

1995

Death by Misinformation - Governmental Liability for Faulty FAA Weather Information

Frederick P. Alimonti

Recommended Citation

Frederick P. Alimonti, *Death by Misinformation - Governmental Liability for Faulty FAA Weather Information*, 60 J. AIR L. & COM. 961 (1995)
<https://scholar.smu.edu/jalc/vol60/iss4/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DEATH BY MISINFORMATION? GOVERNMENTAL LIABILITY FOR FAULTY FAA WEATHER INFORMATION

FREDERICK P. ALIMONTI*

TABLE OF CONTENTS

| | |
|---|-----|
| I. INTRODUCTION: FAA WEATHER INFORMATION AND GENERAL AVIATION .. | 962 |
| II. THE AVENUE OF RECOVERY—THE FEDERAL TORT CLAIMS ACT | 964 |
| III. PILOT IN COMMAND AND FAULTY WEATHER INFORMATION | 965 |
| IV. PILOT AND FAA RESPONSIBILITIES—A QUESTION OF CAUSATION | 966 |
| V. ONE EXTREME—POOR PILOT JUDGMENT . | 973 |
| VI. THE OTHER EXTREME—EXCLUSIVE GOVERNMENTAL LIABILITY | 975 |
| VII. <i>MOORHEAD</i> —THE MANUFACTURER, TOO . | 979 |
| VIII. SUPERSEDING CAUSE? | 981 |
| IX. <i>WEBB</i> AND <i>WORTHINGTON</i> —A BALANCED APPROACH? | 988 |
| X. CONCLUSION | 995 |

* B.A., Fordham University, 1985; J.D., St. John's University School of Law, 1989. Member of Law Review (1987-89), Associate Editor (1988-89). An Associate with the New York office of Haight, Gardner, Poor & Havens, concentrating in products liability, aviation, and insurance defense. Admitted to practice in the State of New York, the United States Court of Appeals for the Eleventh Circuit, and the United States District Courts for the Southern and Eastern Districts of New York. Vice-Chair of the ABA Committee on Aviation Litigation; Member of New York State Bar Association, American Bar Association Forum on Air & Space Law, and Association of the Bar of the City of New York. Mr. Alimonti is an active private pilot.

I. INTRODUCTION: FAA WEATHER INFORMATION AND GENERAL AVIATION

ACCURATE WEATHER information is of critical importance to the general aviation pilot. Weather information is frequently obtained by a pilot in various stages of flight and flight preparation. First, the pilot will call a Federal Aviation Administration (FAA) Flight Service Station (FSS) for a preflight weather briefing while still on the ground. In the course of this briefing, the pilot is advised by an FSS "Weather Briefer," or "Specialist," of current and anticipated weather along his proposed route of flight. In reliance on this information, the pilot will determine what route to take, possible diversions if weather intervenes, and whether to undertake the flight at all. Depending on the length of the flight, the conditions encountered, and the habits of the pilot, additional weather information may be obtained by radio while en route through either an FSS or an air traffic control (ATC) facility. Weather information may also be necessary in a more time-critical situation, such as advice regarding specific weather conditions at a destination airport. If the weather is not as anticipated, on arrival or approach for example, the pilot may be caught in a potentially dangerous situation for which he is not prepared.

Unlike pilots of commercial aircraft and high-speed turbine aircraft, the general aviation pilot is particularly at the mercy of the elements, typically being unable to escape adverse weather conditions by simply climbing above them. The critical inquiry when a pilot comes to grief in a weather-related accident after receiving faulty weather information is one of causation: was the faulty information a proximate cause of the accident or did the pilot exercise poor judgment when a sounder course of action would have extricated him from the situation?

In the typical scenario, a pilot, in reliance on an FSS weather briefing, undertakes a flight and encounters adverse weather of which he has not been advised. He must then decide whether to abort the flight, alter his course, or press on as planned. If he crashes before escaping the ad-

verse weather, the inevitable lawsuit will follow. This lawsuit will (or at least should) examine the interrelationship between two fundamental concepts in aviation: (1) the pilot in command's ultimate responsibility for the safe conduct of his flight, and (2) the pilot's entitlement to accurate weather information pertinent to the route of his flight. Even in more time critical situations where the pilot receives the "latest" weather conditions from an ATC before approaching or landing at an airport and detrimentally relies on faulty information, the issue is essentially the same: whether the faulty information or pilot error was the legal cause of the accident. Although in the past it was often held that the pilot was solely responsible for such accidents, or contributorily negligent, modern theories of multiple causation and comparative fault potentially sound the death knell for such findings of exclusive causation.

This article will examine the liability of the government for providing inadequate or inaccurate weather information to pilots, and the line being drawn in causation between negligent services provided by the government and negligence of the pilot for failing to avoid danger. Federal courts have been reluctant to extend governmental liability in aviation cases, where pilot error is often a contributing factor to an accident. In the era of contributory negligence, a finding of pilot error operated as a complete bar to recovery by the pilot himself.¹ Additionally, a finding that pilot error was the sole proximate cause or an intervening, superseding cause of an accident typically precluded recovery by all accident victims against all defendants other than the negligent pilot.

Conversely, in these modern times of comparative fault and multiple proximate causes, when some blame lies with the government, only a finding that another's negligence

¹ See, e.g., *Bowen v. United States*, 570 F.2d 1311, 1323 (7th Cir. 1978) (holding contributory fault an absolute defense under Indiana law); *Insurance Co. of Pa. v. United States*, 590 F. Supp. 435, 444 (S.D. Miss. 1984) (applying Kentucky law); *Peters v. United States*, 596 F. Supp. 889, 895 (E.D. Pa. 1984) (applying Virginia law); *Swanson v. United States*, 435 F. Supp. 654, 663 (S.D.N.Y. 1977) (applying New York and Pennsylvania law).

was the sole legal cause of the accident will forestall governmental liability. Although federal courts continue to find that pilot error was the "sole proximate cause" of weather-related accidents (notwithstanding extreme negligence on the part of the FAA), it is submitted that the liability of the government for FSS and ATC negligence is likely to be an increasing avenue of recovery for plaintiffs and for the apportionment of liability among defendants. The extent of the government's liability is of import to both the plaintiff and defense bars. For the plaintiff, a solvent defendant is added to the liability equation. On the other side of the "v.," deep pocket co-defendants (typically insured manufacturers and aircraft operators) benefit by not being the only defendants with sufficient resources to satisfy a hefty award.

II. THE AVENUE OF RECOVERY—THE FEDERAL TORT CLAIMS ACT

Prior to the enactment of the Federal Tort Claims Act (FTCA)² and its waiver of sovereign immunity, the government could not be held liable in tort for the negligence of its employees.³ The FTCA provides that the "government of the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to

² 28 U.S.C. § 2674 (1988).

³ See *Schillinger v. United States*, 155 U.S. 163, 166 (1894); *Langford v. United States*, 101 U.S. 341 (1879). Although the doctrine of sovereign immunity can be traced to the English maxim, "the King can do no wrong," this common law rule has no equivalent in American jurisprudence. *Langford*, 101 U.S. at 342-43. Rather, American sovereign immunity was justified as "a policy imposed by necessity." *Schillinger*, 155 U.S. at 167.

Both *Schillinger* and *Langford* considered attempts to expand the liability of the government under the Court of Claims Act—then the only avenue of judicial relief against the federal government. In both instances the door to the courthouse was held firmly closed to any suits against the government sounding other than in contract. *Schillinger*, 155 U.S. at 167; *Langford*, 101 U.S. at 345; see *Morgan v. United States*, 81 U.S. (14 Wall.) 531, 534-35 (1871) (denying recovery to owners of leased vessel for negligence of government Quartermaster absent contractual basis); *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274-75 (1868) (refusing to extend liability beyond express or implied contract); see generally 91 C.J.S. *United States* §§ 117, 176 (1955) (stating the United States must consent to be sued).

judgment or for punitive damages.”⁴ The United States district courts have exclusive jurisdiction over claims asserted under the FTCA, where the action proceeds as a non-jury trial.⁵

Under the FTCA, the form of the cause of action is determined by state substantive law. In the final analysis, cases involving inaccurate weather information will often turn on such fundamental common law tort concepts as proximate cause, intervening and superseding cause, and contributory negligence.

III. PILOT IN COMMAND AND FAULTY WEATHER INFORMATION

There is perhaps no principle so well ingrained in aviation as that of “pilot in command.” The pilot in command is the final authority regarding the safe conduct of a flight and operation of the aircraft. The extent of this responsibility is codified in the Federal Aviation Regulations (FARs).

Federal Aviation Regulation 91.3 provides in pertinent part:

(a) [t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft[;] (b) [i]n an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.⁶

As the preceding regulation clearly provides, the pilot in command has significant discretion in an emergency situation—even to the extent of violating regulations and the

⁴ 28 U.S.C. § 2674 (1988). The rule embodied by the FTCA with respect to governmental torts is little more than a specific application of the common law rule of *respondeat superior*. Section 219(1) of the Restatement (Second) of Agency states the principle thus: “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.” *RESTATEMENT (SECOND) OF AGENCY* § 219(1) (1957).

⁵ 28 U.S.C. § 1346(b) (1988).

⁶ 14 C.F.R. § 91.3 (1994).

instructions of ATC personnel when, in his or her judgment, the safe conduct of the flight so requires.⁷

The critical issue in cases where a pilot commences or continues a flight into adverse weather conditions and crashes is the reasonableness of the pilot's decision to undertake or continue the flight under prevailing conditions. The conduct of the pilot and his decisions will be viewed under the strict scrutiny of the pilot in command concept—the ultimate issue being whether this “directly responsible” individual exercised sound judgment in planning, initiating, conducting, and continuing the flight. Thus, even when relying on faulty weather information, a pilot may still have a “last clear chance” of sorts to avoid the accident, thereby absolving the government of liability.⁸

IV. PILOT AND FAA RESPONSIBILITIES—A QUESTION OF CAUSATION

The complex interaction between the pilot and the FAA regarding weather information gives rise to situations of dual responsibility and, occasionally, dual culpability. When inaccurate and incomplete weather information contributes to an air crash, two potential causal factors must be weighed: (1) the failure of FSS and/or ATC personnel to provide accurate information, and (2) the pilot's subsequent opportunity to escape or avoid any peril occasioned by the negligent governmental conduct.

⁷ A common example of such a “noncompliance” is refusing an ATC direction that would require a pilot, operating under visual rules, to violate VFR weather minimums (e.g., a direction that, if followed, would send the flight into clouds).

⁸ “Last clear chance” is a common law doctrine pursuant to which a negligent plaintiff may nonetheless recover, if the negligent defendant had the last opportunity to prevent the plaintiff's subsequent harm, under circumstances where the plaintiff could no longer reasonably avoid injury. This doctrine was primarily an early way around the otherwise absolute bar of contributory negligence. See RESTATEMENT (SECOND) OF TORTS §§ 479, 480 (1963). In the context of the cases discussed herein, the government is rarely held to have had the “last clear chance” to save the pilot; rather, courts often find the pilot should have avoided or escaped the peril himself. But see *Insurance Co. of Pa. v. United States*, 590 F. Supp. 435, 442 (S.D. Miss. 1984) (holding that FSS had “last clear chance” to prevent pilot encounter with adverse weather); see *infra* notes 63-67 and accompanying text.

*Ingham v. Eastern Air Lines*⁹ is an early expression of the pilot's and government's dual responsibility for the safe operation of aircraft, particularly during marginal weather in an airport traffic pattern. *Ingham* involved a commercial flight into New York's Idlewild Airport (now JFK) in foggy conditions. On November 30, 1962, an Eastern DC-7 entering the New York area at approximately 9:00 p.m. was advised that Idlewild was experiencing substantial fog. The flight crew was not informed, however, that runway visibility had dropped from three-quarters of a mile to one-half mile. Moreover, the fact that one weather observer at Idlewild had reported visibility of one-quarter mile, below the one-half mile minimum required for the DC-7's instrument landing system (ILS) approach, also went unreported. The airplane crashed while attempting a missed approach. Twenty-one passengers and four flight crew perished, and approximately thirty other passengers were injured. The trial court found the flight crew partially at fault for failing to maintain runway alignment and delaying the missed approach. Moreover, even when initiated, the missed approach was improperly executed.¹⁰

The *Ingham* court concluded that the accident was the result of concurrent negligence on the part of the government, for failing to advise the flight crew of the runway conditions, and the airline, for its misaligned approach and botched go-around. In holding the government partly liable, the *Ingham* court expressly recognized that the pilot of an aircraft relies on the government to provide accurate information and that the failure to provide such information may put the aircraft at risk.¹¹

The better reasoned decisions involving critical exchanges of weather information between the FAA and pi-

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

¹⁰ According to the DC-7 manual, the proper procedure for a missed approach requires the application of full take-off power to all engines, establishing a positive rate of climb and, lastly, retraction of the flaps and landing gear. Post-accident investigation revealed that none of the engines were operating at full power, yet the gear had already been retracted. *Id.* at 231-32.

¹¹ *Id.* at 235-36.

lots have recognized the interdependence of these two entities. Although the pilot in command bears the ultimate responsibility for the safe conduct of the flight, "he must know those facts which are material to the operation of his plane."¹²

The interrelation of faulty weather information and subsequent decisions of the pilot in command was also at issue in *Somlo v. United States*.¹³ Pilot Thomas G. Somlo undertook a flight from Naples, Florida on January 2, 1963, in a Cessna 310. His intended destination was Chicago's O'Hare Airport. His aircraft crashed eight miles east of the airport due to accumulated structural icing. Somlo and his younger daughter survived the crash, but his wife, elder daughter, mother-in-law, and another passenger perished.

Somlo obtained a full weather briefing prior to his departure and was advised that he could expect VFR¹⁴ conditions along his entire route. After stopping at Chattanooga, Tennessee for fuel and food, Somlo proceeded with his flight. He then contacted Bowling Green FSS for en route weather information. At that time, light aircraft "advisory Delta" was in effect, which warned of icing and IFR¹⁵ conditions along Somlo's proposed route. Somlo claimed that he never received this information. FSS personnel disagreed and produced station records to support their position.¹⁶

¹² *Dyer v. United States*, 551 F. Supp. 1266, 1276 (W.D. Mich. 1982) (citing *Gill v. United States*, 229 F.2d 1072, 1077-78 (5th Cir. 1970)); see also *Spaulding v. United States*, 455 F.2d 222, 227 (9th Cir. 1972) (recognizing duty of FSS weather briefer to provide accurate information to pilot); *Springer v. United States*, 641 F. Supp. 913, 935 (D.S.C. 1986) (holding that the scope of government duty to pilots is determined both by written procedures and induced pilot reliance), *aff'd without op.*, 819 F.2d 1139 (4th Cir. 1987); *Somlo v. United States*, 274 F. Supp. 827, 837 (N.D. Ill. 1967), *aff'd*, 416 F.2d 640 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) (holding that FSS has duty to supply latest accurate weather information).

¹³ 274 F. Supp. 827 (N.D. Ill. 1967), *aff'd*, 416 F.2d 640 (7th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970).

¹⁴ "VFR" means operations under "Visual Flight Rules" per 14 C.F.R. §§ 91.151-159 (1994).

¹⁵ "IFR" means operations under "Instrument Flight Rules" per 14 C.F.R. §§ 91.167-193 (1994).

¹⁶ *Somlo*, 274 F. Supp. at 830-31.

Somlo later contacted Lafayette, Indiana FSS, where he was not warned of icing conditions, despite the continued validity of advisory Delta and an amended forecast for freezing rain. Evidently, he was supplied with information as to the forecast IFR conditions because he filed an IFR flight plan for the remainder of the flight. Although ultimately holding that the crash was attributable to Somlo's continued flight into icing conditions,¹⁷ the court recognized the concomitant duties of pilots and FSS personnel. Applying the "good samaritan" rule of *Indian Towing Co. v. United States*,¹⁸ the court recognized that when the government undertakes the performance of a duty, inducing reliance, it has a duty to perform that duty non-negligently: "We think that if Mr. Somlo was never supplied with the available weather information which indicated icing conditions and the probability thereof, that he would have a justifiable grievance against the Government."¹⁹

Although Lafayette FSS breached its duty to Somlo by not providing advisory Delta or a warning of the freezing precipitation, the court held that Somlo's negligence in not requesting additional information and in pressing on with the flight was the "major contributing proximate cause" of the accident.²⁰ Concluding that Somlo had received an earlier warning of icing and had failed to make further inquiries along his route, the court held that his failure to obtain additional information caused the crash: "From what we have indicated, we do not believe Mr. Somlo adequately fulfilled his responsibilities as pilot in command of his craft."²¹

Although there was some fault on the part of the FSS in failing to provide the current weather information at Lafay-

¹⁷ The court also questioned Somlo's credibility, choosing to accept FSS's version of a contested communication with Bowling Green FSS. The court accepted the government's testimony that Somlo had been advised of forecast icing and dismissed Somlo's testimony to the contrary. *Id.* at 838, 842.

¹⁸ 350 U.S. 61 (1955). This same doctrine was previously applied by the Second Circuit in *Ingham*, 373 F.2d at 236.

¹⁹ *Somlo*, 274 F. Supp. at 838.

²⁰ *Id.* at 843.

²¹ *Id.* at 841.

ette, a full review of the *Somlo* decision leaves one convinced that Somlo was primarily responsible for his own misfortunes. Moreover, he did not help his cause by misrepresenting to ATC that he was not carrying passengers (he was not rated to carry passengers in the multi-engine Cessna 310 involved in the incident). This and other apparent misrepresentations unquestionably undermined Somlo's credibility.

The district court decision in *Black v. United States*²² is an early example of an apportionment of liability between a general aviation pilot and FSS personnel. That court recognized that pilot error and inadequate weather information can combine and *both* proximately cause an accident.²³ In *Black*, the VFR pilot contacted Alexandria, Louisiana FSS while en route from Baton Rouge, Louisiana to Fort Worth, Texas on May 9, 1965. Black requested and received information on winds aloft and the current altimeter setting. However, contrary to the guidelines of the Flight Assistant Service Handbook, the FSS Specialist did not inquire as to Black's course and destination and, therefore, could not supply appropriate information as to hazardous conditions en route. Had he obtained this information, he would have realized that "Sigmet Charlie 2"²⁴ was pertinent to Black's flight.²⁵ This Sigmet warned of thunderstorms, some of a severe nature, near Black's course. Black later flew into a thunderstorm and crashed. Black and his two passengers were killed.

In the subsequent wrongful death action under the FTCA,²⁶ the trial court found that the failure of FSS to inquire and supply Sigmet Charlie 2 was a proximate cause of the accident.²⁷ Although an accident of this type clearly could not have occurred without negligently flying into the

²² 303 F. Supp. 1249 (N.D. Tex. 1969), *rev'd*, 441 F.2d 741 (5th Cir. 1971).

²³ *Id.* at 1251-52.

²⁴ The FAA uses "SIGMET" for "Significant Meteorological Information," meaning an inflight advisory of weather that is hazardous to all aircraft.

²⁵ *Black*, 303 F. Supp. at 1251.

²⁶ 28 U.S.C. § 2674 (1988).

²⁷ *Black*, 303 F. Supp. at 1251-52.

hazardous weather conditions, the court rejected the argument that pilot negligence was the sole cause of the accident. Applying Louisiana's law of proximate cause, the court held that FSS negligence was a "substantial cause" of the crash.²⁸ "[T]he mere possibility that [the accident] might have happened without the [FSS] negligence is not sufficient to break the chain of cause and effect between the negligence and the injury."²⁹ However, due to Black's contributory negligence, the government was held to have a right of indemnity against Black's estate for its liability to the estates of the other passengers.³⁰ Accordingly, the effect of the apparently progressive ruling of the court depended, as a practical matter, on the assets of Black to satisfy the claims of his passengers. If Black was amply insured or could otherwise satisfy the passengers' awards against him, the judgment against the government was a mere paper tiger, as the government's payout could, in theory, be recovered back from Black or his insurer. However, a finding of sole proximate causation and/or intervening superseding cause, as espoused by the government, would have had the more drastic effect of cutting off all avenues of recovery other than Black himself. In reversing, the Fifth Circuit held that Black's continued flight into the storm was precisely such a superseding intervening cause, thereby cutting off any avenue of relief against the government.³¹

The Sixth Circuit reversed the Middle District of Tennessee's absolution of the government in similar circumstances in *Pierce v. United States*.³² Pilot Richard Pierce and his passengers were killed after his aircraft broke up in flight. The plaintiff claimed that the aircraft broke up in severe turbulence associated with a thunderstorm. The government argued that Pierce flew into instrument conditions and

²⁸ *Id.* at 1252-53.

²⁹ *Id.* (quoting *Home Gas & Fuel Co. v. Mississippi Tank Co.*, 166 So. 2d 252, 256 (La. 1964)).

³⁰ *Id.* at 1253.

³¹ *Black v. United States*, 441 F.2d 741, 745 (5th Cir. 1971).

³² 679 F.2d 617 (6th Cir. 1982).

overstressed the airframe while trying to recover from an inadvertent spiral.³³

The district court found that Pierce had planned a VFR flight from New Castle, Indiana to Polk County, Georgia for April 11, 1976, with five members of his family. During the flight, Pierce contacted Indianapolis FSS on several occasions and was repeatedly advised that VFR flight was not recommended and that a cold front was passing through the area. A possibility of thunderstorms was mentioned. In the course of his last briefing at 3:06 p.m. on April 11, Pierce was advised of improving conditions and, unlike his prior briefings, was not advised that VFR was not recommended. Pierce was not told of Sigmet Charlie 1, which warned of possible embedded thunderstorms in chains or clusters of increasing severity.³⁴ Contemporaneous radar reports confirmed the presence of rain and thunderstorms. Pierce opened his VFR flight plan at 3:50 p.m. and was never heard from again. Plaintiffs argued that placing the pilot in a perilous situation where weather endangered the flight constituted a proximate cause of the ensuing crash, even if pilot error and disorientation contributed to the accident.³⁵ The government maintained that pilot error was the sole cause of the accident and nonetheless broke the chain of causation from any breach of duty by the FSS. Unable to choose between the two conflicting theories of causation, the district court held that plaintiffs had not proved that the failure to warn of the thunderstorms had caused the crash.³⁶

The Sixth Circuit held that the trial court had not made sufficiently specific fact findings and conclusions of law on proximate causation.³⁷ The district court should have determined whether the failure to advise of the thunderstorms constituted a breach of duty and, if so, whether the

³³ *Id.* at 620.

³⁴ *Id.*

³⁵ *Id.* at 621.

³⁶ *Id.*

³⁷ *Pierce*, 679 F.2d at 621.

breach was a proximate cause of the accident. The possibility of two proximate causes—pilot and FSS conduct—did not preclude a finding of FAA negligence. Under the applicable law of Indiana, more than one course of conduct could constitute proximate causes of an accident.³⁸ Contributory negligence might foreclose recovery by the pilot, but would not be imputed to the passengers and bar recovery from another negligent actor. Only a finding of “sole proximate caus[ation]” on the part of Pierce could foreclose recovery against the government for all aboard.³⁹

V. ONE EXTREME—POOR PILOT JUDGMENT

One of the earlier cases to examine the relationship between a general aviation pilot and federal authorities was *Kullberg v. United States*.⁴⁰ In *Kullberg*, the estate of the deceased pilot, Richard Kullberg, commenced an action under the FTCA,⁴¹ alleging that the government had failed to provide adequate weather information and vectoring services, causing the decedent, a VFR-only pilot, to fly “inadvertently” into instrument meteorological conditions (IMC).⁴² Plaintiff contended that the aircraft crashed due to accumulated ice and further alleged numerous negligent acts on the part of the government, including failure to provide gratuitous in-flight weather information, failure of ATC personnel to provide information that Kullberg had never requested, and inadequate radar vectoring into the Greater Pittsburgh Airport.

The essential facts of the case, as found by the district judge, were that Kullberg continued his flight in deteriorating conditions, failed to request weather advisories en route, deliberately flew into IMC conditions, and attempted to fly an instrument approach although he was not certifi-

³⁸ *Id.* at 622 (citing *Hartzler v. Chesapeake & O.R. Co.*, 433 F.2d 104, 108 (7th Cir. 1970) (applying Indiana law)).

³⁹ *Id.* at 623.

⁴⁰ 271 F. Supp. 788 (W.D. Pa. 1964).

⁴¹ 28 U.S.C. § 2674 (1988).

⁴² This type of accident is commonly referred to as “VFR into IMC.”

cated for instrument flight. After requesting and accepting a radar guided approach calling for him to descend through clouds in violation of VFR, Kullberg's plane apparently broke up due to "heavy positive loads on the aircraft."⁴³ The court concluded that the probable cause of this break-up was "a high speed spiral occasioned by the pilot's loss of control" after Kullberg became disoriented in the clouds.⁴⁴

The court held that the government had not breached any duty to Kullberg.⁴⁵ Rather, Kullberg's repeated acts of negligence had caused the crash.⁴⁶ Moreover, even if the crash had been caused by icing, contrary to the court's findings, Kullberg's contributory negligence barred any recovery.⁴⁷ Among Kullberg's negligent acts were: commencing the flight into anticipated en route IFR conditions; failing to advise ATC that he was not instrument rated; descending into overcast; and failing to advise ATC of weather encountered in the course of the descent.⁴⁸

Kullberg represents one extreme of pilot negligence, the fault clearly lying exclusively with the pilot in command. Examples of such pure pilot error and lack of judgment abound.⁴⁹ In these cases there is little doubt where the primary fault lies, and one would be hard pressed to apportion

⁴³ *Kullberg*, 271 F. Supp. at 796.

⁴⁴ *Id.*

⁴⁵ *Id.* at 798.

⁴⁶ *Id.* at 797.

⁴⁷ *Id.* at 799.

⁴⁸ *Kullberg*, 271 F. Supp. at 796-97.

⁴⁹ See, e.g., *Barbosa v. United States*, 811 F.2d 1444, 1448 (11th Cir. 1987) (continued flight into thunderstorms despite adverse weather advisories); *Spaulding v. United States*, 455 F.2d 222, 227 (9th Cir. 1972) (flight into forecasted IFR conditions); *Black v. United States*, 441 F.2d 741, 744-46 (5th Cir. 1971) (VFR flight without weather briefing—penetrating storm for over 100 miles); *Davis v. United States*, 643 F. Supp. 67, 77-78 (N.D. Ill. 1986) (VFR flight on rainy day into forecasted deteriorating weather), *aff'd*, 824 F.2d 549 (7th Cir. 1987); *Lombard v. United States*, 601 F. Supp. 10, 12 (E.D. Mo. 1984) (flight into forecasted IFR conditions), *aff'd*, 767 F.2d 929 (8th Cir. 1985); *Baker v. United States*, 417 F. Supp. 471, 483-86 (W.D. Wash. 1975) (commercial flight into cloud-obscured terrain); *DeVere v. True-Flite, Inc.*, 268 F. Supp. 226 (E.D.N.C. 1967) (failure to obtain weather briefing—crash on VFR flight into clouds).

liability to the government for the failure of FAA personnel to save the pilot from himself.

VI. THE OTHER EXTREME—EXCLUSIVE GOVERNMENTAL LIABILITY

It is rare for the government to be held exclusively liable for the crash of an aircraft in adverse weather. In most cases, a period of time separates the negligence of the government from that of the pilot. The pilot is therefore typically afforded some window of opportunity to avoid or escape the perilous weather situation. The size of this window and how well it is utilized by the pilot will determine whether the pilot was contributorily negligent, comparatively negligent, or solely at fault. Thus, in order for government negligence to be the sole proximate cause of a weather-related aviation accident, the government's conduct must place the aircraft in a situation from which it has little or no chance of escape.

*Martin v. United States*⁵⁰ presented just such an unusual scenario. In *Martin*, two highly qualified IFR pilots were at the controls of a twin Cessna 414 (Reg. No. N44JG, hereinafter "4JG") when it crashed on approach to Pine Bluff Airport, Arkansas in instrument flight conditions. Both of the pilots and two passengers perished in the crash. The representatives of the various estates settled with non-government defendants and maintained an FTCA action against the United States.

The flight departed New Orleans, Louisiana at 5:24 p.m. on December 6, 1974 in instrument conditions. 4JG obtained a weather briefing before departure, and minimal IFR conditions were forecast throughout Arkansas. Pine Bluff was a controlled airport, but lacked an instrument landing system for precision approaches.⁵¹ Prior to attempting the approach, Pine Bluff ATC supplied 4JG with an altimeter setting of 29.80 inches of mercury. In fact, the

⁵⁰ 448 F. Supp. 855 (E.D. Ark. 1977), *aff'd in part, rev'd in part*, 586 F.2d 1206 (8th Cir. 1978).

⁵¹ *Id.* at 862.

proper setting was 29.90 inches, causing the altimeter to read 100 feet higher than the actual altitude. At the time it supplied the altimeter setting, Pine Bluff controllers knew that a special weather observation was due out shortly and that this amended report would reflect deteriorating conditions at Pine Bluff.⁵² 4JG's last-received weather information advised of 300 foot ceilings and one mile visibility in drizzle and fog.⁵³ By 7:23 p.m. this weather observation had been revised to indicate that the ceiling had dropped to zero and the sky was obscured. Nonetheless, Pine Bluff ATC failed to advise 4JG of the deteriorating condition in the course of an additional radio communication at 7:25 p.m. When Pine Bluff controllers attempted to advise 4JG of the change in field conditions at 7:26:23, 4JG did not respond. By that time, 4JG had either crashed or was beyond recovery.

The court concluded that 4JG descended below the published minimum descent altitude (MDA)⁵⁴ because of the incorrect altimeter setting, not due to any error on the part of the now deceased pilots, who were presumed to have complied with regulations.⁵⁵ Accordingly, the pilots were presumed to have been in visual contact with the runway when they continued the descent below what they thought to have been MDA. Upon identifying appropriate runway markings, the pilot in command would have been in the process of transitioning from flight by instruments to flight by visual reference. During this critical period, the pilot was under the mistaken belief that he had 100 feet more altitude than actually available. This mistaken belief, in combination with the fog-enshrouded trees below and ob-

⁵² At approximately 7:16 p.m. Pine Bluff controllers advised Little Rock ATC that worsening weather conditions would soon be reported. Pine Bluff communicated the altimeter setting to 4JG at 7:21 p.m. *Id.* at 867.

⁵³ *Id.* at 868.

⁵⁴ FAR 91.175 sets forth the MDA requirements. Descent below the published MDA on approach is prohibited unless the pilot is in visual contact with the runway or specified runway markings, including the runway end identifier lights. 14 C.F.R. § 91.175 (1994) (equivalent to 14 C.F.R. § 91.117 in *Martin* time frame).

⁵⁵ *Martin*, 448 F. Supp. at 870.

scured sky above, was held to have led to spatial disorientation and, ultimately, the loss of control and crash.⁵⁶

The court concluded that 4JG would have abandoned the instrument approach well before the accident, had the deteriorating weather conditions been timely reported.⁵⁷ The inaccurate altimeter setting exacerbated the danger. Most significantly, the court rejected entirely the government's argument that the pilots of 4JG had contributed to the accident.⁵⁸ The court noted that the pilot in command's primary responsibility was for the safe conduct of the flight,⁵⁹ but held that the experienced pilot(s) had justifiably relied on the information provided by the controllers.⁶⁰ Under the applicable law of Arkansas, contributory fault need not constitute a complete bar to recovery.⁶¹ The finding of no pilot negligence was facilitated by the lack of definitive proof as to which of the two pilots was actually operating the aircraft at the time of the crash. Unable to determine which occupant should pay the penalty for contributory negligence, if any, the court refused to speculate and held the government exclusively liable.⁶²

In an unusual reversal of their roles in proximate causation, subsequent acts of the government were held to have superseded earlier pilot negligence in *Insurance Co. of Pennsylvania v. United States*.⁶³ In this case, commercial pilot Gary Norman Ryan obtained a weather briefing at approximately 5:00 p.m. on October 27, 1977. Ryan intended to make a cargo run in a Cessna 402A twin engine aircraft from Jackson to Tupelo, Mississippi and continue on to Evansville, Indiana and Detroit, Michigan.

⁵⁶ *Id.* at 870-71.

⁵⁷ *Id.* at 871.

⁵⁸ *Id.* at 872.

⁵⁹ *Id.* at 865.

⁶⁰ *Martin*, 448 F. Supp. at 870-71; *see generally* *Indian Towing v. United States*, 350 U.S. 61 (1955) (government undertaking to perform a duty has duty to perform that duty non-negligently).

⁶¹ *Martin*, 448 F. Supp. at 871.

⁶² *Id.* at 872.

⁶³ 590 F. Supp. 435 (S.D. Miss. 1984).

VFR conditions were forecast for Ryan's route until approximately two hours after his scheduled arrival in Evansville. Ryan completed the flight to Tupelo in VFR conditions without incident. While en route to Tupelo, Ryan filed an IFR flight plan for his flight from Tupelo to Evansville. Although he was required to obtain weather information when filing this flight plan, Ryan neglected to do so.⁶⁴ Ryan did, however, obtain weather information from Memphis Center while en route to Evansville and was advised that the Evansville Airport was fogged in with one-eighth mile visibility, below the minimum required for an instrument approach. Despite advisories from Paducah, Kentucky FSS that conditions at Evansville continued to deteriorate, Ryan continued on course to Evansville. At 8:47 p.m., Ryan contacted Terre Haute FSS and spoke to Specialist James Freeman. Freeman failed to supply Airmet "Alpha One" that warned of deteriorating conditions at Evansville as well as Owensboro, a possible alternate airport. Between 9:10 and 9:22 p.m., Ryan missed two approaches due to low visibility at the Evansville Airport.

Ryan, who was quite familiar with the area, contacted nearby Henderson Airport at 9:30 p.m. and was advised by Mrs. Jo Davis, the unicom operator, that the field was fogged in. At that time, Ryan informed ATC that he had approximately forty minutes of fuel remaining in his tanks. Specialist Freeman, knowing Ryan's fuel condition, diverted him to the airport in Bowling Green, Kentucky. Unbeknownst to Ryan and Freeman, Jo Davis continued to monitor Ryan's radio transmissions from the Henderson Airport. By 9:37 p.m., conditions at Henderson had cleared. Davis contacted Freeman and advised him of the improvement at Henderson. Freeman never relayed this information to Ryan, despite the fact that Ryan was only minutes away from a safe landing at the Henderson field at the time (9:41 p.m.). Freeman also failed to advise Ryan of clear conditions in nearby Paducah, Kentucky. During this time pe-

⁶⁴ *Id.* at 437.

riod, Ryan had over forty minutes of fuel remaining, as he ultimately crash landed at 10:24 p.m. with both tanks dry. Ryan survived the crash and commenced an action against the government for Freeman's failure to advise him of the deteriorating conditions at Evansville and to route him to a closer airport.

The district court found that both Ryan and Freeman had been negligent.⁶⁵ Freeman, however, had the "last clear chance" to extricate Ryan from his predicament under Kentucky law.⁶⁶ Thus, in this unusual case of role reversal, Ryan's previous negligence was cut off by the later negligence of FSS, which was held to have ultimately placed Ryan in a situation from which he could not recover.⁶⁷

VII. MOORHEAD—THE MANUFACTURER, TOO

In an unusual variation on the roles of pilot and government, a design flaw was held to be the proximate cause of an accident that followed on the heels of a questionable weather briefing. In *Moorhead v. Mitsubishi Aircraft*,⁶⁸ pilot R.D. Baker and four passengers perished when their aircraft went down after an icing encounter. In the course of the preflight briefing, Baker was advised of clouds, thunderstorms, and precipitation. Icing was not mentioned. The National Weather Service had, however, forecast icing along Baker's route between Dallas, Texas and Augusta, Georgia.

⁶⁵ *Id.* at 444.

⁶⁶ Freeman's negligence included his failure to advise of the conditions at Paducah and his failure to pass on the information from Mrs. Jo Davis regarding the clear conditions at Henderson Airport. *Id.* at 442-44. Ryan's acts of negligence consisted of violating the FARs by attempting an instrument approach in below minimum conditions, continuing his course into Evansville despite poor conditions, not having required approach charts aboard the aircraft, and inadequate fuel preservation technique. *Id.* at 444. Interestingly, although Ryan's poor fuel management preceded or was concurrent with the negligence of Freeman, it apparently did not amount to a "clear [enough] chance" to save himself. *Insurance Co. of Pa.*, 590 F. Supp. at 444.

⁶⁷ *Id.*

⁶⁸ 828 F.2d 278 (5th Cir. 1987).

After a 4:13 p.m. departure, the aircraft climbed normally to its cruising altitude of 21,000 feet. Icing was encountered shortly thereafter, and the aircraft had begun to lose velocity by 4:46 p.m. By 4:51 p.m., the Mitsubishi MU-2B-25 reached its highest altitude of 21,400 feet and slowed from its initial cruise velocity of 198 knots to 125 knots. The plane began to descend rapidly and disappeared from the radar controller's scopes by 4:52 p.m.

As is typically the case in fatal general aviation accidents, there was little direct evidence as to the cause of the crash. Evidence was primarily drawn from expert accident reconstruction. The district court found that the FAA had not been negligent under the applicable law of Texas and held that the U.S. Government had breached no duty to Baker and his passengers by failing to advise of the forecast icing.⁶⁹ The district court held, as a matter of fact, that the weather briefing satisfied the requisite level of due care notwithstanding the omission of the icing information.⁷⁰ This fact finding was reviewed by the Fifth Circuit under the clearly erroneous standard of review.⁷¹

The circuit court's affirmance on this issue demonstrates the high duty of care required of the pilot in command, who is charged not only with obtaining adequate weather information but also with understanding the full implications of the information received. Specifically, the court held that Baker, a certificated instrument pilot, should have understood that the presence of thunderstorms and precipitation above the freezing level of the atmosphere implied a strong possibility of structural icing.⁷²

Although upholding the district court's findings on breach of duty, the Fifth Circuit added that any breach of duty by the FAA, even if it did take place, was not a proximate cause of the crash as it was not likely to have affected the

⁶⁹ *Id.* at 281.

⁷⁰ *Id.* at 282.

⁷¹ *Id.*

⁷² *Id.* at 285.

pilot's conduct and decision to undertake the flight.⁷³ Rather, the proximate causes consisted of the inadequate design of the aircraft's Pitot static system and the conduct of Baker.⁷⁴ The Pitot static system was adjudged defective because it had a tendency to exaggerate airspeed in icing conditions, thus causing the pilot to believe he was flying at a higher, hence safer, airspeed than his actual airspeed.⁷⁵ The district court found Baker negligent for: (1) entering the clouds responsible for the icing; (2) prolonging his encounter with the icing conditions; and (3) losing control of the aircraft.⁷⁶

The Fifth Circuit affirmed as to all but the first-listed instance of pilot negligence.⁷⁷ Entering moderate icing in an aircraft equipped for such conditions was not per se unreasonable.⁷⁸ Having reversed this one finding of negligence, the case was remanded to the district court for a reapportionment of fault between Baker and Mitsubishi.⁷⁹

VIII. SUPERSEDING CAUSE?

Notwithstanding the application of a "progressive" pure comparative fault statute, the Eight Circuit recently upheld a finding of "sole proximate" cause, absolving the government from liability to both pilot and passengers. After a seemingly interminable litigation, a helicopter pilot was held solely responsible for his death and the death of the two nurses accompanying him when his aircraft flew into terrain while encountering forecast, but unreported, re-

⁷³ *Moorhead*, 828 F.2d at 283.

⁷⁴ *Id.* at 284-85.

⁷⁵ *Id.* at 284. The Pitot static system measures the differential between ram air, forced into the Pitot tube as the aircraft moves forward through the air, and static, or undisturbed atmospheric pressure. The defect alleged in *Moorhead* evidently caused a false increase in this differential in icing, causing a higher indicated airspeed. See generally VAN SICKLE'S, MODERN AIRMANSHIP 207-08 (John F. Welch ed., 6th ed. 1990); FAA FLIGHT TRAINING HANDBOOK 26 AC 61-21A (explaining Pitot static system).

⁷⁶ *Moorhead*, 828 F.2d at 285.

⁷⁷ *Id.* at 282.

⁷⁸ *Id.* at 285.

⁷⁹ The district court had found Baker and Mitsubishi liable 60% and 40% for the accident, respectively. *Moorhead*, 828 F.2d at 281.

duced visibility. Moreover, the government was absolved from liability despite the court's specific finding that the weather briefer had failed to supply pertinent weather information that, if supplied, would have prevented the pilot from undertaking the flight. As a result, the FBO and its insurer bore the brunt of this loss, and neither the plaintiff nor any of the co-defendants had any recourse against the government for clear breaches of duty.

The essential factual findings of the case are set forth in the decision of the trial court in *Budden v. United States*.⁸⁰ On the afternoon of December 20, 1985, Craig Budden, a pilot and employee of Rodgers Helicopter Service, was assigned to fly a medevac flight from Kearney, Nebraska to Ainsworth, Nebraska. He obtained an abbreviated weather briefing at 5:52 p.m. from the Omaha Flight Service Station. Budden requested weather reports from Broken Bow and Ainsworth, Nebraska, as well as whether they were "expecting any significant weather moving through that area in the next hour and a half."⁸¹ He was advised that he could expect no worse than occasional ceilings of 1200 feet and visibility as low as three miles until 4:00 a.m. local time.⁸²

There was no dispute that the briefer provided adequate information with respect to the reported weather at Ainsworth and Broken Bow. However, the adequacy of the information relating to "significant weather moving through the area" was hotly contested. The briefer did not consult the applicable Chicago Area Forecast (FA), relying instead on the more localized Transcribed Weather Broadcasts (TWEBs) and Terminal Area Forecasts.⁸³ The Chicago FA

⁸⁰ 748 F. Supp. 1374 (D. Neb. 1990) (*Budden I*), vacated, 963 F.2d 188 (8th Cir. 1992).

⁸¹ *Id.* at 1381.

⁸² *Id.* at 1382.

⁸³ An "Area Forecast" describes current and forecast weather over an area the size of several states. The Chicago FA covers 12 states in the North Central United States, including Nebraska. "Terminal Forecasts" report weather within a 25 nautical mile radius of a specific airport, while "TWEBs" contain data pertinent to specific routes of flight. See generally TERRY T. LANKFORD, *THE PILOT'S GUIDE TO WEATHER REPORTS, FORECASTS & FLIGHT PLANNING* 71-132 (1990) (in-depth discussion of scope and purpose of foregoing).

advised of potential icing and the possibility of ceilings below 1000 feet. The information relayed to Budden made no mention of either icing or ceilings below 1000 feet prior to 4:00 a.m.

Under the applicable FAA regulations, night helicopter flights with ceilings below 1000 feet and visibility of less than three miles were prohibited.⁸⁴ Moreover, Rodgers Helicopter's internal regulations, expressly incorporated into the FARs, prohibited operations under visual flight rules with ceilings of less than 1000 feet and visibility of less than three miles.⁸⁵ Budden, although a certified IFR pilot, intended to make the flight VFR, and could not do otherwise, as Rodgers' Bell 206L was not certified for instrument flight.

On the basis of the weather briefing received, Budden departed Kearney at 6:01 p.m. under visual flight rules in VFR conditions. He crashed approximately twenty miles short of Ainsworth, just before 7:00 p.m. Budden and the two nurses accompanying him were killed. Although several persons had seen the aircraft as it neared the crash site, there were no witnesses to the actual impact.

Rodgers' and Budden's insurer (Budden was an additional insured on Rodgers' policy) settled the claims of the estates of the deceased nurses. Thereafter, Rodgers Helicopter, Budden's estate, Rodgers' liability insurer, and Rodgers' workers' compensation carrier commenced an FTCA action against the United States for the alleged negligence of the weather briefer. The *Budden I* court found that the briefer had breached its duty to Budden by failing to advise him of the potential icing conditions in the Ainsworth and Broken Bow area, stating:

[The briefer's] failure to inform Budden of the forecast of rime icing undoubtedly contributed to Budden's decision to commence the flight, because N110LG was not certified to

⁸⁴ *Budden v. United States*, 808 F. Supp. 1444, 1445 (D. Neb. 1992) (*Budden III*), *aff'd*, 15 F.3d 1444 (8th Cir. 1994). This minimum has since been amended to 1200 feet. See 14 C.F.R. § 135.205(6)(2) (1989).

⁸⁵ *Budden III*, 808 F. Supp. at 1455.

fly in any icing conditions. Federal Aviation Regulation § 135.227(b)(2) prohibits take-off under VFR conditions into known light or moderate icing condition "unless the aircraft has functional deicing or anti-icing equipment" ⁸⁶

However, despite its findings that the briefer had breached his duty and that Budden presumably would not have departed if advised of the icing, the trial court held that the government was not liable because this particular negligence was not a proximate cause of the accident.⁸⁷ Piecing together the various expert and lay testimony in the case, the court concluded that the crash had not been caused by icing.⁸⁸ Rather, testimony suggested that Budden had flown into a "scud" cloud and attempted to descend below it. Due to an inaccurate altimeter setting, Budden believed his altitude to be approximately sixty feet greater than the aircraft's actual altitude. The court concluded, "it was the pilot's continued flight into deteriorating weather conditions consisting of decreasing cloud ceilings and visibility, not icing, that caused this accident."⁸⁹

The decision of the trial court gave rise to the first appeal, *Budden II*.⁹⁰ The Budden I plaintiffs alleged on appeal that the district court had failed to address the briefer's failure to advise of possible ceilings below 1000 feet in the Ainsworth and Broken Bow vicinities, as indicated by the Chicago FA. The Eighth Circuit remanded the case back to the district court for a determination of whether the failure to warn of the ceilings below 1000 feet had proximately caused the accident.⁹¹

In the next manifestation of this dispute, *Budden III*,⁹² the district court concluded that despite the briefer's failure to advise of the low ceilings, the accident was solely Budden's

⁸⁶ *Budden I*, 748 F. Supp. at 1384.

⁸⁷ *Id.* at 1385.

⁸⁸ *Id.* at 1389.

⁸⁹ *Id.* at 1398.

⁹⁰ 963 F.2d 188 (8th Cir. 1992).

⁹¹ *Id.* at 194.

⁹² 808 F. Supp. 1444 (D. Neb. 1992).

fault for pressing on with the flight.⁹³ In a terse, one-page opinion, Senior District Judge Urbom held that a "reasonable person" would have turned around or attempted to land.⁹⁴ The Eighth Circuit would later interpret this to mean that Budden's decision to continue the flight into the bad weather constituted an intervening act of negligence.⁹⁵ The legal effect of this intervening cause was to cut off any causal link from the briefer's negligence and impose liability solely on the pilot for his decision to continue the flight.⁹⁶ The *Budden IV* court affirmed the trial court's determination that Budden bore sole responsibility for the accident.⁹⁷ This decision prevented both Budden's estate and the insurers from collecting any monies from the United States for the negligence of the briefer.

The circuit court in *Budden IV* reviewed the district court's determination of causation as a "finding of fact" under Nebraska law, which was subject to reversal only if "clearly erroneous."⁹⁸ Under this standard, the Eighth Circuit could only reverse the trial court if it was "left with the definite and firm conviction that a mistake has been committed."⁹⁹ This standard of review would prove to be an insurmountable obstacle to a successful appeal.

Constrained by this standard of review, the Eighth Circuit affirmed the decision of the district court, holding that "[a]lthough the unique facts of this case make for a close call on proximate cause, the district court did not clearly err."¹⁰⁰ In reaching its decision, the Eighth Circuit focused not on Budden's decision to initiate the flight, but on his decision to continue into worsening conditions after he was airborne.¹⁰¹ In rendering its holding, the court stated:

⁹³ *Id.* at 1445.

⁹⁴ *Id.*

⁹⁵ *Budden v. United States*, 8 F.3d 1278 (8th Cir. 1993) (*Budden IV*), *amended and superseded by* 15 F.3d 1444 (8th Cir. 1994).

⁹⁶ *Id.* at 1283.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1282.

⁹⁹ *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

¹⁰⁰ *Budden IV*, 8 F.3d at 1283.

¹⁰¹ *Id.* at 1284.

[T]he district court made a close call on circumstantial evidence about the pilot's conduct in relation to the adverse weather which he confronted. The evidence presented by its very nature gives rise to varying conclusions. While another fact-finder might have reached different conclusions on proximate cause and the pilot's negligence, we cannot say that the district court's ultimate finding that the pilot's negligence solely caused the tragic air crash is clearly erroneous.¹⁰²

In a well-reasoned dissent, Senior Judge Lay advocated just such a "different" conclusion, and reversal.¹⁰³ He disagreed with his Eighth Circuit colleagues' refusal to consider the effect of the weather briefing on the pilot's decision to undertake the flight. According to the dissent, "[i]t is the very possibility that a pilot will respond inadequately, or even negligently, that makes a crash the foreseeable result of an inadequate weather forecast."¹⁰⁴ The dissent pointed to a line of Nebraska cases holding that if the negligence of another (i.e., Budden's continued flight) was foreseeable to the first negligent actor (i.e., the weather briefer), the first actor remains liable. In sum, Judge Lay reasoned that continued flight into worsening conditions is precisely the type of hazard rendered likely by an inaccurate weather briefing.¹⁰⁵

Finally, and perhaps most importantly, Judge Lay wrote that the effect of the affirmance was to completely exonerate a negligent party from liability in a state that recognizes comparative negligence.¹⁰⁶ The Nebraska Comparative Negligence Statute¹⁰⁷ was not considered by the trial court and was not applied to weigh the relative negligence of the parties. Absent the finding of an intervening cause, the statute would have required the government to share the

¹⁰² *Id.* at 1284-85.

¹⁰³ *Id.* at 1285 (Lay, J., dissenting).

¹⁰⁴ *Id.* at 1286.

¹⁰⁵ *Budden IV*, 8 F.3d at 1287.

¹⁰⁶ *Id.* at 1288.

¹⁰⁷ NEB. REV. STAT. § 25-21, 185 (1994).

liability with Budden's and Rodgers' insurer.¹⁰⁸ Although Budden, as pilot in command, bore the ultimate responsibility for the safe conduct of his flight, he was denied the very information that would have been critical to his go or no-go decision.¹⁰⁹

In this author's view, the fair result would have been the apportionment of some liability against the government. It is well ingrained in Nebraska case law that the test for intervening cause is whether the subsequent act (Budden's decision to fly into worsening conditions) was foreseeable to the first negligent party (the briefer). As recently as 1989, the Supreme Court of Nebraska held: "The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is *not* foreseeable."¹¹⁰ Conversely, it would seem that a finding of superseding cause is not sustainable unless the later actor's negligence was unforeseeable. The district court in *Budden I* and *Budden III* made no such finding. Indeed, it is difficult to imagine that continuing flight into adverse weather could have been anything other than the foreseeable result of the inadequate briefing.¹¹¹

A finding of intervening and superseding cause was similarly upheld in *Tinkler v. United States*.¹¹² In *Tinkler*, on April 25, 1985, FSS personnel refused to provide weather information to the pilot because this information had been put away and the station was about to close for the evening. The pilot was advised to contact another FSS for weather information, which he never did. The aircraft crashed in a typical "VFR-in-IMC" scenario after encountering low fog

¹⁰⁸ *Id.*

¹⁰⁹ The final incarnation of this litigation, *Budden v. United States*, 15 F.3d 1444 (8th Cir. 1994), denied a petition for rehearing and modified *Budden IV*, clarifying its earlier affirmance that Budden's negligence was the *sole* proximate cause of the crash. *Id.* at 1445-46.

¹¹⁰ *Looney v. Pickering*, 439 N.W.2d 467, 471 (Neb. 1989) (citations omitted) (emphasis added).

¹¹¹ Accident statistics indicate that weather was the main factor in 40% of all general aviation accidents in the United States. DAVID THURSTON, *DESIGN FOR SAFETY* 167 (2d ed. 1995).

¹¹² 982 F.2d 1456 (10th Cir. 1992).

and clouds. Although concluding that FSS had been negligent by not providing the information readily available by computer, the district court held that the pilot's failure to obtain follow-up information and the continued flight into IMC were superseding causes of the accident.¹¹³ Again, notwithstanding the negligence of the government, the finding of sole proximate cause was upheld by the circuit court, reviewing under the "clearly erroneous" standard.¹¹⁴

IX. WEBB AND WORTHINGTON—A BALANCED APPROACH?

FTCA liability for the acts and omissions of FSS and ATC personnel was recently examined in *Webb v. United States*¹¹⁵ and *Worthington v. United States*.¹¹⁶ *Webb* involved a series of miscommunications and omissions on the part of the pilot in command, FSS, and ATC personnel, all of whom arguably bore some causal relationship to the crash of a Piper Archer on February 5, 1988. Neither the pilot nor his two passengers survived. *Worthington* involved inaccurate on-field weather information relayed to a pilot on instrument approach.

In *Webb*, pilot Allen Charlesworth, a low-time VFR pilot, planned a flight from Salt Lake Airport, Utah to Roswell Airport, New Mexico. He first contacted the Cedar City, Utah FSS on the evening of February 4, 1988, for an outlook briefing. FSS Specialist J. Walstad advised Charlesworth of the potential for low visibility at the intended 5:30 a.m. departure the next day and suggested that he postpone his departure. He did not provide the terminal forecast for Roswell, Charlesworth's destination.

Charlesworth's next contact with FSS came at 4:30 a.m. on the day of the intended flight. Again he spoke to Walstad. At the time of the call, the FSS computer system was

¹¹³ *Tinkler v. United States*, 700 F. Supp. 1067, 1074 (D. Kan. 1988), *aff'd*, 982 F.2d 1456 (10th Cir. 1992).

¹¹⁴ *Tinkler*, 982 F.2d at 1469.

¹¹⁵ 840 F. Supp. 1484 (D. Utah 1994).

¹¹⁶ 21 F.3d 399 (11th Cir. 1994).

“down,” and the full information needed for a standard briefing was not available. Charlesworth was advised that the information he had received was neither current nor complete.

The limited information available to Walstad indicated that the weather en route would not be ideal for a cross-country VFR flight, but would improve later in the day. Walstad was unable to relay the current conditions at Roswell, which were well below VFR minimums. Walstad accepted Charlesworth’s VFR flight plan for filing, but failed to note the limited nature of the briefing on the form. Thus, incoming FSS Specialists reviewing the flight plan could not know that Charlesworth had received less than a full weather briefing. Compounding the error, the replacement FSS personnel at the end of the shift had not been advised that the computer system had been down, nor was a notation to that effect made in the station’s record of operations. Had either of these precautions been taken, later shifts presumably would have been aware of the system’s problems and could have anticipated that incomplete briefings had been given during the down time.

Charlesworth initiated a third preflight contact with FSS at 7:30 a.m. on the date of accident. He spoke to Specialist B. Poulson at the Cedar City FSS. Charlesworth did not request a complete standard briefing, and Poulson did not ask if he required one. Poulson had no way of knowing of the limited briefing previously given and supplied only the information he considered necessary to supplement what he assumed had been a full standard briefing. Poulson failed to advise Charlesworth of the severity of the current conditions at Roswell, which had been reported as sky totally obscured by snow, clouds, and fog with a visibility of one-half mile—well below the VFR minimum of a 1000 foot ceiling and three miles visibility.¹¹⁷

Charlesworth departed Salt Lake at approximately 8:30 a.m. under IMC conditions, presumably obtaining a special

¹¹⁷ 14 C.F.R. § 91.155 (1994).

VFR clearance,¹¹⁸ and contacted Cedar City FSS by radio at approximately 8:41 a.m. to open his VFR flight plan. Charlesworth did not ask Specialist McKay at Cedar City FSS, with whom he had opened the flight plan, for additional weather information. McKay had no way of knowing that Charlesworth lacked full and accurate weather information at that time. Unbeknownst to Charlesworth and McKay, the Roswell Airport had been closed for over three hours due to one-quarter mile visibility and a totally snow-obscured ceiling. Charlesworth landed in Albuquerque, New Mexico at approximately 1:00 p.m., where he was delayed in order to repair a malfunctioning speaker in the aircraft's radio.

At 2:31 p.m., shortly after departing Albuquerque, Charlesworth contacted Roswell FSS, spoke to Specialist B. Byrom, and requested the current Roswell weather. The field was VFR, but variable. The routine radio contact initiated by Charlesworth required Byrom to supply weather advisories within 150 miles of the flight. Byrom failed to supply NOTAMS¹¹⁹ as to the accumulated snow at Roswell, or to advise Charlesworth that VFR was not recommended, which would have been warranted under the prevailing weather conditions.

Charlesworth contacted the Roswell control tower and was immediately advised that the field was IFR. After some missed communications between pilot and tower, Charlesworth was asked to restate his intentions. Charlesworth, apparently abandoning any thoughts of diverting to another airport, requested a special VFR clearance into Roswell. At 2:52 p.m., controller Brown at Roswell gave Charlesworth the airport NOTAMS, including information as to snow accumulation and the condition of the runways. The district court found that both the pilot and the controllers should have known that there was a danger of a whiteout, a condi-

¹¹⁸ When obtained from the authorized ATC facility, a special VFR clearance allows a pilot to fly in controlled airspace in less than VFR conditions when he can remain clear of clouds. *Id.* at § 91.157.

¹¹⁹ This is a notice given to airmen.

tion where visual reference to the horizon is lost, which can lead to spatial disorientation.¹²⁰

Charlesworth communicated intermittently with the tower from this initial contact at 2:48 p.m. When the tower attempted further contact at 3:03 p.m., there was no response. Witnesses on the ground reported seeing the aircraft fly toward the airport at 300 feet AGL, below an overcast. At some point before entering the airport's control zone,¹²¹ Charlesworth attempted a 180-degree turn, mis-executed the maneuver, and crashed. The court concluded that Charlesworth had experienced whiteout, lost visual references, and crashed while attempting a steep bank to extricate himself from the situation.¹²²

Under the applicable laws of New Mexico, in order to recover against the government, the representatives of the decedents had to prove that the various FAA personnel had breached a duty of care to the pilot and that this breach was a proximate cause of the accident. Addressing the issue of duty of care, District Judge Greene properly noted that the pilot and the FAA bear concurrent duties for the safe operation of the aircraft.¹²³ Thus, negligence on the part of the FAA would not preclude a finding of negligence on the part of the pilot and vice versa.

The court found that Charlesworth was negligent in failing to obtain adequate pre-flight and in-flight weather information.¹²⁴ When he departed Salt Lake Airport, Charlesworth knew or should have known that he had not received adequate weather information, and he should have obtained a full briefing when he spoke to Cedar City FSS. Charlesworth also failed to obtain a full briefing via radio when opening his flight plan.¹²⁵ Cedar City FSS was

¹²⁰ FAA Advisory Circular 60-4A (Feb. 9, 1983).

¹²¹ Now referred to as class "D" airspace, a control zone is an area usually extending five miles from a controlled airport to an altitude of 2500 feet AGL. AIRMAN'S INFORMATION MANUAL ¶¶ 3-22, 3-26 (1993).

¹²² *Webb*, 840 F. Supp. at 1507.

¹²³ *Id.* at 1511.

¹²⁴ *Id.* at 1512.

¹²⁵ *Id.* at 1513.

negligent in failing to obtain sufficient background information from Charlesworth to provide an adequate weather update.¹²⁶

The court carefully examined the pilot's responsibilities with respect to avoiding adverse conditions and complying with visual flight rules. Based upon the information supplied, the court held that Charlesworth should have known that he was approaching a hazardous situation in Roswell.¹²⁷ The FAA Flight Training Handbook provides that "minima are 'absolute *minimum* requirements and are not recommended for pilots having limited experience.'"¹²⁸ The court concluded that attempting a special VFR approach, under the conditions known to Charlesworth, was not reasonable.¹²⁹

In addition, the court held that the scope of FSS and ATC duties to pilots was defined not only by official duty manuals and regulations, but by pilot reliance as well.¹³⁰ However, both FSS Specialists and Air Traffic Controllers are entitled to assume that a pilot knows and will abide by Federal Aviation Regulations and are not required to anticipate a pilot's negligence or to supply pilots with gratuitous opinions as to how they should conduct their flight.¹³¹

Although the primary duty of controllers is the safe separation of aircraft, the court held that a controller's secondary duties require him to supply pilots with pertinent weather information, particularly regarding conditions more apparent to the controller than the pilot.¹³² Similarly, a controller "cannot sit passively by and watch someone commit a negligent act, or a grossly negligent act."¹³³

¹²⁶ *Id.* at 1517.

¹²⁷ *Webb*, 840 F. Supp. at 1512-13.

¹²⁸ *Id.* at 1513 (citation omitted).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1514.

¹³¹ *Cf. Lombard v. United States*, 601 F. Supp. 10, 13 (E.D. Mo. 1984) (FSS personnel need not take steps "of speculative value" to forestall pilot error).

¹³² *Webb*, 840 F. Supp. at 1517.

¹³³ *Id.* at 1515 (quoting *Himmeler v. United States*, 474 F. Supp. 914, 943 (E.D. Pa. 1979)).

The court held that Specialist Walstad and other employees at Cedar City FSS breached a duty to Charlesworth by failing to provide a sufficient outlook briefing the day before the flight, failing to advise of alternative weather sources when the computer was inoperative, and failing to alert later briefers that Charlesworth had not received adequate information.¹³⁴ However, these acts were not held to have proximately caused the accident.¹³⁵

Despite finding considerable negligence on the part of various individuals involved in this tragedy, the court determined that Albuquerque represented a significant dividing line with respect to which of these acts were proximate causes. Applying the law of New Mexico, the court held that reaching Albuquerque (a safe port), being delayed, and resuming the flight "constituted a new beginning, a major break in the causal chain."¹³⁶ Although the pilot and FSS had committed negligent acts prior to the Albuquerque landing, the negligence "had far spent itself and was too small for the law's notice by the time the plane crashed near Roswell."¹³⁷

The post-Albuquerque negligent acts held to constitute a proximate cause of the crash were those of Charlesworth FSS Specialist Byrom, and Roswell Controller Brown.¹³⁸ Charlesworth's negligence consisted of failing to avoid adverse weather conditions of which he had actual or constructive notice.¹³⁹ Specialist Byrom had negligently failed to advise the pilot that VFR was not recommended and that the potential for whiteout existed.¹⁴⁰ Controller Brown's failure to advise of decreasing visibility and the possibility of whiteout due to the lack of visual references from the aircraft's approach position was also a legal cause of the acci-

¹³⁴ *Id.* at 1521.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1520-21.

¹³⁷ *Id.* at 1520.

¹³⁸ *Webb*, 840 F. Supp. at 1521.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

dent.¹⁴¹ Applying New Mexico's law of pure contributory negligence, the court apportioned sixty percent of the liability to Charlesworth and forty percent to the federal government for the collective acts and omissions of Byrom and Brown.¹⁴²

In *Worthington v. United States*,¹⁴³ a pilot and three passengers were killed when their single engine aircraft crashed into a wooded area near a Jacksonville airport on November 13, 1988. Although the weather had been clear throughout most of the flight, fog enshrouded the destination airport at the time of the crash. The pilot had been cleared for an IFR approach, but the plane crashed shortly after reaching decision height.

Plaintiff argued that the air traffic controller had supplied inaccurate weather data to the pilot, precipitating the crash. After a non-jury trial, the district court entered judgment for the defendant, holding that the pilot's negligence was the sole cause of the accident. The Eleventh Circuit reversed.¹⁴⁴

The plaintiff theorized that Worthington, upon encountering unforecast weather conditions at decision height, experienced spatial disorientation, which caused the crash. An expert listed five factors that he believed contributed to the pilot's disorientation:

- (1) inadequate weather information at the terminal check-in;
- (2) insufficient time to line up for an instrument approach because of the delayed turnover from approach to local control;
- (3) inadequate weather information after clearance outside the marker and before reaching decision height;
- (4) the pilot's mistaken belief, based upon information received from ATC, that he would encounter visual conditions at decision height; and

¹⁴¹ *Id.*

¹⁴² *Id.* at 1521-22.

¹⁴³ 21 F.3d 399 (11th Cir. 1994).

¹⁴⁴ *Id.* at 399.

(5) the increased workload upon approaching decision height due to the late transfer.¹⁴⁵

In light of the parties' agreement that the pilot had experienced spatial disorientation, the Eleventh Circuit rejected the district court's finding to the contrary.¹⁴⁶ The appellate court concluded that the pilot thought that he would reach decision height in clear skies, based on the controller's information, and that the lack of visual references caused the disorientation.¹⁴⁷ The court further concluded that the pilot was most likely trying to execute a missed approach at the time of the crash.¹⁴⁸

Applying Florida's pure comparative negligence rule, the circuit court concluded that the lower court had not apportioned liability correctly.¹⁴⁹ The district judge had concluded that the pilot's actions were an intervening cause, breaking the causal connection between any controller negligence and the accident. The Eleventh Circuit reversed, holding that the pilot's actions were precisely of the type that controllers should foresee when inaccurate and untimely weather information is supplied in such time-critical situations.¹⁵⁰ Although the pilot was not without fault, his negligence should have been considered in apportioning fault; it should not have acted to bar recovery.¹⁵¹ The case was sent back to the district court for an apportionment of liability and determination of damages.¹⁵²

X. CONCLUSION

Determining the scope of governmental liability when inadequate weather information contributes to an aviation ac-

¹⁴⁵ *Id.* at 402.

¹⁴⁶ *Id.* at 403.

¹⁴⁷ *Id.*

¹⁴⁸ *Worthington*, 21 F.3d at 403.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 406.

¹⁵¹ *Id.* at 407.

¹⁵² *Cf. Martin v. United States*, 448 F. Supp. 855 (E.D. Ark. 1977) *aff'd in part, rev'd in part*, 586 F.2d 1206 (8th Cir. 1978) (similar fact pattern resulting in judgment against government); *see supra* notes 50-62 and accompanying text.

cident requires a legally basic, yet factually complex, determination of causation. Arising under the FTCA, this determination of causation is left to the federal bench, which is to apply the substantive law of the appropriate state. Thus, even the most complex issues of proximate cause, contributory fault, and superseding cause will be left to an eminently qualified individual.¹⁵³

Unfortunately, whether the flaw is a hesitancy to expand the scope of governmental liability or unfamiliarity with a given state's tort law, the *Budden* cases demonstrate that this system is far from foolproof. In light of the nearly universal acceptance of comparative fault and the recognition that a given accident may have several proximate causes, it is reasonable to expect an increasing trend toward apportioning liability against the government when FSS or ATC personnel are negligent in fulfilling their duty to supply pilots with accurate and timely weather information. *Webb* and *Worthington* are likely representative of this modern trend. An increased viability of such claims against the government will no doubt be welcomed by plaintiffs and co-defendants alike.

¹⁵³ Not to mention the significant contribution of able-bodied clerks!