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Federal Tort Claims Act: FAA Warnings to Private Aircraft Passengers: *Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978)

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Note

Federal Tort Claims Act: FAA Warnings to Private Aircraft Passengers

Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

I. INTRODUCTION

The Federal Tort Claims Act (FTCA)[1] specifically waives the sovereign immunity of the United States for the torts of federal employees.[2] The FTCA requires that the conduct for which the government is liable must be the same as that for which a private individual would be liable[3] under the law of the jurisdiction in which the act or omission complained of occurred.[4]

Because of the extensive involvement of the United States in aviation, the FTCA has frequently been invoked in airplane crash cases.[5] *Clemente v. United States*[6] arose out of the crash of a private aircraft that killed, among others, Roberto Clemente, a renowned professional baseball player. The plaintiffs claimed the crash might have been prevented had Federal Aviation Administration (FAA) inspectors warned Clemente of safety regulation violations on that flight.[7]

The court in *Clemente* faced the issue of whether a duty was

1. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).
2. *See id.* § 2680 (list of exceptions to waiver of the government's sovereign immunity).
3. *Id.* §§ 1346(b), 2674.
4. *Id.* § 1346(b). *See* Richards v. United States, 369 U.S. 1, 9 (1962); Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 91 (1st Cir. 1975).
5. *E.g.*, Todd v. United States, 553 F.2d 381 (5th Cir. 1977); Dickens v. United States, 545 F.2d 886 (5th Cir. 1977); Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *In re* Air Crash Disaster at New Orleans, La., 422 F. Supp. 1166 (W.D. Tenn. 1975), *aff'd*, 544 F.2d 270 (6th Cir. 1976); Thinguldstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972); Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969).
6. 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).
7. *Id.* at 1143.

imposed on the United States, through the FAA, by the promulgation of an FAA administrative directive. This note will examine the court's decision that no duty was imposed which ran to the passengers of the flight that killed Clemente.[8] No attempt is made to discuss the sufficiency of safety precautions in private aircraft and government regulation thereof.

II. THE FACTS

On September 25, 1972, the Director of the Southern Region of the FAA issued Order SO8430.20C, which was implemented in San Juan, Puerto Rico, by at least October 31, 1972.[9] The order, as quoted by the court, stated in relevant part:

> 1. PURPOSE. This order outlines procedures for a continuous surveillance program of large and turbine powered airplanes. . . .
>
> . . . .
>
> 3. ACTION. . . . to establish the method for notification of arriving and departing large aircraft and turbine powered aircraft that cannot be readily identified as bona fide air carriers . . . . Representative of these are: . . . DC-7 . . . To accomplish this program effectively, consideration should be given to night and weekend surveillance . . . as necessary.
>
> . . . .
>
> 5. BACKGROUND. Several accidents/incidents involving noncertified carriers disclosed . . . operators were transporting specialized groups . . . without an appropriate operating certificate, and little regard to airworthiness safety standards on their aircraft. . . .
>
> . . . .
>
> 7. ON SITE INSPECTION
>
> a. Conduct ramp inspection with at least the following emphasis to determine that the crew and operator comply with . . . [these] requirements for safety of flight.
>
> . . . .
>
> (6) Airworthiness of the aircraft.
>
> . . . .
>
> (8) Weight and Balance
>
> . . . .
>
> (10) Pilot qualification . . . .
>
> . . . .
>
> d. . . . Clear indication of alleged illegal flight should be made known to flight crew *and persons chartering the service.*[10]

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8. Since the court of appeals held that no cause of action was established by the plaintiffs, the court did not address the issue of whether the FAA inspectors' conduct was covered by the discretionary function exception of 28 U.S.C. § 2680(a) (1976). 567 F.2d at 1150 n.15.
9. Clemente v. United States, 422 F. Supp. 564, 570 (D.P.R. 1976), *rehearing denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).
10. *Id.* at 570-71 (emphasis added).

The DC-7CF aircraft chartered by Mr. Clemente to fly relief supplies to earthquake stricken Nicaragua[11] was damaged while taxiing in San Juan, Puerto Rico, on December 2, 1972. The propellers on engines No. 2 and No. 3 stopped suddenly upon hitting "a hard object"[12] after the plane had veered off the taxiway. On two separate occasions, the accident was investigated by FAA inspectors.[13] After repairs were completed by qualified mechanics,[14] the plane was returned to the owner and it was not flown again until the Clemente charter. The FAA inspectors were aware subsequent to the December 2 accident that the owner was again advertising the plane as available for charter.[15]

The flight to Nicaragua was attempted on December 31, 1972, and the weather on that date was excellent.[16] A witness reported that the aircraft struggled to gain altitude on takeoff[17] and within three minutes after takeoff, San Juan Control Tower received a brief transmission from the pilot stating only that the airplane was coming back to land. The aircraft crashed into the Atlantic Ocean before it could return to land. Three of the four engines were recovered from the Atlantic and engines No. 2 and No. 3 showed signs of failure prior to the crash.[18]

The fuel receipts and customs declaration examined during the post-crash investigation revealed that the gross takeoff weight of the aircraft was 4,193 pounds over the maximum allowable gross weight of 144,750 pounds.[19] The Federal Air Regulations required

11. Several airplane loads of supplies had already been transported to Nicaragua when the last airplane prepared to leave on December 30, 1972. When the last flight could not hold all the cargo available, Mr. Clemente was approached by Arthur S. Rivera, owner of the DC-7CF, who made his airplane available for charter to Clemente. *Id.* at 566.
12. *Id.* at 565-66.
13. Both of the principal investigators were by chance present at the San Juan airport on the date of the accident. *Id.* at 566.
14. The mechanics were apparently satisfied that the airplane was fully repaired because one of them, Francisco Matias, was aboard the flight with Clemente and died in the crash. *Id.*
15. *Id.* at 566 n.7.
16. There were scattered clouds at 2,200 feet above sea level and the visibility was 10 miles. *Id.* at 567.
17. The witness testified that on takeoff the engines sounded even and normal. At the end of the takeoff roll, he heard three backfires and a different engine sound, caused by a change in engine revolutions. After the aircraft was out of sight, he heard an explosion. *Id.* at 567-68 n.12.
18. Rough seas prevented recovery of any portion of the airplane for about a week. Engine No. 2 was recovered with a "feathered" propeller, a situation in which the propeller blades are mechanically rotated to a position parallel to the onrushing wind so as to present the least wind resistance after an engine failure. The magnetic sump pump of engine No. 3 contained broken pieces of cylinder rings, but the rings were found intact in the cylinders. *Id.* at 568.
19. *Id.* at 567.

the crew for that flight to consist of a qualified pilot in command, a co-pilot and a flight engineer.[20] The pilot in command was well qualified,[21] but the owner, who was not qualified, served as co-pilot[22] and did not succeed in obtaining a flight engineer for the flight.[23]

The relatives of Clemente and the other passengers brought suit against the United States under the FTCA.[24] The district court held that the FAA order was mandatory upon the FAA personnel,[25] that the order created a duty to the passengers as a matter of law,[26] and that the failure to follow the order was a cause of the accident.[27] Accordingly, the district court found for the plaintiffs on the issue of negligence.

III. DECISION OF THE COURT OF APPEALS

A. Indian Towing Co. v. United States

In *Clemente*, the Court of Appeals for the First Circuit based its decision upon the Supreme Court's rejection of the government's sovereignty defense in *Indian Towing Co. v. United States*.[28] The *Clemente* court reasoned that since the government was to be examined in the same manner as a private individual,[29] the acts and orders of the United States should be viewed as made by a private individual and not by a sovereign government.[30] FAA orders such

20. 14 C.F.R. §§ 121.385(b), 121.385(c)(3), 121.387 (1978).
21. He held an airline transport pilot certificate issued by the FAA with multi-engine and instrument ratings, plus a DC-7 type rating. Of his approximately 12,500 hours of flight time, about 3,000 hours had been spent in DC-7 type aircraft, and he had last flown a DC-7 on November 10, 1972. 422 F. Supp. at 567.
22. Although Rivera held a commercial pilot's certificate with instrument and multi-engine ratings, he was not type certificated by the FAA for DC-7 aircraft and only 6 hours of his 1,900 total flying hours had been accumulated in DC-7 aircraft. *Id.*
23. *Id.*
24. Clemente v. United States, 422 F. Supp. 564 (D.P.R. 1976), *rehearing denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006.
25. *Id.* at 571-72.
26. *Id.*
27. *Id.* at 572. Under the tort law of Puerto Rico, it was not necessary that this be the *only* proximate cause of the accident; it was sufficient to find it was *a* proximate cause. *See* note 53 & accompanying text *infra*.
28. 350 U.S. 61 (1955). *See also* Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953), *aff'd in part, rev'd in part on other grounds sub nom.* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 962 (1956).
29. Clemente v. United States, 567 F.2d at 1144. *See also* 28 U.S.C. §§ 1346(b), 2674 (1976).
30. 567 F.2d at 1144.

as Order SO8430.20C were therefore viewed, not "as commands which create legal duties or standards,"[31] but rather as "in the context of an employee relationship . . . which includes reciprocal duties . . . but not necessarily a legal duty to the citizenry."[32]

In addition, the court found no Puerto Rico case imposing liability in a similar situation.[33] The court then considered the *Restatement (Second) of Torts*,[34] which bases liability on one of three grounds if the order is viewed as made by a private individual:

> [T]he conduct of the employee actually increased the risk or harm to the damaged [persons]; the harm to the damaged [persons] resulted from [their] reliance on the employee carrying out the inspection as ordered; or there existed a prior duty to inspect owed by the employer to the damaged [persons].[35]

The *Clemente* court also indicated reliance was a crucial factor in determining the Supreme Court's holding in *Indian Towing Co.*[36] The court in *Clemente* found no indication that Clemente and his fellow passengers, "or anyone else for that matter,"[37] had ever relied on the FAA to inspect a charter flight before departure.[38]

B. The Policy Grounds

The court felt that to decide that a duty existed would "interpret every command made . . . by the . . . staff of any federal agency as creating a duty of the federal government to the beneficiaries of that command such that the government would be liable to the beneficiary if the command was not carried out."[39] It described this result as "limitless liability,"[40] and repudiated any case which might be interpreted to hold such a duty exists.[41]

The court also suggested that the surrender of immunity by the United States in the FTCA "should be interpreted narrowly."[42] The court stated no further reasons or citations of authority for this rule of law, but nevertheless felt it must submit the cases cited

31. *Id.*
32. *Id.*
33. *Id.* at 1145. *See* note 53 & accompanying text *infra*.
34. RESTATEMENT (SECOND) OF TORTS § 324A (1965).
35. 567 F.2d at 1145 (paraphrasing RESTATEMENT (SECOND) OF TORTS § 324A (1965)).
36. 567 F.2d at 1148. *See* Indian Towing Co. v. United States, 350 U.S. 61, 64-65, 69 (1955).
37. 567 F.2d at 1148.
38. *Id.*
39. *Id.* at 1145-46 (footnote omitted).
40. *Id.* at 1146.
41. The court stated: "We . . . would not so hold unless we were required to do so by established precedent." *Id.*
42. *Id.*

by the district court to "critical scrutiny."[43]

C. Air Traffic Controller Cases

The court spent a great deal of energy distinguishing those cases involving air traffic controllers from the situation before it.[44] The court found three particular differences of importance:

> First, they operate under federal rules which were clearly designed to establish standards of care for a particular role, regardless of the status of the employee . . . fulfilling it. . . .
>
> Second, the nature of the role of air tower operators involves various duties to air traffic regardless of the procedures promulgated in the [air controller's] manual. . . .
>
> The third . . . is a corollary of the second. The relationship between pilots and passengers and air controllers is imbued with reliance . . . .[45]

The court did not foreclose a duty from developing in the future between passengers in private aircraft and FAA inspectors, but indicated that "there is no basis for assuming that particular duties, not defined by statute, apply to this role."[46]

The court then shifted its attention to the pilot by citing to the FAA regulation which provides that "[t]he pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight."[47] The court added to this rule the observation that "[t]here is no suggestion in the present case that the pilot did not know or should not be held responsible for such facts as the qualification of his crew and the weight of his cargo."[48]

IV. ANALYSIS

The court attempted to blur the question of the liability of the United States by referring to the FAA regulation[49] assigning the pilot final responsibility for aircraft operation.[50] Unquestionably, the pilot in command negligently failed to perform his duties to control the weight of the aircraft at takeoff[51] and the qualifications of the flight crew.[52]

However, Puerto Rico law assigns liability to negligence which was *a* proximate cause of the accident, regardless of whether it was the only proximate cause or whether another's negligence was

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43. *Id.*
44. *Id.* at 1146-49. *See* notes 78-79 & accompanying text *infra*.
45. 567 F.2d at 1147-48.
46. *Id.* at 1148.
47. *Id.* at 1149 (quoting 14 C.F.R. § 91.29(b) (1978)).
48. 567 F.2d at 1149 n.13.
49. *See* notes 47-48 & accompanying text *supra*.
50. *Id.* This seems to have the effect of pinning liability on the person least likely to be around after the crash.
51. *See* note 19 & accompanying text *supra*.
52. *See* notes 20-23 & accompanying text *supra*.

also a proximate cause of the accident.[53] If the FAA inspectors breached a duty owed to the plaintiffs' decedents and the breach was a proximate cause of their death, the United States ought to be liable under the FTCA,[54] regardless of whether the negligence of another also contributed to the accident.

The policy reasons cited by the court in *Clemente* are unconvincing and unsupported[55] by the other principal authorities referred to by the court. The court looked to *Union Trust Co. v. United States*[56] and to the Supreme Court's decision in *Indian Towing Co. v. United States*[57] for a discussion of the waiver of sovereign immunity under the FTCA. The Supreme Court explained the FTCA as follows:

> The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards. . . . The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the

53. P.R. LAWS ANN. tit. 31, § 5141 (1968) provides in relevant part: "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done."

In Reyes v. Heirs of Sánchez Soto, 98 P.R.R. 299, 303-04 (1970), the Supreme Court of Puerto Rico described the statute as "infinitely embracing, as ample and embracing as human conduct is." In addition, the court in Correa v. Puerto Rico Water Resources Auth., 83 P.R.R. 139, 149 (1961), described that statutory duty as "a broad blanket" arising "without any preceding juridical relation 'except for the generic duty, common to all men, of not causing damage to another.'" *See also* Ginés Meléndez v. Puerto Rico Aquaduct & Sewer Auth., 86 P.R.R. 490, 497 (1962).

54. The intent of Congress is clearly reflected in the language of the statute: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1976). *See also* note 58 & accompanying text *infra*.

55. *See* notes 58-64 & accompanying text *infra*.

56. 113 F. Supp. 80 (D.D.C. 1953), *aff'd in part, rev'd in part on other grounds sub nom.* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 962 (1956). The court in *Union Trust Co.* indicated the expansive nature of the FTCA:

> The present climate of public opinion, of which the Federal Tort Claims Act is the most conspicuous example, is to the effect that the fiction of sovereign immunity is for the most part outmoded and as far as it relates to the act in question, *preserved only in those specific exceptions* which Congress has specifically indicated . . . .

Id. at 84 (emphasis added).

57. 350 U.S. 61 (1955). This case was the subject of numerous casenotes shortly after the decision was announced. *See, e.g.*, Note, *Governmental Functions and the Tort Claims Act*, 70 HARV. L. REV. 134 (1956); Note, *Governmental Function—Liability of United States for Damages*, 42 IOWA L. REV. 130 (1956); Note, *Pertinence of Governmental-Proprietary Distinction*, 54 MICH. L. REV. 875 (1956); Note, *Federal Tort Claims Act—A Liberalized Interpretation*, 35 NEB. L. REV. 509 (1956); Note, *Governmental Function Test Rejected in Determination of Federal Liability at the "Operational" Level*, 34 TEX. L. REV. 956 (1956).

> conduct of governmental activities in circumstances like unto those in which a private person would be liable . . . . [T]his Court must not . . . as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.[58]

Nevertheless, the court in *Clemente* believed the FTCA "should be interpreted narrowly."[59] No authority was cited for this belief, and it is in apparent conflict with the Supreme Court's position.

Both *Union Trust Co.* and *Indian Towing Co.* involved situations in which the government made a discretionary decision to undertake some new activity,[60] and then failed to perform the activity with due care. Both courts were consistent in holding that, although the government would not have been liable if the activity had not commenced,[61] once performance began the government had a duty to perform these activities with due care.[62]

In addition, the court in *Clemente* forecast future "limitless liability" if the government were held liable in this instance.[63] However, even if a general rule that government orders establish a duty existed, there remains a distinct difference between the *Clemente* situation and the majority of governmental employer-employee relationships. The foreseeability of harm to the class of individuals sought to be protected by the order is much greater in the area of mass transportation safety than in most other areas of government activity.[64] The delivery of most government services does not subject the recipient to possible death or serious physical injury. Since most services involve potential economic injury only, the need for the imposition of a duty to fulfill the order with due care is not as strong.

The *Clemente* decision correctly stated the approach which

58. 350 U.S. at 68-69.
59. 567 F.2d at 1146.
60. Indian Towing Co. v. United States, 350 U.S. 61 (1955) (Coast Guard established and maintained marine navigational lighthouse); Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953), *aff'd in part, rev'd in part on other grounds sub nom.* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 962 (1956) (FAA undertook operation of aircraft control tower at Washington National Airport).
61. Indian Towing Co. v. United States, 350 U.S. at 69; Union Trust Co. v. United States, 113 F. Supp. at 84.
62. *Id.*
63. 567 F.2d at 1146.
64. The allegations would still be limited by the traditional tort doctrines of the various jurisdictions. Particularly, the element of causation would restrict recovery in many cases in which a breach of a duty owed to a member of the public could be shown. *See* Bristow v. United States, 309 F.2d 465 (6th Cir. 1962) (per curiam) (FAA negligence in issuing airworthiness certificate cut off by intervening negligence of pilot). *See also* Note, *The Federal Seal of Approval: Government Liability for Negligent Inspection*, 62 GEO. L.J. 937, 957 (1974). *See generally* W. PROSSER, TORTS §§ 41-45 (4th ed. 1971).

should be taken when reviewing an administrative order such as that issued by the FAA in this instance.[65] The language of the FTCA supports the "sovereignty in reverse" analysis under which such orders are to be viewed as a directive from a private employer to his employee.[66] Still, a statute or regulation is not easily distinguished from this type of directive, in that a statute or regulation is intended to be relied upon by the general public when promulgated, and the administrative directive involved in *Clemente*, while aimed mainly at government officials, is of interest to the public. Particularly because the government performs many services which private individuals do not, rejection of the argument of the plaintiffs in *Clemente* should not be viewed as absolving the government of responsibility under the FTCA in these activities, even though no private individual undertakes them.[67]

The court banished to the footnotes of its opinion discussion of two cases it had itself earlier decided. The first, *Gercey v. United States*,[68] held that the Coast Guard was not negligent "in failing to adopt a policy of taking positive steps to protect the public from vessels whose certificates have been revoked."[69] But the court in *Gercey*[70] qualified its holding by stating: "[T]he Coast Guard's alleged negligence lies in failing to adopt a policy . . . not in imperfectly executing a federal program established either by an act of Congress or a federal regulation."[71]

This language implies that had the Coast Guard adopted a "policy of taking positive steps"[72] and not carried it out with the exercise of due care, a different result would have been obtained in *Gercey*. This language appears readily applicable to the fact situa-

65. *See* notes 28-32 & accompanying text *supra*.
66. The FTCA provides: "The United States shall be liable . . . *in the same manner* and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1976) (emphasis added). An individual issuing such an order to one of his employees would not generally establish a standard of care as the government does in enacting a statute or regulation. *See* RESTATEMENT (SECOND) OF TORTS § 324A (1965). The FCTA requires the courts to view the government's acts and orders as if performed by a private individual, and thus only as made in an employer-employee relationship.
67. That is the clear holding of Indian Towing Co. v. United States, 350 U.S. 61 (1955), and the cases following. The fact that no private individual maintains marine navigational facilities such as lighthouses could not prevent recovery when the activity (maintaining a lighthouse) was negligently performed. *Id.* at 64-65.
68. 540 F.2d 536 (1st Cir. 1976).
69. *Id.* at 538.
70. It should be noted that the court in *Gercey* consisted of the same two circuit judges that sat in *Clemente*, which was decided by two circuit judges and a district judge, and that Chief Judge Coffin authored both opinions.
71. 540 F.2d at 538.
72. *Id.*

tion presented to the district court in *Clemente*. And the language of the lower court opinion indicates that the district court followed this recent case for it cited to *Gercey* in the crucial paragraph discussing the duty established by the FAA order.[73] Clearly, the language of *Gercey* dealing with negligence in the execution of a federal program is dictum. However, the facts in *Clemente* were sufficiently similar that the district court could reasonably have followed that language.

The First Circuit was also forced to deal with the language of another of its own cases, *Delta Air Lines, Inc. v. United States*.[74] In that case the court announced the broad principle that "the unexcused violation by a federal employee of procedures established by the Government which have as their purpose the protection of those who were in fact harmed constitutes negligence."[75] The situation in *Clemente* unquestionably fits within that linguistic framework. The court in *Clemente* explained this away by noting that the case involved air traffic controllers.[76] The court explained its *Gercey* language by noting that the FAA order SO8430.20C was neither a statute nor a regulation.[77] While these statements indicated the language of *Gercey* and *Delta Air Lines* was not controlling in *Clemente*, they did not explain why the rule each announced should not be followed.

The *Clemente* court distinguished air traffic controllers from FAA inspectors by looking to the history of the development of air traffic control.[78] Indeed, in almost every FTCA case involving airplane crashes arising outside the military, the plaintiffs alleged negligence on the part of air traffic controllers.[79] No case appears to allege a breach of a duty to inspect on the part of other FAA

73. Clemente v. United States, 422 F. Supp. 564, 571 (D.P.R. 1976), *rehearing denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

74. 561 F.2d 381 (1st Cir. 1977).

75. *Id.* at 393-94.

76. 567 F.2d at 1147 n.10.

77. *Id.* at 1145 n.5.

78. *Id.* at 1147.

79. *See, e.g.*, Delta Air Lines, Inc. v. United States, 561 F.2d 381 (1st Cir. 1977); Todd v. United States, 553 F.2d 384 (5th Cir. 1977); Dickens v. United States, 545 F.2d 886 (5th Cir. 1977); Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *In re* Air Crash Disaster at New Orleans, La., 422 F. Supp. 1166 (W.D. Tenn. 1975), *aff'd*, 544 F.2d 270 (6th Cir. 1976); Baker v. United States, 417 F. Supp. 471 (W.D. Wash. 1975); Ozark Air Lines, Inc. v. Delta Air Lines, Inc., 402 F. Supp. 687 (N.D. Ill. 1975); Allen v. United States, 370 F. Supp. 992 (E.D. Mo. 1973); Thinguldstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972); Gill v. United States, 285 F. Supp. 253 (E.D. Tex. 1968), *aff'd in part, rev'd in part*, 429 F.2d 1072 (5th Cir. 1970), *appeal after remand*, 449 F.2d 765 (5th Cir. 1971); Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953), *aff'd in part, rev'd in part on other grounds sub nom.*

employees.[80]

The lower court chose to follow language, which appears in most air traffic controller cases: "It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently."[81]

The First Circuit restricted this doctrine solely to air controllers by stating: "[T]he duties of air controllers . . . are not analogous to other facets of the FAA operations or the work of other federal agencies."[82] The Court of Appeals for the Second Circuit apparently would not agree. In *Ingham v. Eastern Air Lines, Inc.*,[83] the court compared the breach of duty of an air controller to that of a government hospital which was under no obligation to deliver medical services to discharged veterans but when it did so negligently, was held liable under the FTCA.[84] Although air controllers have special duties running to the general public,[85] one should not conclude that, therefore, no other group could have similar special duties arising as a result of its gratuitous undertaking to perform services to the public.

The convincing, yet troublesome portion of the *Clemente* court's decision deals with reliance.[86] The cases upon which the

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Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955), *modified*, 350 U.S. 962 (1956).

See also Levy, *The Expanding Responsibility of the Government Air Traffic Controller*, 36 FORDHAM L. REV. 401 (1968).

80. *See, e.g.*, Bristow v. United States, 545 F.2d 886 (6th Cir. 1962) (per curiam) (issuance of airworthiness certificate); Fielder v. United States, 423 F. Supp. 77 (C.D. Cal. 1976) (failure to determine hang gliders were "aircraft"); Hoffman v. United States, 398 F. Supp. 530 (E.D. Mich. 1975) (issuance of air taxi/commercial operator certificate to air carrier); Marival, Inc. v. Planes, Inc., 306 F. Supp. 855 (N.D. Ga. 1969) (misrepresentation of airworthiness by issuance of airworthiness certificate); Sullivan v. United States, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969) (preparation and circulation of aeronautical navigation charts); Gibbs v. United States, 251 F. Supp. 391 (E.D. Tenn. 1965) (regulating flight and licensing of pilots).

81. Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 236 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

82. 567 F.2d at 1147 n.10.

83. 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

84. *Id.* at 236 (citing United States v. Brown, 348 U.S. 110 (1954)).

85. *See, e.g.*, Hartz v. United States, 387 F.2d 870, 873-74 (5th Cir. 1968).

86. Because the "sovereignty in reverse" analysis requires the FAA order to be viewed as an order from a private individual employer to his or her employee, recovery required a showing of (1) increased risk or harm from the failure to inspect, (2) a prior duty to inspect, or (3) reliance by the plaintiffs' decedents on the order to inspect and warn. *See* notes 34-38 & accompanying text *supra*. The first two were clearly not present in *Clemente*, so recovery depended upon a showing of reliance on the FAA inspection by the plaintiffs' decedents.

district court relied find their basis in the "good Samaritan" doctrine announced in *Indian Towing Co. v. United States*:[87]

> [I]t is hornbook tort law that one who undertakes to warn the public of danger and *thereby induces reliance* must perform his "good Samaritan" task in a careful manner. . . . The Coast Guard need not undertake the lighthouse services. But once it [did] . . . and *engendered reliance* on the guidance afforded by the light, it was obligated to use due care . . . .[88]

There can be no doubt that the general public, including pilots and passengers of all types of aircraft in particular, is aware of and relies upon the assistance of air traffic controllers for at least some flights.[89] The question is whether the passengers killed on the *Clemente* flight relied upon the FAA inspectors when they boarded that flight.

Undoubtedly Clemente and the other passengers relied on the expertise of the pilot and the owner.[90] They probably did not expect to see an FAA inspector on the ramp checking the pilots' licenses and weighing the cargo. In addition, the FAA does not have the resources necessary to check every departing charter flight for compliance with every regulation.[91]

However, the public is aware that aviation is regulated by the FAA in such areas as design certification,[92] licensing of mechanics,[93] maximum hours of service of airmen,[94] and accident investi-

87. 350 U.S. 61 (1955).
88. *Id.* at 64-65, 69 (emphasis added).
89. *See* note 79 & accompanying text *supra*. *See also* Note, *Federal Tort Claims Act—Good Samaritan Doctrine*, 32 AM. TRIAL LAW. L.J. 702, 706-07 (1968); Note, *Air Traffic Controller Has Duty to Warn Pilot of Adverse Weather Conditions That Cause Visibility to Fall Below FAA Minimums*, 24 VAND. L. REV. 189, 191-93 (1970).
90. If the plaintiffs' decedents had believed the pilot and owner to be unreliable, they would not have chartered or boarded that aircraft.
91. The total 1974 authorized employment of the Operations Division of the FAA was 52,926 positions. *Department of Transportation and Related Agencies Appropriations for 1974: Hearings Before the Subcomm. on Dep't of Transportation and Related Agencies of the House Comm. on Appropriations*, 93d Cong., 1st Sess. 57 (1973). Of this total employment, some 21,846 positions were reserved for air traffic control. *Id.* at 61. Of the remainder, only a small portion served in the Flights Standards Office. From 1960 to 1970, the number of flights handled under Instrument Flight Rules increased by over 100 percent. FAA AIR TRAFFIC ACTIVITY 3 (1970).

    "On a typical day in 1960, there were more than 100,000 aircraft flights in operation across the nation." R. BURKHARDT, THE FEDERAL AVIATION ADMINISTRATION 73 (1967). Indeed, "[i]t would be impossible for a ten person office to be on hand wherever and whenever a private citizen chooses . . . to engage in air navigation." Reply Brief for Appellant at 14, Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).
92. 49 U.S.C. § 1421(a)(1)(1976).
93. *Id.* § 1421(a)(3).
94. *Id.* § 1421(a)(5).

gation.[95] The passengers in *Clemente* may have relied on the FAA to ascertain that the aircraft, which had obviously unairworthy systems on December 2, 1972,[96] was now airworthy on the first flight of that aircraft after the December 2 accident.

Certainly, *Indian Towing Co.* differs from *Clemente* as to the nature of the government's undertaking. In *Indian Towing Co.*, the government placed a lighthouse into operation and kept it in working order. It was a *physical structure* within the view of the public. In *Clemente*, the FAA Order was by its very nature an intangible, existing only for brief moments when the physical actions to carry it out were accomplished. The passengers' reliance must be found, if at all, in their observation of the FAA inspectors carrying out the Order or reports of such observations by others. Mere reference to the written order fails to qualify as reliance in the *Indian Towing Co.* sense.

In addition, the *Indian Towing Co.* undertaking was continuous, mandatory, and performed in a single location. Enforcement of the *Clemente* Order occurred only intermittently. The Order required spot checks, not a check on every departing aircraft.[97] And the public could not conclude from the language of the Order itself when and where such enforcement would occur. Reliance required knowledge of the decedents as to where and when such enforcement had previously occurred, and a reasonable belief that such enforcement would again occur on their flight.

There was apparently no evidence indicating the reliance of the plaintiffs' decedents on the FAA inspectors.[98] But such evidence was snuffed out, for the most part, by the death of Clemente and his fellow passengers. It is not known whether Clemente or the other passengers had previously flown aboard a chartered aircraft being flown for the first time after repair from an accident.[99] But those men might reasonably expect the FAA inspectors to follow up their investigation of an accident involving an aircraft that the inspectors knew was being offered for charter by personally ob-

95. *Id.* §§ 1354(a), 1354(c).

96. The accident which damaged, *inter alia*, engines No. 2 and No. 3 was caused by the failure of the braking and steering systems. Clemente v. United States, 422 F. Supp. 564, 565-66 (D.P.R. 1976), *rehearing denied*, 426 F. Supp. 1 (D.P.R.), *rev'd*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

97. *See* text accompanying note 10 *supra*. Although the Order describes the program as "continuous," the phrases "consideration should be given" and "as necessary" indicate a continuing program of spot checks is required. *Id.* at 570-71.

98. 567 F.2d at 1148.

99. One of the passengers, Francisco Matias, was a licensed airframe and powerplant mechanic. *See* note 14 *supra*. It is quite likely he had previously flown for the first time after repairs, whether the repairs resulted from an accident or otherwise.

serving the aircraft before its departure on its first subsequent flight. Depending on when such an inspection was made, it may or may not have disclosed the defects in pilot qualifications and overweight cargo load. Evidence of reliance can be inferred from the knowing use of the service performed.[100] The persons chartering aircraft may not know that particular airplane's accident history, but they should be entitled to know that if an accident had involved that aircraft, a reasonable inspection was thereafter made to determine the airworthiness of aircraft covered by such an FAA order.

V. CONCLUSION

The court in *Clemente* wisely applied an analysis of the FAA Order, rejecting the implied sovereignty of the government in all acts.[101] The distinction between air controllers and other federal agencies should not control because the "good Samaritan" doctrine of *Indian Towing Co.*[102] was not intended to be restricted to a single class of federal employees.[103]

This decision rests on the court's assessment of the reliance of Clemente and the other passengers on the FAA order to inspect all aircraft of that type. Because no direct evidence of reliance was introduced and the court found no evidence of prior, continuing conduct from which reliance could be inferred, the decision of the court is correct.[104] However, it should not be necessary that reliance on the language of the particular order be demonstrated; reliance on past conduct relating to the airworthiness of accident

100. *See* Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951). The author states:

> A comparable case is one in which a person undertakes, either gratuitously or otherwise, to protect another; the resulting tort liability for failure to give the protection is based on reliance. Thus, a railroad may not be required to station a watchman at a crossing. However, a traveler injured at the crossing would not be barred by his failure to take the customary methods of self protection if he had been led to believe that a crossing tender would be present. Here is conduct which has the effect of a gratuitous promise, since the prior conduct has led the plaintiff to believe that the service would be given.

Id. at 919 (footnotes omitted).

101. *See* notes 65-67 & accompanying text *supra*.

102. 350 U.S. at 64-65.

103. Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 236 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

104. *See* notes 97-98 & accompanying text *supra*. The author does not expect the FAA to investigate every charter flight under such an order as SO8430.20C. However, the FAA should follow through with such an inspection where it has notice of airworthiness problems, whether caused by accident or otherwise, in an aircraft covered by such an FAA directive.

damaged aircraft should be sufficient. The government is not an insurer of private aviation, but neither should the FAA be allowed to ignore a problem in which it has already become involved.

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