The Seventh in Kentucky

The History of Bluegrass Jury Trials

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The Kentucky Trial Court Review
Louisville, Kentucky

Products Liability in Kentucky

The products liability case is an interesting genre of tort law and it came a little late to the party. It was not an ancient tort as our forefathers didn't live in a world where consumer products were manufactured on a national or even global scale.

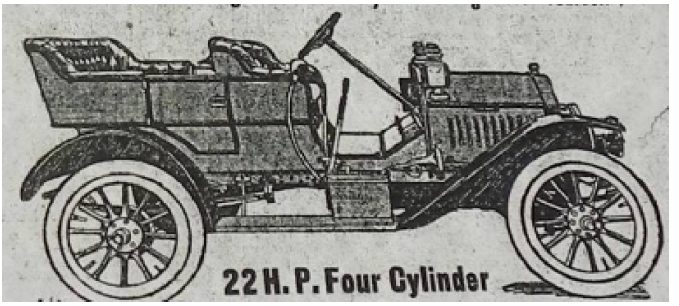
That all changed at the start of the 20th century. The automobile had been invented and it was now being mass produced. One of Kentucky's first product liability cases, would not surprisingly then, involve an automobile in the case of *Lucy Shaffer v. Olds Motor Works.*

Lucy Shaffer of Cincinnati and in her 20s, came to visit her aunt in Louisville in July of 1909. Lucy was a Smith College graduate and the daughter of a prominent Cincinnati lawyer, Frank Shaffer of the well-known Peck Shaffer firm. [Peck Shaffer was later absorbed by Dinsmore & Shohl.]

That afternoon Lucy joined her sister and aunt with a friend, William Colston, for a ride in an automobile. This was something of a novelty. A month earlier, Colston, who worked as a railroad superintendent, had bought a brand new Olds Motor Works sedan. Olds Motor Works, which had just been acquired by General Motors, was not yet commonly known as Oldsmobile.

Colston's car was a 1909 Model 20. Some 5,000 rolled off a Lansing, Michigan assembly line that year. Colston paid about $1,200 for the car.

Colston and the aunt rode in the front seat. Lucy and



her sister were in the back seat. The Model 20 (pictured) was a lot different than a modern vehicle. The rear seat was merely

attached to a wooden box by an iron strap held in place by wooden screws. That was it.

Colston drove on Broadway Hill in East Louisville towards Bardstown Road. He wasn't speeding or otherwise driving in a reckless manner. It was just a cruise.

Suddenly the rear seat (a so-called rumble seat) came loose from the box and Lucy was thrown from the car. She suffered a significant arm fracture in the collision. Lucy was a prominent enough (and her father too) Cincinnati citizen that the incident made the Cincinnati newspaper the next day.

Six months later in January of 1910, Lucy sued Olds Motor Works and alleged the Model 20 was defective. Quite simply, the seat in the nearly new car should not have come loose unless it was insecurely fastened in the first place. While today that seems self-evident, this was a novel claim in 1910. It wasn't presented either by a chump lawyer. Lucy had hired Percy Booth, one of Louisville's most prominent lawyers, who would later enjoy a sixty-year legal career.

It took eleven months for the case to come to trial. A Louisville jury before Judge Field found for Lucy and awarded her medical bills of $598 plus $3,500 more for personal injury. The verdict totaled $4,098.

Olds Motor Works took an appeal to the Kentucky Court of Appeals. It argued, among other things, that Lucy lacked privity to sue, that is, it hadn't sold the Model 20 to her. It also argued that as it didn't know the car was defective, it could not be held to account. Who knew the seat would fly off suddenly?

The appellate court ruled in December of 1911 and affirmed the trial court. It rejected the privity argument and also held that a lack of knowledge by Olds Motor Works of the defect was no defense. When a seat falls off a brand new car, a fair inference can be drawn that the seat was not properly fastened. The court also concluded that the flimsy design of the seat made it unsafe and dangerous for passengers. Lucy would collect her verdict.

Lucy through her misadventure while visiting Louisville and subsequent litigation became one of the first product liability plaintiffs in the history of the state. While a 1912 opinion is old news in 2017, *Olds Motor Works v. Shaffer* was good law for many years and addressed significant issues, including whether an

injured person has to have privity with the seller. Lucy went on to live a mostly anonymous life. She was a teacher in Cincinnati and died (without marrying or having children) in 1957 at the age of 71.

Moving forward half a century, little Thomas Atcher, age 4, rode in a Ford automobile with his mother on January 23, 1949. They proceeded on U.S. 60 within the Fort Knox reservation at Tiptop, KY. Suddenly the rear door of the sedan opened and little Thomas fell out of the car and suffered severe injuries.

His mother filed a lawsuit in Meade Circuit Court against both Ford and the local dealer. The defendants sought to move the case to federal court and argued it should be heard there because the crash happened on federal land. The trial court denied the motion and an appeal was taken. In 1952 the Court of Appeals held Meade Circuit Court had jurisdiction.

The trial finally occurred in 1956 in state court. Atcher prevailed and took a verdict of $20,276. He had argued two defects caused the door to come unlatched, namely, an excessively long pin in the latch and a warped frame such that the doors did not properly fit.

Despite the proof of the defect, the Court of Appeals exonerated Ford and the dealer in a May 1957 opinion. It noted the boy's mother knew for several weeks that the doors were not functioning properly and thus that knowledge (greater than that of Ford) was an intervening cause that excused the manufacturer. Rather than complain to the dealer, she simply continued to drive the car and thus this negligence on her part defeated the claim of her son. The verdict was reversed and the lower court instructed to enter a defense judgment.

There was another 1950's era products liability case and again, it was filed against Ford. A defective wheel was blamed on a crash near Vine Grove, KY in May of 1954 that killed a passenger and injured the driver. The suit particularly alleged a "spider" on the left front wheel only had one rivet when it should have had twelve. It was tried to a federal jury in Louisville in July of 1957. The case lasted six days and resulted in a defense verdict.

The modern era of products liability was coming to

Kentucky and it started in earnest in the late 1970s. There were big verdicts in products cases around the country and it was only a matter of time until the big dollar cases were tried here. One of the first to come to trial arose from a motorcycle accident in Richmond in 1978.

Rita Sutphin, age 23 and a student at Eastern Kentucky from Ashland, was a passenger on a motorcycle. Her driver laid the bike on its side to avoid a collision. The motorcycle then slid into an oncoming car. Sutphin struck her head on the rear bumper of that car.

Sutphin was wearing a helmet manufactured by American Sports Company of California. It did not protect her well enough. Sutphin sustained a severe brain injury and remained in a coma until the trial two years later in 1980.

In this suit pursued by a guardian, it was alleged the helmet was defective in that it was not strong enough to withstand the collision and protect Sutphin. American Sports defended that the helmet was safely designed, Sutphin being injured when the chin strap of the helmet became snagged.

The trial was complex and lasted eight days in Madison Circuit Court before Judge Jimmy Chenault. Both sides relied on numerous experts and the plaintiff introduced a fifteen-minute "day-in-the-life" video of Sutphin. Sutphin was unresponsive at trial and was then living in a nursing home. The helmet maker also presented an animation and slides regarding the helmet.

The deliberations lasted four hours and Sutphin was awarded $2.5 million. That represented $1.5 million for past and future medicals, $500,000 for pain and suffering and $500,000 for future lost wages. American Sports took an appeal of the verdict, but the case was dismissed by the parties in December of 1981. The resolution of the litigation is not known.

Sutphin never awoke from her brain injury. She died in February of 1981, just a little over a year after the verdict.

Near in time to the Sutphin case, an interesting products case was being tried in Green County. It started with a bizarre incident.

Gordon Price was a gun enthusiast and he purchased a Ruger replica Peacemaker handgun. The single-action revolver was first manufactured in 1873, Ruger bringing it back in the 1950s during the heyday of television westerns. The gun

hearkened to the era of the Wild West.

Price bought the gun in Berlin in 1973 while serving in the military. He returned to his home in Green County and kept the gun under floor mat of his pick-up truck.

This gun had particular features that made it unusually dangerous even for a gun. It is designed to only be safely used when loaded with five, not six cartridges. If the gun is fully loaded with six cartridges, it can be easily triggered. The only safe use of the gun is with five cartridges.

Price didn't know this and took his vehicle to a Green County service station for repairs. The gun was still under the mat. Karol Bloyd worked at the station and was removing the floor mats to clean them. As Bloyd did so, the gun accidentally discharged and Bloyd was shot in the ankle.

Bloyd sued Sturm Ruger (the gun's manufacturer) and alleged the design was defective in that it could be so easily fired. A Green County jury found for Bloyd against Sturm Ruger and awarded him damages of $50,000.

Sturm Ruger took an appeal. The Court of Appeals affirmed in May of 1978. Judge William Gant wrote that the gun was dangerous and the court was not impressed "with the argument that this was an authentic replica of the gun that won the West." He further explained a safer design would have prevented this shooting.

Sturm Ruger sought review at the Supreme Court. The high court (the Kentucky Supreme Court was still a new entity, having just been created by constitutional amendment in 1975) reversed the verdict a year later in July of 1979. Justice Sternberg opined that the gun was reasonably safe, the accident being caused by Price's misuse of it in contravention of clear warnings. That is, the gun wasn't defective by design, nor did it fire itself. Instead the firing was a negligent event occasioned by Price's misuse in storing the verdict under the floor mat of which Strum Ruger had no control. The case was remanded for the entry of a defense judgment.

Justice Reed dissented from the majority that Strum Ruger need not foresee the precise method of harm. The test was whether it was reasonable for it to foresee "the general area of the risk of harm." Reed only secured two votes for his position (Justices Aker and Clayton), Sternberg taking the day by a 4-3 opinion, also joined by Justices Palmore, Lukowsky and

Stephenson.

The Kentucky Supreme Court decided another products case a year later in *Nichols v. Union Underwear*. The case began with a little boy, Ricky Nichols, age 4, who was badly burned when while playing with matches, his Union Underwear manufactured t-shirt catching on fire. Nichols sued Union Underwear and alleged the t-shirt was unreasonably dangerous because of its flammability characteristics. The case came to trial in Frankfort and a defense verdict was returned.

The case worked its way to the Supreme Court which reversed the defense verdict. Justice Stephens identified an instruction error at trial, the lower court having focused on the consumer's knowledge of the product, namely the t-shirt could only be unreasonably dangerous if it is dangerous beyond the extent a consumer will expect. Stephens explained that consumer knowledge is but just one factor to consider and the court offered a sample instruction on remand that excluded mention of consumer expectation. The outcome of the Ricky Nichols case on remand to the Franklin Circuit Court is not known.

A somewhat similar case would come to trial a little more than thirty years later. Colton Polley, a three-year old in Greensburg, was badly burned in 2004 when playing with a BIC cigarette lighter. Colton sued BIC and alleged the lighter was defective in that while it had a child-resistant guard, the guard could be easily dismantled. BIC defended on two fronts, (1) the guard was reasonable, and (2) the parents were to blame for not supervising the boy. A federal jury in Owensboro returned a defense judgment in the case on February 1, 2012. Joseph Mattingly from Lebanon tried it while Edward Stopher of Boehl Stopher & Graves in Louisville defended.

There was a lawyer plaintiff who suffered a severe injury in 1982 and it changed not just the course of his life, but that of many children. Nick King was a successful lawyer in 1982 and he was skeet shooting at the Jefferson Gun Club. He was firing a Remington 12-gauge shotgun. A gift from a doctor friend, the weapon had been fired thousands of times.

On this day the gun exploded as King fired. He lost a thumb and two fingers on his left hand. King also suffered broken bones in his hand, wrist and forearm. Since the explosion, King underwent surgery some fourteen times.

King filed this lawsuit against Remington and alleged the shotgun was defective. It was his theory that Remington used substandard steel in the weapon and that over time, cracks developed in the barrel. The cracks ultimately led to the explosion.

The case came to trial in December of 1988 before Judge Edwin Schroering. Besides the evidence of the defect, King also introduced proof that Remington knew of some 86 other explosions and yet it failed to warn the public. A former Remington employee testified there may have been as many as 200 incidents. Remington thought the accident occurred because King loaded the gun with too much gunpowder.

The jury was inflamed by the proof of the prior explosion events. It awarded King $6,417,926 in damages. The largest part of the award was punitive damages. The jury assessed punitives of $6,000,000. King said at the time, "I was and am upset that Remington knew of the actual problems with the gun and they knew many people had been injured . . .They gave the public no warning of any kind." The Court of Appeals affirmed the verdict two years later.

While the tragedy might have broken some men, it had the opposite effect on King. He was appointed as the Commonwealth Attorney in 1992 by Gov. Brereton Jones. King was then elevated in 1995 to the Kentucky Supreme Court – King ran and lost for election to fill the full term in 1996.

King's service extended beyond the law. Along with his wife, King started a program called Project Vision in 1992. He promised to send a group of 38 poor Louisville children (all 7th graders) to college. Thirty-four of the children stuck with the program and went off to college six years later. Ultimately 21 of the 38 in the program received degrees. King paid for it all. A few years later, King also started a program with Sacred Heart Academy (a private girls school) where he funds tuition for young girls. It continues to serve girls today and the genesis of King's charity nearly 30 years later remains the 1988 verdict against Remington.

The modern era of the products liability was in full swung in the late 1980s. There was an ordinary enough verdict in Lexington in April of 1988 that was handled in an unprecedented way by the judge.

The case started with a fatal crash on July 9, 1981. Shirley Price was driving the family's 1975 Datsun B210 in Lexington. Her infant son, Kevin, was a passenger in the front seat. He was restrained in a car seat. As Price drove, another vehicle broadsided the Datsun.

The impact caused the vehicle to roll over. In the process of the vehicle rolling over, Kevin, still in the car seat, was thrown from the car. The vehicle rolled onto him and the boy was crushed to death.

His estate (representing his parents) sued Nissan and alleged the Datsun (a Nissan imprint) was defectively designed and had a high propensity to roll over. The case was tried in federal court before Judge Henry Wilhoit in April of 1988.

The jury found the vehicle was defective. It assessed 40% of the fault to Nissan, the remainder being assigned to the other driver. That driver had settled before trial.

Then to damages, the jury awarded the Price estate $1,050,000. That included $800,000 for the loss of ability to earn money for the deceased child plus $250,000 for the parent's emotional harm. The verdict then was assessed (less comparative fault) in the sum of $420,000 against Nissan. Peter Perlman had represented the plaintiffs.

After the verdict was returned, the parties huddled in Judge Wilhoit's chambers and struck a settlement. The terms would never become public. In fact, Judge Wilhoit ordered that the jury's verdict (which had already been made public) be sealed forever. He also entered a "gag order" preventing the parties from discussing the matter. The court's affront to the First Amendment and open government (which was widely criticized at the time) was never explained. It was just bizarre. Wilhoit still sits as a senior judge on the federal bench.

See the book for the rest of the products liability chapter

Kentucky's First Mass Tort

The mass tort is an unusual animal of the law where there are multiple persons injured in a single accident. Airplane crashes lead to mass tort events as was the 2007 Comair crash in Lexington. The Beverly Hills Supper Club fire of 1977 was a mass tort. So too was the Carrollton bus crash in 1988. Mass tort events generally lead to litigation.

That's been true in the modern era. It was true too 100 years ago when Kentucky suffered one of its first mass torts The event that precipitated the litigation is now forgotten. That would imply there are people alive who knew it even happened and thus forgot it. Kentucky's first mass tort is lost to history. While it may be unknown, it was a real and devastating catastrophe that changed lives.

It was near dusk on the evening of February 12, 1917 at 5:58 p.m. It had been a busy Monday in Louisville. This was despite the fact it was the first time the country had celebrated Abraham Lincoln's birthday. Louisvillians worked all day.

Louisville was a dense city and its residents moved from one part of the city to the other with ease. Many relied on street cars or a "jitney bus" as they known. There was a rush hour of sorts and the Louisville Railway Company streetcar was crowded. Frances Wessels, age 31 and an immigrant from Ireland, was a passenger. She was on the way home after a day of work as a seamstress.

Florence Becker, a housewife, was headed home too. She had been uptown shopping with her sister. Florence grew impatient with her sister and wanted to go home to make supper for her husband. She was on the streetcar. There were more than 50 people aboard.

At the same time, a Southern Railway train was approaching. The tracks of the two trains would cross at 30th and Broadway. However the light on the front of the Southern Railway train was not burning. And the watchman at the gate wasn't paying attention. The scene was set for disaster.

The train struck the street car with great force and hurled it more than 100 feet. The street car was destroyed and reduced to a pile of scrap. The passengers were either thrown clear of pinned beneath it. Thirty-three people were injured and four more sustained fatal injuries. Florence and Frances were

among the dead. Frances's body was mangled and it was not identified until hours later when a friend saw a ring on her hand with the initials, F.S.W. Florence left behind a husband and a toddler.

The litigation in the case didn't take long. Becker's husband sued Southern Railway. Frances's brother prosecuted a case on her behalf too.

As is common in mass torts cases, almost everyone settled quickly. The injured all reached settlements. The estates of the other two deceased victims also settled, each being paid $10,000 by Southern Railway.

The estate of Frances would be the first to come to trial, a Louisville jury hearing the case in October. As the presiding Judge Charles Ray had directed a verdict against Southern Railway on liability, the jury would only consider damages. It could impose both compensatory and punitive damages.

Southern Railway, represented by Edward Humphrey of Humphrey Crawford Middleton & Humphrey, defended it aggressively. It sought to call an actuary at the trial to introduce proof that life insurance companies value the lost earning capacity of a woman of Frances's age at $5,022. Judge Ray would not let the jury hear the proof.

The jury's verdict awarded the estate $2,500 in damages. It was a bitter pill to swallow, the jury rejecting the imposition of punitive damages. The award was also less than the $7,500 the railroad had offered before trial. It was also significantly less than the settlement of the other two deceased Southern Railway crash plaintiffs.

Just two months later, the Florence Becker case was tried before Judge Walter Lincoln. The estate was awarded damages of $16,000. It was a general award however and the jury did not differentiate between compensatory and punitive damages. The railroad moved for a new trial and argued the award was excessive and that it was unclear what portion represented punitive damages. Judge Lincoln denied the motion and ruled from the bench that the failure to distinguish the verdict by category did not invalidate it. Southern Railway paid the judgment..

The estate of Frances took an appeal of its $2,500 verdict. The appeal was decided in June of 1919. The appellate

court concluded that while the damages were small, it was "not at liberty" to grant a new trial solely on this basis. This was especially so in terms of economic loss as Frances earned only $7 a day as a seamstress.

Kentucky's first mass tort event had come to a close. There were multiple lawsuits and an equal number (less two) of settlements. Two plaintiffs took their chance at trial. It paid off for the Becker estate, but not that of Frances Wessels.

Ninety years after the Southern Railway crash, there would be an airline disaster in Kentucky. While the events of the tragedies were remarkably different, the litigation pattern was similar.

A Comair commuter plane took off from Lexington's airport early on the morning August 27, 2006. The pilots made a grave error. They were confused as to the runways and took off on a shorter runway used for small jets. While the plane became aloft, its speed was insufficient to fly.

The Comair plane crashed into a nearby berm and burst into flames. Forty-seven passengers and two crew were killed. One of the two pilots survived. The estates of 46 of the passengers entered settlements with Comair.

Only a single plaintiff, the estate of Bryan Woodward, age 39 and of Louisiana, elected to go to trial. The case was tried two years later in federal court in Lexington before Judge Karl Forester. It would be tried first on compensatory damages.

The Woodward estate was awarded damages that totaled $7.1 million. That included $3,000,000 and $2,000,000, respectively, for the consortium interest of his two teenage daughters. There had been proof that Woodward was a devoted father. Comair made a motion to remit the award as excessive Judge Forrester denied the motion and explained the consortium awards were more than just about the loss of time and didn't fit neatly into a mathematical formula.

Then as the parties prepared for a second trial concerning punitive damages, Judge Forrester reversed a prior ruling and entered summary judgment for Comair on that issue. The litigation drug on for a time concerning the issue of attorney fees, but Comair ultimately paid the judgment and the case is fully closed.

There are several other aviation cases that deserve

mention. Jimmy Brink operated the Lookout House restaurant/nightclub in downtown Covington. He'd made it from a prohibition roadhouse into a first class venue that brought in nationally-known entertainment. There was a reason for this. Lookout House was essentially a casino that was backed by the Cleveland arm of the Mafia.

Besides being a crook (Brink testified at the Kefauver hearings in 1951 that he did a little bootlegging), Brink was also an accomplished pilot. He owned a 1950 Beech Bonanza airplane and had some 750 hours of flight time.

Brink made a trip to Miami, Florida on August 2, 1952 to close a real estate deal. Was that the real purpose? It's hard to know. Brink's business dealings were shady. The manager of the Lookout House, Charles Drahmann, was a passenger on the plane. He knew nothing about flying planes.

The pair made their trip without incident leaving from the airport in Boone County. The next day they flew back. Brink landed the plane in Macon, GA and the two men had lunch. The two men took off again and headed north towards Atlanta.

For reasons that aren't clear, some 90 minutes later (it should have only taken 10 minutes), the Brink plane tried to land at the Fulton County Airport in Atlanta. It came in low with the gear down and passed the runway. A short distance later the plane crashed into a river bottom.

The plane went up in flames and both Brink and Drahmann were killed. When the police investigated the crash, they discovered a bag with $16,800 in $100 bills. The IRS seized that cash to satisfy tax liens against Brink, although Brink's brother-in-law later sued and recovered the money.

There was tort litigation concerning this airplane crash. Drahmann's widow (Ann – she would later marry a New York mobster of the Genovese family, "Trigger Mike" Coppolla) sued Brink's estate and alleged negligence by him in operating the plane. She cited proof from pilot witnesses at the Fulton County Airport that indicated the plane flew erratically before crashing.

The case first came to trial in 1955 before Judge Rodney Bryson in Kenton Circuit Court. Bryson directed a verdict for Brink's estate. He concluded there was no competent proof that Brink was even flying the plane at the time of the crash. No one had seen the pair take off from Macon and moreover, there was no way to know why the plane had crashed.

Drahmann's widow appealed. The Kentucky Court of Appeals reversed in January of 1956. Judge Astor Hogg from Harlan wrote that reasonable inferences could be drawn that Brink was flying the plane, notably, that Drahmann had no flight experience. It simply didn't make sense that there was any other conclusion.

Judge Porter Sims was hot about the opinion and dissented that it would have far-reaching consequences. Sims was especially exercised that the majority opinion would permit negligence to be presumed rather than proven. He thought that it was just as likely that Drahmann grabbed the controls of the plane as it was that Brink was negligent. While negligence can be proven by circumstantial evidence, Sims didn't think that surmise or guesswork was enough.

The case returned for a jury trial in November of 1957. Marian Moore was the lawyer for the plaintiff. Thomas Hirshfeld defended the pilot. The jury awarded Drahmann's widow (she was by then now married to Trigger Mike) $90,000 in damages.

Just a few years later in 1966, the diary of Drahmann's widow would be published. She had died in 1962 of suicide in a Rome hotel room while under federal protection after divorcing Trigger Mike in 1960. The diary revealed the inner workings of the mob in Northern Kentucky, it being published after her death in 1968 under the title, *The Syndicate Wife.*

From the drama and intrigue of the Brink crash, we turn to a Central Kentucky plane crash in 1959. Dr. Halbert Leet, a Lexington psychiatrist, operated a "Flying Clinic" in Kentucky in the late 1950s. He would fly his plane to remote parts of Kentucky and provide medical service. It caught the attention of a New York writer, Frank Bancroft, who planned a story about it. A photographer, Daniel Weiner, accompanied Bancroft to Kentucky to see Leet at work.

Leet flew a four-seat plane from Lexington to Pineville on January 26, 1959. Weiner and Bancroft went along for the ride. The conditions were foggy on the return to Lexington.

The plane crashed in a muddy field near the Kentucky River and all on board were killed. The estates of Weiner and Bancroft sued the Leet estate and alleged pilot error regarding the crash. Leet defense blamed the crash on a combination of engine trouble and fog. The plaintiffs replied with eyewitnesses

on the ground that Leet was in radio contact and there was no evidence of engine trouble. A Woodford County jury in March of 1961 awarded Weiner $100,000. Bancroft took a $60,000 award. It was described as the largest verdict ever in that county.

There would be another tragic crash in February of 1982 that would take the life of a promising young oil entrepreneur and his family. David Ball, just 38, was described as good at business by his Louisville lawyer, Frederick Dolt, that he was able to catch "lightning in a bottle." It was predicted he'd be the next John Y. Brown, Jr. . . . or even Paul Getty.

Ball and his family (his wife and children) met tragedy at the Lebanon-Springfield airport. They were traveling in a brand-new Piper Cheyenne airplane. A professional pilot, Doug Baker, was at the controls.

As Baker flew the family home on the evening of February 16, 1982 in extremely heavy fog, the plane crashed into a hillside just short of the runway. All were killed. The damages to the Ball estate were enormous. As the owner of two oil companies, his predicted lost earnings and other damages were blackboarded to the jury at $76,000,000.

The claim against Baker advanced to trial in August of 1984 in Louisville before Judge Ken Corey. The Ball estate argued that Baker should have flown on and landed in Louisville. Baker's estate, represented by Louisville attorney, Alex Rose, countered it was Ball who had directed the plane to land at Lebanon-Springfield. It was theorized that an aggressive and demanding Ball, who lived in Lebanon, wanted to get home with his children. The defense relied on an expert, Charles Berry, a former NASA flight surgeon, who theorized about the "demanding passenger" theory.

A Louisville jury bought it and exonerated the pilot at the first trial. Judge Corey subsequently concluded it was error to have allowed the expert Berry to testify. Why? There were no survivors on the plane and it was mere speculation that Ball had demanded Baker land the plane unsafely. He also ruled that as there was no mechanical error proved on the brand new plane, the crash was the sole result of pilot error. The case would be tried on damages only.

The case was to come to a second jury trial the next summer in 1985. As the second trial was to begin, a settlement was reached. The defense agreed to pay the Ball estate $3.5

million in damages and the case was concluded.

The final aviation verdict (again a tragedy) involved a helicopter accident in Eastern Kentucky. The plaintiff, Donald Greene, was piloting a medical helicopter, a Sikorsky A-76, that was traveling from Breathitt County to the University of Kentucky on June 14, 1999. The conditions were foggy.

The helicopter took off from Julian Carroll Airport in Jackson and crashed into a rugged hillside shortly thereafter. Greene and three passengers died instantly. Greene's estate sued BF Goodrich Avionics and blamed the crash on a faulty gyroscope. The best proof of this was the helicopter's "black box" which recorded Greene 19 seconds before the crash saying, "I think I've lost my gyro."

BF Goodrich Avionics replied that the crash was a function of pilot error, Greene having become spatially disoriented in the bad weather. It also thought the "gyro" comment was irrelevant as sitting in the pilot's seat, Greene couldn't have known there was a gyro problem.

The case was tried for eight days in federal court in Lexington in September of 2002 before Judge Hood. Jerome Skinner of Cincinnati was for the pilot. Arnold Taylor from Covington represented the manufacturer. The jury found BF Goodrich Avionics 100% at fault and awarded the Greene estate damages totaling $1,275,830 for his lost earning capacity. As Greene was killed instantly, that was the only available category of damages then allowed under Kentucky law. As previously discussed earlier in this book, because of the change to Kentucky law in *Martin v. Ohio County Hospital* in 2009 to allow post-death consortium, were the Greene case to be tried today, his widow would have been able to present a post-death consortium claim and not been limited solely to a claim for future lost wages.

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