1975

Allegheny Airlines, Inc. v. United States (Case Note)

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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

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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

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[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-

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[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]

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[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

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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]

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[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

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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.

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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-

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[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.