Journal of Air Law and Commerce

Volume 24 | Issue 3 Article 7

1957

Obstructions to Air Highways - Duty of Disclosure

JUDICIAL AND REGULATORY DECISIONS

OBSTRUCTIONS TO AIR HIGHWAYS— DUTY OF DISCLOSURE

ALTHOUGH landowners enjoying their property and its immediate reaches[1] have traditionally been protected against flight interference, Congress has created a right of free travel within the navigable air space.[2] Therefore, there are two generally recognized rights which may be in conflict with one another under certain circumstances. It is well established that flight within the navigable air space which does not disturb the existing use of the owner's property is not considered a trespass to the land below.[3] It is also recognized that flight beneath the congressionally defined navigable air space is a trespass when it interferes with the owner's use and enjoyment of his property.[4] Therefore, the landowner is under no duty to exercise care for the protection of pilot-trespassers.[5]

Nevertheless, a serious conflict still exists with respect to flight within the navigable air space which consititutes an interference with the landowner's use of his property. It is in this area that a new facet to the

---

[1] Presently, there are four theories by which the conflicting interests of aviators and landowners are adjusted:

a. The "zone" theory divides air space into two zones. The air space contained in the lower zone would be owned by the surface owner and the air above would be left to the flyer. Under this theory, the landowners possessory interest encompasses as much of the space above his land as is essential to its complete use and enjoyment. See U.S. v. Causby, 328 U.S. 256 (1946); Smith v. New England, 270 Mass. 511, 170 N.E. 385 (1930).

b. The "use" theory restricts the landowner's interest to only the space actually used. Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936).

c. The "nuisance" theory allows the owners to recover in an action for nuisance or negligence only when the flight results in actual interference with the landowner's use of the property. Brandes v. Mitterling, 67 Ariz. 349, 196 F. 2d 464 (1948); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

d. The theory presented by the Uniform Law for Aeronautics allows the landowner unlimited ownership of the air space, but subject to the aviator's privileges of flight. The Uniform Law has been enacted in 22 states. See Kuehnl, Uniform State Aviation Liability Legislation, 1948 Wis L. Rev. 356, 357. For a discussion criticizing the "privilege" rather than a "right" of flight, see Green, *Flight of Aircraft—Right or Privilege?* 6 J. Air. L. & Com. 201 (1935).

[2] Section 403 of the Civil Aeronautics Act of 1938, 52 Stat. 980, 49 U.S.C. § 403 (1938), provides that:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

As defined in this act, navigable air space constitutes the space above the minimum safety altitudes prescribed by the Civil Aeronautics Board, 52 Stat. 977, 49 U.S.C. § 401 (24) (1938).

In determining the applicability of federal air safety regulations to solely intrastate flight, two recent cases have discussed the question of whether federal regulations have pre-empted the field of aviation. In Gardner v. Allegheny County, 382 Pa. 88, 114 A. 2d 491 (1955), it was held that Congress has pre-empted the field in the area above the minimum safety altitudes—thus, within the navigable air space. In Allegheny Airlines v. Village of Cedarhurst, 238 F. 2d 812 (2d Cir. 1956) it was held that federal legislation and regulation constituted a pre-emption of the entire air space, both above and below the minimum safety altitudes.

[3] Hinman v. Pacific Air Transport, 84 F. 2d 755 (9th Cir. 1936); Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E. 2d 575 (1942).

[4] Capital Airways v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. 2d 776 (1939); Smith v. New England, 270 Mass. 511, 170 N.E. 385 (1935).

[5] La Com v. Pacific Gas & Electric Co., 132 Cal. App. 2d 114, 281 P. 2d 894 (1955); Strother v. Pacific Gas & Electric Co., 94 Cal. App. 2d 525, 211 P. 2d 624 (1949); But see Plewes v. Lancaster, 171 Pa. Super. 312, 90 A. 2d 279 (1952).

landowner-aviator controversy is presented, i.e., to what extent is the surface-user under a duty to disclose the exisistence of power lines or other artificial obstructions suspended within the air space above his property.[6]

Such a problem might arise under federal regulations when, as in the case of *Yoffee v. Pennsylvania Power & Light Co.*,[7] a flyer is obstructed by undisclosed power lines while flying above open water or sparsely populated land.[8] Since the otherwise applicable 500 foot minimum safety altitude is dispensed with in such flight, the flyer might be within the navigable air space and still collide with such wires. A comparable situation would arise when a flyer pursuing a normal and necessary glide path during landing or takeoff

---

[6] Disclosure would constitute the marking, painting or illumination of structures in a manner which would enable flyers to observe their existence in time to avoid collision. Necessarily, the extent of such illumination would vary with the physical peculiarities of the respective flight areas and should be visible at night as well as during the day.

Although most of the reported cases involve collisions with utility wires, a duty of disclosure should be applicable to all persons erecting artificial structures which might endanger reasonably anticipated flight.

[7] 385 Pa. 520, 123 A. 2d 636 (1956). In this case, the plane had collided with transmission lines which the defendant power company had suspended over the Susquehanna River. Although this situation is distinguishable from the landowner cases since this defendant was an easement holder of the air space occupied by its wires, its significance in the surface user-aviator conflict merits consideration.

In imposing a duty of disclosure upon the power company, the court stated that the mere consent of governmental authorities to span the river was merely the grant of an easement and did not insulate the company from liability for negligence. It was recognized that the rationale supporting the landowner's immunity from duty toward trespassers does not warrant its application to easement holders. A predominant motive for immunizing landowners from all but willful and wanton acts was to protect men of property from appropriation of their possession. However, even assuming that this immunity is a necessary concomitant of our present society, there is little merit in honoring easement holders with a similar privilege since they are not the fee holders to whom the privilege was historically directed. Furthermore, the easement granted to power companies generally consists of the right to erect poles, to suspend wires over a portion of the airspace, and to repair their facilities. Except for this allowance, the landowner has retained virtually the same dominion over this segment of his land as he exercises over the remainder of his property.

Since historically, a trespass is an injury to one in possession of his property, only the possessor's rights are injured by a trespasser. Thus, it would be irrational to allow an easement holder to defend a suit on the grounds that the injured trespasser was engaged in an activity unlawful to a third person.

Although the courts were formerly divided on the question as to easement holders in general, the present tendency is to impose upon easement holders the duty to exercise reasonable care for the safety of persons who are trespassers with respect to the landowners. Langazo v. San Joaquin S. & P. Co., 32 Cal. App. 2d 678, 90 P. 2d 825 (1939); Wise v. Southern Indiana Gas & Electric Co., 109 Ind. App. 681, 34 N.E. 2d 975 (1941); Baker Utilities Co. v. Haney, 203 Okla. 91, 218 P. 2d 621 (1950); Humphrey v. Twin State Gas & Electric Co., 100 Vt. 414, 139 Atl. 440 (1927). See also, Restatement, Torts § 386 (1934).

[8] Section 60.17 of the Federal Civil Aeronautics air safety regulations, 14 C.F.R. § 60.17 (1955) provides;

". . . Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes.

". . . Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle or structure."

It should be noted that this open water exception to Section 60.17 had never been considered by a court prior to the *Yoffee* case. In determining that the river at the scene of the accident was open water, the court recognized that the river was two miles wide, and that the nearest bridge was two miles away.

But even if the Susquehanna River was not considered open water, it may be that the pilot in the *Yoffee* case was flying above sparsely populated land so as to come within the alternative wording of the exception to the 500 foot safety altitude allowed under Section 60.17. The court considered the area adjacent to the transmission line to be sparsely populated, although it declined to expressly state that that fact in itself would allow the air above to be considered navigable air space.

is obstructed by invisible power lines located adjacent to an airport runway, as in *Strother v. Pacific Gas & Electric Co.*,[9] and *La Com v. Pacific Gas & Electric Co.*[10] Since such a flight path constitutes the minimum safety altitude, a flyer thus obstructed is lawfully within the navigable air space at the time of the accident.[11] In these two situations, a pilot flying within a zone authorized for his use would not become a trespasser, if at all, until he collides with the fixture erected by the landowner. However, whether lawful flight should cease when the collision occurs—a collision caused by the landowner's failure to disclose the existence of his fixture, is questionable. It seems justifiable to qualify the landowner's right to utilize the air space above his property to a *reasonable* use. If so, the erection of an undisclosed aerial hazard would be just as much an unlawful act as the property owner's obstruction of adjacent land highways.[12] To classify the pilot as a trespasser merely because he is injured by an undisclosed fixture would be exceeding the bounds of both the law and common sense.[13]

---

[9] 94 Cal. App. 2d 525, 211 P. 2d 624 (1949).

[10] 132 Cal. App. 2d 114, 281 P. 2d 894 (1955). In both the *Strother* and *La Com* cases, the court refused to impose a then applicable federal obstruction marking regulation on the grounds that federal safety regulations were not applicable to solely intrastate flight. It should be noted that the only federal regulations presently in effect which deal with the marking of obstructions situated near airports is that notice of construction or alteration on or near airways be given to the Civil Aeronautics Board. 17 Fed. Reg. 4137 (1952).

[11] The Civil Aeronautics Board interpretation of Regulation 60.17, see note 9 *supra*, issued on July 22, 1954, explains that "an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching land is operating within the navigable air space." 19 Fed. Reg. 4602 (1954). In light of the CAB interpretation of Section 60.17, it may be that if the flight path during landing or take-off is "normal and necessary," such a path will be considered within the navigable air space. But when the path is so low as to unreasonably interfere with landowners use and is not "normal and necessary," such flight could be enjoined as not being within the navigable air space. And when the glide path is "normal and necessary," the property owner could seek damages if such flight unreasonably interferes with his enjoyment of the property. See concurring opinion of Chief Justice Stern in Gardner v. Allegheny, 382 Pa. 88, 119, 114 A. 2d 491, 506 (1955). The position of the CAB that a "normal and necessary" glide path constitutes the lower limit of the navigable air space was upheld by the court in Allegheny Airlines v. Village of Cedarhurst, 238 F. 2d 812 (2d Cir. 1956).

It was argued in the Cedarhurst case that regulations allowing a plane, in landings or take-offs, to invade the air space beneath 1000 feet represent an unconstitutional delegation of legislative powers. Section 2(b), 52 Stat. 980, 49 U.S.C. 402(b) (1938) directed the CAB to regulate air transportation in a manner which would promote maximum air safety. The contention that the word "safe" was not a sufficiently definitive standard was rejected by the court in holding that it is not necessary that Congress establish a measure which can be applied with arithmetic certainty. In the case of landings and take-offs, a statutory height at which planes could fly would be unwieldy since such an altitude necessarily varies with the physical peculiarities of each area.

[12] Hoyt v. Public Service & Electric Co., 117 N.J.L. 106, 187 Atl. 43 (1936); Fisher v. Mt. Vernon, 41 App. Div. 293, 58 N.Y.S. 499 (1899); Scalet v. Bell Tel. Co., 291 Pa. 451, 140 Atl. 141 (1928).

[13] Can it be said that such flight constitutes the doing of an unlawful act or of a lawful act in an unlawful manner to the injury of another's person or property? See Waco Cotton Oil Mill v. Walker, 103 S.W. 2d 1071, 1072 (Tex. Civ. App. 1937). Furthermore, under this definition, the landowner should be regarded as the trespasser to the person of the flyer, rather than the flyer to the property of the landowner. This unexpressed result was reached in the *Yoffee* case where the plaintiff's suit was in trespass for the wrongful death of the flyer. Subject to the jury determination of contributory negligence, presumably the pilot's estate would be allowed recovery. It should be noted that even though a duty of disclosure should exist, a pilot who was contributorily negligent would not be allowed to succeed.

Furthermore, it has been suggested that the classic trespass doctrine should be reluctantly applied to the aviator-landowner controversy—it should be replaced with the laws of negligence and nuisance. Green, *Flight of Aircraft—Right or Privilege?* 6 J. Air L. & Com. 201 (1935). See also, Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law.* 3 J. Air L. & Com. 329 (1932).

Unfortunately, the pilot may be barred from recovery if the courts persist in treating the pilot as a trespasser—one towards whom no duty of disclosure exists. The court in the *Yoffee* case, however, alluded to such an obligation when it suggested that even fee holders could not be oblivious to lawful flight over the river. Nevertheless, the few cases which have discussed the liability of property owners to injured pilots have generally treated the flyers as trespassers. In both the *Strother* and *La Com* cases, the court was reluctant to impose liability upon the power company whose undisclosed lines caused the injury on the grounds that such use of the wires was a reasonable enjoyment of the property. It was emphasized that the imposition of such a duty would be as flagrant a violation of due process as requiring the owner of a tall building to remove it at his own expense for the protection of aviators.[14] However, to analogize the duty of marking structures to the compulsion for a man to dismantle a tall building is to overlook the basic distinction between reasonable and unreasonable duties.[15] Therefore, it is suggested that a liberal and more realistic approach to the problem should be adopted.

Relation of Duty of Disclosure to Present Common Law Theories

Although the common law did not contemplate the landowner-aviator conflict, courts might be reluctant to impose a duty of disclosure upon property owners unless the duty could be found within the traditional concepts of the common law. However, such a duty might be based on the negligence theory if the courts recognize the distinction between faultless intruders and wrongdoing intruders—both of whom have been traditionally regarded as trespassers.[16]

Wrongdoing intruders might be those entering the property to remove fruit from an owner's orchard. In such a situation, an action for damages would lie against the trespasser and, correspondingly, no affirmative precautions need be taken for the safety of such wrongdoers even though their intrusion might have been anticipated. Among the class of faultless intruders would be one entering because of necessity, such as a ship mooring to the property owner's dock during a storm,[17] or by accident, as, for example, an aviator flying within the navigable air space who intrudes upon the landowner's fixture merely because it was not visible to him.[18] The significant question presented in applying this distinction is upon what basis may a property owner be required to exercise affirmative precautions for the protection of faultless intruders whose presence should be anticipated. In answering this question, it is helpful to consider the responsibility of property owners to licensees.

---

[14] La Com v. Pacific Gas & Electric Co., see note 10 *supra*.

[15] This distinction was emphasized by Justice Dooling in his dissent to the *La Com* case, at 132 Cal. App. 2d 119, 281 P. 2d 897 (1955).

[16] Green, *Landowner v. Intruder, Intruder v. Landowner; Basis of Liability in Tort*. 21 Mich. L. Rev. 495 (1923). In this article, Dean Green has endeavored to establish a justifiable basis for the attractive nuisance cases in the law of negligence. The young children considered in these cases have been regarded by Green as faultless intruders since their age generally precludes their possessing the capacity and intent to injure the landowner's property.

[17] Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908)—(plaintiff sought refuge in storm by mooring his sailboat to defendant's dock; defendant under duty not to unlash plaintiff's boat.) See also, Campbell v. Race, 61 Mass. (7 Cush.) 408 (1851), (traveler on highway rendered impassable by a sudden snowstorm may pass over adjoining fields, doing no unnecessary damage, without being guilty of a trespass). See also, Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811 (1884).

[18] Other examples of such intruders entering by virtue of their own right might be firemen, policemen and other public officials entering in the course of their employment. Meirs v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920). See also, Bohlen, *Owners' Duty to Those Rightfully on Premises*, 89 U. Pa. L. Rev. 142, 237, 340 (1921).

As distinguished from trespassers, licensees are those entering upon land with the owner's consent. Although a landowner would owe no duty of disclosure towards a trespasser, if the person received permission to enter, his intrusion as licensee would be faultless. Furthermore, the fact that the landowner gave his consent would also put him on notice of the licensee's presence. If the use to which the land is put creates a high probability of injury to others, an affirmative duty to disclose concealed dangers should be imposed upon landowners in favor of those who enter without fault and whose presence should be anticipated. Therefore, since the landowner's consent to the licensee's entry precludes it from being regarded as a wrongdoing, and also informs the owner of the licensee's presence, the owner should be under an obligation to warn licensees of the existence of hidden dangers.[19]

It appears that the status of a faultless intruder is closer to that of a licensee than of a trespasser because he enters without fault, as by necessity or accident. However, the faultless intruder differs from a licensee to the extent that his entry is without consent. But since one of the functions of consent is to prevent a licensee from being regarded as a wrongdoer, it would seem that the lack of consent to the faultless intruder's entry would be partially cured by the fact that such an intrusion was not a wrongdoer in the first instance. Furthermore, there are many situations in which the owner does or should anticipate the presence of such an intruder.[20] No doubt a property owner whose land adjoins an airport runway, or over whose land flight frequently passes at low altitudes, should recognize the significant danger created by undisclosed aerial structures.

Thus, the same elements that raise an affirmative duty of disclosure in favor of licensees (notice of faultless entry and high probability of danger) may exist in the faultless intruder area. Consequently, such an intruder should bear the same relationship to the landowner as does the licensee. As Professor Bohlen has suggested, such affirmative duties in favor of faultless intruders arise as a matter of law as the price paid for voluntarily entering into business or the beneficial use of property (other than mere passive ownership) in a manner which creates a high probability of injury to others.[21]

Although not expressed in similar terms, the results of this analysis have been reached by the courts in many instances. It has frequently been stated, with particular applicability to power companies, that if the actor's

---

[19] Such an affirmative obligation was imposed upon landowners in favor of licensees in Public Service Company v. Elliot, 123 F. 2d (1st Cir. 1941); Campbell v. Boyd, 88 N.C. 129, 43 Am. Rep. 740 (1883); Smith v. Southwest Missouri R. Co., 333 Mo. 314, 62 S.W. 2d 761 (1933).

[20] For example, a farmer whose land adjoined a county road should expect the presence of travelers upon his pastures in the event that a snowstorm temporarily obstructed passage on the road. See Campbell v. Race, note 17 *supra*. Similarly, a dock owner should anticipate that boats caught in sudden squalls might seek refuge by mooring to his dock. Ploof v. Putnam, *supra* note 17.

[21] Bohlen, *Affirmative Obligations in the Law of Torts*, 53 U. Pa. L. Rev. 209, 235 (1905).

Another theory which might be invoked, as was suggested in the *Yoffee* case, is the maxim of *sic utere* (everyone must use his property as not to injure that of another). But as Dean Green has commented, this theory is but an imperfect statement of the general negligence test. See *Landowner v. Intruder, Intruder v. Landowner; Basis of Liability in Tort, supra* note 16. Moreover, it should be noted that the doctrine usually has been applied only in cases involving disputes between adjoining landowners, where clearly established rights and duties are recognized. This doctrine should not be applied as a means to avoid deciding the duty question necessarily presented in negligence cases.

conduct creates a high probability of danger, the actor is bound to use the highest degree of care practicable to avoid injury.[22] Furthermore, a duty has been imposed upon landowners for the protection of highway users from risks created by obstructions which were so situated on the premises that possibility of injury to travelers was readily apparent.[23] A unique situation arises in analogizing surface highway with aviation cases. For in the former, liability is imposed upon the landowner even though he has no right to vary the boundaries of the surface highway by his own act. But with respect to air highways, the owner's mere utilization of the space above his property diminishes the extent of the airlane—an airlane congressionally authorized for flight. Justifiably, a correspondingly greater duty should accompany this unique privilege. At least, a lower standard of care should not be tolerated.[24]

A striking forecast of this present landowner-aviator controversy was presented in *Hynes v. New York R.R.*[25] In that case, a plank attached to the defendant's right of way was used by bathers in the Harlem River as a diving board. While the decedent was standing on the plank, a cross arm with electric wires fell from an overhanging pole and caused his death. In sidestepping the defendant's contention that no duty was owed to trespassers,[26] Justice Cardozo stated that although landowners are not bound to anticipate danger to trespassers, they cannot be indifferent to the presence

---

[22] Stedwell v. City of Chicago, 297 Ill. 486, 130 N.E. 729 (1921); Ferrel v. Dixie Cotton Mills, 157 N.C. 528, 73 S.E. 142 (1911); Foley v. Pittsburg-Des Moines Co., 363 Pa. 1, 68 A. 2d 517 (1949); MacDougall v. Pennsylvania Power & Light Co., 311 Pa. 387, 166 Atl. 589 (1933); Gulf, C. & S. F. Ry. Co. v. Russel, 82 S.W. 2d 948 (Comm. of App. Tex. 1935); Talkington v. Washington Power Co., 96 Wash. 379, 165 Pac. 87 (1917); Restatement Torts, § 500, comment d (1934).

[23] Panhandle & S. F. R. R. v. Willoughby, 58 S.W. 2d 563 (Tex. Civ. App. 1933); Athens Electric Light & Power Co. v. Tanner, 225 S.W. 421 (Tex Civ. App. 1920); (rancher driving cattle at night injured by guy wire adjacent to road).

In the following cases involving night time collision of automobiles with electric poles located in a portion of a street or highway, the defendant was held to be under a duty to disclose the existence of his poles: Aubin v. Duluth Street Ry. Co., 169 Minn. 342, 211 N.W. 580 (1926); State v. Cox, 327 Mo. 152, 36 S.W. 2d 102 (1931); Cunningham v. Springfield, 31 S.W. 2d 123 (Mo. App. 1930); Lovett v. Manchester Street Ry. Co., 85 N.H. 345, 159 Atl. 132 (1932); Nelson v. Duquesne Light Co., 338 Pa. 37, 12 A. 2d 299 (1940).

A similar duty was imposed in the following cases involving automobile collisions with poles situated on the owners' premises but leaning over the highway: Hoyt v. Public Service & Electric Co., 117 N.J.L. 106, 187 Atl. 43 (1936); Fisher v. Mt. Vernon, 41 App. Div. 293, 58 N.Y.S. 499 (1899); Scalet v. Bell Tel. Co., 291 Pa. 451, 140 Atl. 141 (1928).

[24] Comparably, when landowners have allowed the public to use their property as pathways for a number of years, a duty of disclosure has been imposed when hazards have been subsequently placed along the road. Phipps v. Oregon R. and Navigation Co., 161 Fed. 367 (9th Cir. 1908); Rooney v. Woolworth, 78 Conn. 167, 61 Atl. 366 (1905); (excavation across path); Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727 (1883); (excavation along path); Carskaddon v. Mills, 5 Ind. App. 22, 31 N.E. 559 (1892); (barbed wire across path); Brewer v. Furtwangler, 171 Wash. 617, 18 P. 2d 837 (1933); (trespasser attacked by vicious dog allowed recovery); Restatement, Torts, §§ 334-36 (1934).

Thus, when a property owner recognizes frequent flight above his premises, the construction of artificial structures hazardous to such flight should be similarly disclosed.

[25] 231 N.Y. 239, 131 N.E. 898 (1921).

[26] It was imperative to overcome the trespass theory since the decedent was too old to justify use of the attractive nuisance doctrine.

of travelers upon the adjacent public highways.[27] If trespass was not an insurmountable hurdle in the *Hynes* case, where the injured party was aware of his intrusion, certainly trespass is totally inappropriate in the aviator case. Not only is the pilot proceeding along a public air highway, but he is also unaware of the existence of the fixture until the accident occurs. In such circumstances, the landowner and aviator should stand on an equal footing; the conduct of each should anticipate the lawful presence of the other.

Closely aligned to the theory affording protection to highway users under the law of negligence, is the public nuisance doctrine. The court in the *Yoffee* case suggested that this concept was applicable by stating that the defendant's license to span the river did not absolve it from liability for creating a "hazard to the public."[28] A public nuisance on a highway has been defined as any wrongful act or omission upon a highway which prevents the public from safely passing along.[29] Furthermore, the Supreme Court of the United States has announced that the public rights of navigation in the public highways of the air are analogous to those recognized

---

[27] "We are asked to ignore the public ownership of the circumambient spaces of air and water . . . Bathers in the Harlem River . . . were in the enjoyment of a public highway, entitled to protection against the defendant's wires . . . A plane of private right had been interposed between the river and the air, but public ownership was unchanged in the space below and above. . . . There will hardly be denied that a cause of action would have arisen if the wire had fallen on an aeroplane proceeding above the river.

"Here, structures and ways are so united and comingled, superimposed upon one another, that the fields (trespass and rights of highway users) are brought together.

"In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed (with different purposes in mind) . . . Rules appropriate to spheres which are conceived of as separate . . . cannot both be enforced when the spheres become concentric. There must be readjustment or collision. In one sense, and that a highly technical and artificial one, the river at the end of the springboard is an intruder on the adjoining lands, in another sense, and one that realists will accept more readily, he is still on the public waters in the exercise of public rights."

[28] Facts presented in the *Yoffee* case which suggested the unreasonable flight risk created by the undisclosed wires were the following:

a. The transmission towers, which were concealed among tall timbers and vegetation and the copper wires could not be seen at any altitude. A pilot flying at 800 feet, aware of the presence of the towers, could not see them until he was directly above them. At other river crossings, the defendant's electric lines were aluminum coated and visible from a distance of ten miles. In such areas, the towers constructed on the river bank were considered prominent landmarks.

b. The pilot's airplane was furnished with current aeronautical maps, and although New York and Pennsylvania maps normally disclose transmission towers, no obstruction was indicated at the place where the accident occurred. This omission may have been caused by the defendant's failure to notify the CAB of the erection of such wires, pursuant to a current federal regulation. 17 Fed. Reg. 4137 (1952). See *supra* note 10. Another cause of the omission may have been the fact that the wires were so difficult to discern that they escaped the notice of the cartographers.

c. Two and a half years prior to the accident in question, the same transmission line was struck by another pilot. Seven months after the *Yoffee* collision, a helicopter collided with the lines.

d. Civil Aeronautics statistics revealed that in 1947 over 1,000 licensed aircraft were located on 92 bases within a 60 mile radius of the transmission lines. This figure also includes licensed seaplanes based on the Susquehanna River.

[29] Gleason v. Hillcrest Golf Course, 265 N.Y.S. 886, 148 Misc. 246 (1933); (motorist injured by golf ball hit from course adjacent to public highway).

Even if the act complained of was performed on private property, liability is not affected. And irrespective of its inherent lawful purpose, if the act detracts from the safety of travelers, it constitutes a nuisance. Shepard v. Creamer, 160 Mass. 496, 36 N.E. 475 (1894); Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318 (1870); Klepper v. Seymour House Corp., 246 N.Y. 85, 91, 158 N.E. 29, 31, (1927).

in the navigable waters.[30] Therefore, it may be that the maintenance of an undisclosed power line, within the navigable air space, constitutes a wrongful act which obstructs safe passage through the public airways. Moreover, the public nuisance doctrine has been specifically applied to aviation in the case of *Commonwealth v. Von Bestecki,* where further construction of a tower located adjacent to an airport was enjoined.[31] It was held that the erection of a mechanical agency capable of causing death or great bodily harm to ordinary trespassers, if such is dangerous to the public, is indictable as a nuisance. A similar result was reached by a Canadian court in a recent case where a flyer attempting to land a seaplane collided with the defendant's power line.[32] In allowing the pilot a right of recovery, the court recognized that the defendant's maintenance of such lines constituted a public nuisance at common law.

CONCLUSION

Recognition of the vital status which aviation occupies in our present society suggests that the horse and buggy law relied upon in the *Strother* and *La Com* cases has become antiquated. Therefore, in order that harmony between flyers and landowners may be approached, it is imperative that some compromise be made. Balancing the value of human life with the cost of disclosing the existence of power lines suspended within the navigable air space leads to the conclusion that disclosure must be made. In addition, the imposition of such a duty can be set within the framework of the common law, where it has frequently been recognized that one who uses property in a manner which creates a high probability of danger to those whose presence may be readily anticipated must exercise a correspondingly high degree of care.[33] Thus, a picnicker touching high voltage wires concealed in mountain underbrush has been allowed recovery under a dangerous instrumentality theory.[34] And highway users injured by obstructions caused by adjacent property owners have recovered on both negligence and public nuisance theories.[35] If the common law has overcome historic resistance in these areas, certainly it should not deal otherwise with the field of aviation. Furthermore, imposition of a duty of disclosure will not stifle the

---

[30] Braniff Airways v. Nebraska State Board, 347 U.S. 590, 596-7 (1954).

[31] 30 Pa. D. & C. 137 (1937). Although there was an apparent intent by Von Bestecki to inflict harm upon aviators, intent is not an essential element of nuisance. Negligent use of an otherwise utilitarian mechanism will support a nuisance action as long as some interest common to group exercising a public right is injured. Bush v. City of Norwalk, 122 Conn. 426, 189 Atl. 608 (1937); Denny v. Garavaglia, 333 Mich. 317, 52 N.W. 2d 521 (1952); Khoury v. Saratoga County, 267 N.Y. 384, 196 N.E. 299 (1935).

[32] Stephens and Mathias v. MacMillan, 2 D. L. R. 135 (1954). The defendant owned an island situated in a small lake and suspended power lines to the mainland some 350 feet away. The wires had been erected at a height of about 30 feet without securing the requisite permission under the Navigable Waters' Protection Act, Can. Rev. Stat. c. 140, § 4 (1927). (The purpose of this statute was to approve sites of proposed projects and to insure that only such structures which would not interfere with navigation would be erected.) In approaching the water for a landing, the plaintiff's airplane struck the defendant's power line. Irrespective of any statutory violation, the court held that the wires would have constituted a public nuisance at common law—an interference with the right of navigation as it was capable of being exercised. In the MacMillan case, no issue of disclosure was raised. However, it should be noted that discernible wires suspended within the air space should not constitute a public nuisance.

[33] Kimber v. Gas Light & Coke Co., Ltd., (1918) 1 K.B. 439.

[34] Cornucopia Gold Mines v. Locken, 150 F. 2d 75 (9th Cir. 1945).

[35] See notes 23 and 31 *supra.*

utility industry's right to erect structures, but will reflect the ability of the law to satisfy changing social demands. The foresight of Justice Cardozo in the *Hynes* case demonstrates the progress which the courts should employ to avoid adherence to the ancient doctrines manifested in the *Strother* and *La Com* cases. In accordance with this approach, it was recently said that:

> "Fortunately, the principal aim of the law today, and of judicial decisions, is not so much to conform with origins and mere historical continuity, but rather to follow the tracks forward so that they may be kept abreast of the ever-developing changes in our social, economic and government life and with our current conceptions of morality and justice."[36]

---

[36] Address by Chief Justice Stern, Pennsylvania Bar Association, June 24, 1953.