FLIGHT INSTRUCTOR NEGLIGENCE:

DOES THIS TIGER HAVE A TAIL ?

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I. INTRODUCTION

At least since Helen Palsgraf 's trip to Rockaway Beach was interrupted by a falling scale on a railroad platform, [1]. judges and legal scholars have pushed and pulled at the limits of tort liability. Starting in about 1960, the scope of liability in tort expanded rapidly for a quarter of a century .[2] In contrast, during the last ten years there have been numerous efforts at "tort reform,"[3] while new efforts at expanding theories of recovery continue to be mounted.[4] At least one commentator suggests that in spite of these continuing efforts, the expansion of tort law is over .[5]

The scope of the duty owed by a flight instructor to a student pilot has been the subject of periodic treatment by appellate courts. The focus of those cases has usually been whether the facts support a claim of negligence. The general proposition that a flight instructor is obligated to exercise reasonable care in providing instruction to a student has not been controversial. That the flight instructor has no further legal responsibility to the student pilot once the instruction is complete and the student has become a licensed pilot has been assumed.

That assumption is being challenged in a case currently pending in Washington, in which a commercial helicopter pilot is suing the flight school where he took his training. The pilot crashed shortly after beginning his commercial flying career and claims that the crash was caused by the failure of the flight school to teach him about a particular aspect of helicopter flight.

This claim is a creative attempt to extend the range of a flight instructor's responsibility far beyond the successful completion of the training program and raises anew the question once so neatly answered by the Palsgraf court: Does a licensed pilot have a continuing, legally protected right to look to his flight instructor for compensation if he is injured in circumstances which he was not adequately prepared by that flight instructor to deal with? Palsgrafv. Long Island R.R., 162 N.E. 99,99 (N.Y. 1928).

Since there are no appellate cases addressing this issue, an analysis of the question requires that we find a meaningful analogy in some other area of the law. The general concept of "educational malpractice" has produced a body of law strongly suggesting that this effort at expanding liability in aviation law should be summarily rejected. These cases almost universally fail because proximate cause cannot be shown. Judges have found it impossible to determine retrospectively whether the failure, for example, of a child in school is the result of a teacher's incompetence, the child's lack of aptitude or diligence, or other familial and social factors. On the other hand, courts have had little trouble finding proximate cause where injuries were caused by the failure of flight instructors to supervise a student or to inspect an airplane to be taken on a solo flight. In order to understand why this new attempt at expanding liability in aviation law should fail, it is necessary first to understand the scope of a flight instructor's duty as viewed by appellate courts today.

The case law dealing with a flight instructor's duty to protect its students from dangers during flight instruction is usually premised on common carrier law, which imposes a heightened standard of care towards passengers. In a practical sense, the cases are decided in view of the control exercised by the teacher over the student and the teaching environment, as well as a presumption of the instructor's superior knowledge about the hazards of flight. These considerations do not apply to the pilot whose knowledge and flying ability have been tested and approved by the United States government and who has left far behind the protection and influence of his flying instructors.

II. LIABILITY OF FLIGHT SCHOOLS FOR INJURIES TO STUDENTS UNDER THEIR TUTELAGE

A. Traditional Bases for Finding Flight Instructor's Duty.

Many of the cases dealing with flight instructor negligence have little if any thing to do with the instructor-student relationship. For instance, flight instructors have a clear duty to avoid injury to students by negligently flying the training aircraft. For instance, in Linam v. MuIph~, 232 S.W.2d 937 (Mo. 1950), the flight instructor was himself operating the aircraft. During an instructional flight, he took control of the aircraft and provided a demonstration of "flat hatting" over a reservoir. Amazingly, he continued with his reckless flight even when asked by his student to return to a safe altitude. And not surprisingly (since the case, of course, ended up in the appellate reports), he flew into

a power line, and crashed. The court had no trouble finding the instructor negligent and would certainly have reached the same result whether the passenger was a student, some other paid passenger, or a casual guest.

Flight instructors and schools are also charged with the duty of providing aircraft that are not defective and to warn of unsafe mechanical conditions. Aircraft Sales & Service. Inc. v. Gantt, 52 So.2d 388 (Ala. 1951). This duty is certainly owed to non students, such as rental pilots, as well, and doesn't depend on the instructor-student relationship.

The special relationship that exists between instructor and student is better demonstrated in those cases finding liability because the student was injured by a foreseeable hazard about which training should have been provided. In De Rienzo v. Morristown AiIl2ort COIl2., 146 A.2d 127 (N.J. 1958), the student crashed after taking off with the controls locked. There was evidence that the flight school had a general practice of tieing the seat belt around the rear seat controls when securing the aircraft. There was also evidence that the 20-hour student pilot had been assured by an agent of the school that the accident aircraft was ready for flight. In spite of the defendant's claim that the student should have found the condition and released the controls during preflight, and that a proper execution of the checklists before flight would also have demonstrated that the controls were not free, the appellate court agreed with the trial judge that a jury

question had been presented. This is but one example of the general proposition that flight instructors have a duty to provide adequate training and supervision.

That proposition was also explored in Farish v. Canton Flying Services, 58 So.2d 915,917 (Miss. 1952). L. D. Farish was taking flying lessons on the G.I. Bill. He had obtained a private license after some 60 hours of flying time (and one re-examination on the practical flight test), flying primarily Piper Cubs and Aeroncas. He continued in training, hoping to obtain a commercial license. After two hours of dual instruction in a relatively high-performance Ryan aircraft, he took a small boy with him as a passenger, lost control of the aircraft while appearing to be attempting aerobatic maneuvers, and crashed. The flight school was found negligent, and the appellate court found ample evidence to support that result. Farish was apparently a slow student, a fact which should have put the school on notice of a need to monitor his performance particularly closely. He also had not completed a substantial percentage of the ground school which should have been completed for his stage of training. By the school's own standards, he was not technically qualified to solo the Ryan aircraft. In the words of the Court:

> Appellee furnished the plane and assumed to teach appellants' decedent how to fly. It was the teacher. Farish was the pupil or student. Because of its superior knowledge of the danger of injury and the requisite skill to prevent and avoid injury, it was in a better position to judge his ability than he was himself. Under the above principles, due care required that the plane should be reasonably fit for the purpose or capable of the use known

> or intended, and that Farish should be sufficiently trained and instructed in the performance of his task in flying the particular plane.

Id. at 918. While the aircraft was fit, Farish was not.

Many jurisdictions that have considered the legal relationship between the flight instructor and the student have characterized it as that of common carrier-passenger. For example, the Hawaii district court has held that a flight instructor has "the duty, equal to the highest duty a commercial airline owes to its passengers, of care in furnishing instruction." Funnizo v. U.S., 245 F. Supp. 981,990 (D.C. Haw. 1965), affd 381 F.2d 965 (9th Cir. 1965) (instructor negligent when Piper Super Cub crashed after encountering DC-8's wake turbulence upon takeoff). *See also,* Lange v. Nelson-Rxan Flight Service. Inc., 108 N.W.2d 428,432 (Minn. 1961) ("when flying with a flight instructor a trainee is a passenger, and the responsibility of the flying school to him is measured by the legal standard of a carrier"); and Lunsford v. Tucson Aviation *CoW.,* 73 Ariz. 277,240 P .2d 545,546 (1952) ("training school owes to its students the same standard of care as is owed by a common carrier towards its passengers"). Lunsford quoted 6 Am. Jur, Aviation, § 51 :

> In accordance with the rule applying generally to common carriers of passengers for hire, it is the duty of a common carrier by aircraft to exercise with respect to passengers the highest degree of care consistent with the practical operation of the plane. It must use such degree of care not only with respect to operation of the plane, but also with respect to its equipment, its maintenance, and the adjustment of all its parts. The duty and degree of care required of a common carrier of passengers by airplane toward a passenger carried gratuitously are the same as are required toward

> passengers for compensation. Therefore, if one is lawfully a passenger, it is not material whether he did or did not pay his fare.

240 p .2d at 546-47.

Other courts have treated the student-instructor relationship as analogous to a master-servant relationship, Weadock v. Eagle Indem. Co., 15 So.2d 132 (La. App. 1943), or a bailor-bailee relationship, Aircraft Sales & Service. Inc. v. Gantt, 255 Ala. 508,52 So.2d 388 (1951). Regardless of the standard applied --common carrier passenger, master-servant, or bailor-bailee, the reported cases all involve a present, active relationship between the instructor and the student. They do not involve pilots who are no longer flying in the school's aircraft nor under the supervision of school instructors.

The flight school's duty is not affected by the fact that a student has already obtained a private pilot's license and was, at the time of an accident, training for a commercial pilot's license. In Lunsford, supra, plaintiff also already had a private pilot license and had logged 151 hours of pilot time. At the time of his accident, however, he had not received any training in meteorology and had not previously experienced the weather condition (violent midday downdrafts) that caused his accident. The court thus refused to affirm the trial court's dismissal on the basis of assumption of risk. In Farish, supra, where the court found jury questions on the issues of failure to train and proximate cause, the decedent had already received his license as a private pilot and was training to become a commercial pilot. In Lange v. Nelson-Rvan Flight Service. Inc., 108 N.W.2d

428,432 (Minn. 1961), the court held that plaintiffs decedent "had the status of a trainee during the checkout flight" of a leased airplane despite holding a commercial pilot's license with an instructor's rating. That case also held that the instructor, as pilot-in command, is responsible for any negligence in the operation of an aircraft regardless of whether or not it could be established that he was in actual operation of the controls at the time of a crash.

Control or the right to control the aircraft and control over the conditions under which students fly are consistent factors in courts' determinations of duty. A related consideration is the instructor's superior knowledge of the dangers confronting student pilots. As the Mississippi Supreme Court stated in Farish, the flight school was in a better position to judge Parish's ability than he was himself. It was also in a position to control his actions, or at least to limit his access to aircraft. *See also*, Linam, Supra, (liability based on the instructor pilot's physical control of the aircraft); Weadock v. Eagle IndemnitY Co., supra, (Judgment for plaintiff affirmed when evidence showed "total subserviency of the student to the instructor and regard for him as master in all things pertaining to the course. ").

Lisa-Jet. Inc. v. Duncan Aviation, 569 P.2d 1044, 1047 (8th Cir. 1978) also involved a student pilot who was also a licensed pilot, with the court reaching a result which appears to be at odds with the general rule, finding the defendant flight school not liable. On a closer look, however, the case makes sense. While in Farish and Lunsford

the private pilot-rated students were soloing their aircraft at the time of their accidents, in Lisa-Jet the flight instructor and his newly type rated student were on a dual flight. The court focused its analysis on the fact that both pilots were legally qualified to fly the aircraft and there was no conclusive evidence as to which one was actually in control. Thus, just as the mere fact that a student happens to be a licensed pilot does not insulate a flight school from liability, the mere fact that a student-instructor relationship exists is not sufficient to create liability. At least in the cases seen thus far, both the student instructor relationship and the practical and legal right to control the behavior of the student need to exist before a court will impose liability on a flight school.

B. Case Law Analysis of Proximate Cause.

A plaintiff in an action alleging negligence by a flight instructor must plead and prove not only duty and breach of that duty , but that such negligence was the proximate cause of the accident.

> The breach of duty to be actionable must be the proximate cause of the injury complained of, that is, the cause which in natural and continuous sequence unbroken by an efficient intervening cause produces the result, and without which the result would not have occurred. 65 C.J.S., Negligence, § 103, p. 645.

> It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted, is not the proximate cause thereof. 38 Am. Jur. 702.

Clark v. Chrisho12, 72 Id. 340,241 P.2d 171 (1952).

In Clark a student of Chrishop Flying Service had taken the training plane, a Piper Cub Cruiser, for a flight when no instructors or employees were at the airport. Clark took a licensed pilot as his passenger. Witnesses saw the airplane fly by several times at an altitude of approximately ten feet. Shortly thereafter, the airplane crashed, killing both occupants. There were no witnesses to the accident.

The estate claimed the flight school was negligent by permitting Clark (1) to take the airplane without being checked out by an instructor or instructed as to the mechanical condition of the aircraft or the weather conditions, (2) to take a passenger in violation of applicable regulation, and (3) to fly in an aircraft with a malfunctioning engine. The court, however, held that even assuming defendant's negligence, there was no evidence that weather conditions, mechanical conditions, or the presence of the passenger had caused the plane's crash. The action thus was dismissed.

Clark can be contrasted with Farish, in which the court found, among other things, a jury question as to whether defendant's conduct caused the student's death. 58 So. 2d at 918. Farish, who had been initially trained in Piper Cubs and Aeroncas, was flying a Ryan airplane at the time of his accident. A Ryan is heavier and faster than a Cub or Aeronca, has a smaller wing surface, and over twice the horsepower .

Experts concluded from the time it took Parish to solo for his private license that his aptitude was below normal. The experts also concluded that he had insufficient dual instruction in proportion to his solo time. The chief flight instructor admitted that Farish

may have been given less instruction than most students and that he was allowed to fly the Ryan before meeting the relevant requirements of the school's curriculum. Accordingly, it was a question for the jury whether the flight school failed to sufficiently train and instruct Farish and whether such failure caused his death.

Without addressing the scope of duty owed, a Louisiana appellate court affirmed a trial court's factual findings that there was no evidence to support a claim that a flight school was negligent in allowing its student to fly a cross-country flight without sufficient skill to make a cross-country trip or an emergency landing. Lajeune v. Collard, 44 So.2d 504 (La. App. 1950). In Lajeune, the plaintiff took off for a cross-country flight between Shreveport, Louisiana and Houston, Texas. On the return leg, he crashed approximately 10 miles from Shreveport. The court found that the student was an apt pupil, that the trip was not a difficult one and that there was no evidence of mechanical malfunction. Based upon the absence of evidence indicating the flight school acted negligently, the court affirmed a judgment for the flight school.

C. Possible Defenses to Liability.

Among the traditional defenses to tort actions which could theoretically be applied to flight school cases is the defense of assumption of risk.[6] The defense will not bar recovery in a case against a flight school where the student's knowledge was inferior to the teacher's, and the school has control over the conditions in which a student will be instructed to fly. In Lunsford, supra a student pilot was injured on takeoff when he hit

severe midday downdrafts. The student claimed he had not been warned about such weather. While the school raised the defense of assumption of the risk, the court noted that plaintiff had no training in meteorology and had never before flown in the heat of the day. *Id.* at 547. Despite the fact that the weather encountered was neither unusual nor unexpected, the court found that plaintiff had not assumed the risk of this type of weather. *Id.*

The Lunsford holding is a sensible and factually-supported application of the assumption of risk doctrine. The student is still under control of the school and can reasonably be expected to rely on the school to control the circumstances to which it. exposes its students. If this key element of control was no longer present in the relationship, it is difficult to see that the Lunsford court would reach the same result.

Contributory negligence is a defense that has often been asserted by flight schools in actions by student pilots. While the courts are leery of charging a student pilot with his or her own negligence when an instructor with superior knowledge and experience was in control of the circumstances causing injury , even then a jury question may be presented.

In De Rienzo, supra, the plaintiff was a student pilot with about nineteen hours of dual and three hours of solo flight. He went out for solo flight in the Piper Super Cruiser in which he had taken most of his instruction, unaware that the rear stick in the tandem

was locked with the seatbelt. He was able to taxi and take off, but because the flight school had locked the stick, he was unable to level off, resulting in a stall and crash landing.

Defendant claimed that De Rienzo was contributorily negligent in failing to perform some of the pre flight checks that his teachers had instructed him to make. The court found, however, that the student had never been advised of the policy of locking the stick with the rear seatbelt. Furthermore, while checking out the aircraft on the day of the accident, the instructor helping De Rienzo had been called to the phone. As he left, he told the student that "Everything is okay. You got nothing to worry about. All you have to do is gas it up." *Id.* at 133. Under these circumstances, the court stated that it was a jury question whether the flight school's actions relieved the student of "the necessity of making a complete check of his plane before leaving the ground." *Id.*

De Rienzo, then, supports the proposition that even in the incubator of flight training, a student pilot has some responsibility to exercise care for his own safety. He may not blithely ignore lessons which have been taught. From the first day of flight training, he is being prepared for the responsibility imposed on a pilot in command, which is the non-delegable responsibility for the safe conduct of each flight.

D. FAA Regulations Draw a Bright Line at the Conclusion of Flight Training.

To obtain his private pilot's license, a student pilot must meet the requirements of 14 CFR Part 61, Subpart D, and then pass written and practical examinations. 14 C.F .R.

§ 61.33 et. seq. To obtain a commercial pilot's license, the requirements of Subpart E, and further written, oral and practical examination is required. A licensed commercial pilot has demonstrated to the satisfaction of the Federal Aviation Administration his proficiency in:

1) Executing procedures and maneuvers within the aircraft's performance capabilities and limitations, including the use of the aircraft's systems;

2) Executing emergency procedures and maneuvers appropriate to the aircraft;

3) Piloting the aircraft with smoothness and accuracy;

4) Exercising judgment;

5) Applying aeronautical knowledge;

6) Showing that he is the master of the aircraft, with the successful outcome of a procedure or maneuver never seriously in doubt.

14 C.F.R. § 61.43.

Once he has successfully completed the testing and practical examination necessary for a pilot license, the pilot is subject to continuing federal regulation. The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft. Among other responsibilities,

> Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. ...

14 CFR § 91.103.

> The courts have recognized that federal regulations governing aircraft pilots impose duties and responsibilities which, in effect, specify the standard of care that is imposed upon the pilot in command, which, in turn, is employed by common-law principles in defining negligence. Thus, the rule applicable to aircraft is that if the aircraft is operated in a negligent manner the pilot in command is negligent. ..at least in the absence of extenuating circumstances such as sudden illness. This surely imposes a high duty and heavy burden upon the pilot in command of the aircraft. However, the duty is commensurate with the skills required and the perils incurred.

Lange,supra at 423

Once federally licensed and freed of the training environment, a pilot becomes to a large extent a free agent. While his activity is heavily regulated, he is called to account only when he is found to have violated those regulations. He does not have to prove compliance as a precondition to exercise his prerogatives.

> Between the amateur and the professional. ..there is a difference not only in degree but in kind. The skillful man is, within the function of his skill, a different integration, a different nervous and muscular and psychological organization. ... A tennis player or a watchmaker or an airplane pilot is an automatism but he is also criticism and wisdom.

Bernard De Voto, Across the Wide Missouri (1947). While a licensed pilot has demonstrated an acceptable minimum level of physical skill, he has also demonstrated a certain acceptable minimum level of judgment. And it is that "criticism and wisdom" that must keep him from harm's way as his skill develops, and as he confronts the endless variety of problems with which nature and his machine will present him.

A licensed pilot outside the training environment who seeks to hold his old flight school accountable for an airplane accident is like a doctor claiming that his medical

school should be responsible for injuries to a patient caused by prescription of the wrong medicine. His case is more akin to actions brought by highly-trained professionals, such as physicians and lawyers, against the schools at which they were taught. If there are cases dealing with educational malpractice in that context, they might be instructive. There are, in fact, such cases, and they indicate that no recovery is available under such a theory

III. NO LIABILITY OF SCHOOLS FOR INJURIES TO STUDENTS NO LONGER UNDER THEIR TUTELAGE

There are no reported cases stating whether a cause of action lies against a flight school by a former student for inadequate training. However, as recognized in Ross v. Creighton, 957 F .2d 410 (7th Cir. 1992), every court which has considered a common law tort claim for educational malpractice has rejected it.7 This section will analyze whether such a claim should be recognized after a student has completed flight training, passed F AA examinations, and become a licensed pilot. Courts recognize claims for malpractice against doctors and lawyers --why should they not also recognize causes of action against a flight school for failing to teach a pilot a particular concept or maneuver?

A. Educational Malpractice Claims Are Universally Disallowed

Despite the absence of cases about whether a former student can bring a claim for educational malpractice against a flight school, there are many cases brought against other types of schools which hold that there is no cause of action for educational

malpractice. The reasoning of these cases applies equally to a claim against a flight school.

In Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, 60 Cal. App. 3d 867 (1976), a high school graduate who could read only at a fifth grade level sued his school for educational malpractice. The court held that an ex-student has no right to demand damages from a public school system which he claims provided him with an inadequate education. While the court recognized as a truism ". ..that public authorities who are dutybound to educate are also bound to do it with 'care' ...," 131 Cal. Rptr. at 858, it drew a careful distinction between that truism and the question of whether there existed a "duty of care" in the legal sense of that term.

Whether a new cause of action should be recognized is a matter of policy. *Id.* at 859. The court found that the following factors all weighed against creating a cause of action for educational malpractice:

1. Unlike other torts, with education there is no readily accepted standard of care or method to establish causation or injury;
2. There is wide and legitimate debate about what and how to teach;
3. There are multiple factors outside the school's control which can cause academic failure; and
4. Allowing suits against schools would result in a crippling flood of litigation.

Id. Each of the factors cited by the Peter W. court are equally applicable when considering whether to create a right of recovery against a flight school by an ex-student.

In Donohue v. Copiag!!e Union Free School District, 47 N. Y.2d 440,391 N.E.2d 1352 (1979), a high school graduate sued his former school district, claiming he had insufficient skills to read a simple job application. After reiterating the policy considerations canvassed in Peter W ., the Donohue court observed that

> [t]o entertain a cause of action for 'educational malpractice' would require the courts not merely to make judgments as to the validity of broad educational policies --a course we have unalteringly avoided in the past -but, more importantly, to sit in review of the day to day implementation of these policies.

Donohue, supra at 1354.

An extensive rationale was provided by the Kansas Supreme Court in refusing to recognize a cause of action for educational malpractice against a university's court reporting program:

> Educational malpractice is a tort theory beloved of commentators, but not of courts. While often proposed as a remedy for those who think themselves wronged by educators [citations omitted] educational malpractice has been repeatedly rejected by the American courts [citations omitted].
>
> Admittedly" the term 'educational malpractice' has a seductive ring to it; after all, if doctors, lawyers, accountants and other professionals can be held liable for failing to exercise due care, why can't teachers? The answer is that the nature of education radically differs from other professions. Education is an intensely collaborative process, requiring the interaction of student with teacher. A good student can learn from a poor teacher; a poor student can close his mind to a good teacher. Without effort by a student, he cannot be educated. Good teaching method may vary with the needs of the individual student. In other professions, by contrast, client cooperation is far less important; given a modicum of cooperation, a competent

> professional in other fields can control the results obtained. But in education, the ultimate responsibility for success remains always with the student. Both the process and the result are subjective, and proof or disproof extremely difficult.
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> * * *
>
> It also must be remembered that education is a service rendered on an immensely greater scale than other professional services. If every failed student could seek tort damages against any teacher, administrator and school he feels may have shortchanged him at some point in his education, the courts could be deluged and schools shut down. ...This is not to say that the mere worry that litigation will increase justifies a court's refusal to remedy a wrong; it is to say that the real danger of an unrestrained multiplication of lawsuits shows the disutility of the proposed remedy. If poor education (or student laziness) is to be corrected, a common law action for negligence is not a practical means of going about it [citations omitted.]

Einstad v. Washburn UniversitY ofTo12eka, 845 P.2d 685,692-693 (Kan. 1993). *See also,* Tolman v. Cencor Career Colleges. Inc., 851 P .2d 203 (Colo. App. 1992), *affd,* Cencor Inc. v. Tolman, 868 P.2d 396 (1994).

Courts have consistently invoked this reasoning to dismiss suits for educational malpractice in a variety of factual contexts. *See, e.g.,* Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992) (no cause of action to support a claim for admitting a student to a school in which he was ill equipped to succeed academically, just so that he could play basketball); Brantley v. District of Columbia, 640 A.2d 181 (D.C. App. 1994) (claim of a student who spent three years in the second grade before the school district recognized she had learning disabilities rejected as having no basis in law); Agostine v. School District of Philadel12hia, 527 A.2d 193 (Pa. 1987), *app. denied.,* 536 A.2d 1334 (1987) (holding that a student mistakenly diagnosed as mentally retarded instead of learning

disabled has no cause of action for educational malpractice); Hunter v. Board of Education of Montgomery: County, 439 A.2d 582 (Md. 1982) (no cause of action for educational malpractice when a school misdiagnoses a child's learning abilities and places the child in the wrong classes); D.S.W. v. Fairbanks North Star Borough School District, 628 P.2d 554 (Alaska 1981) (no legal basis for a claim for educational malpractice by a student suffering from dyslexia who was negligently classified, placed or taught); Hoffman v. Board of Education, 49 N.Y.2d 121,400 N.E.2d 317 (1979) (child who was negligently placed in a class for mentally retarded children and kept there for ten years although he was not mentally retarded was found to have no cause of action for educational malpractice).

Educational malpractice claims have been similarly dismissed against virtually every type of educational institution, whether public or private. According to a Kentucky appellate court rejecting a claim against a private elementary school,

> we find [the considerations of Peter W., supra, and Donohue, supra to be equally applicable to any attempt to assess the educational experience, whether in the context of public or private education. ...

Rich v. Kentucky Country Day, 793 S.W.2d 832,837 (Ky. App. 1990). *See also,* Cavaliere v. Duffs Business Institute, 605 A.2d 397 (Pa. Super. 1992) (claim against a private court reporting school for inadequate quality of instruction dismissed); Blane v. Alabama Commercial College, 585 So.2d 866 (Ala. 1991) (no cause of action against a private business school's clerical program); Swidryk v. St. Michaels' Medical Center, 493

A.2d 641 (N.J. 1985) (no cause of action by a doctor against a medical school for educational malpractice).

B. Educational Malpractice Claims Arising as Part of Another Tort Case Are Particularly Disfavored.

The courts have been particularly unwilling to recognize claims for educational malpractice when they are joined with another tort case.

In Moore v. Vanderloo, 386 N. W .2d 108 (Iowa 1986), an injured patient sued her chiropractor for medical malpractice and sued his school for educational malpractice. The court, relying on Peter W ., supra, and its progeny found it particularly inappropriate to recognize an educational malpractice cause of action where the complaint was that a school's failure to teach a student a particular thing caused that student to commit a tort after the student had graduated. It reasoned that a cause of action for educational malpractice should not be recognized because: 1) there was no satisfactory standard of care by which to measure an educator's conduct; 2) the court would face inherent uncertainty in determining the cause and extent of damages; 3) a flood of litigation would place an unreasonable burden on schools; and 4) the courts would be "forced to blatantly interfere with the internal operations and daily workings of an educational institution. *Id.* at 115.

> Further, if an educational malpractice claim is allowed against a professional school, could we logically refuse to recognize such a cause of action against an institution offering training courses for certain trades? For

example, would a homeowner damaged by faulty wiring have a cause of action against the electrician's trade school?

Id

Similarly, in Swidryk, supra , a physician against whom a medical malpractice claim was brought sued his medical school for educational malpractice. The plaintiff M.D. had been sued for malpractice in connection with delivery of a baby during his residency. He filed a separate declaratory judgment action, asking the court to rule that he had been improperly supervised, which resulted in the incident underlying the claim against him. The court dismissed the suit, citing those policy considerations discussed in Peter W. and Donohue, supra. In addition, the court was concerned that if an educational malpractice claim was recognized for physicians, every lawsuit for medical malpractice would include a claim for educational malpractice. This would significantly increase the time needed to try a medical case and would result in jury confusion. *Id.* at 645.

C. **Public Policy Requires that Educational Malpractice Law Be Extended to Flight Instruction Cases.**

Although claims for educational malpractice have not found favor under any circumstances, there is a justifiable reluctance to recognize such a claim against highly regulated institutions. Swidryk, 493 A.2d at 644-45. There, the court declined to recognize an educational malpractice claim against a medical school in part because of the vast body of regulations governing all aspects of a medical education. The court

found that intervention in such a highly regulated field would amount to a usurpation of power the legislators vested elsewhere. *Id.*

Similar reasoning should apply to flight instruction, given the extensive regulation by the FAA. The Federal Aviation Regulations provide detailed standards for flight training, licensing, and post-licensing performance by pilots. If courts begin monitoring flight schools by creating a special claim for educational malpractice in this area, they will usurp functions and powers which Congress has chosen to give to the F AA.

The other policy considerations which have led courts to unanimously reject a negligence cause of action for educational malpractice apply equally to flight instruction. There is an acceptable degree of latitude in teaching methods for pilots. It would be nearly impossible for a pilot to prove that a gap in his/her knowledge was caused by improper teaching rather than inattentiveness or forgetfulness. Since there is no accepted standard of care, and no way to prove proximate cause, a former student's claim should not be permitted. Further, if educational malpractice claims are recognized against flight schools, there is no way to prevent satellite litigation in every case involving a trained or educated employee who has allegedly injured another by his or her negligence.

The process of learning to fly is not one which concludes upon receiving a license. Like most professionals, a pilot cannot possibly learn every possible aspect of his career in school, but instead continues to learn with experience.

> We learn how to behave as lawyers, soldiers, merchants, or whatnot by being them. Life, not the parson, teaches conduct.

Oliver Wendell Holmes Jr ., "Letter to Sir Frederick Pollock" (1926).

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1. Palsgrafv. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

2. G. Schwartz, "The Beginning and the Possible End of the Rise of Modem American Tort Law," 26 Ga. L. Rev. 601 (1992).

3. "Tort reform" as the term is commonly used refers to the efforts ofmany state legislatures, and the United States Congress, to impose statutory limits on both theories of liability and the measure of damages. *See, e.g.,* K. Abraham, "What is a Tort Claim? An Interpretation of Contemporary Tort Reform," 51 Md. L. Rev. 172 (1992).

4. *See, e.g.,* Ci12ollone v. Liggett Group. Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); K. Chapin, "Toxic Torts, Public Heath Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury", 13 J. Energy Nat. Resources & Envtl. L. 129 (1993).

5. G. Schwartz, "The Beginning and the Possible End of the Rise ofModem American Tort Law," 26 Ga. L. Rev. 601,652 (1992).

6. Assumption of the risk is no longer, in most jurisdictions, a complete bar to recovery, and the defense as applied is not much different than contributory negligence. However, the analysis of these older cases is useful.

7. Montana has allowed the claim pursuant to a statute which creates the right of action in the special education context. H.M. v. State, 200 Mont. 58, 649 P .2d 425 (1982). No such statute has been addressed by courts in any other jurisdiction.