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LIABILITY OF THE GROUND CONTROL OPERATOR FOR NEGLIGENCE

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THE purpose of this article is to present a general discussion of the tort liability of the ground control operator for negligence in rendering service to the aircraft operator which results in harm to that operator and his passengers. By "ground control operator" is meant persons situate on the ground employed to provide information to, direct, and operate instruments assisting in the direction of aircraft, both while on the ground and in the air.[1] Intended to be included in this definition are weather dispatchers, radio operators, GCA and ILS operators and maintenance personnel, as well as traffic directors, control tower personnel, and the like. As indicated by the two disasters at the Washington National Airport last year,[2] and the recent crash of the Northwest Airlines transport in Minnesota,[3] the matter is not only of theoretical interest but has immediate practical implications as well.

At the outset it should be pointed out that no attempt is made to distinguish suits brought by the aircraft operator and suits brought by his passengers. The approach taken has been first to consider relevant background material, then to take up liability of the ground control operator as a private individual, and finally, liability of government where the ground control operator is an agent of government. This has been done in an effort to focus attention on what is

[1] It is, of course, assumed that such persons do not have a common principal with the aircraft operator.

[2] With respect to the collision between the P-38 and the Eastern Air Lines DC-4, Capt. Bridoux, pilot of the fighter aircraft stated: " . . . that his radio message [desire to land because of engine trouble] had not been acknowledged by the tower operator," and that "he had never been specifically instructed by the tower to 'turn left.'" The ground control officer had been specifically instructed to watch the P-38. *New York Times*, November 11, 1949 [1:2]. In reporting the Capital Air Lines crash it was noted: "sometime before the crash . . . contact with the field through radio and radar was lost . . . According to the Civil Aeronautics Administration, the plane was making an instrument landing with a ceiling of about 400'." *New York Times*, December 13, 1949 [1:6]. Both of these reports indicate the possibility of a finding of negligence on the part of the ground control operator. No such suggestion is intended to be made here however. See also: Sufficient Altitude Not Maintained, C.A.A. Journal, Vol. 10, No. 10, October 15, 1949 at page 117 (ILS out of calibration).

[3] "Civil Aeronautics radio control tower operators reported that the ship was seeking to make the Minneapolis landing on instruments through the swirling snow." *New York Times*, March 8, 1950 [1:7].

believed are the two basic considerations: (a) whether there exists in the law of tort a basis for liability of the ground control operator, and, since most operators are agents of government, (b) whether there exists in favor of government an immunity from conduct of its agents for which it would otherwise be liable. It should be noted, in addition, that the problem of liability of the ground control operator where an agent of government divorced from the liability of government itself is also laid to one side.[4]

I — General Airport Cases

Numerous decisions involving liability of the airport owner or operator for injury to third persons and property indicate that one engaging in such activity is liable as is any other landowner or possessor of land for negligence to invitees.[5] Other cases concern themselves with negligence generally[6] as in the operation of instrumentalities,[7] or are based upon some contractual relationship.[8] Many of the actions are against municipalities and the greater part of the opinion deals with whether the particular operation was in the exercise of a "proprietary" or "governmental" function.[9] The Supreme Court of Pennsylvania has refused to apply its "playground rule" deriviative of the attractive nuisance doctrine where the locus in quo was a road-like

[4] The difficult immunity question arises when it is sought to *enjoin* an agent of government. See: Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682 (1948).

[5] E.g., Strong v. McDuffie, Receiver for Richfield Oil Co., Chronicle Publishing Co., et al., 34 Cal. App. (2d) 335; 93 P. (2d) 649; 1939 U.S.Av.R. 222; 1 Avi. 851 1939); Birckhead v. Sammon et al., 171 Md. 178; 189 A. 265; 1937 U.S.Av.R. 11; 1 Avi. 651 (1936); Mollencop v. City of Salem, 139 Ore. 137; 8 P. (2d) 783; 1932 U.S.Av.R. 22; 1 Avi. 330 (1932); Christopher v. City of El Paso, 98 S. W. (2d) 394; 1937 U.S.Av.R. 153; 1 Avi. 645 (1936).

[6] E.g., City of Mobile v. Lartigue, et al., 23 Ala. App. 479; 127 So. 257; 1930 U.S.Av.R. 50; 1 Avi. 206 (1930); Mayor of Savannah v. Lyons, 54 Ga. App. 661; 189 S.E. 63; 1937 U.S.Av.R. 47; 1 Avi. 657 (1936); Rhodes v. City of Asheville et al., .. N.C. .., 2 Avi. 907 (1949); Stocker v. City of Nashville, 174 Tenn. 483; 126 S.W. (2d) 339; 1939 U.S.Av.R. 42; 1 Avi. 820 (1939).

[7] E.g., Coleman v. City of Oakland, 110 Cal. App. 715; 295 P. 59; 1931 U.S. Av.R. 61; 1 Avi. 253 (1930); Boulineaux v. City of Knoxville, et al., 20 Tenn. App. 404; 99 S.W. (2d) 557; 1937 U.S.Av.R. 145; 1 Avi. 600 (1935).

[8] E.g., Abbott v. City of Des Moines, 230 Iowa 494; 298 N.W. 649; 1941 U.S. Av.R. 39; 1 Avi. 968 (1941); City of Blackwell v. Lee, 178 Okla. 338; 62 P. (2d) 1219; 1937 U.S.Av.R. 180; 1 Avi. 661 (1936). *But cf.* Baruch v. Beech Aircraft Corp., 172 F. (2d) 445; 1949 U.S.Av.R. 104; 2 Avi. 819 (1949). See generally: Rhyne, *Airports and the Courts* (Washington 1944) Chapter VI, pp. 73-81.

[9] Cases favoring or holding municipality liable: City of Mobile v. Lartigue et al., *supra* note 6; Pignet v. City of Santa Monica, 29 Cal. App. (2d) 286; 84 P. (2d) 1966; 1939 U.S.Av.R. 28; 1 Avi. 794 (1938); Coleman v. City of Oakland, *supra* note 7; Peavey v. City of Miami, 146 Fla. 629; 1 So. (2d) 614; 1941 U.S. Av.R. 28; 1 Avi. 955 (1941); Mayor of Savannah v. Lyons, *supra* note 6; Rhodes v. City of Asheville et al., *supra* note 6; City of Blackwell v. Lee, *supra* note 8; Mollencop v. City of Salem, *supra* note 5; Christopher v. City of El Paso, *supra* note 5. *Contra*: Abbott v. City of Des Moines, *supra* note 8; Stocker v. City of Nashville, *supra* note 6; Opinion of Attorney General, 1945 U.S.Av.R. 134; Opinion of Attorney General, 1945 U.S.Av.R. 201; *Cf.* Swoger v. Glynn County et al., 179 Ga. 768; 177 S.E. 723; 1935 U.S.Av.R. 9; 1 Avi. 551 (1945); City of Wichita v. Clapp, 125 Kan. 100; 263 P. 12; 1928 U.S.Av.R. 8; 1 Avi. 107 (1928); Dysart v. City of St. Louis, et al., 321 Mo. 514; 11 S.W. (2d) 1045; 1929 U.S.Av. R. 15; 1 Avi. 129 (1928).

extension of a runway.[10] An interesting case involving the problem of causation was decided in 1936 when the Maryland Court of Appeals[11] reversed a lower court finding of no negligence as a matter of law on the part of the airport operator. A child was struck by an independently owned and operated aircraft engaged in landing. Answering the allegation of independent and intervening cause, the court stated:

> ". . . we are unable to hold as a matter of law that there was no concurring and contributing want of due care on [the part of the airport operator] when, in the absence of what might be regarded as reasonably requisite safeguards, it permitted the unrestricted use of the field by other aircraft during the progress of the air circus by which the crowd was then being held and diverted . . ." [12]

The court was of the opinion that defendant having one group of invitees already on hand, it could have been a breach of duty to that group to allow the presence of a different invitee group.

There is judicial authority to support the recognition of an established duty on the part of the airport operator to keep the runways free from obstructions or other dangers, so far as is reasonably possible, or to place markers around areas where dangers exist in order that pilots may be warned.[13] This duty has been held to apply to the negligent acts of a third person which the airport operator could have been reasonably expected to foresee.[14]. It is apparently also the law of Great Britain.[15] However, the pilot is obligated to exercise due care at least to the extent of circling or "dragging" the field in daylight[16] before attempting a landing,[17] and by keeping himself informed as to the condition of the field upon which he contemplates landing when such notice is made public in a place where pilots would naturally see it.[18] The burden of showing actual or constructive notice of the danger in the defendant is of course on the plaintiff.[19]

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[10] Prokop et ux. v. Becker et al., 345 Pa. 607; 29 A. (2d) 23; 1942 U.S.Av.R. 84; 1 Avi. 1069 (1942).

[11] Birckhead v. Sammon et al., *supra* note 5.

[12] 1937 U.S.Av.R. 26; 1 Avi. 657.

[13] E.g., Beck v. Wings Field, Inc., 122 F. (2d) 114; 1941 U.S.Av.R. 76; 1 Avi. 974 (1940); Pignet v. City of Santa Monica, *supra* note 9; Peavey v. City of Miami, *supra* note 9; Read v. New York City Airport, Inc., 145 N.Y. Misc. 294; 259 N.Y.S. 245; 1933 U.S.Av.R. 31; 1 Avi. 370 (1932); Stevenson et al. v. Reimer, 35 N.W. (2d) 764; 2 Avi. 835 (1949).

[14] Pignet v. City of Santa Monica, *supra* note 9. This holding was reversed in part on appeal. The case was sent back to the jury with instructions that the third person's negligence could not be imputed either to the city or its operator. Pignet v. City of Santa Monica, *supra* note 9. *Accord*: Birckhead v. Sammon et al., *supra* notes 5 and 12.

[15] "The effect of this judgment is that the proprietors of a public aerodrome . . . are under an obligation; (a) to see that the aerodrome is safe for use by such aircraft as are entitled to use it, and (b) to give proper warning of any danger of which they knew or ought to have known." Imperial Airways, Ltd., v. National Flying Services, Ltd., reported in 1933 U.S.Av.R. 50 (1932).

[16] Read v. New York City Airport, Inc., *supra* note 13.

[17] Peavey v. City of Miami, *supra* note 9; Davies v. Oshkosh Airport, Inc., 214 Wisc. 236; 252 N.W. 602; 1934 U.S.Av.R. 122; 1 Avi. 503 (1934).

[18] Peavey v. City of Miami, *supra* note 9.

[19] Employers Fire Insurance Co., v. City of St. Louis, (St. Louis, Mo., Magistrate's Ct. July 1, 1949) reported in 1949 U.S.Av.R. 18.

II — Ground Control Cases

Before proceeding to a discussion as to the possible existence of a duty between the ground control operator, and the aircraft operator and his passengers, especially in light of the more modern instrument landing system (ILS) and ground control approach (GCA),[20] it is necessary to consider in detail three decided cases.

In April of 1941 the Court of Appeals for the Sixth Circuit decided the *Finera* case,[21] an action for personal injuries brought as a result of a ground collision between two aircraft at the Detroit City Airport. Plaintiff had completed his landing and was proceeding to taxi when he was struck by defendant, then about to take-off. Plaintiff's attempt to set aside a directed verdict in favor of defendant failed primarily because of his own contributory negligence, the court stating that plaintiff had ". . . deliberately placed himself in a perilous position by failing to observe what he admits there was nothing to prevent his seeing, if he had looked . . ."[22] The case is of importance here because plaintiff insisted he had a right to "rely on light and radio signals from the airport signal tower, operated by the City of Detroit . . ." and that "no signal; neither red, white, nor green lights were flashed; nor did any message by radio come to him from the tower . . ."[23] The court stated that no duty existed because of a rule of the Board of Aeronautics of Michigan that "upon landing upon an airport, a pilot shall assure himself that there is no danger of collision . . .,"[24] and because of a notice posted on the airport bulletin board by the City to the effect that "the green or white light shall in no instance relieve the pilot from exercising due care and diligence in observing and avoiding other planes in the air or on the ground."[25] The City of Detroit had undertaken no more than to carry out the instructions of the airport manager to tower men, that whenever they were unoccupied with other duties they should, if possible, regulate ground traffic as a matter of accommodation. The exercise of such a function was merely a custom, it established no duty. Those cases like *Erie Railroad Company* v. *Stewart*,[26] holding that one who has adopted a customary method of warning in excess of reasonable requirements and when under no duty to do so may not abandon the practice without reasonable care to warn of the discontinuance, were held "not controlling in the face of the facts of the instant case."[27]

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[20] See discussion *infra* note 33.

[21] Finera v. Thomas et al., d.b.a. Thomas Brothers Air Service et al., 119 F. (2d) 28 (C.C.A. 6th 1941); 1941 U.S.Av.R. 1; 1 Avi. 949.

[22] 1941 U.S.Av.R. 7; 1 Avi. 951.

[23] *Id.*

[24] Rule 19 quoted in the opinion. 1941 U.S.Av.R. 6; 1 Avi. 951.

[25] *Id.*

[26] 40 F. (2d) 855 (C.C.A. 6th 1930). *Infra* note 36.

[27] 1941 U.S.Av.R. 7; 1 Avi. 951.

Johnson v. *Western Air Express Corporation*,[28] was the action brought by Osa Johnson for personal injuries and for the alleged negligent death of her husband, Martin Johnson, occasioned by the crash of a Boeing transport on Los Pinetos peak in the San Gabriel mountains. The aircraft had been attempting an instrument approach to the Burbank Airport. In addition to the carrier, plaintiff sought to hold defendant United Airports Company for "failure to supply a radio localizer beam to the Western Air Express plane for instrument approach to the airport at such times as the same was requested."[29] The California Court of Appeals refused to upset a jury verdict in favor of the defendants because the testimony "furnished grounds upon which the jury could predicate a finding that the disaster occurred by reasons of the unusual forces of nature, and was one which could not have been reasonably anticipated, guarded against or resisted; that the crash was occasioned by the violence of the elements alone, and that the agency of men had nothing to do therewith."[30] With respect to the allegation against United Airports, the court stated there was not a scintilla of evidence that a localizer beam was ever requested and refused, and further, there was nothing in the pleadings to indicate that the giving or failure to give such a beam in any way caused the aircraft to depart from its "position of safety." Similar allegations against the ground radio operator (weather) were disposed of in an identical manner.

The very recent case of *Marino* v. *United States*,[31] goes far in contradicting the dicta of the *Finera* case that no duty exists on the part of the ground control operator. The action was one for personal injuries sustained by a workman when an army aircraft, taxiing out to the line for take-off, struck the tractor with which he was working. Plaintiff had been instructed to be on the lookout for aircraft while working on the runway and to watch the control tower for signals. In this particular instance no signal was made. Upon the testimony of two Army witnesses who stated that it was the duty of the tower to keep things clear on the ground as well as in the air and that this duty ran to the plaintiff, the court allowed recovery. It stated:

> "It has not been overlooked that the control tower was a busy place, and that other planes than the P-51 had to be advised in making landings, but the repairs to the surface of the runway were important enough to the Air Service to call for the exercise of reasonable care to guard against such an accident as took place, and it is my considered view that such reasonable care was not exercised." [32]

This holding is a particularly strong one in view of the fact that plaintiff's getting out of the way on previous occasions without signals from

[28] 45 Cal. App. (2d) 614; 114 P. (2d) 688; 1941 U.S.Av.R. 95; 1 Avi. 976 (1941).

[29] 141 U.S.Av.R. 110, 1 Avi. 983.

[30] *Ibid.* 107; 1 Avi. 982.

[31] 84 F. Supp. 721 (W.D.N.Y. 1949); 1949 U.S.Av.R. 308; 2 Avi. 957

[32] 1949 U.S.Av.R. 314; 2 Avi. 961.

the tower was not held to have constituted sufficient notice as to make him guilty of contributory negligence when he relied in this instance.

The Modern Instrument Facilities

Further discussion requires some knowledge of modern instrument landing facilities. D. W. Rentzel, Administrator of Civil Aeronautics, has outlined the ILS and GCA systems in his recent testimony before the Committee on Interstate and Foreign Commerce of the Senate.[33] The ILS system operates on radio principles and consists of two ground transmitters and a cross-pointer indicator located in the cockpit of the aircraft. One transmitter, the localizer, guides the aircraft laterally to keep it on the centerline of the runway, while the other, emitting the glide path beam, serves to guide the aircraft's rate of descent and vertical angle of approach. The horizontal needle of the cross-pointer is actuated by the glide path transmitter and the vertical needle by the localizer transmitter. When the two needles are at right angles the pilot knows he is on the correct approach path. Should the aircraft deviate, appropriate corrections are made by use of the aircraft control system to place the needles in the proper position — and the aircraft back on the correct approach path.

The GCA system as a component of the "precision beam radar" system, discussed by Mr. Rentzel, provides for no cockpit instrument. The aircraft is picked up by ground radar and the ground control operator "talks" the pilot in for his landing. This is accomplished by the pilot's obeying his ground-sent instructions received over ordinary voice radio, the ground operator matching the "blip" (representing the aircraft) against etched lines on a ground glass screen which fixed lines indicate the correct flight approach path.

III — Liability of Private Individuals

As was argued by the plaintiff in the *Finera* case,[34] there is a rule of tort liability that whenever one voluntarily comes to the aid of another and the latter relies upon such undertaking, there is imposed upon the former a duty of care at least to the extent of not placing the person acting in reliance in a more disadvantageous position than he was in prior to the voluntary undertaking. The Restatement of the Law of Torts states the proposition in the following manner:

> "(1) One who gratuitously renders services to another, . . . is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses.
>
> "(2) One who gratuitously renders services to another, . . . is not subject to liability for discontinuing the services if he does not

[33] Statement of Hon. D. W. Rentzel, Administrator of Civil Aeronautics, Hearings before the Committee on Interstate and Foreign Commerce United States Senate, 81st Congress (1st Session), Pursuant to S. Res. 51 (Washington: Government Printing Office 1949) Part 1 page 161.

[34] *Supra* note 21.

thereby leave the other in a worse position than he was in when the services were begun." [35]

The leading case is *Erie Railroad Company v. Stewart*,[36] holding that the failure of a railroad company to continue maintaining a watchman at one of its crossings (when not required by law) constituted a breach of duty to a passenger riding in a truck struck by one of the company's trains. The majority opinion required that the person relying have knowledge of the custom in order that the reliance be one into which he had been led by the company.[37] The minority judge held such a custom was widespread and one which the railroad company was bound to assume the general public would rely on.[38]

Perhaps the most important concept in this rule of liability is reliance. Consider the aircraft operator near or over an airport upon which contact landing is impossible. Could the failure of ground personnel to exercise due care in directing a landing place the operator in a worse position than the one he was in prior to starting his descent through the overcast? Reliance imports choice. The operator can either take his changes on finding a hole in the weather, seek an alternative landing field and the facilities that may there be available, or fly in on instruments dependent almost wholly upon guidance from the ground.

No operator would attempt a flight knowing his point of destination to be closed unless he knew about and relied on some means of instrument landing. Then, too, complete payload utilization demands the minimum carriage of extra fuel—thirty gallons is roughly equivalent to one paying passenger. To obtain maximum operating efficiency the operator necessarily relies upon weather and other data as well as available instrument landing facilities. Modern air transport must more and more be an effective integration of all efforts if it is to continue to improve the overall efficiency, safety record and certainty of schedule. Obviously there is no bright line of difference which determines where and in what instances relience is placed on ground facilities, and where that reliance begins and where it ends.

But does this mean that the radio operator exonerated from liability in the Johnson case for failure to transmit what turned out to be an important weather report[39] should now be held for the loss of a modern airliner and its fifty or more passengers? At least one court would probably respond in the negative. In deciding *Moch v. Rensselaer Walter Company*,[40] Judge Cardozo sought to draw a distinction between an inaction which was merely the denial of a benefit and an action which positively or actively worked an injury. In that case

[35] Restatement, Torts §323 (1934).
[36] *Supra* note 26.
[37] 40 F. (2d) 855, 857.
[38] *Ibid.* at 858.
[39] 41 U.S.Av.R. 95, 108.
[40] 247 N.Y. 160, 159 N.E. 896 (1928).

defendant water works company had contracted with a city to furnish hydrant water. Plaintiff sought to hold the water company in tort[41] for the loss of his warehouse by fire, occasioned it was alleged, by defendant's negligent failure to maintain sufficient water pressure at the hydrant. The court refused to enlarge the zone of duty imposed upon the water works,[42] stating as follows its opinion as to what might result from a contrary holding:

> The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacturer of goods, who enters upon the performance of his contract, must answer, in that view, not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply. Everyone making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from the contract, to an indefinite number of potential beneficiaries when performance has begun.[43]

In addition to the "must stop somewhere" attitude, commentators have indicated that the courts' reasoning is perhaps inconsistent with other decisions by Mr. Justice Cardozo,[44] and that it is based on the illusory distinction of New York tort law between non-performance and mis-performance.[45] It has also been suggested that paramount in the court's mind was the danger of increased cost of water service should liability be imposed—the balancing of capacity to bear the loss[46]—and that the rule of the case might have been earmarked a "special waterworks situation."[47]

In the *Moch* case the policy question was whether the individual should bear the loss, or whether the water works should assume liability, resulting in a consequent increase in water rates for all users. While there may be analogy between the parties in the two situations—ground control operator for water works, aircraft operator for city, and passenger for plaintiff—the policy question seems considerably different. In the first place alternative forms of transportation to air travel do exist and however desirable it may be to keep air fares at a minimum, these reasons are not as compelling as where the service is on a more monopolistic basis. In addition, the grade of service provided by the ground control operator cannot be divided by a determination of liability or no-liability in a particular situation as can the service offered by a water works. There is no regular and normal use of instrument land-

[41] In addition to common-law tort, plaintiff sought to hold defendant for breach of statutory duty and for breach of contract. 247 N.Y. 160, 163.

[42] *Contra*: Fisher v. Greensboro Water Supply Co., 128 N.C. 375, 38 S.E. 912 (1901); Cases cited, Prosser, Handbook of the Law of Torts (St. Paul 1941) p. 208, note 18; Note, 12 Corn. Law Quart. 207, 210 (1926).

[43] 247 N.Y. 160, 168.

[44] Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 Harv. L. Rev. 372, 393 (1939).

[45] Prosser, *op. cit., supra* note 41 pp. 208, 698.

[46] Prosser, *ibid.* pp. 27, 185.

[47] Seavey, *supra* note 42 at 391.

ing facilities as there is of water. To suggest therefore that the aircraft operator might pay one charge for a "no liability for negligence" ground control service and another charge for a "liability for negligence" service contradicts public policy.

Liability of the ground control operator premised upon his gratuitous undertaking while the most general, including as it may in any particular situation where the other elements necessary for a tort are present, almost every ground service rendered the aircraft operator, is not the only basis upon which liability can be supported. Liability for negligence on the part of the ground control operator, where the physical directing of the aircraft is taken away from the aircraft operator might be premised on the transfer of "control."[48] Consider the transport aircraft making a GCA landing and assume that due to the negligence of the ground control operator instruments are out of calibration or that an incorrect instruction is given, with the result that the pilot, following instructions and through no negligence on his part, flies into the side of a nearby hill. Who was in "control" of the landing operation? The pilot so long as he proceeds with this type of instrument operation merely actuates the controls, blindly, in accordance with instructions from the ground. With the ground control operator assuming charge as well as intimate physical direction of the aircraft itself, the usual rule of liability for negligence should apply,[49] and other necessary elements present he would be liable not only to the aircraft operator and his passengers for harm attributable to that negligence, but for damage to the persons and property of third persons on the ground in addition.

Continuing this reasoning a step further introduces a lent-servant problem. With the pilot acting under the direction of the GCA operator, it is possible to argue that for the landing operation he ceases to be a servant of the aircraft operator and for purposes of tort liability, is transferred to the service of his special master, the ground control operator.[50] Should this be the case the person most affected would be

[48] In Wanderer v. Société Anonyme Belge d'Exploitation de la Navigation Aerienne (SABENA), and Pan American Airways, Inc., 1949 U.S.Av.R. 25 (S.C.N.Y., February 10, 1949), a passenger having a passage ticket issued by defendant SABENA sought to hold defendant Pan American Airways for injuries sustained as a result of the crash of an aircraft owned by SABENA. The complaint alleged "that the defendant Pan American controlled the operations of the defendant Sabena at Gander Airfield; that when the airplane crashed it was being controlled by both defendants, and the defendant Pan American was further charged with fault in failing to instruct the pilot to proceed to another airfield where weather conditions were more favorable than the conditions prevailing in Gander at the time of the accident."

[49] Restatement, Torts, Sec. 281 (1934).

[50] "In the absence of evidence to the contrary, there is an inference that the actor remains in his general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer." Restatement, Agency §227 Comment (b) (1933). Where the servant in question operates machinery it has been said that it is the work or service that has been transferred. Standard Oil Company v. Anderson, 212 U.S. 215 (1909). See also: Robins Dry Dock and Repair Company v. Navigazione Libera Triestina, 261 N.Y. 455 (1933).

the pilot, whose recovery might be denied by the fellow servant rule.[52] It is extremely doubtful however whether a court would go as far as to recognize the establishment of an agency *pro hac vice* in any real sense.[52]

In the special situation where the ground control operator is an agent of the airport operator, liability for negligence resulting in harm to the aircraft operator and his passengers might be based upon the fact that the latter are business invitees.[53] This is the normal situation with respect to property on the ground, and at least in the airspace immediately above the airport as well.[54]

IV — Liability of Government

The preceeding discussion has been devoted to a study of rules of tort liability which might apply, in a given situation, to the activities of the ground control operator. Most ground control operators are however, agents of a municipal, state, or the federal government, and any discussion which does not consider even if briefly the immunities recognized by tort law in behalf of such governments would be manifestly incomplete.

As indicated earlier, tort liability of a municipality depends in most jurisdictions upon whether the particular act or omission complained of was committed in the exercise of a "proprietary" or "governmental" function.[55] Since the classification of particular functions as one or the other is not only difficult but variant from jurisdiction to jurisdiction,[56] only a few comments are worthwhile here. In *Rhodes* v. *City of Asheville*,[57] the Supreme Court of North Carolina had before it an action against a municipal airport operator for wrongful death. After reviewing the authorities the court stated:

> "We have found no decision . . . in which any Court of last resort in this country, has held that the construction, operation and maintenance of an airport by a municipality is a governmental function

However, "if the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for his general employment, the employee as to such act becomes a servant of the temporary employer." Restatement, Agency §227 Comment (d) (1933). Denton v. Yazoo & Mississippi Valley Railroad Co. et al., 248 U.S. 305 (1932); McFarland v. Dixie Machinery & Equipment Company, 348 Mo. 341; 153 S.W. 2d 67 (1941).

[51] Restatement, Agency §476 Comment (b) (1933).

[52] If the pilot is truly the servant of the ground control operator, the latter might be liable at least to passengers for his negligence. The maritime cases involving suits against port authorities for the negligence of a pilot offers some analogy. *Compare* The Thielbek, 241 Fed. 209 (C.C.A. 9th 1917), *with* Standard Oil Company of New Jersey v. United States, 27 Fed. (2d) 370 (S.D. Ala. 1928).

[53] *Supra* note 5.

[54] Airspace within the immediate reaches above land is property of the landowner. United States v. Causby, 328 U.S. 256 (1946).

[55] *Supra* note 9.

[56] See generally: 6 McQuillin, Municipal Corporations (2nd. ed. 1937) §§2792-2822; 4 Dillon, Municipal Corporations (5th. ed. 1911)§§1644-1646, 1665-1668.

[57] *Supra* note 6.

> and that municipalities may not be held liable in tort for the negligent operation thereof, except where they have been expressly exempted from such liability by statute." [58]

The court further indicated the proper proceedure to be followed in avoiding liability – while "it might be wise to exempt municipalities from tort liability in connecton with the construction, operation and mantenance of airports . . . we think the exemption should be expressly granted by the Legislature, rather than by judicial decree."[59] It is also of interest to note in connection with the liability of municipalities that landing fees are more and more becoming service fees, and there is reason to believe that they will continue to be so.[60]

Neither the United States nor any of its component states may be sued without consent. In all state jurisdictions consent of a more or less limited nature has been granted by statute, but here again, the rule varies from jurisdiction to jurisdiction and its study here would be fruitless.[61] On the other hand consent of the United States to be sued in tort is, in most instances, contained in the Federal Tort Claims Act of 1946.[62] The extent of that consent is now defined in Section 2674 of Title 28 of the United States Code:

> "Liability of the United States: The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." [63]

Exclusive jurisdiction for tort claims against the United States is cast in the district courts:

> "Section 1346, United States as defendant (b) . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or for 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." [64]

With respect to liability of the United States for the tortious acts or omissions of its ground control operators, perhaps the most important section of the Act is §2680 of Title 28, Exceptions:

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[58] 2 Avi. at 910.

[59] *Ibid.* at 911.

[60] See discussion: Dearing and Owen, National Transportation Policy (Brookings 1949) pp. 25-29. Compare the realistic approach taken by the Supreme Court of Iowa in Abbott v. City of Des Moines, *supra* note 8. After noting that revenue was equal to only 57 percent of the expense of operation, the court remarked: "Obviously, the airport is not operated for profit to the city." 1941 U.S.Av.R.41.

[61] See: Maguire, State Liability For Tort, 30 Harv. Law Rev. 20 (1916); Borchard, Government Liability In Tort 34 Yale Law Jour. 1 (1934).

[62] Public Law 601, 79th Cong., c. 753, 2nd Session, approved August 2, 1946, 28 U.S.C.A. §§921 et seq.

[63] 62 Stat. 980 (1948).

[64] 62 Stat. 933 (1948).

> 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 of 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 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.[65]

The activities of ground control operators are usually defined by regulations and from their nature necessarily involve a considerable exercise of discretion. Therefore, Section 2680(a) will probably be invoked to bar actions in the kind of situation contemplated in Part III *supra.*

The language of the Exception dealing with a "discretionary function or duty" is extremely broad. In *Thomas* v. *United States,*[66] plaintiff sued under the Act for damages due to the loss of certain property. The Corps of Engineers of the War Department had improperly located dikes or revetments in the Missouri River which resulted in the throwing of water upon the land in question. Defendant's motion to dismiss was sustained under the Exception. The court, after noting that authority for development of the river was conferred by Congress upon the Secretary of War under the supervision of the Chief of Engineers, went on to take the view "that the details or method of carrying out the plan as submitted to and accepted by the Congress for the development of navigable streams for navigation or for flood control under the direction of the Chief of Engineers of the War Department is a discretionary act within the meaning of Subsection (a) of Sec. 2680 . . . which would not render the Government liable for damage resulting from abuse of that discretion or any error or mistake made in carrying it out."[67] The Court of Appeals for the Fourth Circuit was not so uncharitable.[68] The case was one for wrongful death by endemic typhus as a result of the bite of a flea from an infected rat. Defendant's negligence is failing to take adequate measures to exterminate rats on the premises of which deceased had been a tenant was alleged as the cause. The answer to the discretionary function or duty defense was "found in the language of Section 2680 itself because . . . the evidence shows that the government was not charged with a discretionary function or duty, but with the absolute duty of keeping the premises safe for tenants."[69] The absolute duty existed by state law.

It seems reasonably clear that the Exception will not work in favor of the United States where an order or regulation is clearly violated by an employee of the government while acting within the scope of his

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[65] 62 Stat. 948 (1948).

[66] 81 F. Supp. 881 (W.D.Mo. 1949).

[67] *Ibid.* at 882.

[68] State of Maryland, for use of Pumphrey v. Manor Real Estate and Trust Co. et al., 176 Fed. (2d) 414 (C.C.A. 4th 1949).

[69] *Ibid.* at 419.

employment. In *Cerri et al.*, v. *United States,*[70] recovery was allowed for injuries sustained as a result of a shot fired by a soldier on duty while attempting to halt the escape of a civilian under arrest for a minor crime. In another case[71] recovery was allowed the owner of a turkey ranch for loss sustained as a result of low flying Air Force Personnel in violation of both civil and military regulations. The Exception was not mentioned in the opinion.[72]

Where there is no relevant order or regulation, or, if no violation is proved, the problem is somewhat more difficult. In *Denny et ux.* v. *United States,*[73] recovery was denied a commissioned officer and his wife for loss sustained as a result of their child being born stillborn. The negligence alleged was defendant's failure to promptly dispatch an ambulance when labor started. The court found both a statute and an Army regulation to the effect that medical officers shall attend families of service personnel "whenever possible," and stated that "the liability of the United States under the Federal Tort Claims Act does not extend to cases where, as here, injury results from the failure to perform a mere discretionary function or duty, even though the discretion involved be abused."[74] Similarly, in an action[75] brought by the wife of a veteran alleging negligence of the Veteran's Administration Facility at Tuskegee, Alabama, in releasing her husband well knowing that his psychotic condition might be manifested in homicidal tendencies. The court stated that "in effecting the discharge of said veteran, the instructions and directions contained in Veterans' Administration regulations and procedures then in effect were followed in complete and exact detail."[76] However, there is authority for holding the United States in such a case where a substantial showing of negligence is made. In *Jefferson* v. *United States,*[77] plaintiff's claim was based upon the negligence of an army officer in leaving a towel in his stomach after an operation. The complaint was dismissed on the grounds that there existed in the Act an implied exception on behalf of the government for claims made by members of the Armed Forces. While seeking to find such an exception the court stated, "the problem here is made more difficult by reason of the fact . . . that the Act . . . contains numerous types of claims which are excepted from the coverage of the Act, none of which, however, include the instant solution, although in a prior proposed Act for the same general purpose, there was included such an exception."[78]

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[70] 80 F. Supp. 831 (N.D.Cal. 1948).

[71] Hambright v. United States, — F. Supp. —; 2 Avi. 15,030 (W. D. So. Car. 1949).

[72] See also: San Diego Gas and Electric Company v. United States, 173 Fed. (2d) 92; 2 Avi. 842 (C.C.A. 9th 1949).

[73] 171 Fed. (2d) 365 (C.C.A. 5th 1948).

[74] *Ibid.* at 367.

[75] Kendrick v. United States, 82 F. Supp. 430 (N.D. Ala. 1949).

[76] *Ibid.* at 431.

[77] 77 F. Supp. 706 (D. Md. 1948).

[78] *Ibid.* at 712.

Such is at least a partial consideration of the Exception in the lower federal courts.[79] While it is dangerous to generalize on such a paucity of authority, the decisions seem to show, (a) that where there is a clear violation of an order or regulation by an employee of the United States acting within the scope of his authority, the Exception does not apply, and (b) where the act or omission complained of is in the exercise of a discretionary function or duty, or pursuant to a regulation or order, the United States is not liable unless there is a substantial showing of negligence.

V — Conclusions

The ground services offered aircraft operators by government — federal, state and municipal — and by other agencies independent from the immediate operation of flying the aircraft are legion. Such agencies have been defined collectively as the ground control operator in very general terms, and the many and varied services which each renders have been lumped all together and treated as a single effort. This has been done to outline general rules of law which it is hoped will serve as guides in determining the question of liability in any particular factual situation under consideration.

The most inclusive rule and it is submitted the most sound basis upon which to start, is liability for reliance on the undertaking of another. Its operation is not limited in application to GCA operators, property owners or other special cases. The rule may readily apply to the actions of weather dispatchers, traffic directors, and similarly engaged ground personnel. It is a broad shoulder of tort liability and can render full service, especially if it be remembered, in limitation, that there is always to be determined in a given case, whether the ground service negligently rendered was the legal cause of the harm for which recovery is sought.

The principle of sovereign immunity in national law where there is presented no problem of interference with the function of government, is archaic. The loss occasioned by the negligence of an agent of government should be borne by that government as it is borne by a private individual, and should be treated as a cost of administration to be distributed by taxes to the public. "In the course of a century or more a steadily expanding conception of public morality regarding 'governmental responsibility' has led to a 'generous policy of consent for suits against government' to compensate for the negligence of its agents as well as to secure obedience to its contracts."[80] There seems to be no sound reason why that progress should stop.

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[79] In *Larson, etc.* v. *United States, supra* note 4, Mr. Justice Frankfurter had occasion to comment in his dissent that, on the facts of an important precedent to the principal case, recovery could not have been maintained today against the United States under the Federal Tort Claims Act. Section 2680 was cited. 337 U.S. at 718 n. 10.

[80] Quoted by Mr. Justice Frankfurter in the *Larson* Case, *supra* note 4, 337 U.S. at 709. *Cf.* the statement by the majority. *Ibid.* at 704.