spoke of the probability and even "substantial certainty" of death or injury because of the engine failures which had occurred in the past. At first glance that assertion might seem plausible. Yet, in fact, the Complaint does not say that there have been <u>any</u> deaths or injuries because of negligence as to "O-rings" or that any of the twelve alleged failures were followed by an airplane crash.

On the contrary, the Complaint says all three engines failed but that the plane flew back to Miami after the crew succeeded in

---

7/ Once again, the reason that missing information is critical is only common sense. An allegation that Eastern's mechanics made a particular error every time they worked on an engine or even on half of those occasions would present a far more severe risk than an allegation that they made such an error once in a thousand times.

restarting one engine. That fact requires the conclusion that the airplane was able to fly on one engine and, we infer, that it was designed and built to have that ability -- at greater cost to Eastern.

That the Company invested in airplanes which have such a wide margin of safety constitutes "some care."

In and of itself, that fact negates the assertion that Eastern did "nothing" for safety.

Moreover, it is important to bear in mind that the odds against three engines failing on a single flight necessarily were extremely high.

Each of the three failures constituted a separate event, independent of the others. Therefore the basic computation of that risk requires that the probability of the first event be multiplied by the probability of the second and then by the probability of the third. For example, if the odds were a thousand to one[8/] against a single engine failing, the odds of all three failing on a single flight would not be merely three

---

8/ Note that we use this example only as a highly conservative illustration. Amicus does not suggest that the "thousand one" suggestion is based on the record. On the contrary, we think that the failures occur far less frequently and that figure of a "million to one" would have been justified. In any event, our point is that there is nothing in the record which would justify jury, trial judge or anyone else in assessing these probabilities so that the entire claim is based upon guesswork and, necessarily, falls far short of the standards set in McCarson.

thousand to one but one thousand times one thousand times one thousand to one, i.e., one billion to one. See Langley, Practical Statistics for Non-Mathematical People, pp. 24-25 (1971) (Exhibit 1)[9/] (Reproduced as Exhibit 1 to this brief)

B. The Complaint depends upon the premise the problem could be "cured" easily and yet it does not identify that cure.

The jurors also would need a realistic idea of how difficult it would have been for the Company to prevent the mechanics from forgetting to replace an O-ring from time to time.

The Appellant's brief in the Third District assures the reader that the problem is a "simple" one (p. 20) but the plaintiff does not suggest any specific answer.

The Court may wonder if the plaintiff is only saying that if the mechanics had remembered to replace the O-ring there "simply" could not be a problem." But he himself concedes that isolated negligence by an individual mechanic would not provide a basis for his claim. Therefore the reference must be to something which Eastern can and should do to eliminate the possibility of human weakness. Yet the Complaint does not say what that step is.

---

9/ See also Hayslett, Statistics Made Simple, pp. 43-47 (1968).

Thus the pleading does not allege a fact which is legally indispensable.[10/] Instead it relies upon mere conclusions of law and impermissibly vague ones at that.[11/]

Even more important, there is no allegation that other airlines do not have the same problem or that their mechanics do not make the same or comparable mistakes with comparable frequency -- given the universality of human weakness.

Moreover, to an outsider, such as amicus, the problem does not seem at all "simple". The Complaint refers to the work of airplane mechanics in disassembling, repairing and reassembling complex engines. That necessarily involves hand labor which is demanding and yet repetitive.

The plaintiff itself said in the lower courts that human error is inevitable and, accordingly, that some mechanics will make mistakes given the nature of the work.

---

10/ See Huddell v. Levin, 537 F.2d 726 Prod. Liab. Rptr. (CCH) ¶ 7677 (3d Cir. 1976) holding that a claim against the manufacturer for design liability requires the identification of a specific safer alternative. Moreover, in the punitive damages cases the lower court cites, such as Dorsey v. Honda, 655 F.2d 650 (5th Cir. Unit. B., 1981), modified, 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880 (1982), it was critical that the plaintiff had identified a specific alternative designed and that he did not attempt to rely upon unavoidable risks of a small automobile.

11/ Legal conclusions are not sufficient if they are not supported by allegations of fact. Loving v. Viecelli, 164 So.2d 560 (Fla. 3d DCA 1964); Ocala Loan Co. v. Smith, 155 So.2d 711 (Fla. 1st DCA 1963).

We agree.

But the admitted facts leads us to a different conclusion -- that the Complaint has identified a risk which is unavoidable and that this is no basis for moral condemnation of an employer.

* * *

In short, the plaintiff tries to treat episodes of past negligence as the basis for an unprecedented fusion of absolute liability and the tort of "outrage". Under that approach, if human error occurs it would create a "jury issue" as to "outrageousness" regardless of the circumstances.

That is not the law.

The reader's immediate and natural reaction, of course, may be "one mistake like that is too many."

But the hard fact is that perfect safety is not possible; nor is that the legal standard. Wolmer, 499 So.2d at 824-825. Owen ibid at 356, 365. The conduct of an airline or the manufacture of a mass produced product necessarily involves some unavoidable degree of risk. To condemn them merely because the same type of accident occurs without any limitation as to time -- or proof of a feasible remedy - would be a sweeping extension of liability.

## 111. THE PLAINTIFF ATTEMPTS TO DILUTE THE REQUIREMENTS OF THE TORT.

### A. The allegation that Eastern did not take an "appropriate" step is not sufficient to meet the standard set in McCarson.

The Complaint, (paragraph 18) says that Eastern did not take "appropriate" remedial steps.

In its various submissions to the lower courts the plaintiff has said that this allegation "really" meant Eastern did not take any steps to correct the problem. Eastern naturally challenged that assertion. The plaintiff then shifted to arguments that not taking a step which as counsel deems "appropriate" is the same -- in the eyes of the law -- as not taking any measure in the interest of safety.

That cannot be.

We have seen that McCarson and the Restatement of Torts each place great weight on the distinctions between even gross negligence and those exceptionally wanton or "reckless" failures which, alone, can be the sole permissible basis for recovery under the plaintiff's theory. It follows that the distinctions and gradations among efforts to achieve safety necessarily are not only significant but of the essence of this body of law.

B. The argument that Eastern is a common carrier is not an appropriate part of a claim for outrage.

The plaintiff's argument gradually shifts to one that even if the facts do not produce moral outrage in this case, a jury should consider miscellaneous technical matters. If the court were to permit that erosion of McCarson the effect would be to create an entirely new and different claim, one which might extract money from airlines and other businesses but which does

not express the moral judgments or the public policies inherent in Section 46 of the Restatement.

To begin, the law of common carriers derives from medieval history, modern statutes and common-law reasoning 9 Fla. Jur.2d, Carriers, § 4 (1979). It has little or nothing to do with basic morality or the "common sense" reaction which McCarson and Section 46 contemplate. The fact that the airline industry, like other common carriers, is subject to regulation, moreover, does not logically point to any "evil" in a particular managerial technique or mistake by an employee. Many industries are subject to a high degree of regulation -- electric power and the medical profession, for example.

A case of this nature, in fact, is uniquely ill-suited to the application of the common-law tort which, admittedly, is which is uniquely subjective[12/] Restatement, Torts, Second, Sec. 46, Comment C. The maintenance and repair work necessary to keep a fleet of airliners operating is a highly technical matter.[13/]

---

12/ The only technical attributes of the tort are those set forth in the Restatement Section 46, i.e., that a hypothetical reasonable person would cry "outrage." Further, the limits of the tort are defined largely by references to matters it does not cover; i.e., minor rudeness, etc. There is little or no affirmative statement of its elements.

13/ The facile answer might be that there is nothing hard to understand about a failure to put in an O-ring. But, once again, to say mechanics sometimes make mistakes proves nothing. id. at Point 11.

Speculation as to the emotional reaction of a hypothetical "person" provides no basis for a judgment as to the moral significance of flaws in that process.

Indeed, there is an element of "double-counting in the plaintiff's argument. The law already gives airline passengers special protection i.e., the carrier must satisfy the highest duty of care. There is no reason in logic why that special protection could support an inference that the carrier's state of mind or conduct was "atrocious" as it must be for the tort of "outrage." And if, arquendo, there were some valid policy objective, the courts already have met the need by holding the carrier to an unusually high standard of care.

Furthermore, the supposed limitation to common carriers would not last long. In the next case the Court would hear that the "imbalance of bargaining power" between a manufacturer and a consumer is the same, for practical purposes, as that between the carrier and its passengers so that the new rule should extend to that situation as well.

C. The absence of an allegation that Eastern violated a government regulation also defeats the claim of outrage.

The logic of **$46** of the Restatement of Torts and those cases which have permitted claims for the infliction of mental distress is that there are unusual instances where a party has been subjected to an abuse for which he or she and has no other remedy and when the conduct clearly offends shared human values so that jurors can express society's judgment. But that logic no longer

holds when the courts and specialized regulatory agencies already have acted in the general field.

More particularly, the question of what society will tolerate is not an abstraction in this case. The Complaint refers to the fact that matters of safety are regulated by the Federal Aviation Authority. (Complaint, paragraph 12e)[14/]. Thus "civilized society", in fact, has set up regulatory agencies to govern the airlines.

If the regulatory agencies have set requirements specifically directed toward the handling of "O-rings" or the training of mechanics who must do that work, the Complaint does not allege that those regulations were violated.

On the other hand, it may be that the agencies have not addressed those questions individually but, instead, have dealt with them by more general requirements and safety

---

14/ The plaintiff avoids the fact that one of the most fundamental concomitants of common carrier status is being subjected to extensive government regulation. Fla. Jur. 2nd, Carriers, § 4 (1979); State v. Atlantic Coast Line Railroad Co., 56 Fla. 617, 45 So.969 (Fla. 1908).

"redundancies"--such as the aircraft's ability to fly on one engine if the others should fail.

To take a darker view, it may be that the safety agencies have not foreseen the problem of mechanics' negligence in handling or replacing O-rings or that if they did, the regulators concluded that the risk was too remote or the likelihood of significant improvement too slight to justify additional regulation.

Under any of these hypotheses, the net result would be that expert agencies to whom society entrusts the responsibility for airline safety did more or less the same thing that Eastern did or at least did not express any objection or even suggest any alternative. Therefore Eastern's failure -- if such it is -- cannot be said to go beyond the bounds of that which "society" would tolerate.

## IV. NEITHER THE LOGIC NOR THE TEXT OF THE RESTATEMENT OF TORTS SUPPORTS THE PLAINTIFF'S ARGUMENTS

### A. The Third District has ignored significant limitation on the tort of "outrage".

As Judge Schwartz points out in his dissent, **(536** So.2d at **1035-35)** the majority opinion ignores a significant limitation which the Restatement places on the tort of "outrage". That is the requirement in § **46** that the defendant have intended both (a) to perform the action and, also, (b) that the action cause severe mental distress to the plaintiff or, at the least, that the

defendant have been aware that the mental distress would be extremely probable as a result of that action.

Similarly, the Complaint depends upon the assertion that Eastern was guilty of "reckless" conduct. Yet the Restatement of Torts, Section 500 distinguishes mere negligence from recklessness by saying that the latter requires that the defendant have made a "conscious choice". The plaintiff tries to finesse that requirement by converting a negative into a positive, i.e., the vague talk that Eastern "deliberately" did not take some unspecified step which would have been "appropriate." The "lawyering" is clever but the fact remains that the Complaint does not show that Eastern made any "conscious choice" to risk having its own airplanes go down or, even more to the point, what the alternatives were to that "choice".

It might seem "simpler", of course, to say that reckless conduct subjects a passenger to risk and that it is foreseeable that a passenger will be frightened. That situation, however, is precisely the one which is governed by Restatement Torts, Second § 313 (negligence) and § 312 (intentional wrong). Each states clearly that the plaintiff cannot recover for mental distress in the absence of the additional element of intent or the defendant's conscious awareness that the plaintiff would be subjected to that distress as a consequence of the defendant's intentional steps.

In addition, Section 436A states the norm that there is to be no liability for mental distress -- rather than physical injury -- as a consequence of negligence which does not involve intentional misconduct. Cf. Champion v. Gray.

Again, the reader's reaction may be to say that if the Restatement is given that effect, the tort of outrage must be limited to a narrow scope.

Again, that is correct.

As Chief Judge Schwartz suggests, unless that scope is narrow, "outrage" would obliterate limits on negligence and punitive damages which have been fundamental to the Restatement and to Florida law as well.

B. The plaintiff has misread those Restatement sections he does invoke as analogies.

The plaintiff uses § 48 of the Restatement to justify the broad application of the remedy against airlines and every other common carrier. Yet the text does not refer to safety and there is no indication that the draftsmen meant to say anything but what they did say -- a common carrier can be held liable for deliberate insults by its personnel. Indeed, if the ALI had intended that common carriers should be subject to the sweeping liability for which the plaintiff argues, § 48 and its treatment of the detailed and limited question of insults would be inexplicable. At best that language would be mere surplus; at worst it would cast doubt on the existence of the general power.

Using a similar technique, the Plaintiff uses Section 46, Comment F as the basis for an argument that a passenger is in a uniquely "vulnerable" position and that this factor calls for a loose application of Section 46. Yet, in fact, the former section speaks only of weaknesses which are unique to the individual claimant - primarily personal illness. There is no suggestion that it encompasses the nature of the relationship between plaintiff and defendant.

He takes the same approach to § 46, Comment E, reading limited references to "positions of authority" to encompass any common carrier and then using that as the springboard for the expansion of their liability. Again, there is nothing in the language to justify the "assumption" that the section extends the concept of "authority" to a situation where the common carrier -- or any other business -- performs a service which might subject the user to the risk of an accident. Once again, that reading would make the section encompass the entire field and reduce many other sections to surplus.

* * *

The common denominator of the plaintiff's various "impressionistic" readings is that he treats isolated sections of the Restatement as an expression of some unexpressed general policy which calls for the expansion of liability and a judgment in his favor in the particular case.

The effect is to use precise language, tightly limited to specific fields, as the basis for loose analogies.

That turns the existing law inside out.

The Restatement of tort expresses the consensus of existing law - no more and no less. Introduction, pp. viii-ix. True, it does not prohibit an extension of the law but it also cannot serve as authority for such an expansion.

The draftsmen, moreover, viewed the infliction of mental distress and "outrage" as a delicate area -- one which required precise definitions and limitations lest it merge with punitive damages or expand liability for "ordinary" torts such as negligence and product liability. See Judge Schwartz' discussion, (pages 1034-35). Their approach -- the careful enumeration of the specific fields to which the liability extends -- is wholly inconsistent with the plaintiff's apparent assumption that the draftsmen also intended "in a general way" to countenance the imposition of a far broader duty on common carriers and, eventually, on all corporate defendants.

## V. THE THIRD DISTRICT HAS IGNORED CRITICAL QUESTIONS OF POLICY.

The plaintiff attempts to use Eastern's efforts to achieve safety as a weapon against the Company. For example, paragraph 18 shows that Eastern kept records of engine maintenance and, more particularly, of mechanics' negligent failures to install O-rings. That is the sole factual basis of the Complaint. Yet if the company was "indifferent" to safety,

it would not have kept those records. = Gryc v. Dayton - Hudson Corp., 297 NW 2d 727 (Minn. 1980) where it was the failure to keep records as to safety problems and research on cures which was culpable. Moreover, it would not be sensible public policy to deter manufacturers from keeping those records. Owen, ibid at 359. But that is precisely the effect of the Third District's rulings.

The ruling in this case may well affect airline insurance rates. If Eastern and other companies are to be liable for damages to those who "might" have been hurt in actions it will be subject to a new liability that is unlimited in scope, speculative in nature and prone to the exaggeration and fraud which the Supreme Court has warned against so often in the context of punitive damages, Wolmer at 825.

If the Court allows the claim of "outrage" to stand on the basis of lawyers' rhetoric it must look forward to a flood of those claims. Indeed, conscientious lawyers will feel an obligation to their clients to try to transform the marginal punitive damage claim -- outlawed by Wolmer -- into the new tort.

The assumption may be that the loss would be passed on. But these losses are unique in character. The Court has to face the question whether allowing such awards for real but subjective experiences would reduce the amount of resources available to compensate those who suffer more tangible physical injuries.

This case, moreover, is a vivid reminder that not every defendant is in a position to absorb losses and continue in business.

## VI. THE JUDGMENT ON THE PLEADINGS WAS APPROPRIATE AND ESSENTIAL

The majority opinion relies upon a straw man when it says Eastern would have to "prove" that the remedial steps it took were "appropriate" or "sufficient". No jury question can arise unless the plaintiff first pleads a proper cause of action. The Third District has reversed the burden of pleading and required that Eastern prove a negative.

### A. The plaintiff has failed to plead facts necessary to formulate the issue or to allow Eastern to file a responsive pleading.

More technically, the plaintiff has not provided the short and plain statement of the case which Fla.R.Civ.P. 1.110(b) requires. The requirement is lenient, but a Complaint still must be sufficiently specific to permit a defendant to file a meaningful answer. Messana v. Maul Industries, Inc., 50 So.2d 874, 876 (Fla. 1951). Here the plaintiff uses an abundance of legal phrases but he never says just what Eastern did wrong i.e., how it should -- or could -- have eliminated the human error the plaintiff himself has called inevitable.

Skillful plaintiffs' lawyers can paint almost any negligent act or product defect in lurid colors particularly when the

defendant is a large corporation. Owen at 388. But that is not enough.

To say, for example, that Eastern was indifferent to safety (Complaint, paragraph 18) or that the remedial steps the defendant did take were not "appropriate" (Complaint, paragraph 18) is merely to offer a lawyer's conclusions.

An exchange of pleadings would have involved the mere assertion by the plaintiff's lawyers that the problem was "easily cured" and the answer by Eastern's lawyers' legal conclusion that it would not be easily cured or, more realistically, that the defendant had no basis to say whether that proposition is true or false.

B. This is not the routine case where a plaintiff's failure to include necessary allegations can be indulged

To treat this as an ordinary "judgment on the pleading" matter would be to ignore the fact that the plaintiff filed a Complaint which, on its face, is barred by both the impact rule and the Supreme Court's qualitative standard for punitive damages.

Whether that complaint can stand is a question of law.

Restatement, Sec. 46H emphasizes that the judge's duty to evaluate those accusations at the outset. That the draftsmen found it necessary to include that warning demonstrates that the unique nature of the claim and its dangers.

The reality is that the plaintiff attempts to exploit emotion and sympathy by exaggerating human errors by mechanics

into a conscious effort by a corporation to kill its customers, or at the least, total indifference to their fate. It is not enough to say that a jury ultimately might reject an attack of that nature. The accusation is emotionally compelling even if it is logically weak. The door would be open to strike suits and emotional rampages even in strict liability cases where - supposedly - the presence or absence of negligence has no legal significance.

There also is a subtle issue of the separation of powers. The Florida Tort Reform and Insurance Act of 1986, Section 768.72 of the Florida Statutes outlaws even the pleading of punitive damages in the absence of evidence. That represents a policy judgment as to the unfairness of claims of that nature. It would mock the Legislature for the judicial branch to say, now, that the same plaintiff can proceed through the same marginal and burdensome discovery and the same inflammatory opening at trial as long as he avoids the label "punitive damages" and acts under color of a "tort" which actually is nothing but a watered-down version of Section 46.

C. The Court need not fear that it would do an injustice by enforcing existing law.

The deficiency in the Complaint does not appear to be an oversight or the consequence of any lack of experience. On the contrary, the studied vagueness permits the plaintiff to divert attention from the legal insufficiency of the theory.

If the Complaint had suggested that a specific tool would eliminate the problem, the attention of jury and judge would have been focused upon the absence of any such "magical cure." On the other hand, if the Complaint had pleaded a failure to train the mechanics -- a point sometimes hinted at in the briefs below -- that would have called attention to the fact that the failure in question is a human error and that there is no reason to assume any level of training could eliminate occasional failures -- particularly over unlimited time.

Further, the more specific pleading would have highlighted the question of whether the government agencies require anything like the unidentified "cure"; or whether Eastern's peers among airlines have a solution to the problem; and the absence of any evidence as to whether the incidence of human error among Eastern mechanics is significantly higher or lower than that among other airlines.

## CONCLUSION

The human failings alleged in the Complaint are regrettable; the airline -- or a manufacturer under comparable circumstances -- probably should be liable to those who actually were injured, under the normal rules of negligence. But the mechanics' mistakes do not show any dramatic moral failure.

Both the Restatement and the Supreme Court's own decision in McCarson show that requirement to be an indispensable prerequisite for the claim of outrage.

The Complaint in question does not meet that standard. The trial judge, accordingly, dismissed it.

Amicus urges that he should be vindicated and that the Judgment of Dismissal should be reinstated.

Respectfully submitted,

MERSHON, SAWYER, JOHNSTON
DUNWODY & COLE
Attorneys for Amicus Product
Liability Advisory Council
Suite 4500
Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2387
Telephone: (305) 358-5100

By: _____ FOR:
Edward T. O'Donnell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Joel D. Eaton, Esquire, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow and Olin, P.A., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 and Terry L. Redford, Esquire, Thornton, David and Murray, P.A., Suite 100, 2950 Southwest 27th Avenue, Miami, Florida 33133, by mail this 4th day of April, 1989.

By: _____ FOR:
Edward T. O'Donnell

eto180 (stored to Blip 2)