

DUTY OF LANDOWNER TO WARN AIR TRAVELER OF PRESENCE OF HIGH STRUCTURES

A California court has held that a landowner who erects a high structure on his land has no duty to warn aircraft which fly over the land of the presence of the structure. A Washington court has held directly to the contrary. The purpose of this comment is to discuss the rationale of these decisions.

In *Strother et. al. v. Pacific Gas and Electric Company et. al.*,¹ the plaintiff's private aircraft struck power lines owned by the defendant who owned the land upon which a twenty-six foot high power line was erected. The land was adjacent to an airport and the plaintiff was attempting a landing when his airplane struck the wires. The power line was not marked by lights, bright paint, or any other warning device. The air traveler claimed that the defendant had a duty to warn him of the presence of the power lines. He alleged that having failed to fulfill this duty, defendant was negligent and was therefore liable for the damages incurred.

In holding for the defendant, the Court found that he had no duty to warn the plaintiff of the presence of the powerline. The Court based its decision upon the common law rule that a landowner owes no duty of care to a trespasser, and decreed that the plaintiff in this case was a trespasser because his aircraft "entered upon" the land of the defendant without right or permission. The initial contact with the powerline was held to be an entry because in California ownership of the airspace above a person's land extends upwards to the extent of reasonable use of the airspace.² The powerline was held to be a reasonable use of the land, and since the landowner had no duty to warn the trespassing plaintiff of the presence of the wires, he was not negligent.

The common law rule that a landowner owes no duty of care to a trespasser was used by this Court to further a policy of securing to a landowner the maximum beneficial use of his land. The basis of this rationale is that to require the landowner to exercise care toward persons who have no right or permission to be on his land is to place on onerous burden upon him, which would limit his right to use his land as he pleased, and deprive him of its beneficial use.

An example of the extent to which this California Court felt that beneficial use of the land should be protected is this statement which it quoted from a 1939 Indiana case in which an airport owner attempted to enjoin construction of a power line which threatened to interfere with operation of the airport:

¹ 94 Cal.App.2d 525, 211 P.2d 624 (1949); *hearing denied*, Jan. 4, 1950.

² The exact extent of landowner property rights in the air above his land is the subject of much discussion and some doubt. It is safe to say that it extends at least to the actual reasonable use made of that airspace. The question in California is covered by Pub. Util. Code §§21402-21403.

Had the appellee chosen to erect flag poles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its powerlines, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport. . . . The owner of the property is under no duty to keep the premises safe for a trespasser. . . .³

The application of the rule that a landowner owes no duty of care toward a trespasser was ". . . necessary to secure him the beneficial use of his land . . ." ⁴

On essentially the same facts as *Strother*, the Washington Supreme Court in *Mills v. Orcas Power and Light Co.*⁵ held that a landowner did have a duty to warn aircraft of the presence of high structures on his land.

The Washington Court refused to apply the common law rule that a landowner owes no duty of care to a trespasser. The Court reasoned that the common law rule was not applicable because it was designed to operate in a world in which air travel was unknown. The introduction of travel *over* land as opposed to travel *on* land presents a new factual situation with considerations unknown to the courts which developed the traditional trespass rules. These considerations are: (1) the strong public policy of fostering air travel, and (2) the strong public policy of reducing air accidents.

Referring to the public policy of encouraging air travel, the *Mills* court noted that the Supreme Court of the United States has ruled that the air is a national highway.⁶ Courts should foster the use of this air highway, stated the Washington Court, by providing its users with the same protection afforded users of ground highways.

The Court gave effect to these policy considerations by holding that a landowner has a duty, under certain circumstances, to warn aircraft of the presence of high structures on his land. There is a duty, said the Court, to "indicate where the highway ends and the property begins."⁷

In the course of its opinion the Court referred to two common law exceptions to the "no duty to trespassers" rule:

- 1) a duty of care to persons whom the landowner has negligently enticed upon his land;

³ *Strother et. al. v. Pacific Gas and Electric et. al.*, 94 Cal.App.2d 525, 539, 211 P.2d 624, 633 (1949), citing *Capitol Airways Inc. v. Indianapolis Power and Light Co.*, 215 Ind. 462, 18 N.E.2d 776, 778 (1939).

⁴ *Strother et. al. v. Pacific Gas and Electric Co. et. al.*, 94 Cal.App.2d 525, 529, 211 P.2d 624, 627 (1949), citing *Langazo v. San Joaquin Light and Power Corp.*, 32 Cal.App.2d 678, 689, 90 P.2d 825, 831 (1939); *accord*, *La Com et. al. v. Pacific Gas and Electric Co.*, 132 Cal. App.2d 114, 281 P.2d 894 (1955); *Hughes et al., v. Mississippi Power Co.*, 244 Miss. 326, 140 So.2d 539 (1962).

⁵ 56 Wash.2d 807, 355 P.2d 781 (1960); *rehearing denied*, Dec. 15, 1960.

⁶ *United States v. Causby*, 328 U.S. 256 (1946).

⁷ *Mills v. Orcas Power and Light Co.*, 56 Wash.2d 807, 355 P.2d 781, 790 (1960).

- 2) a duty by landowners owning land adjacent to a highway to maintain the land in such a manner as to protect travelers who may reasonably mistake the private land for part of the highway.

The first exception concerns a person who is induced to enter upon land through the negligence of the landowner. Such a person is not a trespasser and consequently is owed a duty of care. The Court applied this exception by stating that if the landowner negligently failed to warn the aircraft of his "property line" (the power line) he negligently induced the plaintiff to make the entry, and consequently the plaintiff was not a trespasser. On the other hand, if the defendant did not negligently induce the plaintiff to enter his property, the plaintiff was a trespasser and no duty of care was owed. Thus, the question is whether or not the defendant negligently failed to give proper warning of the presence of his land.

This argument appears tenuous. Justice Hall, concurring in the *Mills* decision, referred to it as ". . . some technical reason which I am unable to grasp . . ."⁸ Its weakness lies in the presumption that the landowner has a duty to warn the aircraft of the presence of his property. This presupposes the very duty that the plaintiff seeks to establish.⁹

The second exception to which the Court referred was that there is a duty of care toward travelers on the part of a person who owns property adjacent to a highway. The property owner is required to safely maintain any portion of the adjacent property which a traveler may reasonably mistake for part of the highway. For example, if vacant land adjacent to a highway might be mistaken for part of the highway by a traveler at night, the landowner would have a duty to warn the traveler of the location of an obstruction on the property. If he failed to fulfill the duty, he would be liable to the traveler who injured himself by colliding with the obstruction.

This is essentially the rule stated in *Mills*.¹⁰ The "highway" in *Mills* was an air highway, the obstruction was a high structure, and the air traveler may reasonably be foreseen as straying from this highway and colliding with the obstruction.

Obviously, the *Strother* and the *Mills* decisions emphasize different social policies. *Strother* emphasizes the right of the landowner to beneficially enjoy his land whereas *Mills* emphasizes the value and importance of air travel, and the necessity of protecting the air traveler. These social policies differ, but they need cause no irreconcilable conflict. A court which

⁸ *Mills v. Orcas Power and Light Co.*, *supra* note 7, 355 P.2d at 791 (1960).

⁹ Only one case cited by the court in support of the argument deals with trespass to land, the landowner therein being responsible for maintaining the adjacent street. The traveler, skidding on the negligently maintained street, crossed the landowner's boundary line. The landowner could not assert that he was a trespasser; his negligence in failing to maintain the street estopped him from any such claim. The duty violated was failure to maintain the street, not failure to properly warn of the boundary line of the property. See *Roche v. Milwaukee Gas Light Co.*, 5 Wis. 55 (1856).

¹⁰ *Mills v. Orcas Light and Power Co.*, 56 Wash.2d. 807, 355 P.2d 781 (1960).

places upon the landowner a duty of care toward over-flying aircraft will only interfere slightly with the landowner's beneficial use of his land.

With respect to the area of land involved, the landowner need only act upon that portion of his land which supports the vertical obstruction in question, or upon the obstruction itself. In most cases this includes only a small area. Even in exceptional situations where the area is large, or where a power company owns a power line right of way, the burden is no greater than that imposed by common law upon the owner of a power line right of way, or of a canal which parallels an adjacent ground highway.

As to the acts necessary to give proper warnings, the landowner generally does not have to limit the use of his land or structure, nor is it usually necessary to install expensive and elaborate warning devices. Proper warning may be given by use of devices such as lights, bright paint, or signs.¹¹ The simplicity and facility of providing warning of the presence of the ground structure adds weight to the argument for imposing a duty upon the landowner to warn aircraft of vertical obstructions. In weighing the factors involved, it is readily apparent that by relatively minor expenditures tragic air accidents can be prevented.

That the burden is not unreasonable is further demonstrated by the fact that even with the duty of care imposed he is not held to be strictly liable for an air accident involving his high structure; rather, liability will only result if the air traveler can successfully maintain an action in negligence.¹²

An examination of aircraft-ground-structure collision cases which have not involved the trespasser question shows that the following elements must be proven:

- 1) The accident must have been foreseeable. For example, the land may have been located near an airport or the structure was of great height.¹³
- 2) The landowner must have failed to exercise reasonable care.¹⁴
- 3) The failure to exercise reasonable care must have caused the accident and resulted in the damages.¹⁵
- 4) The defendant must not be able to raise any defense to the negligence action such as contributory negligence. This defense has been

¹¹ *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965); *El Paso Natural Gas Co. v. United States*, 343 F.2d 145 (9th Cir. 1965); *Mills v. Orcas Power and Light Co.*, *supra* note 10; *Yoffee v. Penn Power and Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956).

¹² For a case dealing with willful misconduct in this situation see *McLemore v. Harris*, Alaska, 374 P.2d 410 (1962). For cases dealing with intentional interference see *J. D. Liles et. al. v. Charles Harnigan*, 1950 U.S. Av. 90 (Tenn. 1949); *Commonwealth of Penn. v. Von Bestecki et. al.*, 30 Pa. D. & C. 137, 1937 U.S. Av.1 (Pa. 1937).

¹³ *Mills v. Orcas Power and Light Co.*, 57 Wash.2d 807, 355 P.2d 781 (1960) (near airport); *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965) (power line high over valley).

¹⁴ *Mills v. Orcas*, *supra* note 13; *United States v. State of Washington*, *supra* note 13; *Yoffee v. Penn Power*, 385 Pa. 520, 123 A.2d 636 (1956).

¹⁵ *Id.*

alleged when the aircraft was flying below FAA minimum altitudes,¹⁶ when the pilot failed to consult proper charts, when the pilot disregarded his knowledge of the presence of a high structure in the area, and when the pilot attempted to land over the top of power-lines at night.¹⁷

From the above considerations it can be seen that the duty to warn aircraft of the presence of a ground structure does not impose an unreasonable burden upon the landowner, and does not interfere with his beneficial enjoyment of his land. The policy of protecting the air traveler, as seen in *Mills* and the policy of protecting the beneficial enjoyment of the landowner as seen in *Strother* are compatible.

CONCLUSION

The policy of fostering beneficial use of a person's land and the policy of fostering and protecting air travel are not mutually exclusive. The latter policy can be furthered by imposing a duty upon the landowner to warn aircraft of the presence of ground structures which may lead to air tragedy. The landowner who fulfills such a duty will not suffer an onerous burden, nor will the beneficial enjoyment of his land be restricted.

It is suggested that the courts of California should recognize such a duty of care in this State. In light of the phenomenal advances in air travel, it is submitted that this is the only reasonable position.

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¹⁶ See 14 C.F.R. §91.79: "Minimum safe altitudes: general. Except when necessary for take-off or landing no person may operate an aircraft below the following altitudes:

a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

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

¹⁷ *Yoffee v. Penn Power and Light*, 385 Pa. 520, 123 A.2d 636 (1956) (flying below FAA minimum flight altitudes); *El Paso Natural Gas Co. v. United States*, 343 F.2d 145 (9th Cir. 1965) (failure to consult charts); *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965) (knowledge of presence of structure); *La Com et. al. v. Pacific Gas and Electric Co.*, 132 Cal.App.2d 114, 281 P.2d 894 (1955) (attempted landing over wires at night).