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THE ESSENCE OF THE AGENT ORANGE LITIGATION: THE GOVERNMENT CONTRACT DEFENSE

In the recently settled In re "Agent Orange" Product Liability Litigation, one of the major issues of the case focused on whether the independent contractors who manufactured Agent Orange could invoke the government contract defense and thus be protected from liability to service personnel who may have been injured by exposure to Agent Orange. Although the answer to this question involves

1. The Agent Orange cases were consolidated as a class action before Judge Pratt, then of the Eastern District of New York, in 1979. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979). In his first opinion (Agent Orange I), Judge Pratt granted the United States government's motion to dismiss. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980). He next denied defendant-government contractors' motion for summary judgment. Id. at 763. Agent Orange I, based on federal common law, was dismissed by the court of appeals for lack of subject matter jurisdiction because no federal common law right of action was implicated by the facts of the case. 635 F.2d 987, 995 (2d Cir. 1980).

In In re "Agent Orange" Product Liability Litigation (Agent Orange II), 534 F. Supp. 1046, 1056-58 (E.D.N.Y. 1982), Judge Pratt established three elements that the defendant contractors would have to affirmatively prove to be insulated from liability. For the delineation of the elements, see infra text accompanying note 174.

In 1983, Judge Pratt, then a Circuit Judge sitting by designation, granted summary judgment to four of the remaining nine defendants. In re "Agent Orange" Product Liability Litigation (Agent Orange III), 565 F. Supp. 1263, 1278 (E.D.N.Y. 1983). Subsequently, because of his new duties as a Circuit Judge, Judge Pratt withdrew from the case and Judge Weinstein took over. Judge Weinstein reinstated the government and two other defendants into the case. N.Y.L.J., March 9, 1984, at 1, col. 3.

Finally, after five years of legal maneuvering, the "Agent Orange Litigation" was settled. Only hours before jury selection on Monday, May 7, 1984, a $180 million settlement was reached between the servicemen and the defendant-government contractors. This settlement provided that the defendants' payment would immediately be deposited in a bank so that the plaintiffs would be able to receive compounded interest. N.Y.L.J., May 8, 1984, at 1, col. 1. In addition, the settlement expressly stipulated that the defendants denied all liability. Id. at 7. The settlement was subsequently approved by Judge Weinstein. N.Y. Times, Jan. 7, 1985, at 1, col. 3.

2. While Agent Orange was a herbicide sprayed in Southeast Asia, the term "Agent Orange" was also used as a collective term to encompass Agents Blue, White, Purple, Pink and Green as well. Agent Orange I, 506 F. Supp. at 768 n.1. See U.S. COMPTROLLER GENERAL, HEALTH EFFECTS OF EXPOSURE TO HERBICIDE ORANGE IN SOUTH VIETNAM SHOULD BE RESOLVED (1979) [hereinafter cited as COMPTROLLER GENERAL REPORT I].

3. See infra text accompanying notes 47-158.
many policy considerations and implications, this note will focus on whether this defense should be eliminated in such strict products liability suits.4

The participants in the Agent Orange Litigation6 were the United States government, the independent contractors and the injured victims. Typically, the government will provide contractors with the plans and specifications for a product and the contractors' sole responsibility will be to manufacture the product.6 The individual who is seriously injured by a defect in the product's design and who seeks compensation will discover that many barriers exist to prevent his recovery in a subsequent strict liability suit. The government, which provided the defective design, will stand behind the sovereign immunity defense,7 and the independent contractor, who manufactured the product, will assert the government contract defense.8

A wartime setting will place injured victims in a particularly disadvantaged position. Such victims are typically service personnel of the United States military who have no choice but to follow orders from their superiors.9 Orders often involve the use of military equipment and products that may or may not be dangerous or defective.

Without the government contract defense,10 the government contractor faces similar problems in protecting himself against liability for injuries caused by the product he manufactures for the government. His sole responsibility in a mandatory wartime contractual arrangement is to manufacture the product according to the govern-

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4. This note does not analyze the negligence cause of action. In negligence actions, the contractor will be relieved of liability "if he follows plans which are not so glaringly or patently insufficient that an ordinary prudent manufacturer would not follow them." Littlehale v. E.I. du Pont de Nemours & Co., 268 F. Supp. 791, 802 n.16 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967). For a discussion of the government contract defense and the negligence cause of action, see Note, Liability of a Manufacturer For Products Defectively Designed by the Government, 23 B.C.L. REV. 1025, 1032-39 (1982).

5. The term "Agent Orange Litigation" will be used as a reference to Agent Orange I, Agent Orange II, and Agent Orange III as a whole, and not to any single opinion.

6. The government contractor usually does not participate in designing the specifications of the product. For a discussion of contractual arrangements between the government and independent contractors, see Ingrado, Types of Government Contracts, 18 A.F.L. REV. 63, 64-68 (1976).

7. See infra text accompanying notes 20-44.

8. See infra text accompanying notes 47-159.

9. Servicemen are at all times required to follow orders from superior officers. The failure to obey any order or regulation and any dereliction in the performance of duties can lead to severe punishment pursuant to the Uniform Code of Military Justice, Ch. 47, 10 U.S.C. § 892 (1976).

10. See infra text accompanying notes 47-158.
If a defective product subsequently injures a party, the government will successfully plead the governmental immunity defense, leaving the contractor as the only defendant. Thus, the contractor would be forced into a situation in which he must not only manufacture a dangerous product upon demand, but could also be found liable for the government's error. The courts would be forced to decide between two innocent parties: the injured plaintiff who, through no fault of his own, is injured by a defectively designed product, and the independent contractor, who took no part in designing the product.

The Agent Orange Litigation presented a dramatic illustration of this situation. As it suggested, the strongest argument in favor of the existence of a government contract defense has been that of military necessity. However, this note proposes that there are other, more compelling reasons to eliminate the defense in strict products liability suits. Recent developments in the law have moved toward the elimination of this type of defense in strict liability cases. In addition, accepted tort principles run in direct opposition to the defense in such suits. As between the government contractors and the injured servicemen, the government contractors are more able to afford the loss, and are the party to be deterred. Furthermore, the contractors would appear to be the more morally culpable party. This note analyzes these policies and concludes that the government contract defense in strict products liability suits should be eliminated not only in time of war, but in all situations.

Part I of this note discusses the history of the government's immunity and the government contract defense. In part II the recently settled Agent Orange Litigation is addressed, including the background of the case and an analysis of the court's discussion of the defense. Finally, part III discusses alternative tort policies and presents the reasons that call for elimination of the defense.

11. In time of crisis and especially in time of war, compliance with government contract specifications has been governed by statute. During the Vietnam War, the Defense Production Act of 1950, 50 U.S.C. app. §§2061-2071 (1976), gave the President of the United States the authority to require that contracts deemed necessary to promote the national defense take priority over the performance of other contracts. Compliance with the Act was mandatory. 50 U.S.C. app. § 2071 (1976). See infra text accompanying notes 198-205.
12. See infra text accompanying notes 20-44.
13. See infra text accompanying notes 191-95.
14. See infra text accompanying notes 198-223.
15. See infra text accompanying notes 227-38.
16. See infra text accompanying notes 239-42.
17. See infra text accompanying notes 245-53.
I. GOVERNMENTAL IMMUNITY AND THE GOVERNMENT CONTRACT DEFENSE: A HISTORY

The government contract defense is premised on the agency concept which provides that where a principal is immune from suit, his agent, acting within the scope of his authority, is also immune from liability.18 The defense has moved beyond general agency principles, however, to include independent government contractors who seek to avoid liability on the ground that they were forced, under compulsion of federal law, to manufacture a product that was under the careful control of the government.19

A. Governmental Immunity

The United States government cannot be sued unless it expressly consents to such suit.20 This judge-made doctrine, the doctrine of sovereign immunity, was applicable in tort actions against the government until 1946, when Congress enacted the Federal Tort Claims Act ("FTCA").21 The FTCA waives governmental immunity from suit in tort actions against the government; that is, where an employee of the government, acting within the scope of his employment, negligently injures another, the injured party may sue the government as if the government were a private individual.22 But while the FTCA waives governmental immunity in tort actions against the government, it also provides express exceptions to such governmental waiver. One such exception, as interpreted by the Supreme Court,


Such a limitation of liability has been upheld in the case of various educational institutions. See, e.g., Abston v. Waldon Academy, 118 Tenn. 24, 102 S.W. 351 (1907) (an educational institution cannot be sued where its funds were a public charity trust); Alabama Girls Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114 (1904) (action against the school district, due to agency principles, is an action against the state). It has also been found in the case of highway authorities. See, e.g., Hosterman v. Kansas Turnpike Authority, 183 Kan. 590, 331 P.2d 323 (1958) (landlord not entitled to recover for injuries to his person because the turnpike authority's act, as an agent of the sovereign, provided immunity from suit).


22. Id. at § 1346(b).
pertains to claims by active duty service personnel.\textsuperscript{23}

In \textit{Feres v. United States},\textsuperscript{24} the Supreme Court considered three cases involving injuries to servicemen incident to their military service.\textsuperscript{25} Two of the claims involved medical malpractice\textsuperscript{26} and a third claim involved the negligent quartering of a serviceman in a barracks containing a defective heating unit.\textsuperscript{27} Although the Court had difficulty interpreting the FTCA due to the Act's limited legislative history,\textsuperscript{28} the Court balanced the FTCA's waiver of sovereign immunity against the federal issues inherent in injuries arising from military duty. The Court initially looked to the FTCA's rejection of the doctrine of sovereign immunity:

While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by [the] courts. . . .

As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government. [For this reason the Congress] waived immunity and transferred the burden of examining tort claims to the courts.\textsuperscript{29}

The Court concluded that the FTCA was a congressional attempt to extend a remedy to individuals who had previously been barred by the doctrine of sovereign immunity.\textsuperscript{30}

In referring to suits based on acts by military personnel, the
Court began by acknowledging that the government could be subject to suit under the FTCA because "members of the military," acting within their scope of employment, are included in the FTCA's definition of a governmental employee. 1 The Court went on to point out, however, that a provision of the FTCA excepts "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 2 The Court interpreted this FTCA exception as providing that the government could not be sued under the FTCA "for injuries to servicemen where the injuries arose out of or [were] in the course of activity incident to service." 3 Although the Court gave various reasons for its holding, 4 it based its decision primarily on the fact that no American law had ever permitted a soldier to recover for his superior officer's negligence. 5

The Feres doctrine was followed in Stencel Aero Engineering Corp. v. United States, 6 where the Supreme Court barred not only a serviceman's direct claim for injuries, but also a third party's indemnity action against the government. 7 In Stencel, the plaintiff was a National Guard officer who had been permanently injured when the
ejection system of his fighter aircraft malfunctioned. The officer, Captain John Donham, sued both the United States and the Stencel Corporation. Stencel, in turn, cross-claimed against the United States government in an indemnity action.

The government argued that the claims against it should be dismissed, based on the precedent set by the Supreme Court in Feres. The Court accepted the government's argument for sovereign immunity where injuries occur incident to military service, and affirmed the district court's summary judgment dismissing the government contractor's indemnity claims and Captain Donham's tort claims. The Supreme Court affirmed, stating that to permit Stencel's indemnity claim "would be to judicially admit at the back door that which had been legislatively turned away at the front door." The Supreme Court, in relying on the rationale presented in Feres over 20 years before, was concerned with the adverse effect of allowing the judiciary to second-guess military orders. The Court maintained that if the case were decided otherwise, orders by superior officers would be ignored or disregarded until judicial review was obtained, severely paralyzing the United States military.

The FTCA, Feres and Stencel created an impenetrable obstacle to tort actions against the United States government. Both an injured plaintiff and a defendant seeking indemnity must fail where the injuries are incident to military service. Despite its continued affirmation, commentators continue to criticize the Feres-Stencel reasoning and implications.

38. Id. at 668.
40. Id. at 767.
41. Id.
42. Stencel Aero Engineering Corp., 431 U.S. at 673 (quoting Laird v. Nelms, 406 U.S. 797, 802 (1972)).
43. Id.
44. Id. The Court also emphasized that the relationship between a soldier and his superiors is peculiar in nature. Id. at 671-72.
45. See Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); Parker v. United States, 611 F.2d 1007 (5th Cir.), reh'g denied, 615 F.2d 919 (5th Cir. 1980).
B. The Government Contract Defense

While a defendant contractor may be precluded from recovering from the United States for indemnification in the face of potential liability arising from its government contract, there evolved another means for the contractor to protect himself. The government contract defense evolved from the sovereign immunity doctrine. In essence, it allows a government contractor to escape liability where he fully complies with the specifications and terms of the government contract. In 1940, the Supreme Court acknowledged the availability of the defense in *Yearsley v. W.A. Ross Construction Company.* The Court held that if a government contractor carried out its plan in strict compliance with the government contract and the contractor was deemed faultless, such a contractor would be shielded from liability.

In *Yearsley,* the defendant contractor destroyed part of the plaintiff's property while building dikes to improve navigation. The defendant was acting pursuant to an Act of Congress and was supervised by the United States Secretary of War and the United States Chief of Engineers. The plaintiff commenced suit alleging a taking without just compensation, while the defendant claimed that there could be no liability on his part because he was acting pursuant to government directives. The Supreme Court held that the defendant contractor could not be held liable for executing the will of the government if the "authority to carry out the project was validly conferred."

The Court stated that independent contractors, as agents of the government, should be afforded the protection of the sovereign immunity doctrine based on their agency status, noting that:

Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.

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47. *In re "Agent Orange" Product Liability Litigation (Agent Orange I),* 506 F. Supp. at 792; *In re "Agent Orange" Product Liability Litigation (Agent Orange II),* 534 F. Supp. at 1046, 1053.
49. See id. at 20-21.
50. Id. at 19.
51. Id.
52. Id. at 19-20.
53. Id. at 20.
54. Id. at 21.
The sovereign immunity doctrine was thus extended to include government contractors who do not exceed their authority. Furthermore, courts and commentators have inferred from Yearsley that a contractor who has committed no fault will also be afforded the defense.

Thus, the Supreme Court, in Yearsley, developed a two part common law contractor defense that would shield from liability any independent contractor who becomes an agent of the government by entering into a government specifications contract. The first part looks to whether or not the contractor should receive agency status. Where agency status is present, the Court will look to the agent’s compliance with, and performance of, the contract.

The logic of the first requisite element of the defense is clear. Where the independent contractor is merely an extension of the government, it should receive the same treatment as that afforded the government. Accordingly, if the government is deemed immune, the same should be true for the independent contractor.

The second element is more complex. The “fault analysis” has become the key test that courts employ in deciding whether the defendant shall be deemed immune from suit, since cases citing Yearsley seem to rely predominantly on the contractor’s performance. Where performance has deviated from the government’s specifications, courts have denied the defense. The Supreme Court apparently analyzed Yearsley as a negligence case, thereby focusing on the contractor’s fault. The Court concluded that although the de-

55. Yearsley became the seminal case that extended the doctrine of sovereign immunity to independent contractors. Courts that allow the extension rely expressly on Yearsley for authority. See, e.g. In re “Agent Orange” Product Liability Litigation (Agent Orange 1), 506 F. Supp. 762, 792-93 (E.D.N.Y. 1979); Dolphin Gardens, Inc. v. United States, 243 F. Supp. 824, 827 (D. Conn. 1965); Sanner v. Ford Motor Company, 144 N.J. Super. 1 (Super. Ct. Law Div. 1976). However, these cases extend Yearsley beyond its original holding. See infra note 53.

56. Commentators have stated that cases subsequent to Yearsley have applied the extension of the doctrine of sovereign immunity to negligence and strict liability actions. See, e.g., Tobak, A Case of Mistaken Liability: The Government Contractor's Liability for Injuries Incurred by Members of the Armed Forces, 13 PUB. CONT. L.J. 97-101 (1982); Note, supra note 4, at 1048-64.

57. See infra notes 73-75 and accompanying text for a discussion of the manufacturer's failure to conform with the government's designs. The distinctions presented refer to the two different types of defects inherent in a product. Where the product is defective and the manufacturer complied with the government's design specifications, the defect is one in design. See infra text accompanying notes 76-105. However, where the manufacturer departed from the specifications and that departure is the cause of an injury, the manufacturer will be deemed at fault and the defect will be termed a manufacturing defect. See infra text accompanying notes 73-75.

58. Although there is no mention of negligence, the Supreme Court focused on the con-
fendant did cause the damage, there was no fault on the part of the contractors and therefore no liability.\textsuperscript{59}

The Ninth Circuit was one of the first courts to explore the meaning of \textit{Yearsley}. In \textit{Myers v. United States},\textsuperscript{60} the court held that the defendant contractor would be granted immunity because the defendant’s work performance conformed to the contractual arrangement between the defendant and the government.\textsuperscript{61} The plaintiff claimed that the defendant, while constructing a road, committed waste and trespass on his land.\textsuperscript{62} The defendant, who was under contract with the Federal Bureau of Public Roads,\textsuperscript{63} successfully raised the government contract defense.\textsuperscript{64} The \textit{Myers} court, expressly relying on the \textit{Yearsley} rationale, stated that since the work done by the defendant was “in conformity with the terms of [the contract with the government], no liability can be imposed upon it for any damages claimed to have been suffered by the [plaintiffs].”\textsuperscript{65}

Subsequent to \textit{Myers}, the state of the law was such that a contractor would be granted the government contract defense if he strictly complied with the terms of his contract.\textsuperscript{66} The issue of agency no longer seemed to be considered a factor in the decision-making process.\textsuperscript{67} This fault requirement did not realistically square with the evolution of strict products liability suits, an area where fault analysis should be ignored.\textsuperscript{68} Yet the government contract defense was soon extended into the strict products liability arena. Injured parties brought suit on the theory of strict products liability,\textsuperscript{69}


\textsuperscript{59} \textit{Id.}
\textsuperscript{60} Id. at 583.
\textsuperscript{61} Id. at 581.
\textsuperscript{62} Id. at 583.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 583.
\textsuperscript{65} Id.
\textsuperscript{66} The court in \textit{Myers} followed this extension which was first delineated in \textit{Yearsley}, 309 U.S. at 18.
\textsuperscript{67} Recent decisions do not even mention the fact that the government contractor is an agent of the government. \textit{See infra} cases cited in text accompanying notes 113-53.
\textsuperscript{68} \textit{See infra} text accompanying notes 197-98, 205-23. \textit{See also} Note, supra note 4, at 6-19.

\textsuperscript{69} \textit{Restatement (Second) of Torts} \textsection{402A} (1965) defines strict products liability: (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 user or 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.
and were denied recovery due to the fact that the defendant had strictly conformed to the government's demands.\textsuperscript{70}

C. Strict Liability Suits

In strict products liability causes of action, the injured party must prove that there was an unreasonably dangerous defect in the product which proximately caused the injury, and that there was a causal nexus between the manufacturer/seller and the defective product.\textsuperscript{71} The benchmark of liability lies with that connection regardless of the manufacturing party’s involvement in the manufacture of the product.\textsuperscript{72}

In government contract cases, as in all products liability cases, there are two types of defective products—manufacturing defects and design defects. A manufacturing defect occurs when a particular product does not conform to identical units of the same product or varies in a material way from the manufacturer’s intended design specifications or standards of performance.\textsuperscript{73} In manufacturing defect cases, manufacturers have been unsuccessful in asserting the government contract defense.\textsuperscript{74} The defense does not apply in such cases because the manufacturer did not conform to the government’s specifications. Thus, the failure to succeed with this defense has been due to the failure of the manufacturer to conform its product to the specifications supplied by the United States government.\textsuperscript{75} The sec-

\begin{itemize}
\item \textsuperscript{2} The rule stated in Subsection (1) applies although
\begin{itemize}
\item the seller has exercised all possible care in the preparation and sale of his product, and (emphasis added)
\item the user or consumer has not bought the product from or entered into any contractual relation with the seller.
\end{itemize}
\end{itemize}

Id. Although the term ‘seller’ is used, courts have interpreted the term broadly to include government contractors. See, e.g., Challoner v. Day and Zimmerman, Inc., 512 F.2d 77, 82 (5th Cir.), vacated and remanded, 423 U.S. 3 (1975) (the term “seller” attaches to the assembly of howitzer rounds); Foster v. Day and Zimmerman, Inc., 502 F.2d 867, 871-72 (8th Cir. 1974) (rejected defendant’s argument that it was not selling a product); Delaney v. Towmotor Corp., 339 F.2d 4, 6 (2d Cir. 1964) (manufacturer of forklift truck considered a “seller”).

\textsuperscript{70} See infra text accompanying notes 78, 83-105.

\textsuperscript{71} See supra note 69; see also Model Uniform Products Liability Act, 44 Fed. Reg. 62,714, 62,721 (1979) [hereinafter cited as MUPLA].

\textsuperscript{72} Id.

\textsuperscript{73} MUPLA, supra note 71, at 62,721.

\textsuperscript{74} See, e.g., Foster, 502 F.2d at 874; Whitaker v. Harvell-Killgore Corp., 418 F.2d 1010, 1014-15 (5th Cir. 1969), reh'g denied, 424 F.2d 549 (5th Cir. 1970); Montgomery v. Goodyear Aircraft Corp., 392 F.2d 777, 779 (2d Cir.), cert. denied, 393 U.S. 841 (1968).

\textsuperscript{75} The case of the manufacturing defect has evoked little discussion because the manufacturer deviated from the specifications provided and that deviation was the cause of the injury. This type of defect will not be dealt with in this note. For cases dealing with manufac-
ond type of defect is a defect in design. 76 A design defect occurs when:

the likelihood that the product would cause the claimant harm or similar harms, and the seriousness of those harms outweighs the burden on the manufacturer to design a product that would have prevented those harms, and the adverse effect that alternative design would have on the usefulness of the product. 77

Although the law on the government contract defense in strict liability cases is fairly recent, the defense has uniformly been held to bar recovery in cases involving design defects. 78 Courts have not concentrated on traditional tort-related concerns such as which party 79 would be the better bearer of the risk, 80 and which party would be most deterred and is more morally culpable. 81 Rather, the courts have concentrated on other criteria. 82 A New Jersey court, in Sanner v. Ford Motor Co., 83 was among the first to extend the government contract defense to independent government contractors in suits alleging defective design. 84

The New Jersey Superior Court in Sanner stated that a manufacturer is insulated from liability if it strictly complies with the plans and specifications provided by the government in the production of military equipment. 85 The plaintiff, who was thrown from an army jeep manufactured by the defendant, 86 sued on a strict liability theory. 87 The defendant, who had strictly complied with the design

turing defects, see supra note 74.
76. The cases dealt with herein, unless otherwise stated, are design defect cases.
77. MUPLA, supra note 71, at 62,721; see also Rivkin and Silberfeld, Compliance With Product Specifications: Shield or Sword?, THE FORUM 1012, 1018 (1982).
79. In discussing the parties involved, this note assumes that since the government will be deemed immune, see supra text accompanying notes 18-46, the two remaining parties will be the independent contractors and the injured victims.
80. See infra text accompanying notes 227-38.
81. See infra text accompanying notes 239-58.
82. See infra text accompanying notes 90-96, 103-05, 175-95.
84. See id. at 9, 364 A.2d at 47.
85. Id. at 8-9, 364 A.2d at 46-47.
86. Id. at 3, 364 A.2d at 44.
87. Id. at 5, 364 A.2d at 45. The plaintiff alleged that the jeep should have had a roll
specifications provided by the United States Army, asserted the government contract defense and moved for summary judgment. The court granted summary judgment and stated that "[a] manufacturer is bound to comply with plans and specifications provided to it by the Government in the production of military equipment. If it does, it is insulated from liability."  

The *Sanner* decision was based on three distinct considerations. First, the court was concerned with protecting the government's decision-making process. A second goal addressed the protection of the government from inflated prices, since the court reasoned that a government contractor who must anticipate possible liability would pass the cost on to the government by raising the prices of the product produced. The court's final consideration seemed to endorse a fault analysis. The court looked to the type of defect in the product, and when it determined the defect to be one of design, held for the defendant. There was no discussion of whether or not the contractor should receive agency status. Furthermore, the court never addressed nor distinguished between the negligence and strict products liability causes of action. It held for the defendant because it was not at fault in its performance of the contract.  

A New York court created a similar definition of the government contract defense that further removed injured plaintiffs from any relief. In *Casabianca v. Casabianca*, a New York trial court...
held that the government contract defense was a complete bar to recovery where the manufacturer completely followed specifications furnished by the government during time of war. In *Casabianca*, an infant injured his hand in a dough mixer which had been built “in accordance with the army’s specifications for use in field kitchens during World War II” by the defendant government contractor. The injury occurred years after the war when the machine was being used in a pizza shop. The plaintiff sued both the owner of the shop and the machine’s manufacturer, alleging three theories of liability based on the faulty design of the machine. The court granted the defendant manufacturer’s motion to dismiss based on the government contract defense.

In reaching its conclusion, the court stated that the type of action was not relevant. It based its decision solely on the fact that the contractor manufactured the product pursuant to the government’s request. “[The contractor’s] conformance . . . to the specifications provided to him should be, and is, a complete defense to any action based upon design, whether faulty or not.” The court held that the contractor has a right to rely on the government’s specifications and has no obligation to withhold any product that is deemed to be essential to the operation of the United States armed forces. Thus, the manufacturer, even if it considered the product to be dangerous, would be shielded from liability where the government deemed performance of the contract necessary.

A case which recognizes the prerequisites and theories behind the strict products liability cause of action and questions the soundness of the government contract defense is *Challoner v. Day & Zimmerman*. In May of 1970, a serviceman was seriously injured by a premature explosion of a howitzer round while the United States forces were involved in combat in Cambodia. The serviceman brought suit against the manufacturers of the artillery round, alleg-

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98. *Id.* at 350, 428 N.Y.S.2d at 402.
99. *Id.* at 349, 428 N.Y.S.2d at 401.
100. *Id.*
101. *Id.* The plaintiff sued both defendants, alleging negligence, breach of warranty and strict products liability. *Id.*
102. *Id.* at 350, 428 N.Y.S.2d at 402.
103. *Id.* (emphasis added).
104. *Id.*
105. *Id.*
106. 512 F.2d 77 (5th Cir.), vacated and remanded on other grounds, 423 U.S. 3 (1975).
107. *Id.* at 78.
ing both defect in design and a defect in the manufacturing process under strict products liability principles. At trial, judgment was entered for the plaintiff and, thereafter, the defendants appealed. 108

On appeal, the defendants argued that they could not be held liable for a design defect if they had strictly adhered to the design specifications provided by the government. 109 The Fifth Circuit Court of Appeals addressed the applicability of the government contract defense in design defect cases. Although the facts presented led the court to conclude that the defective product did not conform to the government's specifications, 110 the court, in dicta, stated that in claims sounding in strict products liability, the government contract defense should not be applied where there has been a defect in design. 111

[T]he most basic and primary justification for imposing strict liability is present. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 112

In April of 1983, however, the Ninth Circuit Court of Appeals created a broader definition of the government contract defense. In McKay v. Rockwell Int'l Corp., 113 the court held that a manufacturer of military equipment is not only immune from strict liability if the United States provided the specifications for the military equipment, but also if the manufacturers designed the product and the

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108. Id.
109. Id. at 82.
110. Id. at 83.
111. Although the case was a manufacturing defect case, the court, in dicta, stated that traditional policies should hold the defendant liable even if this were a design defect case:

[T]he cited cases which absolve defendants who follow defective designs of another were not decided under a strict liability theory. They involved attempts to demonstrate negligence and stand only for the proposition that there is no negligence in following the design of another unless the design is such that the defectiveness was sufficiently obvious to alert a reasonably competent technician to the danger.

Id. This case was the first to consider and question the soundness of the blanket ban afforded contractors in design defect cases where the plaintiff's cause of action was based on strict product liability and not negligence. For a further discussion of Challoner, see infra text accompanying notes 212-18.


113. 704 F.2d 444 (9th Cir. 1983), cert. denied, 104 S.Ct. 711 (1984).
United States approved those designs.\textsuperscript{114}

In \textit{McKay}, two Navy lieutenants had been killed during separate training missions when they were forced to eject from aircraft they were piloting.\textsuperscript{116} The estates of the men brought actions under theories of negligence, breach of warranty and wrongful death.\textsuperscript{116} The district court found the manufacturer liable for the design of the escape system and entered judgment for the plaintiffs.\textsuperscript{117} The court of appeals reversed, stating that “[t]o apply [strict liability] merely because it is there is to abdicate judicial responsibility.”\textsuperscript{118}

In its analysis, the court of appeals briefly reiterated the \textit{Feres-Stencel} analysis which deemed the United States government immune.\textsuperscript{119} Next, the court confronted the question of who should bear the loss\textsuperscript{120} and concluded that “[t]he reasons for applying the government contractor defense to suppliers of military equipment with design defects approved by the government parallel those supporting the \textit{Feres-Stencel} doctrine.”\textsuperscript{121} First, the court emphasized that, pursuant to \textit{Stencel}, the United States cannot be held liable to service

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 451.
\item \textsuperscript{115} \textit{Id.} at 446.
\item \textsuperscript{116} \textit{Id.} at 447.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} The court cautioned that in a defective product suit, a manufacturer should be held strictly liable in tort for injuries to servicemen under limited circumstances. \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at 448. See \textit{supra} text accompanying notes 22-45.
\item \textsuperscript{120} 704 F.2d at 448. The court stated: “Given the immunities of the United States in cases such as these, the question arises whether a supplier of military equipment should be required to shoulder directly and immediately the entire burden of the liability to an injured serviceman.” \textit{Id.} (emphasis added).
\item \textsuperscript{121} \textit{Id.} at 449. The \textit{Feres-Stencel} doctrine, of course, is concerned exclusively with the doctrine of sovereign immunity, and does not discuss or consider the contractors’ liability. See \textit{supra} text accompanying notes 22-45; see also the dissenting opinion in \textit{McKay}, which stated: “It is apparent . . . that the \textit{Feres-Stencel} doctrine is concerned exclusively with government, not contractor, liability.” 704 F.2d at 456; \textit{In re “Agent Orange” Product Liability Litigation (Agent Orange II),} 506 F. Supp. 762, 772 (E.D.N.Y. 1979), dismissed on other grounds, 635 F.2d. 987 (2d Cir. 1980), where the district court stated “[t]o the extent that plaintiffs’ complaints seek recovery against the defendant chemical companies, of course, the \textit{Feres} doctrine has no application.”

The \textit{McKay} court created a four-part test which, if affirmatively proved, would not subject a supplier of military equipment to strict liability for a design defect where:

1. the United States is immune from liability under \textit{Feres} and \textit{Stencel},
2. the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment,
3. the equipment conformed to those specifications, and
4. the supplier warned the United States about patent errors in the government’s specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451. This test is extremely similar, if not identical to, the three part test enunciated in the \textit{Agent Orange} Litigation. See \textit{infra} text accompanying note 174.
personnel injured by defective military products either directly or indirectly, because holding the suppliers liable would result in the costs being passed on to the United States government.\footnote{122} Second, the court believed that to hold such manufacturers liable where the United States had approved the design specifications would force the judiciary to make military decisions.\footnote{123} Third, the court stated that imposing liability on the government contractor would circumvent the nation's effort "to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods."\footnote{124} Lastly, the court stated that the government contract defense encourages a close working relationship between the military authorities and the government contractors.\footnote{125}

While the majority expanded the defense to include manufacturers who participate in the design of products, the dissent in \textit{McKay}, as noted in a subsequent dissenting opinion, "thoughtfully and critically" rejected the majority's application of the government contractor defense.\footnote{126} The \textit{McKay} dissent had great trouble with the \textit{Feres-Stencel} analogy. After rejecting the analogy,\footnote{127} the dissent concentrated on the majority's first argument, that without the defense, the United States would be the party to ultimately pay the damages. Judge Alarcon persuasively stated that in the realities that control a free market system, suppliers who are held liable, "because of unsafe equipment, will be unable to pass on these costs freely due to the lower bids of their safer competitors."\footnote{128} He concluded that if the government contract defense should exist, it should be allowed only where the defendants were compelled to perform.

\footnote{122}{704 F.2d at 449. The court stated that "holding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product's design and specifications would subvert the \textit{Feres-Stencel} rule since military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States." \textit{Id.}}

\footnote{123}{\textit{Id.}}

\footnote{124}{\textit{Id.} at 450.}

\footnote{125}{\textit{Id.}}


\footnote{127}{\textit{See supra} note 121. Judge Alarcon stated that "[i]n this case, [plaintiffs] have filed neither a direct claim nor a claim of indemnification against the Government. As such, their claims reside outside the previously defined area of concern expressed in \textit{Feres-Stencel} and \textit{Agent Orange}." 704 F.2d at 456 (Alarcon, J., dissenting).}}

\footnote{128}{\textit{Id}. at 457. According to Judge Alarcon, the free market system insures competitive bidding and cost savings by the corporations. "Presumably, such cost savings enable these manufacturers to make lower bid prices and be more competitive. Because the Military is free to pursue and accept these lower bids, they help sharpen competition and keep the overall cost of bids down." \textit{Id}.}
Each of [the cases which allowed the government contract defense] demonstrates, in one way or another, the compulsive nature of the Government’s behavior or direction when its contractor is immune. Only then will the contractor’s behavior be the result of governmental discretion and direction. Consequently, only then should the contractor share in the Government’s immunity.\textsuperscript{129}

The Alarcon dissent has been followed in subsequent cases. In fact, three months after the McKay decision, a district court addressed the issue of the government contract defense, relying predominantly on the Alarcon dissent.\textsuperscript{130} In Johnston v. United States,\textsuperscript{131} employees of a corporation alleged that they contracted cancer from exposure to radiation while working on the repair and overhaul of aircraft equipment.\textsuperscript{132} The defendant contractors moved for summary judgment, arguing that the defectively designed instruments were produced under wartime contracts with the United States.\textsuperscript{133} The court, in denying the motion, distinguished between the “government contract defense” and the “contract specifications defense.”\textsuperscript{134} It stated that the government contract defense “applies only where the product in question has been manufactured pursuant to a contract with the government.”\textsuperscript{135}

The Johnston court expressly rejected the defense in the action. The court stated that where the product in question is not one that pushes technology toward its outer limits, the necessity for the defense is eliminated.\textsuperscript{136} More importantly, the court addressed the question of increased costs upon the government. Following the McKay dissent, the court articulated two persuasive reasons for rejecting the McKay majority. First, since the government contract defense only applies to design defect cases,\textsuperscript{137} the government will be the bearer of the risk when the manufacturer is held accountable for manufacturing defects. “[T]he cost of manufacturing defects will be passed along, through higher contract prices to the government, to all of us who are taxpayers, while the design defect ‘tax’ will fall

\textsuperscript{129} Id. at 459. See infra text accompanying notes 198-205 for a discussion of the statutory elimination of the compulsion requirement.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 353.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 353-59; see generally Note, supra note 4.
\textsuperscript{135} Johnston, 568 F. Supp. at 356.
\textsuperscript{136} Id. at 357.
\textsuperscript{137} See supra text accompanying notes 73-78.
only on a few unfortunate, innocent, randomly selected victims." 138 Second, the court cited Judge Alarcon's dissenting opinion in McKay to support the proposition that imposing liability on the manufacturer will not result in an increase in governmental costs. 139 After dismissing other rationales that support the government contract defense as not applicable, 140 the court concluded: "the government contract defense, in some instances, does nothing more than replace one unfairness with another." 141

In a recent government contract action decided by the California Court of Appeals, McLaughlin v. Sikorsky Aircraft, 142 the plaintiffs were seriously injured by the "failure to include self-retaining bolts in the flight control linkage of [an] aircraft." 143 The appellate court reversed a trial court finding that the defense of government contractor immunity was not available to the defendant-contractors. 144 In adopting the four-part test established in McKay, 145 the court viewed the issue as whether or not strict liability applies to manufacturers of defective military equipment that injures members of the armed services who are on active duty. 146

The first dissenter in McLaughlin, Associate Justice Wiener, sharply criticized the majority for following the McKay holding, maintaining that Judge Alarcon's dissent in McKay was the correct analysis of the issue. 147 Justice Wiener was concerned with the accepted principles of strict products liability that had been carefully articulated for over two decades by the California Supreme Court. 148 He viewed the majority's adoption of the McKay holding as "a skewed cost benefit analysis where the costs are borne by the injured claimants and benefits in the form of increased profits accrue to pri-

138. 568 F. Supp. at 357.
139. Id.
140. Id. at 357-58. The court stated that where the defendant contractors were compelled to manufacture the product, there could be reason for the government contract defense. However, the court found no compulsion present in the case. Id. The court also stated that the Feres-Stencel rationale, as cited in McKay and rejected in the McKay dissent, "has no relevance to this lawsuit." Id. at 358.
141. Id.
143. Id. at 208, 195 Cal. Rptr. at 766.
144. Id. at 207, 195 Cal. Rptr. at 765.
145. Id. at 210-11, 195 Cal. Rptr. at 768. For the delineation of the four-part test, see supra note 121.
146. 148 Cal. App. 3d at 211, n.4, 195 Cal. Rptr. at 768 n.4.
147. Id. at 213, 195 Cal. Rptr. at 769-70.
148. Id. at 212, 195 Cal. Rptr. at 769.
vate manufacturers."

In rejecting McKay, Justice Wiener stated that the doctrine of strict products liability will not lead to increased government costs, but rather will produce a safer product at a lower cost. Next, Justice Wiener rejected the argument that the servicemen will already have been compensated by the Veteran's Benefit Act, stating that

[th]is unsupported premise . . . presupposes that for some unknown reason military personnel bargain for defective products when they enlist. I am unaware of any law, statutory or otherwise, or any articulated public policy that says military personnel should face an increased risk of harm due to defective products when they enter military service.

Lastly, Justice Wiener stated that members of the military should be afforded a high degree of protection for their willingness to risk their lives for the country. Both Justice Wiener and the dissent in McKay realistically evaluated the government contract defense in strict products liability suits by military personnel. While the everchanging state of the law has minimized the need for the defense, sound tort policies have also moved toward the elimination of the government contract defense in strict liability suits.

II. THE AGENT ORANGE LITIGATION

Had the recently settled Agent Orange Litigation gone to trial, it is likely that the outcome would have clarified the role of the government contract defense in strict liability suits. Although settled, it still provides an excellent example of a strict liability case in which

149. Id.
150. Id. at 214-15, 195 Cal. Rptr. at 770-71. In following the McKay dissent, Justice Wiener stated:
   To say there was no room for price negotiation is to naively and incorrectly assume that sellers to the military are unconcerned with profit. Manufacturers engaged in the free enterprise system are able to obtain cost savings enabling them to be more competitive. Because the military can accept lower bids, competition will be sharpened with reduced costs for an improved product. Thus, the net effect of applying strict product liability is to get a safer product at a lower cost.
Id. at 215, 195 Cal. Rptr. at 771 (emphasis added).
152. 148 Cal. App. 3d at 215, 195 Cal. Rptr. at 771.
153. Id.
154. Jury selection for the Agent Orange Litigation was scheduled for Monday, May 7, 1984. Early that morning a settlement was reached. The defendant-government contractors immediately deposited $180 million in an account to be distributed to the injured plaintiffs-servicemen. New York L.J., May 8, 1984, at 1, col. 1.
the government contract defense was asserted. In *In re "Agent Orange" Product Liability Litigation (Agent Orange I)*, Judge Pratt explained why the defense should exist in fact as well as law. In *In re "Agent Orange" Product Liability Litigation (Agent Orange II)* established and defined the elements defendants must affirmatively prove to succeed on the defense. In *In re "Agent Orange" Product Liability Litigation (Agent Orange III)*, the court granted some of the defendants their motion for summary judgment on the government contract defense. A closer look into the Agent Orange Litigation will provide insight into what some courts perceive as the underlying rationale that establishes the defense.

"Agent Orange" is a term used to refer to the various herbicides used by the United States as defoliants in the armed conflict in Vietnam. From 1962 to 1971, over seventeen million gallons of herbicides were sprayed over South Vietnam for purposes of strategic combat. Since that time, servicemen and their families have begun to experience illnesses allegedly related to the government's use of Agent Orange. The servicemen and their estates, widows, wives and children have complained of many ill effects and medical

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156. Id. at 792-94.
158. Id. at 1055-58.
160. Id. at 1278.
161. *See supra* note 2 for a definition of the term "Agent Orange."
163. They were used in an effort to improve the Army's visibility of the enemy and in an attempt to destroy the enemy's food supply. Note, *supra* note 162, at 50. The operation, which was deemed successful, was so devastating to the land that it has been estimated that the vegetation will take at least twenty years to return to its original condition. Id. at 48.
164. In essence, the chemicals were used to accelerate the growth rate of plants so quickly as to lead to their death. This was done by combining two phenoxy herbicides, 2,4,5-T and 2,4-D. *Id.* at 49. The former, 2,4,5-T, while in the process of manufacture, forms an extremely toxic byproduct known as TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin. *Id.* at 51. Professor V. Boekelheide characterized dioxin as "the most toxic simple organic molecule known to man." *Id.* at 53 n. 39. Medical reports have shown dioxin to cause reproductive and hormonal abnormalities and alterations in laboratory animals. *Id.* at 51, 53.
165. *Id.* at 55. Exposure to Agent Orange can be traced to different sources. One report states that possible sources of exposure included "inhalation and dermal exposure from spray drift, inhalation of fumes from burning foliage, ingestion of contaminated food and water, and bathing in contaminated water." *Id.* at 77-78 n. 181; *see* COMPTROLLER GENERAL REPORT, *supra* note 2, at 7.
166. *Agent Orange I*, 635 F.2d at 989; *see* Memorandum of Law, "Government Con-
problems, ranging from physical disorders\(^{166}\) to mental distress,\(^{167}\) as a result of extended exposure to the Agent Orange.\(^{168}\) These service-
men sued the corporations or divisions who manufactured the chemicals.\(^{169}\) As government contractors, the corporations’ role had been to manufacture Agent Orange in accordance with military specifications.\(^{170}\)

The United States District Court for the Eastern District of New York acknowledged the existence of the government contract defense in the *Agent Orange I* suit in 1980.\(^{171}\) Two years later in *Agent Orange II*, Judge Pratt stated that the government contract defense could be asserted in strict liability suits.\(^{172}\)

>[T]he court does not accept the view that the government contract defense cannot apply in a strict products liability case. It is true that the policies giving rise to strict products liability reflect considerations different from those involving a negligence approach to liability. Nevertheless, the policies which require a government contract defense, ... override those considerations which might otherwise impose liability on a manufacturer whether on a negligence or strict products liability theory.\(^{173}\)

After recognizing the affirmative defense, the court stated that there are three elements that must be established in order to insulate the defendant contractors from liability. The defendants must affirmatively prove:

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\(^{166}\) E.g., birth defects, cancer, immune system dysfunction, neurological problems, joint pain, swelling and skin rashes. *See* Holden, *Agent Orange Furor Continues to Build*, 205 Sci. 770, 771-72 (1970); *Letter from G. Bogen, M.D. to the Editor*, 242 J. A.M.A. 2391 (1979) [hereinafter cited as Bogen].

\(^{167}\) E.g., psychological problems, fatigue, dizziness, depression, loss of libido, mood changes. *See* Holden, *supra* note 166, at 770; Bogen, *supra* note 166, at 2391.

\(^{168}\) *Agent Orange I*, 635 F.2d at 989.

\(^{169}\) *Agent Orange I*, 506 F. Supp. at 768 n.2.

\(^{170}\) The defendants asserted that the United States government unilaterally determined the terms and specifications of the contracts and exercised complete control over the entire operation, including the chemical composition of the herbicide, its weight, volume, purity, acidity, appearance, quality, packaging and use in Southeast Asia. *Memorandum of Law, “Government Contract Defense,”* Doc. No. 588 at 2, *Agent Orange II*, 534 F. Supp. 1046; *see* Note, *supra* note 162, at 71 n. 140. *But see infra* note 182 for the plaintiffs’ claim that the specifications were not supplied by the government.

\(^{171}\) 506 F. Supp. at 796. The court stated that it was “satisfied that a government contract defense exists and has possible application to the facts at bar.”

\(^{172}\) *Agent Orange II*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982).

\(^{173}\) *Id.* at 1054 n.1. The court thus recognized the distinction between the two causes of action, but concluded that in this situation there should be no difference between the two. *Id.*
1. That the government established the specifications for "Agent Orange";
2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange." 174

In recognizing the defense, the court listed three "considerations of fairness and public policy." 175 First, the court looked at the concept of deterrence. 176 The court stated that one strong reason for holding a wrongdoer liable for damages is that the wrongdoer will have a strong incentive to prevent future harm. 177 The court noted, however, that many of the courts that have decided government contract suits have considered the contractors as innocent parties who properly performed their role of executing a government plan, 178 and concluded that no societal benefits can be obtained where the party to be held accountable for the damages was not "the party in a position to correct the tortious act." 179 While one can argue that holding the manufacturers liable will not help prevent future torts, the concept of deterrence should not be so casually dismissed. The manufacturer is one of the parties who must be deterred because of its connection to the product. For example, in the Agent Orange Litigation the contractors were specialists in the manufacturing, production,

174. Id. at 1055. Federal and state law have imposed additional requirements. See Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14, 16 (9th Cir. 1961) (specifications for the formula and manufacture of Agent Orange must have been unilaterally designed by the government prior to the solicitation of bids to manufacture phenoxy herbicides; the defendants must have been compelled to manufacture the phenoxy herbicides; and the defendants had to have been prevented, other than by force of contract, from disregarding the government's wishes); Littlehale v. E.I. du Pont de Nemours & Co., 268 F. Supp. 791, 800 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967) (since defendant created an active force or risk, namely blasting caps, it was incumbent upon defendant to see that this force or risk came to rest in a position of apparent safety and the defendant was committed at that point to a duty of care to all those in the orbit of danger); Ryan v. Feeney & Shechan Bldg. Co., 239 N.Y. 43, 46, 145 N.E. 321, 324 (1924) (plans and specifications must not have been so obviously defective that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury); see also supra note 121.
175. Agent Orange I, 506 F. Supp. at 793-94.
176. Id.
177. Id. See infra text accompanying notes 239-44.
handling and marketing of the product. With the government contract defense, such manufacturers are less likely to feel they must take precautionary measures. In fact, there was evidence that the manufacturers' "innocence" was questionable.

The second notion that the court focused on was the possibility of resulting increases in contract prices to cover the manufacturers' risk of loss. The court briefly repeated the argument set forth in *Dolphin Gardens, Inc. v. United States*, reiterated in *Sanner* and adopted in *McKay*, that imposing liability on the contractors will have an adverse effect on the government. Presumably the contractors would seek to insure against the possibility of a design defect by passing the costs of accidents on to the United States by charging a higher price to the government in case of liability, or through higher prices in subsequent sales. Thus, taken to the extreme, the court concluded, "the government might ultimately find it

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180. The contractors in the Agent Orange Litigation owned their plants, produced and obtained the raw materials for the production of the Agent Orange, and owned the Agent Orange and its component parts until it was sold to the government. The contractors were also primarily responsible for inspection during the manufacturing process and of the final product. Plaintiffs' Memorandum of Law, "Government Contract Defense," Doc. No. 582 at 8.

181. See infra text accompanying notes 241-42.

182. The plaintiffs had stated:
In this case, at least some of the defendants had marketed one or another of the components of "Agent Orange" on the civilian market for years. They knew as much about it as anyone in the United States, and perhaps the world. They had the facilities for manufacturing the herbicide and it cannot be gainsaid that they were anxious to sell it. At the same time, there was not one war contractor who was not active in the solicitation of government work to varying degrees . . . . If, as plaintiffs suspect, "Agent Orange" came into being because one or more of the defendants convinced the government that that's what it needed, then it is clear that responsibility for the "Agent Orange" formulation lies not with the government, but with the defendants.


Subsequent to the settlement, other evidence of the manufacturers' guilt has emerged. For example, the Department of Justice, in a sealed brief that relied heavily on confidential documents, attacked the government contractors' patriotic assertion that Agent Orange was manufactured pursuant to government orders. The dioxin, argued the government, was never sought, referenced, or even anticipated in any government contract, and was a result of the manufacturers' input. Nat. L.J., Sept. 17, 1984, at 1, col. 1.


less expensive to waive immunity under the circumstances, accept liability for injuries caused by its planning failures, and thereby avoid the expensive middleman. The court added that if the government contract defense were not recognized, the existing state of the law would leave the manufacturers with a choice between two unfavorable alternatives. They could either manufacture the required product without indemnification from the government for defects in design, or they could refuse to manufacture and suffer severe penalties for failure to comply with the then existing Defense Production Act.

Finally, the court, relying on Casabianca, recognized the principle that "[a] supplier to the military in time of war has a right to rely on [the government's] specifications and is not obligated to withhold from the United States . . . material believed . . . to be necessary because the manufacturer considers the design to be imprudent or even dangerous." The court followed the Casabianca holding, which stated that as long as the contractor conforms to the government contract specifications, he will be immune from any action based on the inadequacy of the government specifications.

After weighing the arguments in support of and in opposition to the government contract defense, the court concluded that a government contractor should have the defense available to him. In Agent Orange I, however, the court stated that one condition that must be met by the contractor is proof that he conformed to all of the government specifications. Two years later, in Agent Orange II, Judge Pratt further warned that a manufacturer might not be shielded from liability unless he informed the government of any risks or hazards of which he had knowledge.

The Agent Orange Litigation provides an example of a typical case involving the use of the government contract defense and the struggles courts engage in when they attempt to apply the defense in

188. See infra text accompanying notes 198-205.
191. Agent Orange I, 506 F. Supp. at 794 (citation omitted).
192. Id.
193. Id.
194. Id. at 793-94.
a strict products liability action. Furthermore, the litigation helps provide insight into the rationale used to support the existence of the government contract defense.

III. THE MOVEMENT AWAY FROM THE GOVERNMENT CONTRACT DEFENSE

The government contract defense is an outgrowth of the concepts of sovereign immunity and agency. In essence, manufacturers are completely shielded from liability provided they establish that their products conform to the United States government's plans and specifications. The movement from sovereign immunity to the extension of the government contract defense to shield independent contractors from liability has gone beyond the bounds of fairness and justice. The aforementioned rationales offered in support of the defense are not as compelling as the reasons that call for the elimination of the defense in strict products liability cases. Both recent developments in the law and accepted tort policies support this conclusion.

A. Recent Developments

1. The Defense Production Act.—From 1950 until 1982, the Defense Production Act of 1950 was in effect. This Act authorized the President of the United States to demand that certain contracts, "which he deem[ed] necessary or appropriate to promote the national defense" take priority over any other contracts. Failure to comply with the Act could lead to severe penalties, including fines and imprisonment. Thus, the fact that government contractors were compelled to perform to the government's demands established a necessity for the government contract defense.

Section 2157 of the Act specifically established the applicability of the government contract defense, providing that "[n]o person shall be held liable for damages or penalties for any act or failure to

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196. See supra text accompanying notes 18, 47-65.
197. See Agent Orange I, 506 F. Supp. at 793-94.
201. Id.
act resulting directly or indirectly from compliance with a rule, regulation or order issued pursuant to this Act." Contractors were forced to comply with the President's order and to give the government contract priority over every other contract. Failure to comply would lead to punishment, while strict compliance with the Act would leave the contractor free from any liability. The Act, however, was repealed in 1982, and the government contractor can no longer claim that performance of a contract is mandatory. Therefore, he can no longer invoke one of the rationales for the defense: that he had no choice other than to perform pursuant to the government’s demands. Furthermore, the section 2157 defense, formerly available to the contractor, has been abolished. Thus, the manufacturer is no longer provided with an express exemption from liability.

If the Agent Orange manufacturers were to contract with the government today, there would be no priority requirement as to performance of the contract, and no mandatory compliance. Furthermore, the contractors would have more liberty in determining the terms of the contract, which would allow them to act as they saw fit to protect themselves. This would be extremely helpful in eliminating the possibility of a design defect caused solely by government specifications.

2. The Development of Strict Products Liability.—The principle that extends sovereign immunity to independent contractors has been seriously questioned and threatened by the development of another recent doctrine—the doctrine of strict products liability. As the early cases indicate, the sovereign immunity doctrine was extended to prevent contractors from becoming the scapegoats for the government’s wrongdoing. This theory specifically applies to negligence actions—actions predicated upon a finding of fault. In ac-

204. Id.
205. 50 U.S.C. app. § 2166(a).
206. As a California appellate court has stated, “although the government contract defense has been recognized by the United States Supreme Court . . . in the context of public works cases . . . this does not compel the conclusion the defense is proper in a strict product liability case.” McLaughlin v. Sikorsky Aircraft, 148 Cal. App. 3d 203, 214, 195 Cal. Rptr. 764, 770 (Ct. App. 1983) (citations omitted). See Tobak, supra note 56, at 93, 97; see also text accompanying notes 66-68.
207. See supra text accompanying notes 48-65.
209. See supra text accompanying notes 57-59, 68-70, 93-94, 103.
tions based on strict liability, or liability without fault, the situation is different.

In strict liability actions, the "seller" is liable to the consumer even though he has exercised all possible care in the preparation and sale of the product.\textsuperscript{210} As one commentator has stated, "an argument based on compliance with the government's plans and specifications might be unavailing, in view of the Restatement of Torts declaration that the doctrine of strict liability is applicable even though the defendant has exercised all possible care in the preparation and sale of his product."\textsuperscript{211}

\textit{Challoner v. Day and Zimmerman, Inc.}\textsuperscript{212} was the first government contract defense case to distinguish between suits premised on strict liability and suits alleging negligence.\textsuperscript{213} In \textit{Challoner}, the plaintiff relied solely upon a strict liability cause of action.\textsuperscript{214} The circuit court recognized that if the suit had been premised on negligence, the contractors would have had a valid defense provided they had complied with the government's plans.\textsuperscript{215} The court stated, however, that since the suit was a strict liability action, there was no need to prove negligence.\textsuperscript{216} Relying on the Restatement of Torts (Second),\textsuperscript{217} the court stated that "[a] strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control."\textsuperscript{218}

Similarly, in \textit{McLaughlin v. Sikorsky Aircraft},\textsuperscript{219} the dissent concentrated on whether or not the "sound principles articulated by the California Supreme Court over the last two decades,"\textsuperscript{220} concerning strict products liability, should be eliminated. The dissent defined the strict products liability doctrine, and stressed that since its genesis the California courts had applied the doctrine as broadly

\begin{itemize}
  \item \textsuperscript{210} Restatement (Second) of Torts § 402(A), comment a. For the text of § 402(A) and a discussion of the term "seller" in reference to government manufacturers, see \textit{supra} note 69.
  \item \textsuperscript{211} Tobak, \textit{supra} note 56, at 97 n.100.
  \item \textsuperscript{212} 512 F.2d 77 (5th Cir.), \textit{vacated and remanded on other grounds}, 423 U.S. 3 (1975).
  \item \textsuperscript{213} \textit{Challoner}, 512 F.2d at 83.
  \item \textsuperscript{214} \textit{Id}.
  \item \textsuperscript{215} \textit{Id} at 82-83.
  \item \textsuperscript{216} \textit{Id} at 83.
  \item \textsuperscript{217} \textit{Id}.
  \item \textsuperscript{218} \textit{Id}.
  \item \textsuperscript{219} 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (Ct. App. 1983).
  \item \textsuperscript{220} \textit{Id} at 212, 195 Cal. Rptr. at 769.
\end{itemize}
as possible in order to assure that defenseless victims would recover damages.\textsuperscript{221} It then concluded: "[s]trict products liability was made a part of California law for valid legal and policy considerations. There is no legal or policy justification in this case to depart from that law."\textsuperscript{222} To allow manufacturers to use the government contract defense in suits that are not predicated on fault would contradict all existing precedent which has moved toward a universal acceptance of the strict products liability philosophy.\textsuperscript{223}

\section*{B. Accepted Tort Principles}

Strict products liability is based on three separate policies: first, the economic theory that suggests distributing the loss to those who are best able to afford it; second, the deterrence factor, which is an attempt to prevent future harm from occurring; and third, the moral aspect of the defendant's conduct.\textsuperscript{224} Distributing the loss to those who are best able to bear it is termed the "loss spreading" rationale.\textsuperscript{225} This economic theory compares the two parties and determines which party is better able to absorb or avoid the losses which, by necessity, must fall upon one party.\textsuperscript{226} Often defendants are corporations and are better able to pass the costs onto consumers through higher prices.\textsuperscript{227}

Rather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it, the courts have tended to find reasons to shift it to the defendants. \textit{Probably no small part of the general extension of the tort law to permit more frequent recovery in recent years has been due to this attitude.}\textsuperscript{228}

The government contract defense is in direct conflict with this conclusion.

Defendants who are government contractors can absorb the risk

\textsuperscript{221} Id. at 214, 195 Cal. Rptr. at 770.
\textsuperscript{222} Id. at 216, 195 Cal. Rptr. at 771.
\textsuperscript{223} As the court stated in Johnston v. United States, 568 F. Supp. 351, 354 (D. Kan. 1983), "[a]t first glance it may seem harsh to hold a manufacturer responsible for a defect in someone else's design, but surely no harsher to hold a retailer or wholesaler responsible for a nonobvious manufacturing defect."
\textsuperscript{224} For a general discussion, see \textit{W. Prosser, Law of Torts} \S 4, at 16-23 (4th ed. 1971).
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} See \textit{W. Prosser, supra} note 224, at 22-23; \textit{see also} Morris, \textit{Hazardous Enterprises and Risk Bearing Capacity}, 61 \textit{Yale L.J.} 1172 (1952); Note, \textit{supra} note 4, at 1030.
\textsuperscript{228} \textit{W. Prosser, supra} note 224 at 22.
much more efficiently than can injured plaintiffs. Although both Judge Pratt, in the Agent Orange Litigation, and the majority in McKay v. Rockwell International Corp. believed the government would be forced to absorb the loss if the government contractor were held liable, Judge Alarcon, in his McKay dissent, was among the first to recognize that the government may not be the bearer of the loss. He stated that in the bid process or “free market system” the costs to the government are minimized. “Just as some manufacturers are better at minimizing the cost of overhead, others will be better at producing safe designs and avoiding liability.” Judge Alarcon’s rationale was reiterated and cited in two subsequent government contract decisions.

In Johnston v. United States, the court posed an additional reason militating against allowing the government contract defense for the purpose of relieving the government of added costs. Since the government contract defense only applies to design defects and not to manufacturing defects, where the manufacturers are held liable for manufacturing defects, the costs will be passed to the government. Thus, if the courts choose not to eliminate the government contract defense, the government will still incur increased prices because manufacturers will charge higher prices for fear of being held liable for manufacturing defects. It would be unfair to have the government pay the cost of manufacturing defects and have the cost of design defects fall on “unfortunate, innocent, randomly selected victims.”

Not only can corporations minimize the costs of performance, they can also absorb the costs of resultant damages. The defendants, in almost every government contract action, are corporations that are sued by one or two plaintiffs. In such situations, the corporations have a much greater ability to spread costs. Servicemen, as indi-

231. See supra text accompanying notes 122.
232. McKay, 704 F.2d at 457.
236. In the Agent Orange Litigation the amount of damages increased due to the number of potential plaintiffs. In fact, the Second Circuit court had noted that plaintiffs' second amended complaint sought damages of approximately four to forty billion dollars. If the corporations were to lose this amount, they could have faced bankruptcy. Agent Orange I, 635 F.2d
individuals, cannot pass the loss onto anyone. Furthermore, the corporations can obtain insurance from an outside source to protect against potential liabilities. Additionally, a large corporation has the option of charging more for a specific product or raising the prices of other products it manufactures. Thus, faced with the possibility of liability, the defendant corporations are in a better position to minimize costs both prior to and subsequent to the victims' injuries.

A second tort policy for imposing liability is to provide an incentive to prevent the occurrence of future harm. Before any societal benefit can be derived from the deterrent effects of tort liability, the party in the position to correct the tortious act or omission must be held accountable for the damages it causes. The theory is that once he is held liable he will be motivated to prevent future harm. "When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."

If the manufacturers are deemed immune from suit because of the government contract defense, the incentive to take precautionary measures to prevent injury will be lacking. The government will provide specifications for a product and the manufacturers will inten-

at 989 n.5. Thus one might argue that the corporations may not be the best bearers of the loss. Furthermore, there are limitations on shifting the loss to corporations:

[T]he courts frequently have been reluctant to saddle an industry with the entire burden of the harm it may cause, for fear that it may prove ruinously heavy. This is particularly true where the liability may extend to an unlimited number of unknown persons, and is incapable of being estimated or insured against in advance. W. PROSSER supra note 224, at 22-23. 237. Although recent trends in tort law have raised the possibility of allowing corporations burdened with such losses to seek protection in bankruptcy, thereby threatening plaintiff recovery, this potential inability to spread costs should not preclude the effectuation of the underlying tort policies. When analyzing tort policies that may favor or disfavor the government contract defense, courts should not permit the fear of a bankrupt corporate defendant to be the determinative factor. For an analysis of the inherent problems associated with filing for bankruptcy in such situations, see Note, Manville: Good Faith Reorganization or "Insulated" Bankruptcy, 12 HOFSTRA L. REV. 121 (1983).

238. See Ginsburg, Allocation of Risk: Contractor Responsibility for Injury to Government Property and to Third Parties Under Supply and R & D Contracts, 2 PUB. CONT. L.J. 333 (1968-69) for a discussion of the different ways to insure for such a loss: "the contractor's liability to third persons depends in large measure on whether the contract is cost-reimbursement or fixed price. If cost-reimbursement, the Government bears the risk of third party liability and, in a sense, insures the contractor." Id. at 337.

239. For a general discussion of the role of deterrence in strict products liability law and tort law, see W. PROSSER, supra note 224, at 23.

240. Id.
tionally do no more than produce it. This concept can be extremely dangerous because the contractor is aware that, with the defense, he will be immune from liability. He will have no incentive to take preventative measures since any testing will most likely raise costs and reduce profit, and will result in a greater chance that the contractors will have knowledge of any potential hazards. Thus, the government contract defense promotes a lack of knowledge on the part of the contractors. Quite simply, the less they know, the less chance there is that they will be held liable for manufacturing a defective product.\footnote{241}

A counterargument to this proposition is that the manufacturers will be too deterred if the defense is eliminated; they will never contract with the government for fear of having unlimited liability. However, this argument is rather weak. There will always be corporations that will take that chance. Corporations maximize profits when the contract with the government.\footnote{242} In fact, it has been said that corporate contracts with the government result in “unreasonable corporate profits.”\footnote{243} Furthermore, in strict products liability actions the manufacturer always faces the risk of liability for a manufacturing defect.\footnote{244}

Not only will corporations take such a risk, but they will also attempt to minimize it. With the elimination of the government con-
tract defense in strict liability suits, corporations, for fear of the hazards of a defective product, will assure themselves of the product's safety. They will be forced to test the product with the threat of legal liability present. This will lead to the manufacture of fewer defective products, and hence fewer injuries and fewer suits.

A third and final consideration is premised on community morals. "[I]n every community there are certain acts and motives which are generally regarded as morally right, and others which are considered as morally wrong. Of course such public opinion has its effect upon the decision of the courts."245 The law of torts is a result of current moral and ethical considerations, and the blame or "fault" that courts put on parties is due to a violation of society's ideal standards of behavior.246 Today the term "fault" has come to mean "social fault."247 In essence, fault is imposed on the individual not because he was intentionally guilty, but because he did not conform to societal expectations.248 Hence, the function of the court is to determine which party and what type of conduct should prevail. When a court is deciding a typical case involving the government contract defense, the court must apply current moral and societal standards to decide which of the two seemingly innocent parties, the manufacturer or injured party, should prevail. Specifically, the court must decide whether the government contract defense should exist, given the current state of our social values.

Clearly the government contract defense is inconsistent with current societal expectations. First, the concept of strict liability has become universal: "[T]here has been a recrudescence of the older 'strict' liability, 'without fault,' in several areas, where new and modern ideas of policy have developed to support it; there has been legislation, and proposals for a great deal more . . . ."249 The trend has been to hold an individual liable if he caused the harm, whether he did so intentionally or inadvertently.250

In addition, there has been a strong movement in the law toward the compensation of the injured victim.251

245. W. Prosser, supra note 224, at 16.
246. Id. at 18.
247. Id.
248. Id.
249. Id. at 19.
250. Id. at 18.
251. W. Prosser, supra note 224, at 22. The law has recently begun to recognize causes of action such as wrongful death, loss of consortium, third party injury, emotional distress, and strict products liability. For a general discussion of the expansion of tort law, see generally id.
The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products [against] which consumers . . . are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.252

Society demands that the party who produces the goods for consumption or use should be held liable for any resulting injuries.253 Thus, based on current social values, the government contractor is the more morally culpable party. Even if the contractor did not design the product, he did manufacture the product which caused the injury.254 It should be noted, too, that the manufacturer is not always innocent.255 The manufacturer in McKay v. Rockwell Int'l,256 for example, had both manufactured and designed the product, yet the court stated that the government contract defense was applicable if affirmatively proved.257

Most importantly, the plaintiffs in such cases, military personnel, are not ordinary customers, and it would be morally wrong not to afford them the highest amount of protection available. "To regard them as ordinary customers would demean and dishonor the high station and public esteem to which, because of their exposure to danger, they are justly entitled."258 Judge Alarcon, in his McKay dissent, persuasively stated that our servicemen deserve the highest degree of protection:

Military personnel are honored and esteemed because they are willing to fight for their country and risk their lives doing so. They are not so respected because they are sometimes forced by their calling to use unsatisfactory or unsafe equipment. It is the Military's, Rockwell's and this court’s duty to insure that our servicemen are provided with reliable and safe equipment . . . . To extend the contractor defense in the way the majority suggests will only result in more unsafe and more unreliable equipment. To do so would

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253. Id. at 1122-23.
254. See Note, supra note 162, at 78.
255. See Note, supra note 4, at 1038-40; see also supra note 182, where plaintiffs allege that the defendants in the Agent Orange Litigation were well aware of the harmful effects of Agent Orange.
256. 704 F.2d 444 (9th Cir. 1983), cert. denied, 104 S. Ct. 711 (1984).
257. Id. at 451.
258. Id. at 453.
unnecessarily increase the danger which our military personnel face so patriotically.\footnote{259}

The irony facing servicemen is that, although they may deserve a higher degree of protection due to their patriotic efforts, because they are members of the military they receive no benefit from the FTCA.\footnote{260} Ordinary customers purchasing consumer goods are able to sue both the manufacturer and the federal government. It seems that the party who should be afforded the most protection is, in actuality, afforded the least. The government contract defense runs in direct opposition to the current trend in the law which protects the "socially moral" party. For this reason, courts must seriously consider eliminating the government contract defense in strict liability suits by service personnel based on defects in design.

It is important to note that even with the elimination of the government contract defense in such suits, the plaintiffs will not necessarily recover damages for their injuries. They must still proceed to the merits of the suit and prove every element of any cause of action alleged. This is no small hurdle. For example, in the Agent Orange Litigation the plaintiffs would have to have proven causation. They would have had to show which companies were responsible for the manufacture of each specific batch of Agent Orange, since many courts have held that proof of the manufacturer's identity is a prerequisite to awarding damages.\footnote{261} This task may have been virtually impossible, since the servicemen would necessarily need to prove that a particular company's herbicide was used in a particular instance, a task which would entail searching through records made over nineteen years ago.\footnote{262}

Of course, some courts have shifted the burden of proof on causation in situations where there is more than one defendant and where it is impossible to determine which defendant injured the plaintiff.\footnote{263} This approach requires that the plaintiff identify every

\footnotesize{259. Id. at 461 (Alarcon, J., dissenting).}\
\footnotesize{260. See supra text accompanying notes 24-46.}\
\footnotesize{262. See Agent Orange I, 506 F. Supp. 762, 783 (E.D.N.Y. 1980); Note, supra note 162 at 66-69.}\
negligent manufacturer. Each manufacturer would then have to show the part or percentage of the harm for which it was responsible.\textsuperscript{264} If the defendants cannot show a basis for a division of liability, then all manufacturers are held liable for the damages inflicted.\textsuperscript{265} Although these recent changes in methods of proving causation have somewhat eased the burden, they have by no means eliminated the plaintiff's burden in such suits.\textsuperscript{266}

Finally, the plaintiffs would have to have shown that the injuries suffered were caused by Agent Orange.\textsuperscript{267} Thus, since the plaintiff’s burdens of proof were not ones easily met, even with the elimination of the government contract defense, the plaintiffs would not have been guaranteed a successful outcome.

Although a rationale may exist to justify the government contract defense in strict liability actions by service personnel, it is evident that the repeal of the Defense Production Act, the development of strict liability principles, and accepted tort principles all provide stronger justification for the elimination of the defense.

**CONCLUSION**

In tort actions involving the government, independent contractors and injured service personnel, there have developed barriers which have made it exceedingly difficult for the injured service personnel to recover for their injuries. First, the FTCA and its judicial interpretation prohibit the injured personnel from suing the party responsible for their injury—the United States government. Consequently, the injured service personnel are forced to sue the only remaining culpable party, the government contractors who manufactured the product responsible for the injury. However, these government contractors can assert the government contract defense, developed from agency principles and the sovereign immunity doctrine. Early cases, primarily for public policy reasons, endorsed the government contract defense.

Most recently, a federal district court in the Agent Orange Liti-

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\textsuperscript{265} Borel, 493 F.2d at 1076.

\textsuperscript{266} For a discussion of the variety of different causation theories, see Note, Proving Causation in Toxic Torts Litigation, 11 Hofstra L. Rev. 1299 (1983).

\textsuperscript{267} The plaintiffs would also have to have shown that the injuries were caused by the manufacturers' negligent conduct or defective product. See Gurran v. American Clipper Corp., 117 Cal. App. 3d 634, 173 Cal. Rptr. 20 (1981).
gation, also for reasons of public policy, recognized the government contract defense in a strict liability suit. The court, after discussing the relevant precedent, granted summary judgment to a number of the defendants, while denying summary judgment on the defense to three of the remaining defendants. If these defendants had succeeded in affirmatively proving the elements of the government contract defense at a subsequent trial, the injured service personnel would have been left without a remedy.

Although the reasons for allowing the government contract defense may be valid, there are other, more compelling reasons to eliminate the defense in strict liability suits brought by injured service personnel. First, there have been recent changes in the law which have changed the contractual relationship between the United States government and the independent contractor. Secondly, society has endorsed fully the strict liability action, which requires merely a showing of causation, and not fault, to hold defendants liable. Additionally, accepted tort principles dictate that the government contract defense, although helpful in negligence actions, should not exist in actions based on strict products liability. These reasons far outweigh any rationale for maintaining the government contract defense in these actions. Injured service personnel, such as those in the Agent Orange Litigation, deserve better than to have valid legal claims with legal damages and yet no one to sue. They deserve the opportunity to be able to go to trial and have a jury determine the merits of their claim.

Richard A. Roth

269. Id. at 796.
271. Id. Subsequent to the Agent Orange III decision, there remained five defendants. Three of those five were denied their summary judgment motion, and the other two did not move for summary judgment on the government contract defense. Id.
272. 50 U.S.C. app. § 2166(a) (1982) abolishes rule which gave priority and mandatory conformance to government contracts. See supra text accompanying notes 199-205.
273. See RESTATEMENT (SECOND) OF TORTS, supra note 69, at § 402A.