Journal of Air Law and Commerce

Volume 41 | Issue 3 Article 5

1975

Case Notes

Gerald S. Reamey

Bruce Keplinger

Michael A. Grossman

William Merritt

Case Notes

TORTS—JOINT ENTERPRISE DOCTRINE—A Flying School/Aircraft Owner Is Engaged in a Joint Enterprise with its Student Pilots and Is Vicariously Liable for the Student's Negligent Acts. *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3614 (1975).

On September 9, 1969, Robert W. Carey, a student pilot flying a solo cross-country flight in a plane owned by the operator of the flight school in which he was enrolled, collided with an Allegheny Airlines plane near Fairland, Indiana, destroying both aircraft and killing Carey, the crew of the Allegheny aircraft, and all 78 passengers.[1] Allegheny Airlines, Inc. and G.E.C.C. Leasing Corporation brought suit seeking recovery of damages sustained by their aircraft and engine, and named Forth Corporation, owner of the airplane and operator of the flying school, as a defendant. The trial court, in holding for the defendants, determined that Allegheny Airlines was contributorily negligent in the operation of its aircraft and that neither joint enterprise nor statutory vicarious liability were applicable. The defendants appealed the trial court's decision to the Seventh Circuit Court of Appeals. *Held, reversed*: A flying school/aircraft owner is engaged in a joint enterprise with its student pilots and is vicariously liable for the student's negligent acts.

Imputed negligence has been with the law for many years. Whether called vicarious liability or imputed contributory negligence, the terms used to characterize the parties' relationship, agency, joint enterprise (a type of agency),[2] master/servant relations,[3] and "ultra-

[1] 1970 NTSB REP. AAR-70-15.

[2] Prosser defines joint enterprise in the following way:

> A "joint enterprise" is something like a partnership, for a more limited period of time, and a more limited purpose. It is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under such circumstances that all have an equal voice in directing the conduct of the enterprise. The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest. Whether such a relation exists between the parties is normally a question for the jury, under

hazardous" activity, are familiar legal "fictions" which have allowed the shifting or spreading of liability for the negligent activity from the actual tortfeasor to another party. Courts, supported by public policy arguments, developed these legal fictions to enable recovery by injured parties against the financially responsible principal, rather than effectively denying recovery by forcing personal judgments against the agent.[4]

The logical extension of vicarious liability into aviation has been premised upon the same "deep pockets" reasoning found in the development of vicarious liability in other tort areas. Just as the automobile owner is likely to be more able than the driver to bear the financial responsibility for the negligence of the driver on the owner's business, so the aircraft owner would seem more capable of paying a judgment than the pilot of the plane.[5] As exemplified by the amount of the claim in *Allegheny*,[6] damages sought for air crash-related, tortious acts usually exceed the resources of the estate of a negligent pilot.

Adopting this reasoning from past non-aviation tort cases, courts have developed the principle that the vicarious liability of an

---

proper instructions from the court.
W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72 (4th ed. 1971) [hereinafter cited as PROSSER].

[3] *See generally* PROSSER §§ 69-74.

[4] *Id.*

[5] Current public policy considerations for vicarious liability are reflected by Prosser:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of the employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise which will, on the bais of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so shift them to society, to the community at large.

PROSSER at 459.

[6] 504 F.2d 104, 106-07 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3614 (May 19, 1975). Allegheny Airlines claimed against Forth Corporation for the value of its aircraft, $3,750,000. G.E.C.C. Leasing Corporation's claim was for $250,000, the value of one turbojet engine leased to Allegheny which was destroyed in the crash.

aircraft owner for the actions of the pilot of that aircraft is dependent upon the existence of either a master/servant, bailor/bailee, or principal/agent relationship between the owner and pilot.[7] Unfortunately, the judicial characterization of a flying school/student pilot situation into either master/servant, bailor/bailee, or principal/agent categories, although financially expedient, would require judicial fact-invention. Usually, a student pilot is neither bailee, agent, nor servant to the flying school; he is more often a customer, purchasing the services of an instructor. Reflecting dissatisfaction with the employment of either legal fictions or judicial fact-invention to find the requisite elements of such fictions, many courts have denounced these methods of imputing negligence to an aircraft owner.[8]

Because of the dissatisfaction with the inherent incongruities necessarily a part of the legal "fictions," Congress and the state legislatures formulated statutory vicarious liability provisions with varying degrees of success. The Federal Aviation Act of 1958 (the Act) provides that:

> "Operation of aircraft" or "Operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the

[7] D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954). For similar holdings in non-aviation cases see Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955); Pierce v. Horvath, 143 Ind. App. 278, 233 N.E.2d 811 (1968).

[8] Broyles v. Jess, 201 Cal. App. 2d 841, 20 Cal. Rptr. 355 (1962); Boyd v. White, 128 Cal. App. 2d 641, 276 P.2d 92 (1954); Johnson v. Central Aviation Corp., 103 Cal. App. 2d 102, 229 P.2d 114 (1951); Ross v. Apple, 143 Ind. App. 357, 240 N.E.2d 825 (1968), *reh. den.*, 241 N.E.2d 872 (1968); Haskin v. Northeast Airways, Inc., 266 Minn. 210, 123 N.W.2d 81 (1963). Where not even the greatest stretch of the judicial imagination could cover the distance between reality and a fictional agency, the use of an airplane has occasionally, like the use of an automobile, been considered "ultrahazardous" and the owner has been held liable for the damage caused by its improper use, whether he was present or not. It would seem highly improbable that flying, any more than automobile operation, should continue to bear the label of "ultrahazardous." Surprisingly, some courts continue to resort to the theory that an airplane is a dangerous instrumentality, and this theory persists in the American Law Institute's Restatement of the Law of Torts. Florida regards the airplane as ultrahazardous. Orefice v. Albert, 237 So. 2d 142 (Fla. 1970). The use of such an anachronistic device is, however, dying and the great majority of courts have expressly refused to consider the airplane ultrahazardous any longer. D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954); Boyd v. White, 128 Cal. App. 2d 641, 276 P.2d 92 (1954); Johnson v. Central Aviation Corp., 103 Cal. App. 2d 102, 229 P.2d 114 (1951); Wood v. United Air Lines, Inc., 32 Misc. 2d 955, 223 N.Y.S.2d 692 (1962).

> capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.[9]

This language or very similar language has been adopted by eighteen states in their own statutes,[10] in an attempt to resolve the problems concomitant with common law vicarious liability. Federal and state courts have, however, had difficulty deciding whether these statutes create or imply a civil remedy against the aircraft owner for third parties injured through the negligence of a pilot who does not own the aircraft he flies.[11]

After enactment of the Federal Aviation Act of 1958, but before the incorporation by states of similar statutory language, many litigants sought a federal forum for their actions. In one such case, *Moungey v. Brandt*,[12] the District Court of the Western District of Wisconsin refused to grant a federal remedy without finding compelling national interest, inadequate state or administrative remedy, and that the plaintiff was in a class protected by the statute. The *Moungey* court's reaction was foreseeable if the approval of the remedy had been viewed as opening the door to plaintiffs seeking statutory vicarious liability in federal courts. The federal forum had

---

[9] 49 U.S.C. § 1301 (26) (1970).

[10] CODE OF ALA. TIT. 4, § 20(25) (1940); CONN. GEN. STAT. REV. § 15-34(20) (1972); DEL. CODE ANN. TIT. 2 § 501 (1974); ILL. REV. STAT. ch. 15½, §§ 22.11, 22.42a-42o (1963); IND. CODE § 8-21-3-1(h) (1971); IOWA CODE § 328.1(14) (1946); KY. REV. STAT. § 183.011(16) (1970); ME. REV. STAT. ANN. TIT. 6 § 3(24) (1964); MASS. LAWS ANN. ch. 90, §§ 35(j), 49B-49R (1975); MICH. COMP. LAWS § 259.22 (1967); MINN. STAT. § 360.013(10) (1966); MISS. CODE § 61-1-3(j) (1972); MONT. REV. CODES ANN. § 1-102(10), *as amended*, (Supp. 1974); NEB. REV. STAT. § 3-101(11) (1970); N.H. REV. STAT. ANN. § 422:3(23) (1968); N.C. GEN. STAT. § 63-1(16) (Supp. 1974); N.Y. GEN. BUS. LAW § 251 (McKinney 1968); VT. STAT. ANN. TIT. 5, § 2(20) (1972).

[11] Courts have refused to imply vicarious liability from state or federal statutory language in McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971); Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389 (5th Cir. 1970); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681 (D.C. Colo. 1969); Yelinek v. Worley, 284 F. Supp. 679 (E.D. Va. 1968); Moungey v. Brandt, 250 F. Supp. 445 (W.D. Wis. 1966); Moody v. McDaniel, 190 F. Supp. 24 (N.D. Miss. 1960); Nachsin v. De La Bretonne, Inc., 17 Cal. App. 3d 637, 95 Cal. Rptr. 227 (1971); Ferrari v. Byerly Aviation, Inc., 131 Ill. App. 2d 747, 268 N.E.2d 558 (1971); Guillen v. Williams, 27 Misc. 2d 575, 212 N.Y.S.2d 556 (1961). Courts have implied vicarious liability from similar or identical language in Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955); Sosa v. Young Flying Service, 277 F. Supp. 554 (S.D. Tex. 1967); Lamasters v. Snodgrass, 248 Iowa 1377, 85 N.W.2d 622 (1957); Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1953).

[12] 250 F. Supp. 445, 451 (W.D. Wis. 1966).

been available to vicarious liability claims in previous years[13] because of the willingness of some courts to imply a civil remedy.[14] Some state courts encouraged imputing negligence to the aircraft owner because of the owner's ability to ". . . spread the risk through insurance and carry the cost thereof as part of [the] costs of doing business."[15] Statutory vicarious liability on the state level may have the effect of easing the blind rush into federal court, especially when finding vicarious liability based on the Act has proven so uncertain.

At least some state courts have been willing to impute the pilot's negligence to the aircraft owner on the basis of state statutory language similar to that contained in the Federal Aviation Act of 1958.[16] The most notable example of state implication of liability is a New Hampshire case, *Hoebee v. Howe*.[17] In *Hoebee*, the relevant statute was identical to the Federal Civil Aeronautics Act of 1938,[18] the predecessor to the present Act. Justice Blandin considered legislative history and fashioned his opinion along those lines:

> It seems to us from reading our act that the intent of our Legislature is clearly to place responsibility on the owner, even though he be without control, for the conduct of one to whom he entrusts the plane.[19]

In a similar interpretation of an Iowa statute, the Iowa Supreme Court in *Lamasters v. Snodgrass*[20] held the aircraft owner vicariously liable under code language virtually identical to that of the Act

[13] *See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Moody v. McDaniel, 190 F. Supp. 24 (N.D. Miss. 1960).

[14] *See* note 11 *supra*.

[15] Johnston v. Long, 300 Cal. 2d 54, —, 181 P.2d 645, 651 (1947) (Traynor, J.).

[16] Lamasters v. Snodgrass, 248 Iowa 1377, 85 N.W.2d 622 (1957); Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1953).

[17] 98 N.H. 168, 97 A.2d 223 (1953).

[18] The Federal Civil Aeronautics Act of 1938 provided:

> Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

Federal Civil Aeronautics Act of 1938, ch. 601, § 1, 52 Stat. 973 (now Federal Aviation Act of 1958, § 101).

[19] 98 N.H. 168, —, 97 A.2d 223, 225 (1953).

[20] 248 Iowa 1377, 85 N.W.2d 622 (1957).

of 1958.[21] Although state courts have also interpreted their respective statutes as implying no vicarious liability,[22] the strong precedent of *Hoebee* lends weight to any subsequent state imposition of statutorily imputed negligence. Indeed, federal court denial of statutory vicarious liability would not serve to discredit state approbation of similar language, and a federal court decision imposing liability under the Act could be taken as tacit approval of state courts' similar treatment of their own statutes.

The application of statutory vicarious liability might have foreclosed the result adopted in *Allegheny* had the intent of the various legislatures been consistently interpreted.[23] But, like others before it, the *Allegheny* court did not base its decision on statutory grounds alone. The court relied heavily on common law, reflecting a distrust of statutory resolution. This return to the common law has revitalized agency theories, including joint enterprise and its basic definition.[24]

Joint enterprise is but one of the common law approaches to vicarious liability, the existence of which is premised in large part upon the existence of a unique relationship between the parties involved giving rise to a mutual duty. Because the underlying basis for imputing liability to one party for the negligence of another lies in this mutual duty, the relationship is analogous to partnership.[25] The fiction thus evolved from the pseudo-agency interaction of the participants has been most singular in its application.

The most common employment of joint enterprise is in automobile settings, but it has been limited even within that context. Relatively few courts have attempted to impute the negligence of the driver to his passenger.[26] Although the doctrine seems particu-

---

[21] *Id.* at —, 85 N.W.2d at 626.

[22] Ferrari v. Byerly Aviation, Inc., 131 Ill. App. 2d 747, 268 N.E.2d 558 (1971); Guillen v. Williams, 27 Misc. 2d 575, 212 N.Y.S.2d 556 (1961).

[23] Aviation cases dealing with statutory vicarious liability have often based their decisions in large part on legislative intent. *See, e.g.*, Yelinik v. Worley, 284 F. Supp. 679, 681 (E.D. Va. 1968); Hoebee v. Howe, 98 N.H. 168, —, 97 A.2d 223, 225 (1953).

[24] *Compare* Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3614 (May 19, 1975) (using the majority definition of joint enterprise) *with* Shoemaker v. Whistler, 513 S.W.2d 10 (Tex. 1974) (using the Restatement definition of joint enterprise).

[25] *See* note 2 *supra*.

[26] Manley v. Horton, 414 S.W.2d 254 (Mo. 1967); Straffus v. Barclay, 147

larly suited for that purpose, more often, the negligent driver has raised joint enterprise as a bar to recovery by the passenger.[27] The restricted application of joint enterprise in this largest area of its use is sharply contrasted by the claim of the plaintiffs in *Allegheny* that the financially secure but absent "passenger" could be reached through the negligent pilot. The dormant possibilities of joint enterprise as a vehicle for recovery against the aircraft owner began to stir to life under the understanding tutelage of an imaginative plaintiff's attorney. Nor did the court consign that attempt to its historical resting place, but looked upon the invocation of such an unusual, if obvious, adhibition with apparent favor.

The definition of joint enterprise used by the *Allegheny* court is that adopted by a majority of jurisdictions.[28] Its basic elements are a community of interest in the object and purpose of the undertaking, an equal right to direct and govern the conduct of the operation, and a contract, either expressed or implied.[29]

Tex. 600, 219 S.W.2d 65 (1949); Jones v. Kasper, 109 Ind. App. 465, 33 N.E.2d 816 (1941); Ahlstedt v. Smith, 130 Neb. 372, 264 N.W. 889 (1936); Fox v. Lavender, 89 Utah 115, 56 P.2d 1049 (1936).

[27] The use of joint enterprise as a bar to recovery is reflected in PROSSER:

> In by far the greater number of cases, the question has been one of contributory negligence, and the driver's misconduct has been imputed to the passenger to bar his own recovery. 'Joint enterprise' is thus of importance chiefly as a defendant's doctrine, imputing the negligence of another to the plaintiff; and as such, it has not been slow to draw the wrath of the plaintiff's partisans.

PROSSER at 476.

[28] PROSSER at 477. This definition of joint enterprise is commonly applied, although it differs in one material term from that proposed by the American Law Institute. The Restatement definition requires, additionally, a community of pecuniary interest in the common purpose.

RESTATEMENT (SECOND) OF TORTS § 491, comment c (1965):

> The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

[29] The court obtained these elements from Jones v. Hernandez, 148 Ind. App. 17, 263 N.E.2d 759 (1970). The court's use of this particular case for its definition of joint enterprise is somewhat incongruous in its factual setting. *Jones* dealt with joint enterprise in a non-vehicular context, deriving its definition of joint enterprise from Keck v. Pozorski, 135 Ind. App. 192, 191 N.E.2d 325 (1963), an automobile case. This mixed factual application of a common definition suggests that the *Allegheny* court could not or would not discern any appreciable difference in the elements of joint enterprise, whether used in an automotive, non-automotive, or aviation case.

The *Allegheny* court found the first requisite element of joint enterprise by considering that the student and the flying school were engaged in a project with a "community of interest" in obtaining a pilot's license for Carey.[30] The court held that, while Carey's interest in obtaining such a license was obvious, the school also had a vested interest in the venture in that it hoped to realize additional business from Carey as a pilot and other potential pilots who might be drawn to the school for training.[31] The flying school and student would, under the court's approach, always have this community of interest because both are economically and objectively concerned with obtaining a goal that is important to each of them, notwithstanding the fact that the goal is pursued for different reasons. The majority of American courts, in traditional non-aviation cases, have, however, not allowed the common use of a vehicle to meet the community of interest requirement.[32] Nor has joint enterprise liability been applied when the parties involved had independent goals.[33] Apparently, the *Allegheny* court disregarded these prior cases in favor of a new concept of community of interest.[34]

---

[30] 504 F.2d at 114.

[31] 504 F.2d at 114. In finding a community of interest, the court said,

> As to the "community of interest in the object or purpose" requirement, both Carey and Forth were seeking the common objective of obtaining a private pilot's license for Carey. Carey's interest was obvious, his personal convenience and to satisfy his desire to learn to fly. Forth's interest in Carey's success was reflected in the additional business to be derived from Carey as a pilot and other potential pilots who might be drawn to Brookside for training. *Id.*

[32] Pope v. Halpern, 193 Cal. 168, 223 P. 470 (1924); Bryant v. Pacific Elec. R. Co., 174 Cal. 737, 164 P. 385 (1917); Coleman v. Bent, 100 Conn. 527, 124 A. 224 (1924). Prosser describes the trend away from such broad definition:

> One group of cases, now definitely very much in the minority and almost passing out of the picture, have found a joint enterprise in the mere association of the driver and the passenger in the use of the vehicle for any purpose in which they have a common interest of any kind.

PROSSER at 477.

[33] Kepler v. Chicago, St. P., M. & O. R. Co., 111 Neb. 273, 196 N.W. 161 (1923) (passenger driven as accommodation to mail letters); Hilton v. Blose, 297 Pa. 458, 147 A. 100 (1929) (on way to bowl on different teams in different games); Conner v. Southland Corp., 240 So. 2d 822 (Fla. App. 1970) (going to work for same employer on different jobs); Kuser v. Barengo, 70 Nev. 66, 254 P.2d 447 (1953) (delegates to convention).

[34] In its opinion, the court cited no authority for its position in finding a community of interest in the purpose. Apparently, the court assumed that the logic of its position was so compelling as to invite no discussion, but when considered in the context of automobile joint enterprise cases, the consequences of

Community of interest in the purpose of the venture can be found in a flying school/student relationship only through a considerable broadening of the bounds of previous definition.[35] The court's opinion recognized a dichotomy of interest in the purpose seen by Forth Corporation and that seen by Carey,[36] but described a most tenuous connection, the desire of the school and the student to license Carey, as sufficient to form the necessary "community" of interest.[37] Such a conclusion seems a reversion to the factual fictions disdained by courts in the previous vicarious liability situations.[38] Virtually any fact setting involving two persons doing business could adapt to meet the requirements for "community of interest" if the *Allegheny* court's emasculation of that requirement finds wide acceptance.[39]

Automobile joint enterprise precedent was inapplicable in deciding whether the parties in *Allegheny* met the second joint enterprise requirement, an equal right to direct and govern the conduct of the operation. In the joint enterprise cases involving automobiles, both parties to the enterprise were present at the time of the tortious act.[40] The *Allegheny* court, however, unequivocally renounced a requirement of joint presence at the time of the wrongdoing because of the hazardous nature of the undertaking and Carey's status as a

---

such an obvious broadening of the definition of joint enterprise seem momentous and certainly worthy of further explanation.

[35] The "community of interest in the object or purpose" of flying lessons is likely to be nonexistent. The flying school, realistically, is interested in the pecuniary aspects of its business, whether with regard to the tuition paid by the student or the desire for future business. The student is interested in learning to fly and receiving the required license, for whatever his personal reasons. It is a broad generalization to state that any common incidental interest fulfills the requirement for this element of joint enterprise. If joint enterprise is to remain a viable means of imputing negligence, it must retain a more narrow focus than the *Allegheny* court allowed, or be used to turn the most casual relationships into situations of potential liability.

[36] *See* note 31 *supra.*

[37] 504 F.2d at 114.

[38] PROSSER at 459.

[39] To date there appears no case so broad in its acceptance of "community of interest" standards as *Allegheny*. Because the court held a prima facie case of joint enterprise had been established when it could have held defendant liable without joint enterprise application, the possibility exists that this case is to be interpreted as applying only to aviation cases in a narrow factual setting.

[40] PROSSER at 478-80.

student pilot.[41] The court reasoned that mutual control did exist: Carey had control over the goal of obtaining his license, and was in physical control of the aircraft at the time of the collision. Forth Corporation had control over Carey as his instructor and had an affirmative obligation under federal air regulations to supervise and control all facets of Carey's training.[42] In most automobile joint enterprise cases, the passenger need not have a right to take physical control, but must have a right to direct the manner in which the vehicle is driven.[43] The *Allegheny* court concluded that the parties did have an equal voice in controlling the aircraft's flight, even without the physical presence of the instructor/owner, and that such mutual control extended to the common objective of obtaining Carey's private pilot's license.[44]

---

[41] 405 F.2d at 114. The court said,

> Moreover, in view of the hazardous nature of Carey's undertaking and his status as a student pilot, we reject any notion which urges that equal control can be established only by a showing of joint presence of the parties at the time of the alleged wrongdoing. *Id.*

The precise meaning of the court's statement is unclear. No authority for this conclusion was cited by the court and the position is apparently unique in aviation cases. The court's reference to the hazardous nature of the undertaking raises questions concerning the possible application of "ultrahazardous" vicarious liability reasoning by the court. Although a holding that flying is ultrahazardous would be anachronistic, it would be more in consonance with precedent than inferring that the element of mutual control may be assumed under hazardous conditions. Indeed, applied to an automobile setting, this theory would allow the mutual control requirement to be met when a solitary driver assumed control of the automobile under dangerous road conditions or while that driver is inexperienced. Such a connotation produces difficult questions concerning how much experience is necessary and what conditions are safe enough to overcome the presumption of mutual control. For a discussion of "ultrahazardous" precedents see note 8 *supra.*

[42] The court said,

> Carey had control over the goal of obtaining his private pilot's license in that he alone had the power to determine his rate of progress by the frequency and timing of his flying. Forth had control over Carey which emanated from the instructor-student relationship. In addition, Forth was under an affirmative obligation under the federal air regulations to supervise and control all facets of Carey's training.

504 F.2d at 114.

[43] Pope v. Halpern, 193 Cal. 168, 223 P. 470 (1924); Churchill v. Briggs, 225 Iowa 1187, 282 N.W. 280 (1938); Carroll v. Hutchinson, 172 Va. 43, 200 S.E. 644 (1939). Prosser summarizes such a relationship by saying, "It is not the fact that he does or does not give directions which is important in itself, but rather the understanding between the parties that he has the right to have his wishes respected, to the same extent as the driver." PROSSER at 479-80.

[44] 504 F.2d at 114. The requirement for mutual control was found by the

The court easily found the final element of contract.[45] The very basis of the relationship between a flying school, such as Forth Corporation, and a student like Carey usually initiates with an express written contract, and may contain additional implied contractual terms.[46]

The *Allegheny* court was not the first to deal with vicarious liability for the aircraft owner.[47] In *Herrick v. Curtiss Flying Service, Inc.*,[48] it was held that without reference to servant and master or principal and agent, liability could be imposed on the owner of the airplane for a collision occurring while the plane was in the control of a student pilot to whom it had been rented.[49] Unlike the court in *Allegheny*, the *Herrick* court did not discuss the possibility of joint enterprise, but the court noted that something beyond the available legal fictions was necessary to hold owners vicariously liable.[50]

As demonstrated by ample statutory history, the desirability of replacing the usual common law approaches to vicarious liability has been accepted for some time, even though the success of such legislative measures has been very limited.[51] Common law vagaries and

---

court, although the absence of any agent of Forth Corporation in the aircraft makes the position difficult at best. Although the court does not mention such a possibility, the finding of mutual control may rest in part on the distinct facts of this case. The absolute necessity of allowing a student to fly solo; increased control of the aircraft by ground personnel using radio; and the omnipresent federal air regulations contribute to a sense that no pilot, and particularly no student pilot, flies completely alone. Enhancing this view is the accepted position that mutual *right* of control is the required element, not mutual physical control. If a doubt exists as to whether the parties have agreed to shared control, the question becomes one for the jury.

[45] 504 F.2d at 114.

[46] Typically, flying schools and students enter into written contracts expressing financial arrangements and liability of the parties. It should not be assumed that every such contract would supply the requisite contractual relationship necessary for joint enterprise. Although the element of contract has seldom been discussed in detail, the contract should logically relate to the purpose of the enterprise. A contract only for financial arrangements between the school and student does not go to the purpose of the venture or liability, and might be said to have nothing to do with the joint enterprise. Use of implied contractual agreements would usually supply the element in any event, but whether any contract will suffice has not been directly decided.

[47] *See* note 11 *supra*.

[48] 1932 U.S. Av. 110 (N.Y.).

[49] *Id.* at 125.

[50] *Id.* at 122-25.

[51] As early as 1939, the National Conference of Commisioners on Uniform State Laws adopted a Uniform Aviation Liability Act which provided for strict

inconsistent statutory usage indicate general dissatisfaction with the legal results compelled by case precedent and code interpretation. A court can hardly be faulted for attempting a universal application of vicarious liability in the small area of general aviation. Of course, any court assuming such a crusading role must expect a most rigorous inspection of its work and must adequately prepare for the logical challenge it will engender.

When taken in the context of vicarious liability precedent, the attempt of the *Allegheny* court to apply joint enterprise becomes difficult to fathom. The elements of joint enterprise are clearly enumerated by cases and authors. The only break with tradition in the definition of joint enterprise is that reflected in the American Law Institute's Restatement of Torts.[52] The action of the court in *Allegheny* is quite clearly moving against the trend by broadening the already inclusive majority definition. Particularly in its finding of a community of interest in the purpose of the venture, the court has accepted a number of dubious presumptions.[53] Surely any interest on the part of the flying school in seeing its students licensed is incidental to its primary financial interest.[54] A community of interest shared by Forth Corporation and Carey would be incomplete without joint interest in this important feature. Finding the element of common interest in the way accepted by the court would allow virtually any relationship to be characterized as a joint enterprise solely on the ground of some incidental area of mutual benefit. An all-encompassing view of a legal fiction cannot be compatible with its initial purpose. For whatever policy considerations, joint enterprise cannot be more acceptable than the previously rejected legal fictions if it is predicated upon sweeping generalizations that draw in factual contexts without discrimination.

---

liability in airplane crashes. The Act met with such opposition that it was never offered for adoption.

[52] For the Restatement definition of joint enterprise, *see* note 28 *supra*. The addition of a community of pecuniary interest to the elements of joint enterprise would narrow the definition and restrict its application. While not accepted by a majority of jurisdictions, some recent cases in aviation have used the Restatement definition, lending support to the trend away from joint enterprise. *See, e.g.*, Shoemaker v. Whistler, 513 S.W.2d 10 (Tex. 1974).

[53] *See* note 35 *supra*.

[54] Substantial evidence was offered at trial and reiterated in Plaintiff's appellate brief to the effect that the financial interest of Forth Corporation was its overriding concern. Brief for Appellants at 93-94, Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974).

The court's view of mutual control stands in a stronger position. Right of control is a possible exception to actual presence in the student/instructor setting. Even without the physical presence of an instructor, the pilot is arguably within an enveloping shroud of regulations, flight plans, instructions, and radio control which make him susceptible to control from the school. Accepting the "right to control" language as sufficient to meet the elemental test, physical presence could be seen as an incidental feature useful in proof of joint enterprise.

The court's finding of the third element of contract is premised upon solid grounds.[55] Indeed, if the other elements of joint enterprise are present, it seems unlikely that a court will deny submission of the issue to the jury regardless of whether an express contract exists. In a flying school/student situation, implied contracts abound and should more than adequately fulfill the requirement even when no express contract for services exists.

The Seventh Circuit Court of Appeals decided *Allegheny* on the grounds of joint enterprise and statutory vicarious liability. In using a statute whose language tracks that of the Federal Aviation Act of 1958,[56] the court added the weight of its opinion to those who would claim vicarious liability under one of the eighteen state statutes now in effect.[57] With statutory precedent for such a decision clear,[58] the court went beyond the necessary findings and held that a prima facie case of joint enterprise had been shown. The directive tone of the opinion assuages any doubts that the common law decision is mere dicta. The court was manifestly willing to proceed on the joint enterprise theory alone. But the statutory language is not so ambiguous as to require a buttress; only two of the eighteen states with such statutes have expressly denied that they provide a civil reme-

---

[55] *See* note 46 *supra.*

[56] The Indiana Code § 8-21-3-1(h) (1971) states:

> Operation of aircraft or operate aircraft—the use of aircraft for the purpose of air navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state.

[57] *See* note 10 *supra.*

[58] *See* note 11 *supra.*

dy.[59] One must assume that the court deliberately went beyond statutory liability in an effort to promote common law remedies. Instead of strengthening and encouraging further use of the legal fictions, and especially joint enterprise, the lack of authority and paucity of expressed reasoning by this court defeated the venture before it had a fair chance to compete. The opportunity for a persuasive case of joint enterprise in aviation was seriously undermined.

Public policy does seem to demand a workable legal solution to the problem faced by survivors with no viable financial expectations. Joint enterprise, like the other legal fictions, is well adapted to resolving these difficulties. The whole concept of legal fictions is based in large part on the humanistic requirements and needs of difficult legal circumstances. The answer is not redress through bad law, but strengthening of statutory application. The dynamism needed is best furnished through legislative enactments that can accurately reflect the desires of the public. The solution is not to make the common law unrecognizable, but rather to make use of statutory potential in effecting a sound humanitarian result. The strength of the common law lies in its maleability, not in unrealistic distortion.

Gerald S. Reamey

TORTS—MANUFACTURER'S NEGLIGENCE—The Buyer of a Used Airplane Can Recover in Negligence from the Airplane's Manufacturer for Cost of Repair, Decline in Value and Loss of Use of the Aircraft, Absent Any Accident. *Omni Flying Club, Inc. v. Cessna Aircraft Co.*, —Mass.—, 315 N.E. 2d 885 (1974).

The Omni Flying Club purchased a Cessna demonstrator aircraft with 150 flight hours[1] from an independent dealer. At the time of the sale, Omni desired the remainder of the aircraft's warranty, and the dealer undertook to obtain that warranty for Omni.[2] The lan-

[59] Ferrari v. Byerly Aviation, Inc., 131 Ill. App. 2d 747, 268 N.E.2d 558 (1971); Guillen v. Williams, 27 Misc. 2d 575, 212 N.Y.S.2d 556 (1961).

[1] Omni Flying Club, Inc. v. Cessna Aircraft Co., — Mass. —, 315 N.E.2d 885 (1974).

[2] *Id.* The warranty appeared in regular print in unnumbered pages behind the index of the aircraft owner's manual.

guage of the warranty excluded all other warranties, express or implied, including any warranty of merchantability.[3] One year later, the original turbocharger on the aircraft was replaced after only 580 flight hours had been registered on the plane.[4] After another thirty hours, the second turbocharger failed and Omni replaced the entire engine, whose expected life was 1400 hours.[5] Omni sued Cessna in a Massachusetts court on express warranty, implied warranty, and negligence, but at the close of the evidence, Omni waived the warranty counts and stood on the allegation of negligence.[6] The jury awarded damages to Omni for the cost of repair of the aircraft, for its decline in value, and for the loss of use of the aircraft while it was being repaired.[7] Cessna appealed this verdict to the Supreme Judicial Court of Massachusetts, asserting that the warranty disclaimer should bar any recovery by Omni, and that, in any case, loss of use was not a proper element of damages.[8] *Held, affirmed*: In an action for negligent manufacture, a buyer of a

[3] The warranty also provided that Cessna's only obligation was to replace defective parts shipped to its place of business in Kansas; that no other person could assume any other obligation for Cessna; and that repair of the aircraft by any unauthorized personnel would cancel the warranty. The record is unclear as to when Omni received a copy of the manual that contained the warranty. *Id.* at —, 315 N.E.2d at 886-87.

[4] *Id.*

[5] All parties agreed that the failure of the second turbocharger was caused by oil starvation which was, in turn, caused by the reversal of a T-valve. The finding of the jury was that the T-valve had been negligently reversed by Cessna at the factory. *Id.*

[6] Omni's attorney dropped the warranty counts because, at the time of trial, privity between the buyer and seller was a condition precedent to any warranty action. The aircraft was not purchased from Cessna, but from an independent dealer. This privity requirement has been abrogated by statute. *See* note 37 *infra.* A California court has held that the implied warranty of merchantibility extends from the manufacturer to the purchaser of a used aircraft. Lindberg v. Coutches, 167 Cal. App. 2d 828, 334 P.2d 701 (Super. Ct. 1959). *See* note 70 *infra.*

[7] The jury awarded damages in the amount of $19,500. This figure included $10,000 for the decline in value of the aircraft, $8,640 for the cost of repair, and an amount for the loss of use of the aircraft for 61 days. — Mass. at —, 315 N.E.2d at 886, 890. On Cessna's motion for new trial, the judge found that this verdict was excessive, and ordered a new trial on the issue of damages unless Omni agreed to a remittitur of $5,178. When the judge learned that Cessna would appeal even this lesser amount, he let the original verdict stand. The appellate court found that this was an abuse of discretion, violating MASS. ANN. LAWS ch. 231, § 127 (1958).

[8] Cessna also alleged that the evidence was insufficient to support a finding of negligence and that the statute of limitations should bar Omni's action. — Mass. at —, 315 N.E.2d at 886.

used aircraft can recover for decline in value, cost of repair, and loss of use of the aircraft, even when there has been no accident.[9]

In allowing recovery to buyers of defective products, the courts have used three general theories: negligence, strict liability, and warranty. The first two are a part of tort law, but the third is governed by contract law. The question which the *Omni* case presents is whether tort law is suited for the area of purely economic loss[10] even though recovery for pecuniary loss has traditionally been the province of warranty. Courts have been hesitant to apply negligence[11] or strict liability[12] to manufacturers for purely economic losses; they seem reluctant to relax the privity requirement for these losses.[13]

Recovery against a manufacturer for its negligence originated in personal injury cases,[14] and recovery for property damage has been limited to damage caused by an accident which reasonably could have caused personal injury.[15] The case law in Massachusetts prior to *Omni* opposed recovery in negligence for pecuniary loss. In 1956, a federal court interpreting Massachusetts law held that a suit

---

[9] The term "accident" means an unintended violent physical occurrence which either causes direct physical injury to a person or has the potential of immediately causing such an injury. The gradual deterioration of a turbocharger by oil starvation would not be an accident.

[10] The terms "purely economic loss" and "pecuniary loss" denote the monetary damage which a buyer sustains solely from the failure of a product to fulfill his expectations. Where there has been an accident, the loss is not purely economic. *See* Comment, *Purely Economic Loss in Products Liability*, 4 SETON HALL L. REV. 145 (1972).

[11] "[W]here there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to recovery against mere negligence, and so have denied recovery." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 665 (4th Ed. 1971). *See also* Note, *Manufacturer's Liability for Economic Loss*, 66 COLUM. L. REV. 917, 929-31 (1966). Potential for a contrary holding can be found in a dictum of the Wisconsin Supreme Court in Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

[12] *See* text accompanying notes 24-36 *infra.*

[13] *See* text accompanying notes 37-42 *infra.*

[14] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[15] International Harvester v. Sharoff, 202 F.2d 52 (10th Cir. 1953) (interpreting Colorado law); Fentress v. Ven Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (Super. Ct. 1958); *see also* Comment, *Purely Economic Loss in Products Liability*, 4 SETON HALL L. REV. 145 (1972).

for purely economic losses caused by the manufacturer's negligence failed to state a claim upon which relief could be granted.[16] A Massachusetts court in *McDonough v. Whalen*[17] recently reaffirmed the position that any recovery in negligence for economic loss requires some accident. The appellate court held in that case that there could be no liability in tort for simple pecuniary loss caused by defective or inferior merchandise.[18] In *McDonough*, sewage escaped across the plaintiff's land because of the defendant's negligence. On appeal, the Supreme Judicial Court of Massachussetts agreed with the appellate court on the issue of purely economic losses,[19] but held that the escape of sewage was an accident which made the damage to the property more than just pecuniary.[20]

Other states have consistently followed the rule that there should be no recovery in negligence for purely economic losses.[21] Historic-

[16] Karl's Shoe Stores v. United Shoe Mach. Corp., 145 F. Supp. 376 (D. Mass. 1956).

> Even though this loss is alleged to have been ultimately due to the negligence of defendant, the facts set forth fail to bring this case within the limits of the decided cases extending the scope of the liability of manufacturers to remote vendees of their products, and hence fails to state a claim upon which relief can be granted.

Id. at 377.

[17] McDonough v. Whalen, — Mass. App. —, 304 N.E.2d 199 (1973), *rev'd on other grounds*, — Mass. —, 313 N.E.2d 435 (1974).

[18] McDonough v. Whalen, — Mass. App. —, 304 N.E.2d 199 (1973).

[19] McDonough v. Whalen, — Mass. —, 313 N.E.2d 435 (1974).

[20] *Id.* It appears that the court is stretching the term "accident." *See* Note 9, *supra*.

[21] In Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965), the rule is stated that negligence must cause damage to person or other property to be actionable. It is further stated that there is no liability for pecuniary loss in a negligence action against a manufacturer. 3 Ohio St. 2d at 140, 209 N.E.2d at 588.

Amodeo v. Autocraft-Hudson, 195 N.Y.S.2d 711 (Sup. Ct. 1959), *aff'd*, 207 N.Y.S.2d 101 (App. Div. 1960), limited the manufacturer's liability for negligence to a consumer to personal injury and direct damage to physical property.

Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956), held that an auto manufacturer's duty was limited to the exercise of reasonable care to insure that the car was free from defects which might reasonably be expected to produce bodily injury or damage to other property.

Transworld Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955), limited the liability in negligence of a manufacturer of aircraft engines which were purchased through a dealer to damages caused by an accident attributable to latent defects in the engine.

See also Lucette Originals, Inc. v. General Cotton Converters, Inc., 8 N.Y. App. Div. 2d 102, 185 N.Y.S.2d 854 (1959); Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481 (1934); Nebelung v. Norman, 14 Cal. 2d 647, 96 P.2d 327 (1939). These cases exemplify the uniformity in the decisions.

ally, recovery has been allowed only in cases in which the burden of the loss on the plaintiff was judged to be too harsh. When the courts find no onerous harshness, the loss is permitted to "lie where it falls."[22] The consensus is that negligence is not a proper theory for purely economic loss; the pecuniary disappointment of a purchaser is not a proper occasion for recovery in negligence,[23] for such an injury, by itself, is neither harsh nor onerous.

While no court has previously seemed to permit recovery under a negligence theory, a few jurisdictions have disdained the application of warranty law and allowed recovery in strict liability for purely economic losses. The first case granting damage in a strict liability action was *Santor v. A & M Karagheusian, Inc.*,[24] in which the New Jersey Supreme Court allowed recovery for the decline in value of carpeting sold to the plaintiff, absent any warranty. Several other jurisdictions have followed this quick[25] path to awarding damages to a plaintiff.[26] Using strict liability as a vehicle to recovery is simpler than warranty law because it permits the courts to sidestep the warranty provisions of the Uniform Commercial Code (U.C.C.),[27] but most courts have refused to take the strict liability path. The U.C.C. was carefully drafted to regulate the relationships between the buyer and seller. By using strict liability to circumvent the U.C.C.,[28] the courts substitute judicial legislation and avoid this carefully drafted statute.

---

[22] O. HOLMES, THE COMMON LAW 94 (1881). "The general principal of our law is that loss from accident must lie where it falls, . . . "

[23] *Id.* at 96. "[T]he prevailing view is that [the State's] cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo."

[24] Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1964). *See* Note, 79 HARV. L. REV. 1315 (1966).

[25] Using a strict libaility theory is quick because it avoids the issue of liability which pervades the remainder of tort law. It can be argued that this quickness is the overriding factor in deciding whether to use strict liability. That strict liability better serves one of the prime goals of tort law—compensating the victim—cannot be denied.

[26] Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W.2d 800 (1970); Air Prod. & Chem., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973); *cf.* Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

[27] *See* text accompanying notes 43-59 *infra.*

[28] A commentator on New Jersey law asserts that the U.C.C. provisions have been pushed aside by the doctrine of strict liability in tort. Rapson, *Products Liability under Parallel Doctrines: Contrasts between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1964).

Strict liability was intended to cover those areas where other tort law is inadequate. Personal injury and serious harm to other property caused by accident are examples of such areas. In these cases the need to compensate the victim has been held to be superior to the need to respect the contractual agreement between buyer and seller. When physical injury occurs, it would be strange to deny recovery because of a previous warranty agreement. A reasonable buyer would not allow a seller to excuse himself from liability for physical injuries caused by the fault of the seller. A seller should not absolve himself via contract of liability for defects which are adjudged to be physically dangerous to the user. Therefore, when personal injury or accidental property damage are involved, the modern trend is not to allow manufacturers to hide behind their disclaimers of warranty.[29] But when the only loss is economic and there has been no hazardous occurrence, this same consideration is not present. The Restatement (Second) of Torts limits the application of strict liability to physical harm.[30] Strict liability should apply to property loss only when the property has been damaged by a dangerous defect in the product.[31]

The leading case expounding the non-applicability of strict liability to pecuniary losses is *Seely v. White Motor Co.*[32] The Su-

---

[29] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J.2d 358, 161 A.2d 69 (1960); Price v. Gatlin, 241 Or. 315, 405 P.2d 502 (1965). In *Price* the Oregon Supreme Court explicitly stated that the social and economic reasons that courts have given for extending strict liability are not persuasive in the case of the disappointed buyer. *Id.* at 242, 405 P.2d at 503.

[30] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

> (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.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[31] Walker v. Decora, Inc., 225 Tenn. 504, 471 S.W.2d 778 (1971).

[32] Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). This case is analyzed in Comment, *Seely v. White Motor Co.: Retrench-*

preme Court of California, speaking through Chief Justice Traynor, rejected the extension of strict liability to permit recovery for a purely economic loss. The court said that strict liability is appropriate only when warranty rules cease to function and that warranty rules function well in a commercial environment. Since warranty rules have not ceased to function, holding a manufacturer strictly liable for a plaintiff's economic losses would expose the manufacturer to liability "for damages of unknown and unlimited scope."[33] Traynor wrote that sellers should not be compelled by the law to insure that each buyer is receiving exactly what he subjectively thinks he is buying. A common justification for using the doctrine of strict liability is that the plaintiff must not be forced to internalize the great costs of the accident. In the case of a buyer merely disappointed with the quality of his purchase, there is no such unbearable cost to the plaintiff. As to this buyer, Traynor stated that "he can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."[34] The concurring and dissenting opinion in *Seely*[35] argued that the warranty sections of the U.C.C. should be applied only within the world of commerce and that small consumers should be protected with strict liability.[36] All of the justices seemed to agree that strict liability should not be applied to pecuniary losses suffered in the commercial environment of relatively equal bargaining positions.

Warranty law provides the third theory under which a buyer may recover in product liability. A court using this theory may adjudicate the buyer's rights under the warranty, once one is proven to exist. There are three basic requirements which a plaintiff must

---

ment in California on Strict Products Liability, 52 VA. L. REV. 509 (1966). The writer states that tort law is not properly applied to economic losses.

[33] Seely v. White Motor Co., 63 Cal. 2d 16-17, 403 P.2d 151, 45 Cal. Rptr. 23 (1965). The *Santor* and *Seely* cases are compared in Note, 19 VAND. L. REV. 214 (1965).

[34] Seely v. White Motor Co., 63 Cal. 2d 18, 403 P.2d 151, 45 Cal. Rptr. 23 (1965).

[35] *Id.* at 19, 403 P.2d at 152, 45 Cal. Rptr. at 24. This portion of the opinion is discussed in Note, *Products Liability: What Type of Loss Will the Doctrine of Strict Liability in Tort Cover?*, 17 HASTINGS L.J. 385 (1965).

[36] Seely v. White Motor Co., 63 Cal. 2d 27, 403 P.2d 157, 45 Cal. Rptr. 29 (1965). It is doubtful whether a buyer such as Omni would be a small consumer. *See* note 66 *infra.*

meet to prove that a warranty exists. The first requirement is to establish privity between the plaintiff and the manufacturer. In *Omni* there is an intermediary dealer between the flying club and Cessna, but since Massachusetts eliminated the privity requirement,[37] there would be no problem with privity if this case arose today.[38] The second requirement is that the notice statute of the U.C.C. must be fulfilled.[39] If a buyer waits an unreasonable time before pursuing his rights under the warranty, those rights are lost. The third requirement is to prove that the statute of limitation has not run.[40] The key question in the case of defective products is when the statute begins to run. The *Omni* court held that the action arose on the date that the negligently manufactured product was sold, not on the date it was manufactured.[41] Once all of these requirements have been satisfied, the issue of whether the warranty has been disclaimed or waived is reached.[42]

U.C.C. section 2-316 applies to the limitation of warranties.[43] It provides that any limitation of the warranty of merchantability must mention merchantability and must be conspicuous if in writing. Further, any limitation of the warranty of fitness must be both conspicuous and in writing.[44] The purpose of these provisions is to avoid any disclaimer that may surprise the consumer.[45] The type of damages involved in the *Omni* case is consequential economic

---

[37] *See* MASS. STAT. ch. 670, § 1 (1971) which amended MASS. ANN. LAWS ch. 106, § 2-318 (1974). This elimination of the privity requirement is a better course to recovery than the stretching of negligence law. *See* text accompanying notes 60-76 *infra*.

[38] *See* McDonough v. Whalen, — Mass. App. —, 304 N.E.2d 199, 201 (1973).

[39] MASS. ANN. LAWS ch. 106, § 2-607(3)(a) (1958) states:

> Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of any breach or be barred from any remedy; . . .

[40] MASS. ANN. LAWS ch. 260, § 2A (1974) states that a cause of action must be brought within three years of the time when the cause of action arose. (At the time of this case, the period was two years.)

[41] Omni Flying Club, Inc. v. Cessna Aircraft Co., — Mass. —, 315 N.E.2d 885 (1974).

[42] For a discussion of disclaimers under the U.C.C., see Ganz, *Limitation of Liability under the Sales Provisions of the Uniform Commercial Code*, 14 DEPAUL L. REV. 73 (1964).

[43] MASS. ANN. LAWS ch. 106, § 2-316 (1958).

[44] The primary objective of § 2-316 is to avoid fine print waivers.

[45] *See* Uniform Laws Comment to MASS. ANN. LAWS ch. 106, § 2-316 (1958).

damages.[46] U.C.C. section 2-719 states that consequential damages may be excluded or limited unless such an action is unconscionable.[47] While the section states that limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, it concludes that limitation of damages when the loss is commercial is not unconscionable.[48] An example of a valid limitation is restricting the buyer's remedy to repair or replacement of non-conforming goods.[49] In the *Omni* case, Cessna's attempt to limit Omni's remedy to repair at Cessna's factory would be valid under the U.C.C. if the language of the limitation were found to be conspicuous.

The U.C.C. defines "conspicuous" in section 1-201 (10).[50] Language in the body of a form must be in larger or different color type in order to be conspicuous.[51] Thus it would seem that the limitation on warranties which appeared in the regular print of the warranty in the unnumbered pages behind the index in the owner's manual would not meet the test of conspicuousness. Were the disclaimer not conspicuous, however, the case still might not be settled. In *Holcomb v. Cessna Aircraft Co.*[52] the exact warranty before the court in the *Omni* case was considered. In this case, the Fifth Circuit held that the disclaimer, while not conspicuous, might not surprise a buyer who had owned four other Cessnas.[53] In *Holcomb* the circuit court reversed a jury verdict allowing recovery

---

[46] MASS. ANN. LAWS ch. 106, §§ 714, 715(2) (1958). For purposes of § 714, the term "consequential damages" includes

> (a) any loss resulting from general or particular requirements and needs which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

[47] MASS. ANN. LAWS ch. 106, § 2-719(3) (1958). Unconscionability is defined at MASS. ANN. LAWS ch. 106, § 2-302 (1958).

[48] MASS. ANN. LAWS ch. 106, § 2-719(3) (1958).

[49] MASS. ANN. LAWS ch. 106, § 2-719(1)(a) (1958). *See* Bayne, *Replacement v. Repair: A Consumer's Brief Challenges General Motors*, 24 SYRACUSE L. REV. 639 (1973).

[50] MASS. ANN. LAWS ch. 106, § 1-201 (1958).

[51] *Id.*

[52] Holcomb v. Cessna Aircraft Co., 439 F.2d 1150 (5th Cir. 1971), *cert. denied*, 404 U.S. 827 (1971).

[53] *Id.* at 1157-58.

to the plaintiff for the decline in value of his negligently constructed Cessna.[54]

The policy of the courts has not been favorable toward the limitation of warranties.[55] The aim is to restrict the limitation of warranties to only those cases in which it is clearly the intent of the parties to proceed only under express warranty.[56] There have been cases in which courts have denied recovery because of the existence of an express disclaimer of which the contracting parties were aware.[57] The commercial forum is the proper setting for disclaimers. In *Omni*, the parties had a relatively equal ability to inspect the goods and insure against any defects.[58] The U.C.C. seeks to require full and fair disclosure of all limitation of warranties within the context of freedom of contract, but freedom of contract itself still remains.[59] In the proper case a warranty may be limited.

In *Omni v. Cessna* the Massachusetts courts allowed recovery for purely economic loss caused by negligence beyond any warranty of merchantability. Surprisingly, the Supreme Judicial Court of Massachusetts neither presented arguments nor cited authority to support its decision that recovery should be allowed in negligence for economic loss, absent any accident.[60] The *Omni* court cited

---

[54] *Id.*

[55] *See* California State Bar Committee on the Commercial Code, *The Uniform Commercial Code*, 37 CALIF. ST. B. J. 143-45 (1962). Many courts have limited the effect of such clauses by:

(1) construing them strictly, Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954);

(2) finding the clause inconsistent with an express warranty in the same transaction, Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3rd Cir. 1951);

(3) finding the buyer had no notice of the clause or stating that disclaimer clauses are against public policy and of no effect, Henningsen v. Bloomfield Motors Inc., 32 N.J.2d 358, 161 A.2d 69 (1960); 8 U.C.L.A. L. REV. 658 (1961).

[56] Note, *The Uniform Commercial Code and Greater Consumer Protection under Warranty Law*, 49 KY. L. REV. 240, 254 (1960).

[57] Southwest Forest Indus., Inc. v. Westinghouse Electric Corp., 422 F.2d 1013 (9th Cir. 1970), *cert. denied*, 400 U.S. 902 (1971); Cherokee Inv. v. Voiles, 433 P.2d 427 (Colo. 1968).

[58] Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 325 (1963).

[59] *See* Cudahy, *Limitation of Warranty under the Uniform Commercial Code*, 47 MARQ. L. REV. 127, 142 (1963).

[60] The issues presented to the court concerning negligence treated only factual questions. Neither side addressed the point that even if negligence were established, settled case law would deny recovery.

Antokol v. Barber[61] to support its holding that recovery could be allowed for loss of use, but *Antokol* is clearly distinguishable because it involved an auto collision, not pecuniary loss as is present in *Omni*.[62] The court cited no case in which a disappointed buyer was permitted to recover in negligence because the product fell below his expectations. The discussion in this note of prior law shows that before the *Omni* case negligence had not been extended to purely economic losses. Thus, the court's holding in *Omni v. Cessna* allowing recovery for purely economic losses caused by negligence is against the authority in Massachusetts and in other states.

With negligence eliminated as an avenue of recovery, the only other major tort area under which Omni could recover is strict liability. Would the Massachusetts court have been more consistent with settled law by allowing recovery under strict liability? The holdings are not so uniform in this area. Most courts deny recovery in strict liability for pecuniary losses, but a few permit recovery. Two problems militate against the application of strict liability to the situation in *Omni*: first, Massachusetts is not a strict liability jurisdiction;[63] and secondly, the underlying philosophy of strict liability does not justify the inclusion of purely economic losses among the proper areas for strict tort liability.[64] As Traynor stated,[65] strict liability should be used only in cases when warranty laws cease to function. The commercial setting of the *Omni* case was not such an area. The *Omni* case concerned the purchase of an airplane by a flying club from a dealer. There was no great disparity in position between the parties. The product was not an everyday necessity.[66] The purchaser had the ability, the experience, and the time

[61] Antokol v. Barber, 248 Mass. 392, 143 N.E. 350 (1924).

[62] *Id.* at 396-97, 143 N.E. at 351-52. *See also* Dearden v. Key, 304 Mass. 659, 24 N.E.2d 644 (1939).

[63] Maloney, *Current Trends in Aviation Products Liability Law*, 577 INS. L. J. 53, 83 (1971).

[64] *See* the discussion in Hawkins Const. Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973), in which Nebraska refused to extend strict liability to any type of property damage. *See also* 7 CREIGHTON L. REV. 396 (1974).

[65] *See* the discussion of Seely v. White Motor Co., *supra* notes 32-36 and accompanying text.

[66] On January 4, 1975, a new federal warranty law became effective, the Magnuson-Moss Warranty-Federal Trade Commission Act, 15 U.S.C. § 2301 (1974). The liberal provisions of this act apply to commerce in "consumer products," which are defined as tangible personal property, distributed in commerce and normally used for personal, family, or household purposes. This new act would not

to compare his prospective purchase with other aircraft and other dealers. The equities by which courts justify the extension of recovery beyond warranty to strict liability were not present in *Omni*.

After discarding negligence and strict liability as theories for deciding the case, the only remaining theory, and the proper one, is warranty. How would Omni be handled under warranty law?[67] In *Omni* there was a sale, an express warranty, and an attempted disclaimer of all warranties. If the disclaimer were successful, then Omni could not recover. In applying the principles of warranty law[68] to the *Omni* case, the key issue would be whether the clause limiting the warranty is conspicuous.[69] The facts of the case show that Cessna's warranty appeared on pages at the back of the owner's manual. But the *Holcomb*[70] case indicates that this Cessna warranty might not unduly surprise a person with previous experience in buying airplanes. Presumably, the Omni Flying Club was an experienced aircraft purchaser.

No matter which result is reached on the issue of the validity of the disclaimer, the case is best decided under contract law.[71] Warranty law was developed to handle just such cases as *Omni*.[72] To bring in tort law both confuses the issue and short-circuits a carefully constructed body of law.[73] Tort law should be confined to the

change the law concerning sales of aircraft. Since this consumer protection legislation was not extended to cover the buyers of airplanes, it may be inferred that Congress assumed that a fairly equal bargaining position exists between the buyers and sellers of aircraft.

[67] In the actual trial, Omni waived all of its counts save the negligence count. This would not preclude the court from basing its decision in warranty, however. *See* FED. R. CIV. P. 54(c).

[68] *See* the discussion of applicable U.C.C. provisions, *supra* notes 39, 43-51 and accompanying text.

[69] An implied warranty of fitness does extend through the sale of a used airplane. Such a warranty could be avoided only by an express disclaimer. Lindberg v. Coutches, 167 Cal. App. 2d 828, 334 P.2d 701 (Super. Ct. 1959).

[70] *See* the discussion of Holcomb v. Cessna Aircraft Co., *supra* notes 52-54 and accompanying text.

[71] MASS. ANN. LAWS ch. 106, § 1-201(10) (1958) states that the issue of conspicuousness is to be decided by the court.

[72] Just as tort law should not encroach upon purely economic losses, warranty law is ill-suited for personal injury cases. For a discussion of the tension between warranty and tort, see Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966).

[73] Inglis v. American Motors, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965), quoting Prosser to the effect that in an action involving product liability based on negligence:

area of accidents and personal injuries;[74] the best arena for handling purely economic losses is warranty law.

The best view is that an action for recovery of economic loss is contractual in nature.[75] The law of sales was formulated to cover such a loss. A seller should be allowed to contract certain risks with the buyer. To allow tort law to enter into this area would hinder the seller's flexibility and would harm the entire commercial context. A prudent seller would have to increase the cost of his product to provide funds to satisfy the claims of disappointed buyers such as Omni. The opportunity for the seller to be flexible is an important one in transactions that do not involve protection from dangerous defects. The unpredictable impact of tort law would hinder the ability of manufacturers and retailers to arrive at a price for their goods that would be fair for all concrened.[76] The U.C.C. has been drafted to resolve commercial loss claims. It should be used except when overriding considerations, such as personal physical injury or accident, justify the introduction of tort law. Extending the doctrines of negligence and strict liability to purely economic losses is a mistake.

Bruce Keplinger

> The only kind of damage not included is pecuniary loss. In other words, loss of the benefit of the bargain. . . . that kind of pecuniary loss is still, so far as I can see, limited to contracts between the parties, and the usual rule that for negligence there is no liability for mere pecuniary loss of a bargain [still prevails].

Prosser, CLEVELAND B. ASS'N J. (May, 1965) 174-75.

[74] For discussion of the logical superiority of warranty law over tort law in the area of economic loss, see Note, *Manufacturer's Liability to Remote Purchasers for 'Economic Loss' Damages—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966); Note, *Economic Loss from Defective Products*, 4 WILLIAMETTE L. REV. 402 (1967).

[75] *See* Sales, *An Overview of Strict Tort Liability in Texas*, 11 HOUSTON L. REV. 1043, 1061-62 (1974).

[76] *See* Speidel, *Products Liability, Economic Loss and the U.C.C.*, 40 TENN. L. REV. 309, 327 (1973).

TORTS—ATC LIABILITY—Aircraft Clearance Given Was One Not Reasonably Designed to Insure the Aircraft's Safety and Therefore Constituted Negligence. *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1975).

On the morning of November 21, 1967, George Todd took off alone from Jacksonville, Florida under Visual Flight Rule (VFR) conditions.[1] After takeoff he was issued an Instrument Flight Rule[2] (IFR) clearance to the Ashland, Alabama Airport. Birmingham, Alabama Approach Control,[3] the control tower for Ashland, cleared Todd for an approach to the Ashland airport but after circling the field Todd decided he would not land, apparently because of a lack of visibility.[4] After reporting that he was unable to land, Todd requested a clearance approach to Anniston, Alabama. At the time of that request Todd was experiencing limited visibility and was flying directly over terrain designated as mountainous.[5] Nevertheless, Birmingham issued him a cruise clearance[6] approach to Anniston at 4,000 feet without first determining the position of the aircraft.[7] This clearance gave Todd the authority to descend from his current altitude of 4,000 feet anytime during the remainder of the flight. Todd then requested a change in destination from Anniston to Talladega, Alabama, and again without first determining the po-

[1] VFR conditions are best thought of as those involving "good" weather. 14 C.F.R. § 91.105 (1975). Regulations (c) and (d) (1) state that for aircraft operations within a control zone a ceiling of at least 1,000 feet is required and take-offs or landings are prohibited whenever ground visibility is less than three statute miles. For a more detailed explanation of IFR and VFR, *see generally* Note, *Government Liability for Negligence of Air Traffic Controllers*, 13 S. TEX. L.J. 41 (1972).

[2] Under IFR, the Air Traffic Controller (ATC) directs virtually every movement (*e.g.*, altitude, speed, rate of descent, and glide slope) of the aircraft by radio commands to the pilot. This system is necessary when the pilot's visibility is impaired by clouds, fog, rain, or other adverse weather and for commercial aviation. 14 C.F.R. §§ 91.115-91.129 (1975).

[3] Birmingham Approach Control controlled the Ashland, Anniston and Talladega area at lower levels. 384 F. Supp. at 1287.

[4] Visibility was approximately one mile in light rain. 384 F. Supp. at 1287.

[5] Part 95 of the Federal Aviation Regulations, 14 C.F.R. § 95.13 (1975) designates the Ashland, Anniston, Talladega area as the Eastern United States Mountainous area.

[6] The word cruise in a clearance indicates to the pilot that a climb to or a descent from the indicated altitude may be made at the pilot's discretion. 384 F. Supp. at 1288.

[7] 384 F. Supp. at 1287.

sition of the aircraft, Birmingham control issued Todd another cruise clearance at 4,000 feet.[8] Todd then reported leaving the 4,000 foot level and approximately seven minutes later[9] collided with the Cheaha Mountains on a heading which was carrying him directly toward the Talladega Airport. The collision, which occurred at 2,100 feet, instantly killed Todd and completely destroyed the plane. Todd's survivors brought this survival and wrongful death action under the Federal Tort Claims Act (FTCA)[10] against the United States. They claimed that the Air Traffic Controller's (ATC's) clearance, which enabled Todd to descend from his altitude at anytime and was issued without a concurrent warning of the weather obscured mountains, constituted negligence and was the proximate cause of Todd's death. The Government claimed that Todd, in the exercise of reasonable care, should have been aware of the mountains and that the cruise clearance, without a concurrent warning, did not constitute negligence. *Held*: The clearance given was one not reasonably designed to insure the aircraft's safety and therefore constituted negligence,[11] although Todd's failure to be aware of the mountains constituted contributory negligence and thus precluded recovery.[12] *Todd v. United States* 384 F.Supp. 1284 (M.D. Fla. 1975).

In reaching the decision that giving the clearance and failing to warn of the weather[13] obscured mountains constituted negligence on

---

[8] *Id.* at 1288.

[9] At 10:53 a.m. Todd reported leaving 4,000 feet. At 11:00 a.m. Todd inquired about the weather and then gave no reply to the Talladega's fixed based operator's response. 384 F. Supp. at 1288.

[10] 28 U.S.C. 1346(b) (1970) reads as follows:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[11] 384 F. Supp. at 1292.

[12] The accident occurred in Alabama, which follows the common law rule that contributory negligence operates as a complete bar to recovery. 384 F. Supp. at 1294.

[13] The court viewed the clearance given and failure to warn as interdependent issues which must be viewed together. The strong implication was that had the

the part of the United States, the court continued the widespread trend toward expanding the liability of the ATC[14] and the United States for air catastrophies.[15] Liability was first established, for all practical purposes[16] in the landmark case of *Eastern Air Lines v. Union Trust Co.*[17] in which it was held that as a result of the FTCA[18] individuals may recover from the federal government for negligent acts of the ATC. In that case, two planes collided after being cleared by the ATC to land on the same runway at approximately the same time. The government claimed that it could not be held liable because it had not consented to be sued for negligent acts of the ATC. The government based its claim on the theory that the ATC performed discretionary acts which are expressly excluded from potential liability under section 1346(b) of the FTCA.[19] In holding that the discretionary function exception of the FTCA was not applicable, the court declared that ATC actions are operational[20]

ATC issued a warning of the mountain with the cruise clearance then the clearance given would not have been negligent. 384 F. Supp. 1292.

[14] The ATC is the function within the Federal Aviation Administration charged with the safe conduct of aircraft flight. ATC activities have been defined to include: 1) taking appropriate action to prevent air collisions, 2) maintaining an orderly flow of air traffic, and 3) furnishing the necessary information and advice the pilot needs to safely operate his aircraft. Smerdon v. United States, 135 F. Supp. 929, 931 (D. Mass. 1955). For the statutory basis of the ATC's responsibility see 49 U.S.C. § 1348 (1970).

[15] *See generally* Levy, *The Expanding Responsibility of the Government Air Traffic Controller*, 36 FORDHAM L. REV. 40 (1968) and Note, *The Expanding Liability of the Air Traffic Controller*, 39 J. AIR L. & COM. 599 (1973).

[16] An interesting question is whether an air traffic controller could have been sued as an individual prior to this time. Curiously, none of the notes or comments dealing exclusively with ATC liability contain any discussion of that liability prior to *Eastern Airlines.*

[17] 221 F.2d 62 (D.C. Cir. 1955).

[18] 28 U.S.C. § 1346(b) (1970).

[19] The pertinent portion of 28 U.S.C. § 2680 (1970) which disallows suits against the Government when its employees are performing discretionary functions, is as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to:
>
> (a) Any claim based upon an act or omission or an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[20] *See* 221 F.2d at 75. The distinction the court makes between discretionary and operational is as follows:

and that the FTCA permits suit against the Government for negligent operational actions.

As could be expected, *Eastern Air Lines*[21] opened the floodgates for a multitude of suits against the government to recover for the negligent actions of the ATC. The basic history of these actions, as well as the standard of duties[22] which evolved from them, were set forth in *American Airlines v. United States.*[23] The court in *American Airlines*[24] began its historical analysis by looking at a mid-air collision case, *United States v. Schultetus.*[25] In that case the court failed to find negligence on the part of the United States despite the fact that the ATC had issued a landing clearance that resulted in a mid-air collision.[26] The decision was based on the proposition that the pilot and not the ATC was directly responsible for the operation of the aircraft.[27] The court in *Schultetus* explained that by maintaining a proper watch, the pilots could have avoided the collision; therefore the actions of the ATC could not have proximately caused the crash. The court also emphasized that the primary responsibility for the operation of the aircraft did not terminate after the receipt of a clearance from the ATC,[28] since the clearance issued was permissive in nature and did not relieve the pilot from exercising reasonable care in executing the provisions of the clearance. Therefore, when the pilot had the direct responsibility to avoid a collision, as was the case under VFR conditions,[29] that responsibility did not terminate merely because a clearance had been issued from the tower.[30]

The court in *American Airlines* then continued its historical

> It was discretionary to decide to operate the control tower, but once that decision was made the day to day acts necessary to carry out that decision by the Air Traffic Controllers are operational and thus not exempt from liability under the discretionary examination of the F.T.C.A. 221 F.2d at 77.

[21] 221 F.2d 62 (D.C. Cir. 1955).

[22] For both the pilot and the A.T.C.

[23] 418 F.2d 180 (5th Cir. 1969). The *Todd* case quoted extensively from several sections of the *American Airlines* opinion.

[24] *Id.*

[25] 277 F.2d 322 (5th Cir. 1960).

[26] The descending pilot was flying under VFR conditions and was warned by the ATC of another aircraft in the vicinity. 277 F.2d at 322.

[27] 277 F.2d at 326.

[28] *Id.* at 327.

[29] For a list of cases supporting this proposition see note 56 *infra.*

[30] *See generally* S. Speizer, Preparation for Aviation Negligence Cases at 397.

analysis by noting that there is one situation in which the pilot is not held directly responsible for the operation of the aircraft. This situation, which occurs when the pilot is unaware of the facts he needs in order to operate the aircraft safely, was illustrated in *Hartz v. United States.*[31] In that case, the failure of the ATC to warn properly a small private plane preparing to take off behind a DC7 of wake turbulance, resulted in the take-off crash of the small plane. In clearifying the *Schultetus* holding that a pilot is legally responsible for the operation of his aircraft, the *American Airlines* court emphasized that before a pilot can be held legally responsible for his aircraft he must know, or in the exercise of reasonable care be held to have known, those facts that were material to the safe operation of the aircraft.[32] The fifth circuit in *American Airlines* reaffirmed this position by expressly approving the language used in *Ingham v. Eastern Airlines.*[33] In *Ingham*, the court found ATC liability when the ATC failed to report to the pilot a drop in visibility. This drop brought the existing weather conditions dangerously close to minimum visibility required for landing, and was considered by the *Ingham* court to be a critical change, which, in the interest of safety, should have been reported to the crew. The court declared that had the pilot known of this change he might have decided to direct the aircraft to another city rather than attempt the landing that resulted in disaster.[34] Furthermore, the court in *Ingham* emphasized that the final decision to land is left to the discretion of the pilot and the failure of the ATC to provide him the pertinent information needed to make that decision proximately caused the accident.

Clearly, the distinguishing feature in finding liability in *Hartz*[35] and *Ingham*[36] and not finding liability in *Schultetus*[37] was that in *Schultetus*[38] the pilot was (or in the exercise of reasonable care

[31] 387 F.2d 870 (5th Cir. 1968).
[32] *Id.* at 873.
[33] 373 F.2d 227 (2d Cir. 1967).
[34] *Id.* at 236.
[35] 387 F.2d 870 (5th Cir. 1968).
[36] 373 F.2d 227 (2d Cir. 1967).
[37] 277 F.2d 322 (5th Cir. 1960).
[38] *Id.*

should have been) aware of the danger and in *Hartz*[39] and *Ingham*[40] he was not. This distinction provided the framework from which the *American Airlines* court set forth the four standards of duty for pilots and the ATC. They were reiterated by the court in *Todd*:[41]

1. The pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation.
2. Before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known, these facts which were then material to its safe operation. Certainly, the pilot is charged with that knowledge which in the exercise of the highest degree of care he should have known.
3. The air traffic controller must give the warnings specified in the manuals.
4. The A.T.C., whether required by the manuals or not, must warn of dangers reasonable apparent to him but not apparent in the exercise of due care to the pilot.[42]

The *Todd* court, while acknowledging that the clearance given and the duty of the ATC to warn of the possible obstruction of the mountains were interdependent issues which must be viewed together, held that there was a duty to warn even though the obstruction of the mountains should have been equally obvious to Todd in the exercise of due care.[43] The court implied that this duty to warn arose under the fourth standard of duty set forth in *American Airlines*.[44] This is a misinterpretation, however, of both that standard and the implications of the *American Airlines*[45] case itself.

In *American Airlines*[46] a plane crashed when it failed to maintain

[39] 387 F.2d 870 (5th Cir. 1960).

[40] 373 F.2d 227 (2d Cir. 1967).

[41] 384 F. Supp. 1284 (M.D. Fla. 1975).

[42] 418 F.2d at 193. In addition to these four standards, *American Airlines* sets forth a fifth standard that was not included in the *Todd* opinion.

> Determined by the facts of the particular case, due care may require an air traffic controller, over and beyond the requirements of the manuals, to delay clearance for a take-off or landing. If, however, a clearance is duly granted the operation of the aircraft is the sole responsibility of the pilot, with which the air traffic controller is not to interfere except as specifically required by the FAA Air Traffic Manuals.

Id. at 193.

[43] 384 F. Supp. at 1292.

[44] 418 F.2d 180 (5th Cir. 1969).

[45] *Id.*

[46] *Id.*

a sufficient altitude as it completed its landing approach during a thunderstorm. American Airlines claimed that the ATC allowed it to descend 255 feet below the elevation of the runway and that a downdraft from the thunderstorm made it impossible to regain the proper altitude needed for landing. Although the court did not find the presence of a downdraft, the case implied that even if there was a downdraft, the crew was in the same position as the ATC to know of a possible downdraft in a thunderstorm and consequently there could be no liability.[47] As pointed out by the court, the key question was whether any actions or omissions by the ATC misled the pilots and adversely affected their ability in the exercise of the highest degree of care to have foreseen the possibility of such a force.[48] In finding no such actions or omissions, the court emphasized that nothing transmitted or omitted by the ATC caused the aircraft to descend to such a low altitude that the crash became *inevitable*.[49] Consequently, the key consideration in *American Airlines*[50] was that even had there been a downdraft which had prevented the plane from acquiring the necessary altitude needed for a safe landing, the pilot, in the exercise of due care, should have been aware of such a possibility; hence, any failure of ATC to warn of the possibility could not have been a proximate cause of this crash.

The concept that the ATC's duty to warn turns on whether the danger is apparent to the pilot (or would have been apparent in the exercise of due care) is illustrated in many cases of ATC liability. For example, in *Coatney v. Berkshire*,[51] two planes collided under VFR conditions after the ATC failed to warn the pilot of the converging courses of the two aircraft. The court found the ATC to be free of liability and held that both pilots should have monitored the control tower and become familiar with the other's position. The court also pointed out that with visibility of 15 miles both pilots should have maintained an adequate lookout, which would have prevented the collision. The decision in *Coatney v. Berkshire*[52] was typical of a multitude of cases involving air catastrophies under

[47] *Id.* at 194, 195.
[48] *Id.* at 193.
[49] *Id.* at 195.
[50] *Id.* at 180.
[51] 500 F.2d 290 (8th Cir. 1974).
[52] *Id.*

VFR conditions. As the court explained in *Coatney*,[53] the law is well settled that under VFR conditions the primary responsibility for the operation of the aircraft rests with the pilot, regardless of the traffic clearance.[54] Other courts have reached the same decisions (no liability for the ATC under VFR conditions) because the pilot has the same ability to view the approaching aircraft as does the ATC.[55] These cases all indicate that under VFR conditions the pilot and not the ATC must be held responsible for any collisions between aircraft.[56]

In addition to the collision cases under clear weather conditions, two of the cases that best illustrate the concept that the ATC's duty to warn turns on whether the danger is apparent to the pilot are the landing accident cases of *Blount Brothers Corp. v. Louisiana*[57] and *Harris v. United States*.[58] In *Blount*,[59] the failure of the ATC to warn the pilot of a displaced runway and a seven foot mound of construction sand did not constitute negligence because the conditions were published in the *Notice to Airmen*[60] and the pilot, in the exercise of reasonable care, should have been aware of the condition. In *Harris*,[61] the failure of the ATC to warn the pilot of a power line obstruction on the runway approach was negligent, because the ATC knew that the pilot was unfamiliar with the area and did not know of the obstructions (nor could have known of them in the exercise of reasonable care).

Therefore, the *Todd*[62] conclusion that failure to warn of the moun-

[53] *Id.*

[54] *Id.* at 292.

[55] In Hamilton v. United States, 497 F.2d 370 (9th Cir. 1974) the court pointed out that in VFR cases the pilot is in much better position to view other aircraft than the ATC.

[56] Tilley v. United States, 375 F.2d 678, 682 (4th Cir. 1967). *See also* United States v. Miller, 303 F.2d 703 (9th Cir. 1962), *cert. denied*,371 United States 955 (1963); Hamilton v. United States, 497 F.2d 370 (9th Cir. 1972); United States v. Wiener, 335 F.2d 379 (9th Cir. 1964); United States v. Schulteus, 277 F.2d 322 (5th Cir. 1960).

[57] 333 F. Supp. 327 (E.D. La. 1971).

[58] 333 F. Supp. 870 (N.D. Tex. 1971).

[59] 333 F. Supp. 327 (E.D. La. 1971).

[60] *Notice to Airmen* was publicized to the aviation public when the FAA published the notice in the Airmen Aviation Manual. Blount Brothers subscribed to manual but neither the pilot nor co-pilot consulted the notices in the manual before take-off.

[61] 333 F. Supp. 870 (N.D. Tex. 1971).

[62] 384 F. Supp. 1284 (M.D. Fla. 1975).

tainous area and that descent might prove dangerous, when Todd, under the exercise of reasonable care, should have been aware of the situation himself was a clear departure from both the fourth standard of *American Airlines*[63] and applicable case law.[64] It was a result that could only be explained by adding a fifth standard of duty (to the four delineated in *American Airlines*),[65] and that was precisely what the *Todd* court did. The court noted:

> Determined by the facts of the case, due care requires an ATC to issue clearances in accordance with FAA manuals and over and beyond the requirements of the manual the clearances issued must be reasonably designed to insure the safety of the aircraft flight.[66]

[63] 418 F.2d 180 (5th Cir. 1969).

[64] *See also* Dickens v. United States, 378 F. Supp. 845 (S.D. Tex. 1974) where failure to warn of wake turbulence was a proximate cause of crash because the pilot could not have foreseen that a larger plane had landed just before him; Black v. United States, 441 F.2d 741 (5th Cir. 1971) where the failure of the operator to warn the pilot of the presence of the storm could not be regarded as a proximate cause of the crash because the pilot discovered the storm himself; Neff v. United States, 420 F.2d 115 (D.C. Cir. 1969) where the control tower's failure to warn of an approaching storm was not negligence because the crew should have been aware of the weather conditions and anticipated the storm. *But see* Stork v. United States, 430 F.2d 1104 (9th Cir. 1970) where ATC granted a take-off clearance in zero visibility and failed to warn pilot of the extreme danger involved in such a flight. The court held that the pilot's apparent knowledge of the dangerous conditions does not obviate the need for a warning from the ATC. However, in Spaulding v. United States, 455 F.2d 222 (9th Cir. 1972) the Ninth Circuit reached the opposite result (no duty) in a similar factual situation and limited *Stork* by stating that the clearance given in *Stork* was a violation of the Federal Regulation which forbids a chartered airplane from taking off in zero visibility. (14 C.F.R. § 42.55); *see also* United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967) where the court held that the ATC had a duty to repeat a warning regarding wake turbulence when the pilot was proceeding to take-off before the time required for turbulence to dissipate in *full view* of the ATC.

[65] 418 F.2d 180 (5th Cir. 1969).

[66] 384 F. Supp. at 1291. It should be noted that this is clearly a different standard than the fifth standard set forth in *American Airlines* (*see* note 42 *supra*). The fifth standard in *American* states that there are some situations in which the ATC should delay clearance for a take-off or landing. That standard says nothing to the effect that the clearance, once given, should be reasonably designed to insure the safety of the aircraft. The point of *American Airlines* was that even if the ATC had permitted the plane to descend to a level where the downdraft effects of a thunderstorm made it impossible to regain the proper altitude needed for a safe landing, there would be no liability because the pilot was in the same position to know of the possible downdraft effects as the ATC. Thus, despite the fact that a clearance, which allows a plane to descend some 255 feet below the runway during a thunderstorm, would have to be considered "one not reasonably designed to insure the safety of the aircraft" the court in *American Airlines* determined that there would be no liability in this situation. Therefore, it must be concluded that the new *Todd* standard does extend the ATC's potential liability beyond the five standards set forth in *American Airlines.*

This fifth standard, which finds liability without regard to whether the pilot knew or in the exercise of due care should have known of the danger that caused the plane to crash, appears to eliminate the requirement of determining whether the failure to warn was a proximate cause of the crash. In eliminating this question of proximate cause, the Todd court has greatly expanded the potential liability of the ATC.

The reason that the courts have failed to find liability for failure to warn in the VFR cases[67] is because the pilot is able to view the entire situation himself so that the failure to warn by another party cannot be regarded as the proximate cause of the crash.[68] Similarly, when a pilot who is flying under poor weather conditions actually discovers the danger, the failure to warn cannot be regarded as the proximate cause of the crash. As the court noted in *Black v. United States*,[69] the failure of the ATC to warn the pilot of the presence of a storm when the pilot himself had discovered it, could not be regarded as the proximate cause of the crash.[70] Only when the danger

[67] Some commentators contend (*See* note, *The Expanding Liability of the Air Traffic Controller*, 39 J. AIR L. & COM. 599, 604-08 1973) that the reason the courts are more likely to find liability in the IFR case (as opposed to the VFR case) is one of control. Under IFR the ATC controls the activity of the aircraft at all times and under VFR the ATC only controls the aircraft while it is in a designated control zone. Control zone is defined as a circular area with a radius of five miles and any extension necessary to include instrument approach and departure paths, 14 C.F.R. § 71.11 (1973). Therefore, because the pilot has more control in the VFR situation, he has a greater responsibility in preventing air collisions than in the case (IFR) where the pilot has relinquished much of the control of his aircraft to the ATC. This analysis breaks down, however, when one considers that even in IFR cases the courts maintain that the pilot is still the person directly responsible for the operation of the aircraft. Both *Todd* and *American Airlines* were IFR cases and yet both contend that the pilot is directly responsible for the operation of the aircraft. When it comes to pilot responsibility these two cases make no distinction between the IFR and VFR situations. Furthermore, the control argument is also lacking because many of the VFR collisions occur within the control zone where the ATC does have control of the aircraft. *See* Coatney v. Berkshire, 500 F.2d 290 (8th Cir. 1974) where the collision occurred while the planes were within the control zone and yet the pilots were still held directly responsible for the operation of the aircraft. Therefore, since courts hold that pilots in all situations are directly responsible for the operation of the aircraft, and many of the VFR cases deal with collisions within the control zone, the argument that the difference in liability is explained by a difference of control is not very persuasive.

[68] *See* Hamilton v. United States, 343 F. Supp. 426 (N.D. Cal. 1971).

[69] 441 F.2d 741 (5th Cir. 1971).

[70] *Id.* at 745.

is unknown to the pilot can one be sure that a causal connection exists between the lack of a warning and the collision.[71]

In finding negligence on the part of the ATC in *Todd*,[72] however, the court never discussed how the clearance given could have had a causal connection to the crash when the pilot in the exercise of due care should have been aware of weather obscured mountains. It is a question which the court should have discussed, and its failure to discuss it leaves only one conclusion. The court has established a standard that finds a causal connection between the ATC's action and the subsequent collision whenever the actions of the ATC are not reasonably designed to isure the safety of the aircraft. It has established a standard which fails to consider whether the pilot in the exercise of due care should have been equally aware of the danger. And most important of all, it has established a standard that definitely takes the primary responsibility for the operation of the aircraft away from the pilot and places it on the ATC and the United States.

Therefore, the actions of the ATC in giving a cruise clearance, without a concurrent warning of the weather obscured mountains, constituted negligence on the part of the United States, despite the fact that the pilot himself in the exercise of due care should have been aware of the mountains. These actions were negligent because they were "not reasonably designed to insure the safety of the aircraft."[73]

The far reaching implications of this reasoning[74] can be best illustrated by applying the *Todd* standard to any of the VFR cases[75] previously discussed.[76] For example, in *Coatney v. Berkshire*[77] the

[71] *See* United States v. Wiener, 335 F.2d 379 (9th Cir. 1964).

[72] 384 F. Supp. 1284 (M.D. Fla. 1975).

[73] *Id.* at 1291.

[74] *Id.*

[75] *See* note 56 *supra.*

[76] It is possible to extend the *Todd* court's reasoning in the IFR situation to the VFR situation for the following reasons: 1) Both *American Airlines* and *Todd* when setting forth the four standards of duties made *no* distinction between the duties of the ATC and the pilot in VFR and IFR situations. 2) The *Todd* court in discussing the contributory negligence question relied primarily on VFR case law to emphasize that Todd had the primary responsibility for operating the aircraft and that responsibility did not diminish because of a clearance from the tower (384 F. Supp. at 1284). 3) Thus based on the *Todd* court's language and the prior cases cited to support it, it is clear that the new standard set forth in *Todd* applies to *both* VFR and IFR situations.

[77] 500 F.2d 290 (8th Cir. 1974).

court held that although the ATC had issued a clearance that resulted in the mid-air collision, there was no liability because the primary responsibility for the operation of the aircraft rested with the pilot and both pilots could have avoided the accident by maintaining a proper lookout. Therefore, the clearnce issued by the ATC could not have been the proximate cause of the crash. Thus, *Coatney* reaffirmed the principle that when the pilot possesses (or in the exercise of reasonable care should have possessed) the same amount of information as the ATC in a particular situation, the primary responsibility for the operation of the aircraft rests with the pilot. Furthermore, this responsibility does not terminate merely because the ATC has issued a clearance.[78]

If one were to apply the reasoning of *Todd*[79] to the *Coatney* case a different result would be reached because the clearance given in *Coatney* was not reasonably designed to insure the safety of the aircraft, despite the fact that both pilots in the exercise of reasonable care could have avoided the collision. Thus, the effect of the *Todd* standard is to shift the primary responsibility for operating the aircraft from the pilot to the ATC, even in those cases in which the pilot possesses adequate means to avoid the collision, notwithstanding the clearance issued by the ATC. This shift evokes a considerable question of fairness when one considers the relative position of the parties during many air disasters. On many occasions the pilot and not the ATC is in a better position to insure the aircraft's safety. For example, in *Hamilton v. United States,*[80] the court emphasized that the pilot flying under VFR conditions is often in a better position than the controller in the tower to view approaching aircraft and other types of danger. Furthermore, the pilot need only be concerned with one aircraft's safety while the ATC must be concerned with the safety of every aircraft in the control zone.[81] Clearly, in those situations it is hard to justify passing the primary responsibility for disaster from the pilot to the ATC. Or, in more precise terms, why should the responsibility pass from the pilot to the United States taxpayer?

---

[78] *See* note 30 *supra.*

[79] 384 F. Supp. 1284 (M.D. Fla. 1975).

[80] 343 F. Supp. 426 (N.D. Cal. 1971).

[81] *Id.* at 432.

Prior to *Todd*[82] it had been almost universally held that the ATC's duty to warn existed only when the danger was not apparent to the pilot in the exercise of reasonable care.[83] In holding that this duty exists even in those cases when the danger *is apparent*, the court has greatly expanded the ATC's potential liability. It has created a duty to warn in every case in which failure to warn would reasonably impair the safe operation of the aircraft. This is not to say, however, that a determination of the pilot's knowledge is no longer important. This determination is critical for the purposes of determining contributory negligence. For example, in *Todd*,[84] the pilot was unable to recover despite the ATC's negligence because under the exercise of reasonable care he should have been aware of the presence of the mountains into which he eventually collided. His failure to be aware of the mountains constituted contributory negligence,[85] and under Alabama law[86] contributory negligence operated as a complete bar to recovery. Therefore, the ATC's *potential* liability increased because of the holding that the failure to warn constituted negligence, although its *actual* liability remained unchanged because of the doctrine of contributory negligence.

This result, however, does not indicate that the *Todd*[87] holding has little significance in determining the actual lilability in failure to warn cases. It has great significance in the many states that apply comparative negligence doctrines.[88] In those states, contributory negligence does *not* operate as a complete defense to any negligence action. Therefore, if this action had been brought in a comparative negligence state, plaintiff would have been able to recover at least

---

[82] 384 F. Supp. 1284 (M.D. Fla. 1975).

[83] United States v. American Airlines, 418 F.2d 180, 193 (5th Cir. 1969).

[84] 384 F. Supp. 1284 (M.D. Fla. 1975).

[85] *Id.* 384 F. Supp. at 1294.

[86] Where the *Todd* case took place.

[87] 384 F. Supp. 1284 (M.D. Fla. 1975).

[88] The doctrine of comparative negligence allows the plaintiff to recover a proportion of his injuries despite the fact he was contributorily negligent, *see generally* GREGORY AND KALVEN, LAWS AND MATERIALS ON TORTS, pp. 248-60. A substantial number of states have adopted comparative negligence statutes which are applicable to all negligent actions. These states include: Arkansas, Connecticut, Florida, Georgia, Nebraska, Hawaii, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, South Dakota, Texas, Vermont, Washington and Wisconsin. For a general discussion of the extent of comparative negligence doctrine in the United States, see 57 AM. JUR. 2d 431 (1971).

a portion of his loss from the Government. Thus, the *Todd* holding does have an *actual* effect on ATC liability; it enables the pilot in a comparative negligence state to recover a portion of his loss from the government in a situation in which he previously would have recovered nothing.[89]

Michael A. Grossman

FEDERALISM—AIRPORT EXPANSION—The Airport and Airway Development Act of 1970 Does Not Preempt the Field of Airport Expansion and Development Nor Does the Award of a Planning Grant Under the Act Constitute Federal Action So Significant As To Require an Environmental Impact Statement Under the National Environmental Policy Act of 1969. *Town of New Windsor v. Ronan*, 13 Av. L. Rep. 17,365 — F. Supp. — (S.D.N.Y. 1974).

In 1971, the New York Legislature passed an act[1] authorizing the Metropolitan Transportation Authority (MTA) to establish an airport for domestic and international air travel and freight transport to be located at Stewart Airport. Pursuant to this authority, the MTA sought to take, by eminent domain proceedings, some 9,000 acres adjacent to the airport. Various landowners and municipal organizations brought action in federal district court to block the MTA's taking of the lands. Plaintiffs alleged, *inter alia*,[2] that the

[89] In reality the *Todd* holding will also affect those people in non-comparative negligence states. Many tort scholars are convinced that juries regard the contributory negligence rule (complete bar to recovery) as too harsh and the juries have in fact been applying the doctrine of comparative negligence in their verdict. *See generally Negligence—A Judge Expresses His Views*, 12 NACCA L.J. 211 (1955).

[1] Act of April 26, 1971, New York State Laws, Chapter 472, *as amended*, May 27, 1971, New York State Laws, Chapter 473.

[2] Plaintiffs also claimed that the taking of the lands was in violation of Fourteenth Amendment guarantees of due process and that the MTA acted *ultra vires* under state law in taking the lands. With respect to the first claim, the court followed the reasoning of the state court in County of Orange v. Metropolitan Transportation Authority, 71 Misc.2d 691, 337 N.Y.S.2d 178 (Sup. Ct. Orange County 1971), *aff'd mem.*, 39 A.D.2d 839, 332 N.Y.S.2d 420 (2d Dep't 1972), and agreed that there could be no genuine doubt that the creation or expansion of an airport is a public purpose for which the power of eminent domain could be validly exercised. With respect to the second claim, the court, while recognizing that, pursuant to the doctrine of pendent jurisdiction, it had the Constitutional power

taking was contrary to the provisions of the Airport and Airway Development Act of 1970 (AADA)[3] since the contemplated airport expansion was or would necessarily be within a National Airport System Plan;[4] and therefore the approval of the Secretary of Transportation was required.[5] Plaintiffs further alleged that the contemplated development involved "major federal action significantly affecting the quality of the human enrivonment"[6] and, therefore, a detailed environmental impact statement was required under the National Environmental Policy Act of 1969 (NEPA).[7] In particular, plaintiffs alleged that receipt by the state of a planning grant under the AADA so federalized the airport expansion as to make an environmental impact statement mandatory. *Held, dismissed*: The AADA does not preempt the field of airport expansion and development nor does the award of a planning grant under the AADA constitute federal action so significant as to require an environmental impact statement under NEPA.

Choosing a location for a major airport is perhaps the most vexing problem associated with new airport construction.[8] There are serious concerns over aircraft noise, air pollution, the effect on wildlife, water tables, open land, and the economic impact on surrounding communities.[9] In some instances, these concerns appear to have been of only limited importance in airport planning.[10] These incidents raise the fear that future airport planning may lead to similar results. Furthermore, methods for dealing with environmental problems after construction or expansion has been completed have been less than successful. Municipalities cannot prohibit

to hear the matter, exercised its discretion and refrained from deciding the issue, holding that it was best left to decision in state court. The action in state court has not been pursued

[3] Airport and Airway Development Act of 1970, 49 U.S.C. § 1701 *et seq.* (1970), *as amended*, (Supp. III, 1973).

[4] 49 U.S.C. § 1712 (1970), *as amended*, (Supp. III, 1973).

[5] 49 U.S.C. § 1716(c)(1) (1970), *as amended*, (Supp. III, 1973).

[6] 3 Av. L. Rep. at 17,367.

[7] National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1970).

[8] Harper, *The Airport Location Problem: The Case of Minneapolis-St. Paul*, 38 ICC Prac. J. 550, 552 (1971).

[9] *Id.* at 552-53.

[10] *See* Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 Urban Lawyer 1 (1972); Comment, *Jetport: Planning and Politics in the Big Cypress Swamp*, 25 U. Miami L. Rev. 713 (1971).

scheduled airline activities by setting noise limits[11] or minimum elevation limits.[12] Zoning restrictions may not impose more than minor burdens on land use nor bar activities already in existence.[13] Trespass actions have been largely unsuccessful and recovery in nuisance is rare.[14] Actions in inverse condemnation have been more successful but, at least in federal courts, there is often a requirement of showing that damage resulted from direct overflight.[15] Even if a damage action is successful, the prevailing plaintiff must often continue to live with the problem. Because of environmental concern, the inability or unwillingness of state agencies to properly account for such concern in airport planning, and the inappropriateness of other remedies, there has been an increasing trend to stop airport problems at their inception—that is, by preventing airport construction or expansion from occurring.

The search for a fourth major airport to serve the New York metropolitan area is an example of this trend. The search began in 1959 when the Port of New York Authority published a report indicating that the demand for air transportation by the end of the following decade would exceed the capabilities of the area's three major airports, Newark, Kennedy, and LaGuardia.[16] Although various plans were suggested over the years and numerous studies were made,[17] by 1970 no acceptable site had yet been located. In that year a task force of the Federal Aviation Administration issued a report noting that Stewart Airport, located only 55 miles from New York City, had been declared surplus by the Department of Defense.[18] The report indicated that the airport had the potential of being developed as a major air carrier airport and freight facility and that its use could significantly relieve the congestion of the

[11] Am. Airlines v. Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

[12] Allegheny Airlines v. Cedarhurst, 238 F.2d 812 (2d Cir. 1956).

[13] *See* Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?*, 38 J. AIR L. & COM. 473, 499 (1972).

[14] *Id.* at 490-91.

[15] *Id.* at 492-94.

[16] *See* Goldstein, *Aircraft Noise and the Selection of Airport Sites*, 43 PA. B. ASS'N Q. 229, 233 (1972).

[17] *Id.* at 233-35.

[18] In denying an early motion for injunctive relief, the court quoted from the FAA Task Force Report. Town of New Windsor v. Roman, 329 F. Supp. 1286, 1288-89 (1971).

metropolitan area airports.[19] While the present acreage was small, the report noted that uninhabited land adjacent to the airport appeared to be available for the requirements of an expanded facility.[20] Most importantly, the report indicated that the site represented "one of the last viable opportunities for additional major airport facilities in the area."[21]

Stewart Airport had been built as a municipal airport for Newburgh, New York, about 1930. In 1942, it became an Air Force base and remained so until March of 1970, at which time the MTA was permitted by the Department of Defense to lease and operate a large portion of the base as a general aviation facility. In July 1970 the MTA acquired title to some 1,590 acres of the facility. In April 1971 the New York Legislature passed, and in May 1971 amended, an act authorizing the establishment of an airport for domestic and international air travel and freight transport at Stewart Airport.[22] Under this act, the MTA was given the authority "to establish, improve, maintain, reconstruct and operate"[23] a general aviation facility at Stewart Airport. Pursuant to this act, MTA Chairman William J. Ronan announced the Authority's intention to acquire approximately 9,000 acres of land to the west of Stewart Airport. Plaintiffs' actions to halt the taking followed.

At the core of the plaintiffs' federal claims were two basic allegations. The first was that the federal government had preempted the field of airport development and expansion by requiring that all airport development projects be subject to the approval of the Secretary of Transportation.[24] The second was that the quantity and quality of federal involvement had reached such significant proportions as to constitute "federal action" within the contemplation of NEPA, requiring the preparation of a detailed environmental impact statement.[25] Both of these claims rested on the provisions and wording of the AADA.

The AADA was enacted to promote expansion and improve-

---

[19] *Id.* at 1289.

[20] *Id.*

[21] *Id.*

[22] *See* note 1 *supra.*

[23] *Id.*

[24] 3 AV. L. REP. at 17,367.

[25] *Id.*

ment of the nation's airway and airport system.[26] To achieve these purposes, the AADA calls for the preparation of a National Airport System Plan[27] to propose the type and estimated cost of airport development necessary to provide an adequate system of public airports. In support of this plan, the AADA authorizes two types of grants: planning grants[28] and development grants.[29] Planning grants are provided to promote the effective location and development of airports and the development of an adequate national airport system plan.[30] Development grants are available for constructing, improving or repairing a public airport, and for acquiring land or easements for future airport development.[31] An application for a development grant may not propose development not included within the current revision of the National Airport System Plan.[32] All proposed development must be in accordance with standards established by the Secretary of Transportation.[33] No project may be approved unless the agency making application holds good title to the landing area of the airport or gives assurance that good title will be acquired.[34] No such qualifications are expressed with respect to planning grants.

The AADA puts special emphasis on environmental concerns, declaring as national policy that authorized airport development projects shall provide for the protection and enhancement of the natural resources and the quality of the national environment.[35] The legislative history of the AADA reflects this concern, recognizing that a "special effort" must be made to achieve compatibility with environmental quality.[36] While recognizing that some conflicts are inevitable between the need for developing essential avi-

[26] 49 U.S.C. § 1701 (1970).

[27] 49 U.S.C. § 1712(a) (1970), *as amended*, (Supp. III, 1973).

[28] 49 U.S.C. § 1713 (1970), *as amended*, (Supp. III, 1973).

[29] 49 U.S.C. § 1714 (1970), *as amended*, (Supp. III, 1973).

[30] 49 U.S.C. § 1713(a) (1970).

[31] 49 U.S.C. § 1711(2) (1970), *as amended*, (Supp. III, 1973).

[32] 49 U.S.C. § 1716(a) (1970).

[33] *Id.* Among other things, these standards govern site location, airport layout, lighting, and approach safety.

[34] 49 U.S.C. § 1716(c)(1) (1970), *as amended*, (Supp. III, 1973).

[35] 49 U.S.C. § 1716(c)(4) (1970).

[36] H.R. REP. No. 601, 91st Cong., 2d Sess. (1969), as contained in U.S. CODE CONG. & AD. NEWS, 91st Cong., 2d Sess. 3047, 3057.

ation facilities and preservation of the nation's natural resources, Congress has indicated its belief that with "suitable care" a "sound balance" can be achieved.[37]

This "sound balance" ostensibly involves a balancing of the federal interest in environmental protection against the federal interest in developing essential aviation facilities. In practice, the balancing process must also consider the state interest in controlling its environment and developing its airport and airway facilities in its own manner. In *New Windsor*, the balancing process required a recognition of the substantial state interest in taking land for contemplated airport expansion. If the AADA preempted the field of airport expansion and development, then state activity could not proceed without approval of the Secretary of Transportation. If the AADA did not preempt the field but the level of federal participation had reached such proportion as to constitute major federal action significantly affecting the quality of the human environment, then the state activity could not proceed until a detailed environmental impact statement had been prepared. Either of these would constitute "federalization" of the airport expansion project. Absent such federalization, the state interest would prevail.

In considering the first possible basis for federalization, the court in *New Windsor* held that the AADA did not preempt the field of airport expansion and development but acted only interstitially against the background of the total *corpus juris* of the state law.[38] Plaintiffs had based their claim on specific language of the AADA which provides that "(a)ll airport development projects shall be subject to the approval of the Secretary. . . ."[39] The court held that, considered in the total context of the act, the reference to "all airport development projects" meant "all federally funded" airport development projects.[40]

The court also rejected the contention that the quantity and quality of federal involvement had already reached such significant proportions as would invoke the requirements of NEPA. Plaintiffs had based this contention on three major factors:[41] (1) that FAA

[37] *Id.*

[38] 3 Av. L. Rep. at 17,368.

[39] 49 U.S.C. § 1716(c)(1), *as amended*, (Supp. III, 1973).

[40] 3 Av. L. Rep. at 17,368.

[41] *Id.*

approval was required for airport alterations; (2) that the state had received a federal planning grant as authorized by the AADA; and (3) that development of the proposed airport would inevitably require federal approval.

FAA approval over alterations to Stewart Airport had been upheld in related litigation concerning the deed by which title to the airport had been transferred from the Department of Defense to the MTA.[42] In rejecting this FAA approval as an adequate ground for federalization, the court relied on *Boston v. Volpe*.[43] In that case, the city of Boston attempted to enjoin the Massachusetts Port Authority from continuing construction of the Outer Taxiway at Logan International Airport pending decision on the merits of Boston's claim that the Authority had not complied with certain federal statutes and regulations. The issue was whether the tentative allocation of development funds under the AADA had so federalized the expansion project as to require a halt to construction until a satisfactory environmental impact statement had been issued. The court in *Boston v. Volpe* rejected the proposition that federal participation in a development forever federalizes the development.[44] Following *Boston v. Volpe*, the *New Windsor* court rejected plaintiffs' argument that the requirement of FAA approval for airport alterations federalized the airport expansion project at Stewart Airport. The court characterized the alterations as something less than major federal action significantly affecting the quality of the human environment.[45]

The court in *Boston v. Volpe* had noted that orders of the Department of Transportation (DOT) specifically defined "federal actions" as including approval of state highway programs but did not mention tentative allocations of funds for airport development.[46] Therefore, the arguments that airport-aid and highway-aid were analogous and that the tentative allocation of development funds federalized the airport expansion project were rejected in *Boston v. Volpe*.[47] The court in *New Windsor* rejected a similar argument that

[42] Town of New Windsor v. Ronan, 12 Av. Cas. ¶ 17,787 (S.D.N.Y. 1973), *aff'd*, 481 F.2d 450 (2d Cir. 1973).

[43] 464 F.2d 254 (1st Cir. 1972).

[44] *Id.* at 258.

[45] 3 Av. L. Rep. at 17,368.

[46] 464 F.2d at 259.

[47] *Id.*

the state's receipt of a planning grant under the AADA federalized the project.[48] The justification for the distinction between highway-aid and airport-aid is that highway development is carried out in a number of discrete stages with federal approval necessary at each stage.[49] This highway development requires the identification of each state's "system," the location of particular highways within a system, and then the designing, planning, and construction of each new highway.[50] With airport development, only a single funding decision is contemplated.[51] Hence, the reasoning runs, in order to ensure highway development properly consistent with federal environmental policies, federalization must occur early in the process. Since state compliance with federal policies in airport-aid situations may be evaluated at the time approval for development funds is sought, however, federalization need not occur prior to that time.

The distinction between highway-aid and airport-aid drawn by the courts in *Boston v. Volpe* and *New Windsor* is an imperfect one. If, in fact, federal participation does not "forever federalize" a project, then it would seem that funding must necessarily be carried out in a number of discrete stages with federal approval necessary at each stage, paralleling the highway-aid situation. The distinction has also been criticized as ignoring the policy of NEPA which is to apply safeguards before deleterious effects on the environment have occurred.[52] The statement of the court in *La Raza Unida v. Volpe*,[53] the case most cited for the principle that federalization of a highway project occurs at an early stage, is particularly pertinent:

> The state should not have the considerable benefits that accompany an option to obtain federal funds without also assuming the attendant obligations. Any project that seeks even the possible protection and assistance of the federal government must fall within the statutes and regulations.[54]

The distinction between highway-aid and airport-aid leads to an

[48] 3 AV. L. REP. at 17,369.

[49] 464 F.2d at 258.

[50] *Id.*

[51] *Id.* at 259.

[52] Note, 39 J. AIR L. & COM. 121, 124 (1973).

[53] 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd*, 488 F.2d 559 (9th Cir. 1973).

[54] 337 F. Supp. at 227.

unexpected and unfortunate result. In the case of highway-aid, location approval is sufficient to federalize a project.[55] But in the case of airport-aid, the location has already been selected at the time development funds are sought. This is because the AADA requires that the state have title to the land to be used, or at least give satisfactory assurance that good title will be acquired, before receiving approval of the development aid.[56] If a state does not contemplate the use of federal development funds until late in the project, or fails by intent or mistake to meet AADA requirements, the Secretary of Transportation must, in his discretion, determine what a "sound balance" requires. But if a state does not contemplate the use of federal development funds at all, the result of the holding of *New Windsor* is that environmental quality is effectively removed as a requirement in airport planning, except as the state may be otherwise bound by state law.

Plaintiffs' final argument for federalization was that development of the proposed airport would inevitably require federal funding and approval. While admitting this likelihood, the court rejected the inevitableness of it, noting that the state, if it wished, could go forward without federal funding.[57] The court recognized that this meant few, if any, of the environmental requirements of the AADA or NEPA would be mandated. It termed the result "unsatisfactory" and "a function of a curious mixture of federalism and/or poor legislative drafting."[58] While wishing the result were otherwise, the court concluded that it was without authority to direct the manner in which the airport activity proceeded, absent a showing of more tangible federal involvement.[59]

It is not clear that the holding of *New Windsor* was compelled. Since a DOT order published just three weeks before the court's decision specifically excluded planning grants which do not imply a project commitment from the meaning of "major federal action,"[60] the court could not have held that the mere receipt of a planning grant by itself required the preparation of an environmental impact

---

[55] *Id.*

[56] 49 U.S.C. § 1716(c)(1) (1970), *as amended*, (Supp. III, 1973).

[57] 3 Av. L. Rep. at 17,369.

[58] *Id.*

[59] *Id.*

[60] DOT Order 5610.1B, 39 Fed. Reg. 35235, 35237 (1974).

statement. But the court might have found from all the facts and circumstances of the case that the level of federal participation had reached a level constituting "major federal action" and that an environmental impact statement should have been prepared prior to the acquisition of land for airport expansion. The court might have determined that the present potential for future development funding had become so great that it constituted a present reality. The court might also have found that the environmental policy expressed in the AADA went beyond the bounds of the section requiring approval of the Secretary for release of development funds. The policy is, after all, a national policy, expressed with regard to "projects." These projects must be planned and the planning must be funded. The court did not have to follow the reasoning of *Boston v. Volpe* in rejecting an analogy to highway-aid. This is particularly evident in light of currently proposed revisions to DOT orders which specifically define tentative approval of new major development, including runway expansion, as constituting "action" within the meaning of NEPA.[61] It is very possible that if the currently proposed regulations were in effect at the time, the court in *Boston v. Volpe* might have found the highway-aid analogy more compelling.

The real problem is with the AADA itself. It purports to define and support a national policy of protecting the nation's environment. Yet the manner in which funds are made available under the Act can lead to a result entirely opposite to the claimed policy. A state is forced under the Act to secure land before it has obtained approval for development funds. If, for whatever reason, the land obtained is not well-suited for the intended development, a heavy burden is placed on the Secretary, or the courts, to balance the substantial state and federal interests involved. The AADA should not direct the states to proceed in a manner which leads to a potential confrontation of interests. What should be required under the AADA is a three-step process. First, the granting of planning funds should permit the state to determine the extent and location of new land required for airport development or expansion. Secondly, federal approval of site location should be determined before the state expends funds to acquire the land, at least in those instances in which the state has no other reason to acquire the land. In analogy

[61] 40 Fed. Reg. 36516, 36519 (1975).

to highway-aid, tentative federal approval at this stage would be considered "major federal action" for purposes of NEPA, and necessary environmental statements would be prepared. Lastly, development funds should be released upon a showing that the land has been secured and provisions of the AADA, NEPA, and applicable DOT regulations and procedures have been met. This process keeps the basic purpose and structure of the AADA intact, invokes NEPA safeguards for appropriate projects, and avoids the confrontation problems presented by *New Windsor*. This approach to the planning of large-scale airport development and expansion projects might well reduce the fears of surrounding communities since federal environmental safeguards would be applicable throughout the planning process. In particular, since federal environmental policy requires that fair consideration be given to the interests of communities in or near a potential project,[62] it is possible that the situation in *New Windsor* might have been avoided completely.

William Merritt

[62] 49 U.S.C. § 1716(c)(3) (1970).

Current Literature