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AVIATION TORT LITIGATION AGAINST THE UNITED STATES — JUDICIAL INROADS ON THE PILOT-IN-COMMAND CONCEPT

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AN INTRODUCTORY LOOK AT AIR TRAFFIC CONTROL AND THE FEDERAL COURTS

IN AVIATION TORT law, the pilot-in-command concept places primary responsibility for the successful operation of the aircraft on the pilot in charge of the flight.¹ Authorized by the Federal Aviation Act of 1958, the Federal Aviation Administration (FAA) implemented the pilot-in-command concept and promulgated the Federal Aviation Regulations (FARs) which assign the pilots' regulatory duties.² A concept historically at the backbone of the pilot/air traffic control navigation system, the pilot-in-command concept has suffered dilution as a result of federal judicial decisions holding air traffic controllers partially liable in aviation accidents. The federal judiciary's rejection of the pilot-in-command concept ignores the completely different nature of the corresponding duties of the pilot-in-command³ and the air traffic controller.⁴ The

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¹ 14 C.F.R. §§ 1-139.127 (1986). 14 C.F.R. § 1.1 (1986) describes the "pilot-in-command" as "the pilot responsible for the operation and safety of an aircraft during flight time."

² The Federal Aviation Act is located at 49 U.S.C. §§ 1301-1552 (1982).

³ 14 C.F.R. § 91.3(a) (1986) makes the pilot-in-command "directly responsible for, and is the final authority as to, the operation of that aircraft."

⁴ Perhaps in some small part the use of the term "controller" rather than "advisor" has created the erroneous impression in the minds of some judges that a "controller" can somehow suggest how to operate the aircraft's controls to a dis-

courts' continuing failure to appreciate the different duties of the pilot and the air traffic controller illustrates that the courts either fail to comprehend, or arbitrarily reject, the system because it conflicts with the judiciary's emotional temperament.

The relationship between a pilot and a controller can be analogized in some ways to the relationship between an automobile driver and a policeman. One might think of a policeman directing the driver of an automobile on a detour caused by a fallen tree. The policeman can point the driver in a particular direction but cannot control him in manipulating the bends in the road. The policeman assumes that the driver has received the proper training, testing, and licensing to drive the automobile, has sufficient fuel and functional brakes, and will not collide with another automobile or the tree. By the same token, air traffic controllers provide "clearances" to a pilot. Clearances represent to the pilot that no other aircraft will receive a clearance to do the same thing at the same time and play a particularly important role in instrument weather conditions when pilots cannot see and avoid each other.⁵ The controller's separation of one aircraft from other aircraft constitutes the nub of the air traffic control system. However, the controller cannot direct the pilot in actually manipulating his flight path.

The FAA establishes air traffic control (ATC) facilities at certain locations, exercises discretion in designing the facilities, determines the number of controllers at each facility and their functions, and decides what type of services to provide at each facility. These decisions, combined with the fact that the controllers assume the pilots will do what the regulatory system requires, indicate the reliance placed by the controllers on the pilot-in-command (PIC) concept. The rising number of judicial decisions rejecting the PIC concept historically relied upon by both pilots

oriented, disorganized or incompetent pilot. For the purposes of this article, all air traffic controllers referred to are employees of the FAA.

⁵ See 14 C.F.R. §§ 91.115-91.129 (1986) for the Instrument Flight Rules.

and controllers not only assumes a defect in the agency implementation of the pilot/controller system, but also constitutes a presumption of judicial omniscience that remains largely unsupported.

In its evaluation of aviation accident cases, the United States judiciary often creates a standard of care that transgresses any duty assigned to pilots or assumed by the ATC system. Jurists too often adopt findings of fact carefully crafted by the plaintiff's counsel in these cases. Unfortunately, these facts frequently contradict the PIC concept, which delegates primary responsibility to pilots and secondary responsibility to controllers. Privately funded aviation experts⁶ often persuade the courts to reject the presumption that the air traffic controllers acted consistently with their training. The courts' analysis in such cases apparently rejects either common sense, the presumption that air traffic controllers fulfilled their duties, or allegiance to the fair play of the United States judicial system.

This commentary does not deal with the constitutional separation of powers between the executive and judicial branches. Nor is it just a matter of sour grapes. It simply searches for the objectivity in aviation accident cases upon which the judicial system and the Federal Tort Claims Act are theoretically based. The commentary criticizes the attitude of a growing number of judges who, through their findings of fact and conclusions of law, distort the reality of the largely well-tuned aviation administrative system known, understood, and generally adhered to by the pilots and controllers using it. The legal inroads into the pilot-in-command concept result from some personal, moral, or social belief of the jurists not recognized by statutes, regulations, manuals, or traditional case law. A

⁶ The qualifications of an air traffic controller presented as an expert in court are questionable if he has not functioned as a controller for years, has not worked at the type of ATC facility involved in the accident, or has not utilized the type of equipment involved. Furthermore, such experts offer their opinion as to the pilot's decision-making process although they may have never been a pilot.

number of federal district courts too readily adopt a paternalistic approach to the allocation of liability in aviation accident cases. These courts refuse to accept the fortuitous and isolated nature of tragedies such as aircraft accidents. As a result, they rely on a public liability approach and arbitrarily assign fault to air traffic control in an effort to provide government compensation to the injured for their losses in aviation accidents.

I. THE REGULATORY PILOT-IN-COMMAND CONCEPT (PIC)

The regulatory pilot-in-command concept originated in the military and served as the foundation for responsibility assumed by military pilots. The PIC concept recognizes that only the pilot in command of the aircraft in flight knows his limitations and his responsibilities. Such responsibilities include a preflight inspection of the aircraft, preflight planning, evaluation of the weather, and maintenance of flight currency requirements.⁷ The air traffic control system expects and assumes that the pilot-in-command has competently fulfilled his responsibilities before and during the flight. Furthermore, the ATC system of the FAA relies on the assumption that pilots will do precisely what the Federal Aviation Regulations require, and, because of their testing and training, that the pilots will not need a timely reminder as to what the FARs require.⁸ If controllers could not rely on such assumptions, aviation would generally come to a halt.

The FARs require pilots to be capable of conducting flights, making approaches, and executing missed approaches to an airport runway without an air traffic controller. The thousands of daily flights, both commercial

⁷ *E.g.*, *Michelmores v. United States*, 299 F. Supp. 1116, 1119 (C.D. Cal. 1969), *aff'd sub nom.*, *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972) (the district court observed that "[the pilot] alone knows the capability of his aircraft, and he and he alone knows his own qualification to operate the aircraft").

⁸ *E.g.*, *Colorado Flying Academy v. United States*, 724 F.2d 871, 878 (10th Cir. 1984) (citing with approval the district court's conclusion that "an air traffic controller has the right to rely upon the assumption that a pilot knows and will abide by the applicable Federal Aviation Regulations").

and general, made to airports throughout the United States where *no* air traffic control service exists illustrates PIC primary responsibility, ATC assumption of pilot capability, and the independent nature of the duties of pilots and controllers. How does the pilot land at an airport when flying virtually "in the blind," without any controller within 100 miles? The pilot guides himself only with FARs, approach plates depicting the regulatory landing procedure,⁹ and an airport instrument landing system used during the approach and landing. As required by the FARs, the pilot flies on the aircraft's instruments without relying on continuous sequencing or advisories from ATC.

A. *Historical Development of the PIC Concept*

Since 1941 when pilots utilizing United States airspace first received federal certification,¹⁰ the advances in technology have not altered the duty of pilots to comply with FARs or the expectations of controllers that pilots will so comply. While modern technology has made the ATC system more efficient, it has not altered the regulatory pilot-in-command concept¹¹ that the pilot has primary responsibility for control and operation of the aircraft.¹²

⁹ The FARs require pilots flying under instrument conditions to carry approach plates depicting the instrument approach procedures for landing at the intended airport. 14 C.F.R. § 91.116(a) (1986). For Standard Instrument Approach procedures, see 14 C.F.R. § 97 (1986).

¹⁰ A. BRIDDON, E. CHAMPIE & P. MARRAINE, *FAA HISTORICAL FACT BOOK 43* (1974) [hereinafter cited as A. BRIDDON].

¹¹ The "pilot-in-command" is defined in 14 C.F.R. §§ 1.1 and 91.3(a) (1986). In those aircraft certificated for flight only with more than one pilot, 14 C.F.R. § 91.213 (1986), the military "chain-of-command" requirements apply, 14 C.F.R. § 61.55 (1986). Historically, ATC was included in this regulatory chain-of-command only for those functions which controllers are trained to expect pilots to rely on.

¹² Like the legion of circuit court cases citing 14 C.F.R. § 91.3(a) (1986) for the proposition that the pilot-in-command is primarily responsible for control of his aircraft, other circuit court decisions have acknowledged the *secondary* duties of controllers. See *Hamilton v. United States*, 343 F. Supp. 426, 432 (N.D. Cal. 1971), *aff'd*, 497 F.2d 370 (9th Cir. 1974) (the court observed that "the duties of the controllers, when they exist at all, are purely secondary"). The respective duties of the PIC and ATC have been described as "concurrent but independent

Technological advances including developments in solid-state and microchip electronics have created significant changes in the active (primary) operational control of an aircraft by the pilot and the passive (ancillary) assistance functions of the controller.¹⁹ While the pilot's burden has lessened with the development of more sophisticated aircraft instrumentation, the regulatory system addressing the responsibilities of the PIC has remained very much constant. Modern instrumentation should not shift the pilot's burden to fly safely to ATC, nor should it force ATC to speculate on a pilot's ability to use his instrumentation.

ATC has similarly experienced vast improvements in ra-

duties." *Redhead v. United States*, 686 F.2d 178, 184 (3d Cir. 1982) (Becker, J., dissenting), *cert. denied*, 459 U.S. 1203 (1983). Decisions that depend on conditions known in detail only by the pilot must be made by him. *Id.* at 183. Similarly, the function of controllers has been held to be that of merely assisting the pilot in the performance of duties imposed on him. *United States v. Miller*, 303 F.2d 703, 710-11 (9th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

¹⁹ A limited chronology of advances affecting operational control of an aircraft in IFR weather conditions (when the pilot cannot see outside the cockpit for visual reference in order to maintain the stability of the aircraft and is physically incapable of providing his own visual separation from other aircraft) includes:

1929 James H. Doolittle made the first recorded successful instrument landing. Receiving directional guidance from a radio range course aligned with the runway and distance from the airport by means of radio markers, he controlled his altitude with a sensing altimeter. A directional gyro and artificial horizon provided altitude guidance. A. BRIDDON, *supra* note 10, at 17.

1931 The first instrument landing by a system incorporating a glide slope was made at the College Park, Maryland Airport. *Id.* at 20.

1932 The first blind solo flight on instruments only occurred at Dayton, Ohio. *Id.* at 20.

1933 The first cross-country test of all-instrument (blind) flying and landing was made from College Park, Md. to Newark, N.J. *Id.* at 21.

1937 The first wholly automatic aircraft landing was made at Dayton, Ohio. *Id.* at 32.

1947 The CAA granted its first approval of the Army GCA radar device for commercial planes, authorizing its use by Pan American Airways at Gander, Newfoundland. *Id.* at 55.

1951 The CAA put into operation the the first VOR (very high frequency, omnidirectional range) airway for use by pilots. *Id.* at 67.

1952 45,000 miles of very high frequency (omnirange) airways, referred to as Victor airways, were placed into operation to supplement the then existing 70,000 miles of federally maintained low frequency airways. *Id.* at 70.

1964 The first computer landing (automatic touchdown) was made by a United Airlines Carabelle jet at Dulles Airport. *Id.* at 147.

dar computer technology, weather information, and overall modernization of equipment and facilities.¹⁴ Computer technology is currently being used to develop the Fourth Generation ATC system, described in the National Airspace System Plan, which includes an airborne Traffic Alert Collision Avoidance System (TACS). Solid-state electronics as well as new computer hardware and software will accommodate more sophisticated levels of automation and will facilitate the ultimate melding of en route and terminal functions.

The paralleled leap in electronic wizardry available to both pilots and controllers has not, despite the testimony of air traffic experts, changed the limited advisory role of air traffic controllers who naturally assume that the PIC is qualified and competent. The regulatory system administered by the FAA, upon which pilots and controllers rely at all times, presumes that the pilot has full control of the aircraft, fully understands minimum criteria relating to

¹⁴ Some technological advances of significance to ATC in providing assistance to the PIC include:

1941 The CAA began operation of ATC towers, taking them over from local agencies having airport control. Late in 1941 there were eight towers operated by the CAA. *Id.* at 43.

1946 The first radar-equipped control tower for civilian flying was unveiled at the Indianapolis Airport. *Id.* at 52.

1948 Development of the transistor made possible the subsequent production of the semi-automated Third Generation ATC system. *Id.* at 62.

1959 The FAA put into operation in the New York area a sixty-four code radar beacon system designed to reinforce primary radar signals from the body of the aircraft itself and to permit positive identification of individual aircraft equipped with a transponder emitting electronic signals to reciprocating FAA ground radar equipment. *Id.* at 92.

1965 The first single radar system capable of displaying Mode C (altitude reporting) radar beacon signals in alphanumeric form (called Advanced Radar Terminal Control System [ARTS]) was installed at the Atlanta terminal. *Id.* at 146. By August 1975 sixty-three terminals had acquired the basic ARTS system.

1970 The FAA implemented the Terminal Control Area (TCA) concept which required an aircraft entering that defined airspace around certain airports to be equipped with a two-way radio, transponder and VOR navigational receiver. *Id.* at 217.

1974 The Third Generation ATC system was completed at a cost of \$640 million.

1975 Radar data processing was completed at all twenty contiguous centers in the United States.

aircraft performance, and knows his or her speed, altitude, and approximate location at all times.

Too many courts have reversed the roles of the pilots and controllers, placing primary responsibility for aviation accidents on the controllers. Neither the regulatory system nor the personal training and testing of pilots or controllers can support this fundamental role reversal. In accident cases involving aircraft flying under instrument flight rules (IFR), the courts often ignore the aircraft's required instrumentation¹⁵ and the controller's reasonable expectation that the pilot guides himself while flying in the "blind" with appropriate charts, approach plates, airport directory, etc. Courts forget that the pilot has been trained and tested to fly in instrument conditions, and that he possesses a minimum number of hours of flight experience in adverse weather.¹⁶ Furthermore, the pilot does not initiate the flight with the expectation that a controller will have to tell him the location, speed, altitude, rate of descent, etc., of the aircraft. While pilots do not expect such instruction, some courts assume that they do. As a result, these courts too often impose liability on controllers in aviation accident cases, particularly when the accident involved passengers. Allocating fault to controllers places greater responsibility on them than the regulatory administrative system and their training intended.

The remainder of this article discusses the interrelationship of the independent duties of the PIC and the controllers, both at a terminal (Tower) facility and an en-route (Center) facility, and the judicial rejection of the FAA's regulatory system relating to PIC responsibilities and controller assistance.

¹⁵ 14 C.F.R. § 91.33(d) (1986).

¹⁶ An applicant for an instrument rating is required to have a total of 125 hours of flight time, including fifty hours as PIC with other than a student pilot certificate, forty hours of simulated or actual instrument time, and fifteen hours of instrument flight instruction. 14 C.F.R. § 61.65(e) (1986).

II. THE CLASSICAL JUDICIAL CONCEPT OF A PIC AND SUBSEQUENT JUDICIAL RECIDIVISM

Early federal court decisions readily acknowledged the regulatory premise around which the air traffic control system of the United States turns. That regulatory premise places the direct responsibility and the final authority for the operation of the aircraft in the hands of the PIC.¹⁷ Unfortunately, the courts have increasingly diluted the purity of those earlier decisions that emphasized the PIC regulatory premise. Judges apply their own moral and social judgments concerning the allocation of liability in aviation accident cases by using "factual exceptions" which take responsibility for the operation of the aircraft away from the PIC and place it on the controller. These factual exceptions contradict those earlier decisions without explanation and without any modification of the ATC system by the FAA to justify the exceptions. *Clemente v. United States*,¹⁸ an aviation accident case from the 1970s,

¹⁷ See generally *Cates v. United States*, 544 F.2d 270 (6th Cir. 1976) (holding pilot responsible because controller's statement could not have given a reasonable pilot clearance to land); *Bibler v. Young*, 492 F.2d 1351 (6th Cir.) (pilot's failure to contact local control prevented local control from warning pilot), *cert. denied*, 419 U.S. 996 (1974); *Hamilton v. United States*, 497 F.2d 370 (9th Cir. 1974) (ATC under no duty to inform each of two aircraft of others position in VFR conditions); *American Airlines v. United States*, 418 F.2d 180 (5th Cir. 1969) (operation of aircraft is sole responsibility of pilot and controller is not to interfere except as specifically required by FAA Air Traffic Control Manuals); *Neff v. United States*, 420 F.2d 115 (D.C. Cir. 1969) (clearance for takeoff as thunderstorm approached did not warrant pilot's disregard of apparent signs of danger), *cert. denied*, 397 U.S. 1066 (1970); *Somlo v. United States*, 416 F.2d 640 (7th Cir. 1969) (failure of controller to give pilot warning of local icing was not the proximate cause of the crash since the pilot was negligent in bringing the aircraft into an area of known probable icing), *cert. denied*, 397 U.S. 989 (1970); *United Airlines v. Wiener*, 335 F.2d 379 (9th Cir.) (operating personnel of aircraft had the responsibility for separation of aircraft flying in normal flight rule weather), *cert. denied*, 379 U.S. 951 (1964); *United States v. Miller*, 303 F.2d 703 (9th Cir. 1962) (existence of a control tower at an airfield does not relieve pilot of his duties), *cert. denied*, 371 U.S. 955 (1963); *Baker v. United States*, 417 F. Supp. 387 (W.D. Wash. 1975) (operational control of aircraft under visual flight rules is placed on PIC rather than ATC); *Sawyer v. United States*, 297 F. Supp. 324 (E.D.N.Y. 1969) (fact that pilot is flying with air traffic clearance does not relieve him of responsibility for operational control), *aff'd*, 436 F.2d 640 (2d Cir. 1971).

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

contains judicial language that avoids placing a moral and legal duty for loss on the government:

We should point out that there is a fine line but a vital and necessary one between the principle of holding the government responsible for the conduct by which it carries out its affairs when federal employees negligently injure the public and the principle that the government may be turned to as a final source of relief from the tragedies of life.¹⁹

The compensatory concept in aviation tort law has expanded to rely more and more on the government to compensate those injured in plane crashes. Possible contributing factors to this expansion include the growth of government social spending in the 1960s, coupled with a generation of more socially-acclimated judges appointed to the federal bench. Unfortunately, the expanded compensatory concept frequently veers away from the traditional emphasis on the independent responsibilities of the pilot and the controller, and disregards the separate and distinct functions of controllers as they process the flight data created by pilots.

Another factor adding to the load placed on controllers by our litigious society has been the death of the state contributory negligence defense as a bar to liability.²⁰ The rise of the comparative negligence theory has created a judicial attitude regarding liability which cannot be justified by the traditional moral and legal concept of duty. Thus, comparative negligence fosters a judicial attitude that the court should look to the government to compen-

¹⁹ *Id.* at 1150.

²⁰ When the FTCA became effective in 1946 only four states adhered to comparative negligence. By the late 1960's, seven additional states had abandoned contributory negligence through judicial fiat or legislation. By 1980, following the groundswell of social changes of the 1970s, ten states had established a system of pure comparative negligence, twenty-three states had established a modified system, and two states had established a slight-gross system. Today only Alabama, Delaware, Indiana, Maryland and New Mexico adhere to contributory negligence. Wade, *Comparative Negligence — Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 302-06 (1980). See also *Alvis v. Ribar*, 421 N.E.2d 886, 891-92 (Ill. 1981).

sate the innocent passengers on an underinsured private aircraft for injuries when the aircraft crashes, regardless of actual negligence or proximate cause. In eager pursuit of a "final source of relief from the tragedies of life," these courts have unjustifiably attributed liability to the air traffic controller, even though the controller performed fully in keeping with training, custom and practice, the pilot's expectations, and the FAA's regulatory and administrative procedures.

The growing legislative interest in placing ceilings on awards, capping noneconomic damages, and revising the joint and several liability concept reflects a moral withdrawal from joint and several liability in comparative negligence law. Ironically, California, the state with the most aviation activity and whose courts have increasingly ignored traditional aviation responsibilities, leads the change. Its voters recently adopted Proposition 51 which rejected the joint and several liability concept and limited contribution to an amount not greater than a defendant's pro rata share of negligence.

A. *An early dilution of the PIC concept: Ingham v. Eastern Airlines*

*Ingham v. Eastern Airlines*²¹ remains one of the first significant federal appellate court inroads into the respective duties of pilots and controllers. In *Ingham* an Eastern DC-7B aircraft flew from Charlotte, North Carolina to New York's Kennedy Airport (then Idlewild).²² The crew knew adverse weather conditions could divert the plane to Philadelphia.²³ While in a holding pattern, the controller advised the crew that "there was pretty bad fog on the airport," and as a result "some [planes] are making it and some are not."²⁴ Traffic control advised the crew at 9:24 p.m. that the visibility at the airport was one and one half

²¹ 373 F.2d 227 (2d Cir. 1967).

²² *Id.* at 229-30.

²³ *Id.* at 230.

²⁴ *Id.* at 231.

miles with fog and at 9:30 p.m. that visibility had dropped to one mile.²⁵ At 9:32:29 the controller coordinating in the radar room announced in a "louder than normal voice" that the tower had reported a drop in the visibility to three-quarters of a mile.²⁶ More than a minute later, at 9:33:57, the controller handling the Eastern flight advised the crew that the visibility remained one mile.²⁷ That "erroneous report" was the last visibility reading given to the crew before the DC-7B crashed twelve minutes later at approximately 9:45.²⁸

The government argued that the controller's manual required the controller to advise the pilot of a change in visibility only when the visibility fell below the crew's minimum landing requirements, in this case one-half mile visibility.²⁹ Providing its own "more meaningful and reasonable interpretation" of the manual provision,³⁰ the court ruled that it

required the approach controller to report those subsequent changes which, under all the circumstances, the crew would have considered important both in determining whether to attempt a landing, and in preparing for the weather conditions most likely to be encountered near the runway. In our view, a drop in visibility of twenty-five percent, from one mile to three-quarters of a mile, bringing

²⁵ *Id.* at 233-34. The visibility readings provided to the crew were taken from the tower cab and remained at all times above the FAR minimums for landing. A visibility reading was made by a Runway Visual Range (RVR) device located near the threshold of Runway 4 Right upon which the Eastern flight was cleared for landing. *Id.* at 234. Though the court agreed that the RVR was inoperative, its below-minimum readings, combined with the surface observations of one-quarter mile visibility made by a U.S. Weather Bureau observer, had an impact on the court's evaluation of the FAA visibility reporting procedure. *Id.* at 234.

²⁶ *Id.* at 233.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 234.

³⁰ *Id.* at 235. The court rejected the "government's inordinately narrow interpretation" of § 265.2 of the Air Traffic Control Procedures Manual which required reporting of "current weather conditions, *as necessary*." *Id.* In recent years, air traffic experts have distorted the guideline material in the manual, particularly in testifying that *any* manual language must be complied with in excruciating detail.

existing weather conditions dangerously close to landing minimums, is such a critical change that, in the interests of safety, it should have been reported to the crew of EAL 512.³¹

The writer necessarily rejects the court's misinterpretation of the manual requirement because the court's reasoning assumed that the flight crashed because of the twenty-five percent difference in visibility. The court based this assumption only on the *speculation* that either the "pilot might have decided to divert to Philadelphia rather than to attempt an ILS landing at Idlewild," or "the crew might have maneuvered the plane differently, and could have been ready and able at an earlier time to execute a missed approach."³² The court ignored not only the regulatory pilot-in-command presumption, but also the fact that the crew understood both that the weather customarily changed, and that some planes were landing successfully and some were not. Simply put, "when the crew finally decided to terminate the improper approach, the 'missed approach' maneuver was performed in a negligent manner."³³

The decision to execute a missed approach, like the "final decision either to attempt a landing or divert to another airport," was justifiably "in the hands of the pilot."³⁴ The rationale for placing full responsibility on the pilot, recited but carefully ignored by the court, provided that "he is in the best position to observe and judge the actual effect of the weather on the plane's landing approach."³⁵ Despite such recitals, the court in essence rejected the PIC concept and searched for guarantees of protection and compensation that the aviation system can never provide. The court expressed paternalistic concern for cases like that in *Ingham* saying, "The pilot should

³¹ *Id.*

³² *Id.* at 236.

³³ *Id.* at 231.

³⁴ *Id.* at 237.

³⁵ *Id.* The pilot's ability to assess his own capabilities and that of the crew is also significant.

have been told that weather conditions were becoming marginal, and that he might well encounter less than minimum visibility upon reaching the runway."³⁶ Thus, the court ignored the crew's awareness of the adverse weather conditions, the fact that some aircraft had to execute missed approaches, and the drop in visibility from one and one-half miles to one mile.

While the controller could have advised the crew of the drop in visibility, the controller justifiably relied on the pilot's training, testing, and certification in adverse conditions. If pilots could not fly in such conditions without guidance, how could any pilot land at an airport without a tower during IFR weather conditions? The *Ingham* case illustrates an early effort to switch the roles of the PIC and air traffic control. Such role reversal has no foundation in the development of aviation, in the training of aviators or controllers, or in the regulatory scheme by which air traffic control provides services to the aviation public. The *Ingham* decision cannot be explained by any change in the regulatory standards relating to the operation of an aircraft, by any agency assumption of increased agency duties, or by the evolution of some custom and practice within the pilot/controller system.

Although courts have the power to determine the liability of any party, including an employee of the United States,³⁷ based on the breach of duty by that party, the controllers in *Ingham* breached no duty known to pilots or controllers. Neither the aviation regulatory system nor the administrative procedures implementing it reflect such a duty. Therefore, *Ingham* established a relatively new judicially-created duty for air traffic controllers. This duty, a separate and higher duty than those previously known to aviation, solely benefited the injured *passengers*, because it allowed the courts to reach the government for compensation.

Cases subsequent to *Ingham* have, over the years, carved

³⁶ *Id.*

³⁷ 28 U.S.C. § 1346(b) (1982).

out additional niches of responsibility for controllers. The courts continue to place new duties on the controllers, while at the same time reiterating the traditional case law relating to the PIC responsibilities. This is particularly apparent in lawsuits involving accidents in IFR weather conditions. Courts have a natural tendency to expect more of controllers during flights in IFR conditions, and do not appreciate that such flights are normal everyday experiences for both the controller and the pilot conducting the flight. Judges seem to have difficulty understanding the concept of flying without visibility and ignore the fact that the pilot has represented to the ATC system that he is fully qualified and equipped to deal with any change in visibility, engine loss, etc. The controller relies on that representation to mean that the pilot is prepared to deal with an emergency situation.

The writer does not propose that a controller should ignore a pilot's request for specific assistance in a situation which the pilot did not have the equipment to handle or could not be expected to perform. But the courts should continue to recognize the historical basis for the PIC concept. The arbitrary assignment of responsibility for aviation accidents to controllers by some federal courts indirectly emasculates the PIC concept and serves to unfairly shift the burden of operation to ATC contrary to the statutory and regulatory scheme of the FAA. The courts should also attempt to better understand the passive nature of the controller's training as well as the controller's assumption that the pilot knows his abilities, equipment and regulatory responsibilities under the FARs. The FAA bases its determinations as to the number of controllers and the existence or type of radar at each facility on the assumption that all pilots will do what the FARs require.³⁸

The Federal Aviation Regulations permit the PIC to de-

³⁸ FAR requirements are described in a wealth of publications utilized in pilot training such as the Pilots Handbook of Aeronautical Knowledge (FAA Advisory Circular AC-61-23B), the Airman's Information Manual (FAA publication issued

viate from the FARs only in conditions that constitute an emergency.³⁹ Courts need to understand that a controller cannot appreciate the immediacy or severity of conditions that may develop into a real emergency unless the pilot frankly admits to the controller that he personally cannot perform a maneuver or that his aircraft cannot perform certain maneuvers.⁴⁰ Until then, a controller cannot know whether a problem exists or the depth of the problem. More importantly, a nonpilot controller can *never* appreciate the dozens of factors the pilot must evaluate in a developing emergency. In aviation accident litigation, plaintiffs' ATC experts often distort this lack of appreciation.⁴¹ Such experts testify that the controller in radio contact with the pilot could fully comprehend the seriousness of the flight conditions and the amount of information available to the pilot. In many *real* emergencies, the pilot may already have his hands so full just maintaining control of the aircraft and weighing his abilities and available alternatives, that he could not afford the luxury of a dialogue with the controller. Because of the testimony of ATC experts, courts have been too willing to find that an "emergency" existed in which the controller failed to perform properly.⁴² Such findings require unreasonable con-

four times annually), the Instrument Flying Handbook (FAA Advisory Circular AC-61-27c) and Aviation Weather (FAA Advisory Circular 006A).

³⁹ 14 C.F.R. § 91.3(b) (1986). "Emergencies" include situations in which the only pilot has slumped over the steering yoke or the cockpit is on fire. "Potential" emergencies range from a request for information as to fuel availability at a remote airport to a request for general weather information.

⁴⁰ Hindsight often shows that a pilot disguised the truth either out of a false sense of pride or out of fear of an FAA enforcement action against his pilot certificate because of his noncompliance with the FARs.

⁴¹ Usually, ATC experts have no flight experience and know little or nothing about engine manifold pressure, maximum rate of climb capabilities of the aircraft, glide characteristics of the aircraft, hours or minutes of flight time in existing wind conditions, etc.

⁴² An "emergency" is described in the ATC manual 7110.65, 1550, in the following language:

'Emergency Determinations'

- a. An emergency can be either a *Distress* or *Urgency* condition, as defined in the Pilot/Controller Glossary.
- b. A pilot who encounters a *Distress* condition should declare an emergency by beginning the initial communication with the word

troller foresight and effort not expected by the pilots, controllers, or the ATC system.

Since pilot "emergencies" occur in a limitless number of situations, the FAA can provide controllers with only the most general guidelines for handling such emergencies in the ATC manual (7110.65). During training, controllers do not participate in specific simulated emergencies designed to test the controller on his reaction to an actual emergency situation.⁴³ The ATC manual simply advises the controller to use his or her best "judgment."⁴⁴

'Mayday,' preferably repeated three times. For an *Urgency* condition, the word 'Pan' should be used in the same manner.

c. If the words 'Mayday' or 'Pan' are not used and you are in doubt that a situation constitutes an emergency or potential emergency, handle it as though it were an emergency.

d. Because of the infinite variety of possible emergency situations, specific procedures cannot be prescribed. However, when you believe an emergency exists or is imminent, select and pursue a course of action which appears to be most appropriate under the circumstances and which nearly conforms to the instructions in this manual.

⁴³ For example, the 1982 FAA Advisory "National Air Traffic Training Program" *TERMINAL* lesson plan dealing with "Emergency, Radio & Radar Failure, Hijack Procedures" outlines only four emergency situations: 1) Hijacked aircraft, 2) Lost aircraft and VFR aircraft about to encounter IFR conditions, 3) Radio failure, and 4) Radar failure. Number 2 presents the most trouble since VFR pilots typically enter IFR conditions *before* they indicate to a controller that they might need help. The FAA lesson plan distinguishes between actual or imminent emergency situations, and indicates "minimum requirements" which "*would vary depending on type of emergency*" (emphasis added). Depending on the type of emergency, the minimum reporting requirements might include: A) Aircraft identification and type, B) Nature of emergency, C) Pilot's desires, D) Aircraft altitude, and E) Fuel remaining in time. The lesson plan advises coordination with other FAA facilities "if radar or DF (Director Finder — used when aircraft is lost and radar service or coverage is unavailable) is available." The plan provides a *very brief outline* for controller assistance in "lost aircraft orientation," "radar assistance to VFR aircraft in weather difficulty," and "informing pilot of minimum safe altitude" and "accurate position determined" if the aircraft has already encountered IFR conditions. The training of controllers does not even attempt to meet the extreme expectations of plaintiffs' ATC experts.

⁴⁴ The FAA Academy lesson plan referred to above states that "All possible situations or conditions are not covered in the ATC Handbook. Controllers must use their judgment and experience whenever a situation develops that has no prescribed solution." The plaintiffs' ATC expert often relies on this provision to establish fault on the part of the controller.

Unfortunately, the FAA has created somewhat of a dilemma by promoting the highest degree of aviation safety by ATC. The FAA has created differing levels of emergencies. The ATC manual provides that a controller should treat every potential emergency, however remote, as an actual emergency. Arguably, every time an aircraft takes off a potential emergency exists. The FAA also trains a controller to expect each pilot to promptly advise ATC when he confronts an emergency. A controller can fairly assume that a pilot not qualified to fly in instrument meteorological conditions can decide for himself whether the cloud cover prohibits visual flight.⁴⁵ Furthermore, a controller can assume that if a pilot confronts a change in meteorological conditions, he will return to his point of origination. However, the plaintiffs' ATC experts will testify that a controller could have prevented an accident that occurred when a pilot encountered instrument meteorological conditions. Fortunately, the fact that a controller's training does not include the limitless number of potential or real emergencies supports the argument that a controller should not be found at fault in an aviation emergency situation.

Pilots cannot expect specific controller assistance during emergencies until ATC trains controllers to deal with particular potential or real emergency situations. For example, since the controller's primary function is to separate aircraft in IFR weather conditions, the pilot can expect the controller to provide clearances which will allow the pilot to avoid other aircraft that the pilot cannot see in actual IFR conditions. Absent some emergency created by the pilot, the ATC has an absolute duty to separate aircraft⁴⁶ on IFR flight plans.⁴⁷ Furthermore, when a controller provides a pilot with clearance on an IFR flight

⁴⁵ See 14 C.F.R. §§ 91.105-91.109 (1986) for the Visual Flight Rules.

⁴⁶ Such separation may not be "standard" separation by reason of emergency or other limited circumstances.

⁴⁷ The pilot of an aircraft on an IFR flight plan still has a duty in visual flight conditions to observe other aircraft, particularly those which have not, either in compliance or not in compliance with the FARs, filed a flight plan for such flight.

plan for the entire distance between points A and B at a certain altitude, the pilot can expect and presume that no mountain peak juts above that altitude on that flight path.

The expectations and presumptions between pilots and controllers are mutual, however. Therefore, when the pilot is cleared at a given altitude between points A and B, with a clearance to land at C, the aviation system presumes that the pilot is qualified to precisely conduct such a flight and approach for landing. It also assumes that he has the proper equipment, sufficient fuel, and the appropriate aeronautical chart and approach plate for the specific runway, and that he maintains a keen awareness of his location *at all times* by referring to the aircraft instruments and the appropriate chart/approach plate. Unless a pilot conducting an IFR flight has reported the loss of some critical piece of equipment for which no back-up equipment exists, the controller assumes that the PIC is complying with regulatory requirements and good operating practices and that he can satisfactorily complete the flight.

The burden of presumption would shift from the pilot to the controller only in those situations in which the pilot did not know *critical* facts. Those unknown critical facts must result from some development or phenomena *not within the pilot's control*, and not simply from the pilot's failure to do what the ATC system expected of him. Those facts must be so patent and so obvious to the nonpilot controller that one could *only* conclude that the situation required a controller advisory to the pilot. An example of a critical fact unknown to the pilot, an "unexpected unknown," would include a new report of severe weather made by other pilots (PIREP's) to the controller that could adversely affect the pilot's flight, such as *unforecasted* icing or turbulence. Another example would include radar indications of intense precipitation when the pilot of an aircraft did not have radar equipment. The controller should recognize such an unknown fact as information of significance to a pilot and should know that the pilot did

not have such information available to him at the time of his preflight weather briefing. The plaintiffs' ATC expert typically suggests that the controller must foresee and bring to the pilot's attention *anything* unknown to the pilot, even as a result of the pilot's gross or ordinary negligence. Such a suggestion contradicts the aviation concept of PIC responsibility which assumes that pilots can capably conduct their flights. The ATC system relies on the concept of PIC responsibility.

B. *A Further Dilution of the PIC Concept — VFR Flight and Rudelson v. United States*

Though still objectionable, the judicial inroads into the PIC concept are somewhat easier to accept when applied to an aviation accident occurring in instrument weather conditions (IFR), in which the pilot ostensibly flies "blind." The understandable sympathy felt by the public for individuals burdened by the loss of sight is analogous to the sympathy felt by the courts for the pilot flying "blind" in IFR weather conditions. Such judicial inroads into the PIC concept are more difficult to accept, though, when applied to an accident that occurred under visual flight conditions (VFR). The "see and be seen" concept established by the FAA for VFR flight has generally remained sacred over the years. This concept places a duty on the PIC to observe other aircraft in VFR conditions and separate himself from them because the ATC cannot provide VFR separation. When a pilot makes a VFR flight, a fundamental presumption arises that the pilot could see sufficiently to plan and execute the flight or he would have remained safely on the ground. The "see and be seen" concept has been firmly established by history, by regulatory policy, by the breadth of uncontrolled airspace throughout the United States, and by what remains of a common law concept of duty placed on those who cannot explain their own actions or inactions which caused the accident. At the urging of the plaintiffs' ATC expert, however, some courts are searching for an outlet for their

social persuasions by placing responsibility for accidents occurring under visual flight conditions on ATC.

The case of *Rudelson v. United States*⁴⁸ illustrates the search by a court for controller liability, thereby upholding the court's social persuasions. In *Rudelson* a Cessna airplane piloted by Rudelson, a student aviator, and DuVal, a flight instructor, collided in mid-air with a Piper airplane flown by Aardema.⁴⁹ The collision occurred about a mile south of the Santa Monica, California airport in VFR conditions at an altitude of approximately 1,000 feet.⁵⁰ The collision resulted when Aardema entered the traffic pattern unannounced and failed to see and avoid the Cessna aircraft.⁵¹ The survivors of Rudelson and Aardema sued the United States under the Federal Tort Claims Act, claiming that certain federally employed air traffic controllers had negligently caused the collision.⁵²

The district court found that the United States was twenty percent at fault because its controllers failed to scan the traffic entry corridor area of the downwind leg of the traffic pattern during a two minute period immediately preceding the collision.⁵³ If they had done so, they "would have seen that the planes were in a position of imminent peril and could have warned the pilots in time

⁴⁸ 602 F.2d 1326 (9th Cir. 1979).

⁴⁹ *Id.* at 1328.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* The district court ruled that under California's pure comparative negligence principles, student pilot Rudelson was ten percent negligent and his instructor DuVal twenty-five percent negligent. The pilot of the other aircraft, Aardema, was found to be forty-five percent negligent. *Id.* The court found Rudelson's heirs had suffered \$1,360,586.25 in losses as a result of Rudelson's death. *Id.* The court deducted \$136,058.62 to reflect Rudelson's ten percent negligence and \$200,000 received by the Rudelson heirs in settlement of the claims against Aardema, Aviation Unlimited and its owner, and DuVal. This left a net award of \$1,024,527.63 payable to the Rudelson heirs by the United States for the twenty percent negligence of the controllers. *Id.* The court also found that Aardema's heirs had suffered \$542,909.14 in losses as a result of Aardema's death. *Id.* Because Aardema was forty-five percent negligent, the court subtracted \$244,309.11, producing a net award of \$298,600.23. *Id.* The United States was held liable for the entire amounts of both net awards. *Id.*

to prevent the collision.”⁵⁴ The Ninth Circuit, in affirming the district court, did not follow the FAA’s PIC concept or prior Ninth Circuit case law. Despite the fact that the FAA operations manual did not expressly order the controller to monitor the position of a trainer aircraft,⁵⁵ judicial egalitarianism moved the Ninth Circuit to reason that under “especially dangerous conditions” the controller must take steps beyond those set forth in the manuals.⁵⁶

The Ninth Circuit referred to the “dangerous realities” of the entry corridor.⁵⁷ Such a description is unrealistic because VFR aircraft use the entry corridor as part of a *standard* landing procedure thousands of times each day at airports both with and without ATC facilities across the United States. Occasionally pilots err, as do automobile drivers entering or exiting highways. The placement of controllers in a tower cab a mile or more distant from the entry corridor, however, does not mean that the controllers can distinguish the respective lateral or vertical distances of entering aircraft for the purpose of separating these aircraft. The sequencing of properly reporting VFR aircraft is like drawing the numbered ticket at the ice cream cone counter in that it provides a clearance order for landing. However, such sequencing is necessarily based on the assumption that pilots flying in visual flight conditions will “see and avoid” other aircraft when entering the pattern for landing. The controller, located a great distance away from the entering airplanes, cannot determine the amount of separation between VFR aircraft, particularly when the see and avoid concept typi-

⁵⁴ *Id.*

⁵⁵ The decision vaguely referred to “controllers” in the plural. In fact, any duty rests on the controller assigned to the specific position. In *Rudelson* the Local Controller was assigned to the Rudelson aircraft. The court’s use of the plural denoted a judicial impression that each aircraft enjoyed the luxury of focused attention not only by the appropriate assigned controller, but also by other controllers.

⁵⁶ *Rudelson*, 602 F.2d at 1329. The implied assumption is that any flight is “dangerous.” This is an antiquated concept customarily rejected by courts.

⁵⁷ *Id.*

cally involves hundreds of feet. In addition, Aardema's unannounced entry into the traffic pattern arguably provided an additional defense to the allegation that the controller(s) involved should have provided some warning to Rudelson.⁵⁸

The district court based its findings of fact on its social judgment as to who should bear the burden of this aviation accident. The *Rudelson* decision, affirmed by the Ninth Circuit as not "clearly wrong," illustrates a judicially-created escape from well-founded aviation law, regulations, custom and practice. It can be explained only as a case of judicial social policy making. At one point the Ninth Circuit, quoting the FARs, stated that "vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft."⁵⁹ The court went on to state that "regulations create no exception for student pilots," so that respective violations of the FARs by Rudelson and DuVal constituted negligence *per se*.⁶⁰ Finally, the Ninth Circuit noted that "[b]lind spots can be compensated for by head movement and aircraft movement," and concluded that Rudelson ought to have maintained a better lookout.⁶¹ Yet the court found the passive controller twice as negligent as the actively negligent pilot!⁶²

What is the source of such anti-syllogistic logic? The Ninth Circuit speculated that had the controller(s)

not fixed their attention upon one part of the airport area for an unreasonable length of time, they probably would

⁵⁸ The Ninth Circuit held that the controller had a duty to transmit warnings by radio or light beam to the planes. *Id.* Evidence of a radio warning would have provided a strong defense to the allegation of controller negligence, but use of the light beam to warn the pilots in either aircraft would have been senseless, particularly for the pilot in the DuVal-Rudelson aircraft whose "attention would probably be distracted from time to time by the teaching exercises." *Id.* The suggestion that light beams would have been a sufficient warning are testament to the exaggerations of the ATC experts who do not know what goes on in the cockpit.

⁵⁹ *Id.* at 1330 (quoting 14 C.F.R. § 91.67(a) (1986)).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1328.

have seen the unannounced Piper, which was plainly visible in a clear sky, in time to warn the Cessna by radio and the Piper by light gun. The [district] court also found that prompt action by the controllers probably would have prevented the collision."⁶³

The court added insult to the PIC concept by reasoning that "the pilots' negligence did not break the chain of causation because their failure to see and avoid each other's aircraft was foreseeable by the controllers."⁶⁴ Neither an aviation law concept nor a regulatory practice and procedure supported that rationale. The rationale is supported only by some falsely charitable notion that the court can twist FARs and pilot/controller practices and procedures to support its moral convictions.

Unfortunately, *Rudelson* is a significant decision because both the district court and the Ninth Circuit disregarded the fundamental aviation concepts and the administrative system established by the FAA, that arm of the executive branch of government which possesses the technical expertise and the discretionary powers necessary to establish aviation standards. The *Rudelson* courts, relying on the factual testimony of ATC experts, readily circumvented the FAA's aviation standards.

In *Foss v. United States*⁶⁵ the Ninth Circuit unfortunately gave added weight to its position that a controller bears responsibility for collisions occurring in visual flight conditions. *Foss* involved a pilot's collision with a radio tower in VFR weather conditions near the Fullerton, California airport.⁶⁶ A right-hand pattern for Runway 24 and a left-hand pattern for Runway 6 were in use on the day of the accident. An 819-foot radio tower was located approximately two miles north of the threshold of Runway 6.⁶⁷ Though the FAA does not establish mandatory airport

⁶³ *Id.* at 1330.

⁶⁴ *Id.*

⁶⁵ 623 F.2d 104 (9th Cir. 1980).

⁶⁶ *Id.* at 104.

⁶⁷ *Id.* The tower's placement was therefore near the end of the downwind leg prior to the left turn to base for Runway 6, and, conversely, near the beginning of

traffic pattern altitudes, it had published a traffic pattern for Fullerton Airport calling for a recommended 800-foot downwind approach for Runway 24.⁶⁸ The controller gave the pilot a VFR clearance for Runway 6. The pilot flew the downwind leg for Runway 6 into the setting sun at an altitude of approximately 800 feet and collided with the 819-foot radio tower.⁶⁹ The district court, affirmed by the Ninth Circuit, found the controller(s) negligent in failing to broadcast a general warning to all aircraft in the area regarding the hazard of the KFI tower during the period of reduced visibility due to the sun position and a haze layer.⁷⁰ The United States appealed the district court's finding that the pilot was not negligent *to some degree*.⁷¹

The United States argued "that under California law any violation of statute, or agency regulation, is negligence per se, and that the pilot in this case violated applicable regulations of the F.A.A."⁷² The Ninth Circuit disagreed with the United States' contention that the pilot violated applicable regulations and therefore did not find the pilot negligent *per se*.⁷³ The United States further argued that the pilot violated both the regulation requiring that the pilot familiarize himself "with all available information" concerning the traffic pattern and tower location, and the regulation providing for the PIC's direct responsibility for, and final authority as to, the operation of the aircraft.⁷⁴ Finally, the United States contended that under these regulations the pilot had a duty to see and avoid the tower in the VFR conditions.⁷⁵ The court did not accept the FAA's "broad interpretation of the FAA regula-

the downwind leg leading to the customary right turn to the base leg for Runway 24.

⁶⁸ *Id.*

⁶⁹ *Id.* at 104-05.

⁷⁰ *Id.* at 105.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 106.

⁷⁴ *Id.*

⁷⁵ *Id.*

tions."⁷⁶ It cited *Spaulding v. United States* for the rule that the standard of care for the controllers and the pilot is concurrent.⁷⁷ Yet the Ninth Circuit in *Foss* avoided the only logical conclusion as to pilot negligence from the rule in *Spaulding* by stating "we find nothing in *Spaulding* that suggests that concurrent responsibility always results in concurrent liability, or compels a conclusion that the pilot is always negligent when an air crash occurs."⁷⁸

The conclusion that a local pilot in VFR conditions can hit a tower without being negligent is absurd. It directly contradicts both the aviation system implemented by the FAA, and earlier Ninth Circuit language ruling that a violation of regulations *does* constitute negligence *per se*. The decision does not follow common sense. Although the immutable "see and avoid" regulatory responsibility still exists, the holding in *Foss* resulted in the disappearance from Ninth Circuit caselaw of any percentage of pilot negligence even though conditions made such pilot negligence obvious.

C. *A judicial rejection of the regulatory PIC concept: Daley v. United States*

*Daley v. United States*⁷⁹ is a textbook example of a district court's rejection of the PIC concept. The district court's

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972)).

⁷⁸ *Id.*

⁷⁹ 792 F.2d 1081 (11th Cir. 1986). The plaintiffs were the widows and children of the pilot and his two passengers. A synopsis of the appellate history of the case disclosed that subsequent to the three member panel decision of the Eleventh Circuit, the Department of Justice attorney with primary responsibility for trial and appeal of the case left the Government for private practice. The writer assisted in the trial of the case, as well as in preparation of the appellate brief, and subsequent to the Eleventh Circuit panel decision, the Chief Counsel's Office of the FAA, requested that a petition for rehearing *en banc* be filed with the Eleventh Circuit, or that a petition for writ of certiorari be filed with the Supreme Court (despite the improbability of success). The petition for rehearing was not filed, and both the Torts Branch and Civil Division of the Department of Justice recommended to the Solicitor General against petitioning for a writ of certiorari. No petition was filed because the case was felt to essentially involve only a review of facts in determining whether controller negligence was a proximate cause of the accident. In addition, the arguable presence of a state law legal issue as to the signifi-

holding in *Daley* is so factually biased that it provides a classic study in judicial justification for what appears to have been a predetermined holding by the district court. The decision will unfortunately serve as authority for the growing number of aviation accident cases which will cite *Daley* for the technically insupportable, judicially-created duties of ATC. These judicially-created duties find their basis in convoluted judicial reasoning which ignores objective facts and lacks the support of any recognized sense of duty within America's aviation system.

In *Daley* the Twin Beechcraft airplane N65V collided with a guy wire of a television transmission antenna tower.⁸⁰ The collision occurred when Mellish, the pilot, attempted to execute a missed approach with an inoperative engine in instrument weather conditions to Runway 28 of the Gainesville Regional Airport, Gainesville, Florida.⁸¹ The district court found that the failure of the controller(s) at Gainesville to ascertain the location of N65V after it reported engine failure on the missed approach, and to warn N65V's pilot of its unsafe proximity to the television tower, constituted negligence and proximately caused the crash.⁸² The Eleventh Circuit affirmed.⁸³

Mellish, a retired military fighter pilot veteran residing in Tampa, had flown for Tampa Air Center, Inc., the owner of the aircraft, for several years.⁸⁴ He had previously flown into and out of Gainesville Regional Airport.⁸⁵ He had more than 8,000 hours of flight time and held a commercial airplane certificate with ratings for flight in instrument weather conditions (IFR) and in

cance of the ATC manual in determining the standard of care required, was not felt by the Department of Justice to justify the petition.

⁸⁰ *Id.* at 1082.

⁸¹ *Id.* at 1082-83. A missed approach is a relatively common procedure flown by the pilot when he cannot complete his approach for whatever reason. *Daley v. United States*, No. 81-1117, slip op. at 17 (M.D. Fla. April 8, 1985), *aff'd*, 792 F.2d 1081 (11th Cir. 1986).

⁸² *Daley*, 792 F.2d at 1083.

⁸³ *Id.*

⁸⁴ *Daley*, No. 81-1117, slip op. at 1.

⁸⁵ *Id.* at 9.

multi-engine aircraft like the one involved in the accident.⁸⁶ PIC Mellish had been trained, tested, and required as part of his certification by the FAA, to execute a missed approach *after the loss of one engine*, the precise circumstance of this case. Situations involving the loss of one engine occur hundreds, if not thousands, of times each year throughout the United States.

ATC trains air traffic controllers to assume that the FAA has tested the PIC of a multi-engine aircraft on his ability to maintain control of the aircraft before he acquired multi-engine rating. Furthermore, controllers are trained to expect a pilot to properly perform a missed approach. Every instrument-rated pilot like Mellish has received training and testing in completing an approach or missed approach in adverse weather conditions and is required to be able to do so by the FARs.⁸⁷

In Finding of Fact 15 the district court found that because the flight was an air taxi flight for hire in instrument meteorological conditions, the FAA required pilot David Mellish to fly with either a copilot or an autopilot.⁸⁸ Mellish had not checked out in the use of the autopilot for three years, though the FARs required he do so every six months.⁸⁹ The district court found in Finding of Fact 30

⁸⁶ *Id.* See 14 C.F.R. §§ 61.121-141 (1986) for the requirements for the issuance of commercial airplane certificates. See 14 C.F.R. § 61.45 (1986) for a discussion of flight tests. See 14 C.F.R. § 61.63(d)(3)(i) (1986) for a discussion of requirements for multi-engine airplanes. Air traffic controllers are trained to rely on factors such as Mellish's multi-engine rating, acknowledged in Finding of Fact 4, and the FAA's mandatory training, testing and certification of Mellish to fly the aircraft even if an engine-loss occurred.

⁸⁷ See 14 C.F.R. § 91.116 (1986).

⁸⁸ *Daley*, No. 81-1117, slip op. at 5. The Tampa Air Center (TAC) aircraft involved in *Daley*, bearing registration number N65V, was a venerable twin-engine Beach 18 manufactured in 1956. The FAA certified TAC pursuant to 14 C.F.R. § 135 (1986) to operate certain aircraft as an air taxi/charter operator, subject to numerous operational limitations. One of those limitations was that for each taxi operation conducted under 14 C.F.R. Part 135 (1986), TAC's aircraft must be piloted either by two properly qualified pilots or by one properly qualified pilot and a properly functioning autopilot.

⁸⁹ The court took judicial notice of that FAR, promulgated pursuant to the FAA's statutory duty to "promote safety of flight of civilian aircraft," found in the Federal Aviation Act of 1958, 49 U.S.C. § 1421(a) (1982). The district court ig-

that although Mellish had *not* received a current check ride with respect to the use of the autopilot, he was knowledgeable and proficient regarding its use.⁹⁰

The pretrial discovery disclosed entries on the log of N65V that the autopilot had not functioned for a considerable period of time with no record of repair.⁹¹ Despite the absence of any record that the autopilot had been repaired, the court found no "persuasive evidence" that the autopilot did not function.⁹² Furthermore, the court found no evidence as to whether Mellish used or needed to use the autopilot and "no persuasive evidence that the operational status of the autopilot or the use thereof were

nored the regulatory requirement and its purpose—that a second pilot or autopilot would ease the pilot's workload in controlling the aircraft, particularly in the event an emergency should arise. The Eleventh Circuit blindly followed the specious reasoning in ignoring the purpose for promulgation of the regulations. The fact that 14 C.F.R. § 135.105 (1986) was promulgated for the very purpose of easing a single pilot's workload in a multi-engine aircraft was lost in the confusion exemplified in Finding of Fact 65 in which the court found that Mellish "complied to the best of his ability" with communications received from air traffic controllers. This Finding of Fact evidenced a lack of common sense. If the court had used common sense it would necessarily have found that a pilot in an emergency has little time to operate the controls of the aircraft, and less time to communicate with ATC or to review the approach plate. The only plausible explanation for Mellish's subsequent misidentification of the outer marker for the ILS 28 approach at Gainesville was his inability to deal with the mounting complexities of the instrument approach by himself.

⁹⁰ *Daley*, No. 81-1117, slip op. at 8. 14 C.F.R. § 135.297(g)(3) (1986) (mandated twelve month autopilot proficiency check).

⁹¹ Witnesses for the United States, including pilots who had previously flown N65V, testified as to the history of the autopilot and its condition on October 24, 1980. The district court severely limited this testimony when it dismissed the third party action by the United States against TAC.

In Finding of Fact 23 the court found that Mellish was not an aircraft mechanic and had no responsibilities with respect to maintenance of N65V. *Daley*, No. 81-1117, slip op. at 7. Though Mellish was not a mechanic, as part of the PIC's preflight inspection he was required to familiarize himself with the aircraft log, to review reported discrepancies and log sign-offs of actual maintenance performed by a certified mechanic. 14 C.F.R. § 91.5 (1986). The district court recognized that it was the habit and routine practice of Mellish to conduct a complete and thorough preflight inspection in Finding of Fact 32. *Daley*, No. 81-1117, slip op. at 8. The district court could not point to any real evidence regarding the factual and expert opinion found in the NTSB report and elsewhere that the autopilot was not functioning on the date of the accident.

⁹² *Daley*, No. 81-1117, slip op. at 8.

issues material to the cause of the crash.”⁹³ The court’s logic is contradicted by the regulatory intent behind the FARs mandating Mellish’s use of an autopilot. Arguably, if Mellish did not need the navigational help of the autopilot, the impact of N65V with the guy wire must have been voluntary.

On October 24, 1980, N65V departed from Tampa International Airport at 7:05 a.m. on a chartered business trip to Lake City, Florida.⁹⁴ On board were pilot Mellish and passenger Stephens.⁹⁵ The aircraft flew on a VFR flight to Bartow, Florida where it picked up Daley, a second passenger.⁹⁶ After departing Bartow Airport, Mellish filed an IFR flight plan for the flight to Lake City, Florida.⁹⁷ FAA regulations barred Mellish from even conducting the flight to Lake City because the Lake City Airport did not have an officially recognized weather reporting facility.⁹⁸ The district court noted the “poor weather conditions” at Lake City in Finding of Fact 51,⁹⁹ but ignored Mellish’s violation of the FAA regulation when he attempted an instrument approach to Lake City Airport. Both Mellish’s willingness to fly without a second pilot or functioning autopilot, and his departure for Lake City from Bartow, illustrated his lack of care in pre-

⁹³ *Id.*

⁹⁴ *Daley*, 792 F.2d at 1083.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Daley*, No. 81-1117, slip op. at 8. The FARs require that the pilot file an IFR flight plan for operation in controlled airspace in instrument weather conditions. 14 C.F.R. § 91.115 (1986).

⁹⁸ 14 C.F.R. § 135.225(a) (1986). “No pilot may begin an instrument approach procedure to an airport unless—(1) [t]hat airport has a weather reporting facility operated by the U.S. National Weather Service, a source approved by U.S. National Weather Service, or a source approved by the Administrator.” *Id.*

⁹⁹ See *Daley*, No. 81-1117, slip op. at 18 for Finding of Fact 51. Mellish’s violation of 14 C.F.R. § 135.225(a) (1986) created the basis for opinion testimony by the United States’ pilot expert about Mellish’s negligence in his preflight planning. In Finding of Fact 58 the district court found that at the time of the accident the weather at Gainesville Regional Airport was poor with a fog cover contributing to poor visibility. *Id.* at 21. The court’s reference to poor weather and visibility in Finding of Fact 58 misconstrued the responsibilities of the PIC in the district court’s subsequent analysis.

flight planning which later swelled to recklessness in his approach to the Gainesville Airport. The district court's regulatory oblivion cannot disguise PIC negligence from the very inception of the flight.

As a properly certified PIC, Mellish had been trained, tested, and was required by the "force of law" FARs to fly on the instruments and to make an instrument approach under Instrument Flight Rules. The pilots and controllers comprising the FAA's aviation system assume that a pilot like Mellish will specifically comply with those "force of law" regulations. If controllers and other pilots could not rely on a pilot like Mellish doing *precisely* what the FARs mandate in instrument weather conditions, the entire aviation system of the United States would fall apart. If a pilot did not follow the predetermined procedures as expected there would be no security in the clearance provided by controllers to small and large aircraft alike.

Due to adverse weather conditions, N65V could not land at Lake City.¹⁰⁰ Mellish reported to the FAA Jacksonville Air Route Traffic Control Center that he could not land at Lake City because of weather.¹⁰¹ The court found that the Jacksonville Center "directed" him to proceed to Gainesville Regional Airport.¹⁰² The weather conditions at Gainesville were also poor with limited visibility.¹⁰³ At 9:16 a.m. Mellish contacted the Gainesville approach controller and advised the controller that he was "holding" at a particular intersection at a prescribed altitude of 3,000 feet.¹⁰⁴ At 9:28 Mellish responded that

¹⁰⁰ *Daley*, 792 F.2d at 1083.

¹⁰¹ *Daley*, No. 81-1117, slip op. at 9.

¹⁰² *Id.* The confusion of the district court as to the responsibilities of the PIC is seen in Finding of Fact 38, where the court found that Mellish was "directed" to Gainesville, Florida. The pilot elects where he wants to land, and the controllers coordinate with appropriate FAA facilities in order to provide "separation" from other aircraft. Controllers simply provided a clearance to Mellish for his flight to Gainesville. They did not, and could not, "direct" him to fly to *any* airport. The court misunderstood that it was the election of Mellish as PIC to fly to Gainesville.

¹⁰³ The weather at Gainesville included a visibility of between one-half to one mile, fog, and a ceiling of clouds 400 feet above the ground.

¹⁰⁴ Mellish's ability to identify himself from a particular intersection, like subsequent maneuvers, was achieved through Mellish's use of electronic navigational

he had received another radio navigation aid "suitable for navigation," and at 9:29 the controller cleared him to that radio beacon. At 9:32 a.m. Mellish again contacted the Gainesville approach controller and asked, "Should I get out my ILS (Instrument Landing System) ah twenty eight approach?" This question indicated Mellish's familiarity with the Gainesville Airport, and, more significantly, that he knew the probable runway in use (28) and had the instrument approach plate for that runway with him on board N65V.¹⁰⁵ The controller immediately told Mellish that Mellish could indeed expect to land on ILS Runway 28.¹⁰⁶

The district court defied common sense in its analysis of the ILS 28 approach plate.¹⁰⁷ It concluded that the approach plate was erroneous, that it misled Mellish, and that it contributed to his misunderstanding as to how to conduct the missed approach.¹⁰⁸ However, the approach plate Mellish used clearly depicted the very tower he hit.¹⁰⁹ The court did not comment on Mellish's previous flights into Gainesville.¹¹⁰ The written instructions on the approach plate were as clear as possible.¹¹¹ This pub-

equipment on board N65V. The use of such equipment is a regulatory requirement, is expected by controllers, and serves to illustrate the means used by pilots to maintain control of their aircraft pursuant to FARs. This instrument identification of a specific point in the air at a specific altitude becomes more significant later in the flight and later in the district court's decision.

¹⁰⁵ See *Daley*, No. 81-1117, slip op. at 11. This approach plate depicted the 869-foot tower (1049 feet above sea level) which Mellish hit. It also depicted five other towers with listed heights located close to the airport. The district court acknowledged Mellish's use of the approach plate in Finding of Fact 63. See *Daley*, No. 81-1117, slip op. at 22. A pilot typically places such a plate in front of him for easy reference.

¹⁰⁶ *Daley*, No. 81-1117, slip op. at 11.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 44-49.

¹⁰⁹ *Id.* at 48.

¹¹⁰ See *id.* at 9. Mellish's pilot's log disclosed that he had flown into Gainesville twelve times.

¹¹¹ The district court found that the missed approach required a turn, and the plan view of that procedure did not depict a turn. *Id.* at 44. Instead the plan depicted the path of the published missed approach with a broken straight arrow rather than a curved arrow depicting a left turn. *Id.* at 6. The U.S. specifications (IACC) in effect, however, provided for the straight arrow depicted on the ap-

lished regulatory procedure directed Mellish, in "force of law" regulatory language requiring pilot compliance, to climb to 600 feet and make a climbing left turn to 2,000 feet.¹¹² More importantly, the approach plate clearly *depicted to any pilot, regardless of what type of missed approach he conducted, the existence of two towers straight ahead, at least one of which had an altitude of 1049 feet.* (869'AGL). However, the court found the FAA negligent in its depiction of the missed approach on the approach plate,¹¹³ because the approach plate depicted the path of the published missed approach with a broken straight arrow rather than a curved arrow.¹¹⁴ The court's reasoning severely tested logic when it found that the pilot's reliance on the depiction of the straight arrow constituted a proximate cause of the crash,¹¹⁵ but did not find the pilot negligent in hitting the tower to which that straight arrow directly led.

At 9:40 the controller instructed Mellish to contact the Gainesville Tower,¹¹⁶ a *nonradar* facility at the airport. The Gainesville Tower relied on the sequencing of arriving Instrument Flight Plan aircraft by Gainesville Approach which coordinated their arrivals with the Center. At 9:40 the approach controller further instructed Mellish to change to the Gainesville Tower radio frequency and to *report when he reached the outer marker (the "fix").*¹¹⁷ The

proach plate, and no charting experts testified to the contrary. Subsequent to the crash of N65V the government revised the approach plate to show a curved arrow instead of a straight arrows. *Id.* at 45. Finding of Fact 22 disclosed the weight given by the court to the post-accident remedial measure rule. *Id.* at 7. The NTSB made a post-accident recommendation that a curved arrow to the left be utilized, as displayed on a privately published approach plate. Charting experts of the U.S. disagreed with the NTSB conclusion as to the IACC specification, and the U.S. objected to the court's admission of such evidence which violated 49 U.S.C. § 1441(e) (1982) and Rule 407 of the Federal Rules of Evidence.

¹¹² See *Daley*, No. 81-1117, slip op. at 45.

¹¹³ *Daley*, No. 81-1117, slip op. at 22.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 22.

¹¹⁶ See *id.* at 13. (Again the court used the words "instructed" or "directed" erroneously. See *supra* note 102). FARs required Mellish to contact the tower so that the controller would know, for separation purposes, the location of N65V. See 14 C.F.R. § 91.75 (1986).

¹¹⁷ *Daley*, No. 81-1117, slip op. at 13. The controller instructed Mellish to "re-

nonradar tower controller (local controller) relied upon the total 4.7 nautical mile (5.4 statutory mile) distance from the outer marker to the runway to determine the location of an aircraft when a pilot reported that he had reached the outer marker. The nonradar tower controller used a pilot's report of reaching that point as a basis for determining the distance between that aircraft and other aircraft so that the controller could meet the minimum separation criteria to avoid a mid-air collision. At 9:41 the *nonradar* tower controller (local controller) asked Mellish for an estimate as to when he would reach the outer marker, and Mellish responded "about two minutes."¹¹⁸

At 9:43 the local controller (LC) advised Mellish that, in the event he could not complete his approach to land, he was to exercise an alternate missed approach procedure rather than the standard missed approach depicted on the approach plate, because another aircraft was conducting a standard missed approach.¹¹⁹ At 9:44 Mellish reported that he had reached the outer marker, and the LC immediately cleared him to land on Runway 28.¹²⁰ At 9:46:41

port the outer marker inbound." *Id.* A pilot making an instrument approach, regardless of how poor the weather, must report at each "designated reporting point" (fix) on the approach plate or at those points specified by ATC. 14 C.F.R. § 91.125(a) (1986). The outer marker, depicted on the approach plate, was located on an inbound 281 degree magnetic heading 4.2 nautical miles from the middle marker. The middle marker was located on the same magnetic heading .5 of a nautical mile from the threshold of Runway 28. In aviation, nautical miles in distance and knots in airspeed are standard measures. A nautical mile (NM) equals 1.15 of the 5280-foot statutory mile, so the 4.7 NM would equal 5.4 statutory miles. See BLACK'S LAW DICTIONARY 895 (5th ed. 1979).

¹¹⁸ *Daley*, No. 81-1117, slip. op. at 13.

¹¹⁹ *Id.* Both the missed approach and alternate missed approach procedures are promulgated by regulation. See 14 C.F.R. § 97 (1986). The standard missed approach procedure written on the approach plate stated: "MISSED APPROACH: Climb to 600 then climbing left turn to 2,000 direct GNV VORTAC and hold." (The GNV VORTAC is located on a 238 degree magnetic heading 11.6 nautical miles from the outer marker).

¹²⁰ *Daley*, No. 81-1117, slip op. at 14. The court found in Finding of Fact 29 that N65V was "airworthy" when it left Tampa. *Id.* at 8. This finding is without support. The NTSB's post accident investigation found the cause of the pilot's loss of an engine. Testimony of the investigation related to a substantial amount of foreign debris in the left engine fuel filter. The conclusion in Finding of Fact 29 was "clearly wrong," since one engine failed.

Mellish advised the LC that he was executing a "missed approach," which the LC acknowledged at 9:46:45.¹²¹ At 9:46:51 the LC no longer had a potential conflict with the prior aircraft executing the standard missed approach procedure for Runway 28, so the LC instructed Mellish to execute the same.¹²² Mellish failed to acknowledge receipt of that transmission, so at 9:47:05 the LC asked, "[D]id you copy Sir?"¹²³ At 9:47:07 Mellish responded, "Roger I've got a little trouble here."¹²⁴ This prompted the LC to immediately ask Mellish at 9:47:10 to advise him of the problem so the LC would know what assistance he could offer.¹²⁵ The following transmissions¹²⁶ occurred in the fifty-seven to sixty-two second time period between the first transmission from Mellish identifying his problem and the accident time of 9:48:10-15 as established by the plaintiffs' expert's opinion:

¹²¹ *Id.* at 14.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

9:47:13 N65V Got an engine out¹²⁷
 9:47:16 LCL Six five victor roger understand you have an engine out
 9:47:28 LCL Six five victor if you're receiving Wynds [outer marker radio navigation aid] you can proceed back to Wynds via direct maintain ah two thousand if able sir and you're cleared for the ILS runway two eight approach¹²⁸
 9:47:54 LCL Twin Beech six five victor Gainesville Tower
 9:47:56 N65V Six five victor I'm still with you but I'm having trouble getting the engine feathered¹²⁹
 9:48:01 LCL Roger did you copy the clearance sir¹³⁰ if able maintain two thousand and you're — to Wynds outbound and you're cleared for the ILS runway two eight approach.
 9:48:08 LCL Six five victor
 9:48:15 LCL Six five victor if you've got time I'd like your souls on board and the ah amount of fuel you have sir.

¹²⁷ *Id.* at 14-15.

¹²⁸ *Id.* at 14. This priority clearance to N65V to return to the approach for Runway 28 consumed approximately ten seconds. After determining that no threat of a mid-air collision between N65V and other aircraft existed, the local controller's first duty was to provide N65V with an emergency clearance to return to land at Gainesville. The LC would have appreciated Mellish's concentration in the missed approach, could not have told him how to fly the aircraft, and would have been reluctant to ask unnecessary questions while Mellish remained busy.

¹²⁹ *Id.* at 15. Technically, the propeller, not the engine, is "feathered." The propeller is "feathered" by twisting the blades edgewise into the wind. This reduces the drag of the windmilling propeller.

¹³⁰ *Id.* The LC had no way of knowing N65V's precise altitude, its rate of climb, the pilot's capabilities, or whether the engine could be restarted, etc. Therefore, in the forty-four second period from the time Mellish reported that he had lost an engine to this clearance at 9:48:01, the LC would have been engrossed in assuring separation of N65V from other aircraft. In addition, almost four minutes had passed from the 9:44:14 time when Mellish reported "at the marker." *Id.* at 14. Based on an approximate speed of 120 knots (two miles per minute) the LC would have reasonably assumed that N65V was about one mile beyond the threshold of the 6500 foot Runway 28. Therefore, the LC would have assumed N65V was still over the Gainesville Airport.

The parties did not dispute that N65V struck a guy wire of a television transmission antenna tower located some seven miles west of the Gainesville Regional Airport at approximately 9:48:10-15 a.m.¹³¹ First, this paper will attempt to unravel the convoluted reasoning of the district court. Then the author will make a proposal to remove, or largely eliminate, the injustice such a decision plays on the taxpayers of the United States, whether the decision was prompted by the overload of the courts or by the unwillingness of the courts to comprehend the objective facts.

In the fifty-seven to sixty-two second period between the 9:47:13 report of an engine out and the 9:48:10-15 time of the accident, a reasonable person would conclude that the LC had a rather short period of time to assess the severity of the emergency Mellish confronted and the nature of the assistance Mellish needed. This short time period is coupled with the LC's reasonable expectation that Mellish would comply with FARs and customary pilot procedures, rather than continuing to fly straight ahead for seven miles at a low altitude. The district court erred in ruling in Finding of Fact 49 that "[t]he evidence was inconclusive as to the location of N65V when the missed approach was declared."¹³² The Eleventh Circuit compounded that error when it affirmed the district court's finding that "the controllers . . . knew or should have known, that on any of the missed approach instructions N65V had been given it would be proceeding in a west-bound direction that would put it in the *general vicinity of the television antenna towers*" (emphasis added).¹³³ The Eleventh Circuit's statement was factually erroneous. Un-

¹³¹ See *id.* at 2.

¹³² *Id.* at 18.

¹³³ *Daley*, 792 F.2d at 1984. Courts typically ascribe specific knowledge of the aircraft to all the controllers when only the one controller dealing with the aircraft actually had such specific information. In this case, the local controller was the one controller who had specific information regarding N65V.

Furthermore, the simplistic and subjective phrase concerning "general vicinity" is misleading because it was not made from an aviation standpoint. It is much like saying that because the writer lives seven miles from the Washington Monument and the White House, he lives in their neighborhood.

fortunately, the statement serves as the focal point of the *Daley* decision around which the court made the facts fit.

Finding of Fact 49 was a rather remarkable finding.¹³⁴ Assume that a LC does not have to anticipate a pilot's violation of a FAR.¹³⁵ When Mellish reported at the marker at 9:44:14, the LC would have to conclude, based on Mellish's mandatory report of reaching the outer marker at 9:44:14 and his report of executing a missed approach at 9:46:41, that Mellish had flown about two and one-half minutes from the outer marker located 4.7 nautical miles from the runway. Since testimony and evidence indicated the approximate approach speed of a properly operating twin-engine aircraft ranges between 90-120 knots, the LC would have reasonably approximated the position of N65V using a simple time/distance calculation.¹³⁶ If N65V reached at the outer marker at 9:44:14, two and one-half minutes later the LC would naturally assume that N65V had flown three and three-quarters to five miles from the outer marker. This would place N65V from one-half mile west of the middle marker to a point three-tenths of a mile down Runway 28. At that point N65V should have been some eight miles east of the tower, and the LC would have no reason to believe that N65V had flown into the "general vicinity" of the antenna towers. However, the district court found that the LC should have known N65V proceeded in that general vicinity.¹³⁷ The Eleventh Circuit simply turned its head from the factual complexities of the case in affirming the district court's clearly erroneous findings.

Finding of Fact 55 best exemplified the district court's

¹³⁴ See *Daley*, No. 81-1117, slip op. at 18 for Finding of Fact 49.

¹³⁵ *Colorado Flying Academy*, 724 F.2d at 878. All experts agreed that the LC had no way of knowing that Mellish had erroneously reported his position. Since Mellish obviously did not know his location, he could not comply with the reporting point accuracy requirement. See 14 C.F.R. § 91.125 (1986). The courts ignored the "force of law" of that regulation.

¹³⁶ As will later be shown, information derived from the Center radar data disclosed Mellish's error. The district court's opinion evaded this information.

¹³⁷ *Daley*, 792 F.2d at 1084.

emotional leaning. This finding related to the treatment of N65V as an "emergency" after the pilot reported an engine out:

When the air traffic controllers in Gainesville finally contacted Jacksonville [Center]¹³⁸ after losing contact with N65V,¹³⁹ to see if N65V could be located on the radar, the first question the Jacksonville controller asked was, "Okay, where is he now?" The response made by Gainesville was "I don't know, you got a seventy-seven squawk." The second question asked by Jacksonville to the air traffic controller in Gainesville was at 9:49:04, "What altitude is he?" The response by Gainesville at 9:49:06 was "Ah, we gave him two thousand." Again, at 9:49:20, Jacksonville asked "What altitude is he?" At 9:49:22 Gainesville said, "He was cleared for the approach and lost an engine and ah we *believe* he circled back around toward Wynds at two thousand." The controller at Gainesville did not know where N65V was and had waited approximately one and one-half minutes to seek assistance from the radar facilities at Jacksonville.¹⁴⁰

¹³⁸ After the 9:47:13 report of the engine out, a review of the transcript disclosed that the LC needed to ask for a confirmation of that somewhat unusual report at 9:47:16. When Mellish did not answer, the LC gave a priority clearance to Mellish for return to Runway 28 with a ten second transmission at 9:47:28. *Daley*, No. 81-1117, slip op. at 14. The LC then consumed some sixteen seconds to reconsider the location of N65V and the location of other aircraft on approach to or departure from Gainesville before he tried to contact N65V at 9:47:54. *Id.* at 15. N65V acknowledged the transmission at 9:47:56, and the LC responded immediately at 9:48:01 repeating the clearance. *Id.* N65V acknowledged receipt of that repeated clearance at 9:48:08, and the LC asked about a most critical factor at 9:48:15, "if you've got time I'd like your souls on board and the ah amount of fuel you have." *Id.* This information was necessary to determine where N65V could fly to if the pilot was unable to land at Gainesville because of the poor weather conditions. The seemingly morbid question as to the number of souls on board related to the possible need for an ambulance and emergency equipment. This question is specifically listed in the ATC manual as a question to be asked when time permitted.

¹³⁹ "Losing contact with N65V" implied that the Tower had some sort of "radar contact" with N65V, though the LC did not have radar available. The only loss of *radio* contact occurred after the last transmission from N65V at 9:48:08, two to seven seconds before the accident. The LC obviously assumed that Mellish was conducting the missed approach as Mellish was trained, tested, and certified to do.

¹⁴⁰ *Daley*, No. 81-1117, slip op. at 19-20.

The court's finding in Finding of Fact 55 contained confusion, misstatement, and factual error. The Eleventh Circuit's affirmation of the finding suggested that appealing a case so factually complex is ineffective because most judges are not familiar with the technical subject matter. Obviously, without radar the LC could not have known or have been expected to know the *specific* location or altitude of N65V. The district court ignored the regulatory approach plate procedures and the methodology of such regulatory instrument approach procedures reviewed in general terms by numerous courts.

If the court had not ignored such procedures it would have understood that if Mellish had actually been at the outer marker (Wynds) at 9:44:14, his assumed regulatory altitude would have been 1700 feet above sea level.¹⁴¹ The regulatory approach plate procedures then required (and the controller assumed) N65V to descend to Runway 28 on a glide slope angle of three degrees for 4.2 nautical miles to the middle marker. Thus, for the safety of other aircraft, the LC had to assume that every pilot would conduct the approach along the 281 degree localizer course, and descend three degrees down the glide slope at the known customary rate of speed for a twin-engine turbo-propeller aircraft. Until Mellish declared a missed approach at 9:46:41, the LC would have assumed that Mellish was making the approach required by the approach plate procedures. At the missed approach point (the middle marker one-half mile from the runway threshold), Mellish had to decide whether he could locate the runway environment for the purpose of continuing the approach to land at a minimum altitude of 326 feet.¹⁴²

¹⁴¹ The Gainesville Regional Airport is at an altitude of 152 feet above sea level.

¹⁴² The approach plate provided a speed/time table for the pilot to compute the time it would take him to fly the 4.7 miles from the Final Approach Fix (outer marker) to the Missed Approach Point (near the middle marker). These figures disclosed 3:08 minutes to fly the 4.7 miles at a speed of ninety knots and 2:21 minutes at a speed of 120 knots. The LC acknowledged his expectation of these approach times by testifying that when Mellish declared a missed approach at 9:46:41 the LC assumed that N65V was at the Missed Approach Point. When

The LC had dealt with hundreds of similar aircraft making such instrument approaches annually and has the ILS Runway 28 approach plate for such landings available. Depending on the number of aircraft, separation of aircraft required the LC to make mental calculations relating to 1) the time the pilot reported the regulatory Final Approach Fix (middle marker), 2) the approximate approach speed, and 3) the time when the pilot declared that he was executing a missed approach. Those mental calculations as to distance included the minimum altitude of 326 feet at the Missed Approach Point. The LC had no indication of any problem with N65V between the 9:44:14 report "at the marker" and the 9:46:41 declaration of a "missed approach." The courts did not recognize an emergency existed until Mellish reported an engine out at 9:47:13 — fifty-seven to sixty-two seconds before the accident.¹⁴³ This fact is contrary to the court's finding that the LC "waited approximately one and one-half minutes" to contact the Center.¹⁴⁴ In fact, a review of the record disclosed that in the fifty-seven to sixty-two second time period from the creation of the "emergency" until the accident only a sixteen second break existed (from 9:47:38 to 9:47:54) during which the LC could physically have spoken to anyone other than Mellish.¹⁴⁵

In Finding of Fact 55 the court ignored the amount of time that the LC necessarily consumed when the LC contacted the Center to obtain radar assistance. The LC consumed several seconds explaining the problem, describing the aircraft and its general expected location, and conveying the understandable uncertainty as to its *exact* location or altitude.¹⁴⁶ Because Mellish erroneously reported that he had reached the outer marker at 9:44:14, the LC could not have known the location of N65V. Obvi-

Mellish reported an engine out at 9:47:11, the LC assumed N65V was "just at the western edge of the airport."

¹⁴³ *Daley*, 792 F.2d at 1984.

¹⁴⁴ *Daley*, No. 81-1117, slip op. at 20.

¹⁴⁵ See *supra* note 136 for a review of the record.

¹⁴⁶ See *Daley*, No. 81-1117, slip op. at 19-20.

ously Mellish did not know his location either. Regardless of when the LC contacted the Center, the LC could not possibly have told the appropriate Center controller precisely where to look for N65V.¹⁴⁷

The testimony of all experts confirmed the fact that from the LC's first notice of an emergency at 9:47:13, a span of fifty-seven to sixty-two seconds existed in which to act. However, the transcript indicated that realistically the LC had no more than thirty-four to thirty-nine seconds in which to act.¹⁴⁸ Furthermore, these estimates assumed that the LC devoted his time and thoughts to the safety of *only* N65V. Accepting for the purpose of comment the court's finding that fifty-seven to sixty-two seconds passed between the declaration of emergency and the accident, the transmission to and from the LC and N65V necessarily consumed all but sixteen seconds.¹⁴⁹ Thus, the LC arguably had approximately sixteen seconds to either 1) explain the problem to his flight data controller and call for and await the arrival of his area supervisor for explanation, or 2) contact the Center himself by interphone. The only evidence indicated that it would have taken at least five seconds to grab the telephone, press the appropriate number, and await the answer at the Center. Find-

¹⁴⁷ A center radar target like N65V unidentified at the Center because no longer part of their computer data (printed on a flight progress strip) would be unknown to them. Without an operating encoding altimeter on board the aircraft on a particular transponder code (which N65V was not), the Center controller would not be able to identify the target as being N65V and would not be able to determine whether the target was at the altitude of the minimum radar coverage of 10,000 feet.

¹⁴⁸ During the period of approximately ten seconds between the termination of the LC's transmission at 9:47:16 and the next transmission by the LC at 9:47:28, the LC was obviously awaiting a response from Mellish. *See Daley*, No. 81-1117, slip op. at 14. Finding of Fact 56 stated that the ATC manual "requires that as a minimum, the air traffic controller should determine the pilot's desires." *Id.* at 20. That is true, but it is unknown why the court bothered to trouble itself with that observation.

¹⁴⁹ The fifty-seven to sixty-two seconds span of time, taken from the testimony of plaintiffs' air traffic expert, is obviously generous to plaintiffs' case. A more realistic time would begin at the close of the LC's first priority clearance to Mellish ending at 9:47:36. That time would leave no more than thirty-four to thirty-nine seconds in which to act.

ing of Fact 55 indicated that the LC would then have had to ask for the appropriate Center sector controller and relay to him the customary information assumed about *any* aircraft declaring a missed approach.¹⁵⁰ The Center controller would have assumed the pilot executed the missed approach pursuant to the regulatory missed approach procedures and would have looked to his scope for an unknown (nonradar identified) target heading *southwest* toward the Gainesville (GNV) VORTAC. Once the Center controller found no unknown target fitting the flight path description, he just *might* have located an unknown target at a point some six or more miles west of the airport on a generally westerly heading. Since the Center controller did not have the towers depicted on his scope, he would not have known that the target's direction headed towards the towers. We must further assume that the Center controller could have explained the location of the target to the LC at Gainesville, and that the LC would have concluded that the target was N65V in time to warn Mellish of two towers on his approximate route of flight. The district court's conclusion that even a small part of this coordination could physically have been completed in approximately sixteen seconds was pure folly. Furthermore, the Eleventh Circuit's blind affirmance of the district court made a sad statement about its appellate function.

The district court based its justification for its factual aberrations in part on the limited radar data compiled after 9:06:16 when the Center told Mellish that "radar services terminated" and suggested he contact Gainesville Approach. This data was retrieved from the Center's Interim Track Analysis Program (ITAP) after the accident.¹⁵¹ Such radar data is generally accurate, provided

¹⁵⁰ See *Daley*, No. 81-1117, slip op. at 19-20. The district and appellate courts obliquely transformed the standard missed approach of N65V into something almost mystical. In fact, Finding of Fact 46 described the missed approach as "a relatively common procedure that is flown by the pilot when he is unable to complete his approach for any reason." *Id.* at 17.

¹⁵¹ The retrieval of the data was part of the post-accident investigation. The

the aircraft maintained a sufficient altitude.

The ITAP radar data obtained from the Center directly after the accident contradicted not only certain findings of fact, but also the reasoning of both courts. The Center recorded the radar data of N65V on the ITAP printout using targets registered at twelve second radar sweeps based on Limited Data Blocks.¹⁵² The radar data in that exhibit created the *only* real evidence as to the flight path and altitude of N65V. Admittedly, because the Center did not control N65V, and N65V flew too low for Full Data Blocks, several of the radar hits were missing. As a result, the altitude of N65V was missing for certain locations. However, at the time of each recorded hit, N65V flew at a particular latitude and longitude at a certain altitude (except for those missing altitude returns). When, for instance, the radar recorded the N65V target at points A, B, and D, the approximate location and altitude of N65V at the missing radar hit point C could be computed using common sense extrapolations which the courts chose to avoid.

The ITAP data disclosed that when Mellish erroneously stated his position at the outer marker at 9:44:14, N65V was located some *six miles further west* toward the towers than the LC could have known. The LC relied upon Mellish's misrepresentation in attempting to assist Mellish. Both courts simply ignored these facts. The district court concluded that "[t]he evidence does not support a finding that the pilot was negligent in declaring the marker."¹⁵³ The court offered "several equally plausible theories . . . pertaining to the issue of where N65V was at 9:44:14 and

data permitted a reconstruction of the flight path of N65V, although it had several missing radar "hits" or missing altitude reports. Reconstruction of the approximate location of N65V when Mellish declared a missed approach was relatively simple. Though determination of the precise latitude and longitude of N65V at the time of a missing radar hit might allow a range difference of perhaps as much as a quarter of a mile in either direction, its *approximate* location and altitude were easy to determine.

¹⁵² Trial Court Exhibit 25.

¹⁵³ *Daley*, No. 81-1117, slip op. at 52.

why the pilot declared the marker at that time.”¹⁵⁴

Theory 1: The court's first theory provided that the pilot falsely reported because of “either a malfunction of the ILS system or a malfunction of the aircraft's navigation aids. There was testimony of an ILS malfunction by the pilot of the plane preceding N65V.”¹⁵⁵ In Finding of Fact 42 the court concluded that “[t]he ILS system for Runway 28 at Gainesville Regional Airport did malfunction the morning of October 24, 1980.”¹⁵⁶ This finding was contradicted by the fact that other aircraft successfully utilized the ILS that morning and a certified test of the ILS system conducted by an FAA test aircraft after the accident indicated compliance with all performance criteria. The “malfunction” reported by the pilot of the preceding aircraft seemingly related to a problem he experienced with his equipment in conducting the ILS approach. The pilot did not transmit to ATC that a problem with the FAA's ILS ground equipment existed as required by the FARs.¹⁵⁷ The pilot landed safely. If the ILS system failed to function properly, the pilot needed only to discontinue his approach as required by the “force of law” FARs.¹⁵⁸

Theory 2: The district court theorized that Mellish “reported ‘at the marker’ after he had passed the outer marker and had not reached the middle marker. The pilot received the proper signals¹⁵⁹ but simply did not report on time.”¹⁶⁰ The district court then criticized Exhibit 23, a chart constructed from the ITAP radar data with dots representing the latitude, longitude, and altitude informa-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* See *id.* at 10-11 for an explanation of the ILS Components in Finding of Fact 42.

¹⁵⁶ *Id.* at 11.

¹⁵⁷ See 14 C.F.R. § 91.129 (1986)

¹⁵⁸ See *Delta Airlines v. United States*, 561 F.2d 381, 384 (1st Cir.) (FAA Regulations and Delta Procedures require that at decision height, the captain must determine if the landing environment is in sight and whether a safe landing can be made; if not, he must execute a missed approach), *cert. denied*, 434 U.S. 1064 (1978).

¹⁵⁹ The pilot would receive different signals at the outer marker and middle marker.

¹⁶⁰ *Daley*, No. 81-1117, slip op. at 52-53.

tion taken from the radar data, at times synchronized from the radio/radar/computer data. The positions of the aircraft on the chart were simple latitude and longitude representations of the position of N65V taken from the ITAP data. The aircraft symbols depicted N65V's route of flight from east to west. The government used the time and distances between the ITAP hits to determine the approximate position of N65V at the locations where N65V's low altitude prohibited a radar hit. The court dismissed the ITAP data charted on Exhibit 23 as merely the "Government's opinion" as to the location of N65V at the time of logged radio communications.¹⁶¹ No witness refuted the chart. The district court's rejection of the radar/computer data and the information extrapolated from it lacked rational explanation.

The failure of the district court to accept the validity of the radar data demonstrated the court's dedication to a certain social goal. The failure of both courts to hold the pilot accountable for his errors contradicted aviation justice. The courts erred in ignoring the pilot error which misled the LC into believing that N65V was not in the general vicinity of the tower. The courts failed to recognize the fact that approaches to an airport "conducted under instrument flight rules are required to be in accordance with the standard instrument approach procedure set forth in Part 97 of the Federal Aviation Regulations."¹⁶²

Outstanding case law from the Fifth Circuit and other

¹⁶¹ *Id.* at 53.

¹⁶² *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914, 919 (C.D. Cal.), *aff'd*, 457 F.2d 667 (9th Cir.), *aff'd*, 411 U.S. 624 (1973). Four months after *Daley*, a different panel of the Eleventh Circuit acknowledged requisite pilot skill in the operation of an aircraft (for instrument approaches or otherwise as a condition of certification) in *Heller v. United States*, 803 F.2d 1558 (11th Cir. 1986). In *Heller* a FTCA lawsuit alleged the negligent decertification of a pilot by the FAA. "In discharging this duty, the Administrator requires a pilot to obtain a medical certificate as a condition to the issuance of an airman's certificate which also certifies the pilot's aviation skills. See 14 C.F.R. § 61.3(c) (1986)." *Id.* at 1560. It would almost appear that these panels of the Eleventh Circuit were serving cross purposes.

circuits illustrates the absurdity of the *Daley* decision. For example, in *Redhead v. United States*¹⁶³ the Third Circuit described the respective duties of pilots and controllers as concurrent but independent duties and stated that "decisions that depend on conditions known in detail only by the pilot must be made by him."¹⁶⁴ The Ninth Circuit observed in *Hamilton v. United States*¹⁶⁵ that "the duties of the controllers, when they exist at all, are purely secondary."¹⁶⁶ In *United States v. Miller*¹⁶⁷ the Ninth Circuit noted that the main function of controllers has been ruled to merely assist the pilot in the performance of duties imposed on the pilot.¹⁶⁸ The overall language of the Eleventh Circuit in *Daley*¹⁶⁹ rejected not only the legislative and administrative schemes which created the regulatory pilot-in-command concept,¹⁷⁰ but also cases from several circuits reciting the pilot-in-command concept.¹⁷¹ The pilot bears the primary responsibility for the operation of the aircraft whether or not the pilot knows he is dealing with an emergency or the controller thinks the pilot is dealing with an emergency.¹⁷²

¹⁶³ 686 F.2d 178 (3d Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

¹⁶⁴ *Id.* at 183.

¹⁶⁵ 343 F. Supp. 426 (N.D. Cal.1971), *aff'd*, 497 F.2d 370 (9th Cir. 1974).

¹⁶⁶ *Id.* at 432.

¹⁶⁷ 303 F.2d 703 (9th Cir. 1962).

¹⁶⁸ *Id.* at 710-11.

¹⁶⁹ In footnote 11 of the *Daley* decision, the Eleventh Circuit cited *United States v. Schultetus*, 277 F.2d 322, 328 (5th Cir.), *cert. denied*, 364 U.S. 828 (1960). The court noted that "our predecessor court indicated that air traffic controllers may even owe a greater duty than pilots in situations, such as here, where a pilot is operating under IFR conditions." *Daley*, 792 F.2d at 105 n.11. That dictum failed to comprehend the difference between IFR flight in those cases where the pilot is not executing a standard procedure and is relying on the controller to provide vectors for his route of flight or altitude, from situations like that in *Daley*. In *Daley* the existence of IFR conditions should have no bearing on the pilot's customary duty and the controller's reliance on the pilot performing exactly as he was trained, tested and certified to do.

¹⁷⁰ If anything, in an emergency the pilot is afforded greater authority in exercising his discretionary powers. See *Chapman v. United States*, 194 F.2d 974 (5th Cir. 1952).

¹⁷¹ See 14 C.F.R. § 91.3 (1986) (pilot-in-command concept). The Eleventh Circuit's decision ignored patent pilot negligence and the pilot's failure to comply with 14 C.F.R. § 91.3 (1986).

¹⁷² The duty of a controller has been described as one of ordinary care or due

"[T]he duties of a pilot do not cease merely because clearance from the tower has been received."¹⁷³ Mellish *had* to have been negligent when he collided with the tower after he failed to conduct the missed approach procedure.¹⁷⁴ As the holder of a multi-engine certificate, Mellish had been tested, certified, and required to perform such a missed approach procedure even after the loss of one engine. In concluding that Mellish could not execute an initial approach or a missed approach, or maintain control after loss of one engine, the Eleventh Circuit substituted its inexperienced judgment for the judgment of the regulatory agency which determined the minimum performance criteria. The FAA established regulatory requirements with which the pilot must comply in executing an approach or missed approach. The Eleventh Circuit merely substituted its own personal judgment as to controller/pilot responsibilities for the FAA's system upon which those knowledgeable in aviation rely.

The Eleventh Circuit affirmed the district court's finding that, "given the emergency situation confronting Mellish," pilot error did not proximately cause the crash.¹⁷⁵ The circuit court reasoned illogically that had the controller warned the pilot about the towers¹⁷⁶ the pilot could have safely landed N65V as required by regulation. The district court erred in finding no pilot negligence, not

diligence even in an emergency. *Baker v. United States*, 417 F. Supp. 471, 486 (W.D. Wash. 1975), *citing* *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972). The respective duties of pilot and controller might arguably be exchanged only when the pilot is relying on air traffic control to provide a service that the pilot cannot perform or that he is not expected to perform under the regulatory scheme. A singular example occurs when, in IFR weather conditions, a controller provides radar vectors to separate two aircraft because they cannot physically see each other. The controller does not intend for the pilots to follow the regulatory approach procedures while he is providing sequencing information.

¹⁷³ *Todd v. United States*, 384 F. Supp. 1284, 1292 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

¹⁷⁴ See 14 C.F.R. § 91.116(e)(1986).

¹⁷⁵ *Daley*, 792 F.2d at 1087 n.14.

¹⁷⁶ Such a warning would seemingly have been a useless act since, as the district court observed, it "probably is correct" that the pilot Mellish "should have seen the depiction of the antenna towers." *Daley*, No. 81-1117, slip op. at 48.

only because the pilot should have been aware of the towers, but also because he misrepresented his position to controllers.¹⁷⁷ Under the facts, the Eleventh Circuit erred in affirming the district court's ruling as to no pilot negligence because that ruling is not supportable.¹⁷⁸ *Daley* cannot be reconciled with cases like *Ross v. United States*,¹⁷⁹ in which the Fifth Circuit recognized that the pilot "was aware of the necessity for maintaining prescribed approach altitudes" or executing regulatory approach procedures (or direction of flight and missed approach procedures).¹⁸⁰

As to the findings of fact and conclusions of law relating to air traffic control negligence, the LC did not have a sufficient period of time to deal with the emergency created in a large part by Mellish. To rule that the LC could have gotten the Center to appreciate the problem and could have arranged to vector N65V around the towers in a sixteen second interval is unreasonable. Furthermore, the court erred in its opinion that the appropriate Center controller could have determined the location, altitude, and direction of flight of the radar target of N65V in even the entire fifty-seven to sixty-two second time frame. From the start of the emergency at 9:47:13, the ITAP data blocks disclosed that the first radar sweep indicating the position of N65V occurred at 9:47:20.¹⁸¹ The radar data for N65V theoretically available to the Center controller from the declaration of engine loss until the time of impact would have been:

9:47:20 — (altitude missing on computer)¹⁸²

¹⁷⁷ See *id.* at 50-54 for a discussion of pilot negligence.

¹⁷⁸ See *Daley*, 792 F.2d at 1087 n.14 for the Eleventh Circuit's affirmance of the district court ruling as to no pilot negligence.

¹⁷⁹ 640 F.2d 511 (5th Cir. 1981).

¹⁸⁰ *Id.* at 520.

¹⁸¹ The target data immediately proceeding 9:47:20 was that of 9:47:09, disclosing an altitude of 500 feet.

¹⁸² Because of poor reception, low altitude, or radar limitations, the altitude was not available on the computer. These altitudes are in mean sea level, so to determine the altitude of N65V above the ground one must subtract the general airport elevation of 152 feet.

9:47:32 — 600 feet

9:47:44 — (missing on computer)

9:47:55 — 700 feet

9:48:07 — (missing on computer)

If the LC had immediately contacted the appropriate Center controller after the 9:47:36 termination of the LC's 9:47:26 transmission to Mellish to ask the controller to look for the target of N65V executing a missed approach, the interphone call would have consumed five seconds. All air traffic witnesses agreed that the LC request to the Center controller would have taken at least ten seconds. That fifteen seconds meant that the search for N65V could not begin until 9:47:51. The first N65V target the Center controller could possibly have seen would have been the target shown at 9:47:55 at an altitude of 700 feet. Since spurious targets occasionally appear from ground objects, weather phenomena, etc., a controller would ordinarily have confirmed the reappearance of a target on the two succeeding hits comprising twenty-four additional seconds. However, assume further that the Center controller saw the N65V target immediately and relayed to the LC the information that the target was west of the Gainesville Regional Airport at an altitude of 700 feet. The target's altitude of 700 feet would have placed it above the 440-foot tower to the left of the extended centerline of Runway 28, above the 233-foot tower, and above the 295-foot tower to the right of the extended centerline.¹⁸⁹ The LC would have had no reason to believe the N65V would continue flight almost straight ahead for several miles, descend, and impact the tower.

The missing altitude readout on the ITAP on the last radar return at 9:48:07 would not have indicated to either controller that N65V did not continue the 100-foot rate of

¹⁸⁹ Because the Center controller does not deal with ground obstructions, his scope, set on a range of fifty miles or more, does not display such obstructions and does not provide the kind of detail necessary for vectoring aircraft around such obstructions. The LC might be able to roughly describe such obstructions after reviewing the approach plate and the sectional chart (used for VFR flights).

climb evidenced by the radar returns of 500 feet at 9:47:09, 600 feet at 9:47:32 and 700 feet at 9:47:55. The impact of N65V with the guy wire 134 feet above the ground¹⁸⁴ proved that Mellish could not maintain the flight altitude of N65V and that ATC's performance did not cause the crash. That impact also contradicted Finding of Fact 61 which stated that "with reasonable assistance from air traffic control, the pilot could have landed the plane."¹⁸⁵ Because N65V descended from its 548-foot altitude (700-foot MSL) at 9:47:55 to an altitude of 134 feet at no later than the 9:48:10-15 estimate of the time of the accident made by plaintiffs' expert, the N65V had to "land" somewhere. Since Mellish did not, or could not, execute any missed approach procedure when he reached an altitude of 600 feet, an *accident was inevitable*. Even if the LC had advised Mellish of the towers ahead of him, Mellish would have had to remain above them or thread his way through them without radar assistance because N65V flew too low for radar coverage.

Liability of the United States in *Daley* resulted from several factors including 1) ATC expert testimony which distorted ATC duties, 2) a judicial rejection of the carefully assigned regulatory duties of the PIC, and 3) the unsupported reasoning of a district court apparently struck with an emotional commitment to placing the liability for compensating the injuries on the government. The affirmation of the district court decision by the Eleventh Circuit reflected the deficiency of the appellate review process of factually complex cases.

¹⁸⁴ Uncontested expert accident reconstruction testimony indicated that N65V was at a thirty degree banked angle, nose slightly low, and its speed about eighty m.p.h. approaching its VSO (stall speed with flaps up) as ten feet of the right wing was cut off by a thirteen degree sloping cable. It would appear that N65V never descended below the 400-500 foot ceiling until impact. The position of the trim indicators were in a fully left position. The helical screw holding the position of the trim indicator would not have been affected by the impact, indicating that Mellish attempted to offset the asymmetrical power produced by the right engine failure and the velocity minimum control (VMC).

¹⁸⁵ *Daley*, No. 81-1117, slip op. at 22.

D. *A capricious reversal of aviation roles by the judiciary —*
Thielmann v. United States

In *Thielmann v. United States*¹⁸⁶ a Bellanca aircraft flown by Thielmann crashed into a mountain killing both Thielmann and his passenger Blankenship.¹⁸⁷ The district court found the controllers sixty percent negligent and the pilot forty percent negligent.¹⁸⁸

Thielmann was a fifty-five year old resident of Santa Barbara, California and a part owner of a Bellanca 17-30 single-engine aircraft bearing FAA registration number N4907V.¹⁸⁹ He held a private pilot's certificate and had gained his instrument rating in 1976.¹⁹⁰ Since then, he had accrued about thirty-five hours of instrument time.¹⁹¹ On May 7, 1982, Thielmann flew N4907V (07V) from Santa Barbara to Fresno to pick up his son-in-law Edward Blankenship for the return to Santa Barbara.¹⁹² Blankenship, a U.S. Marine Corps pilot, had over 144 hours of flight time in instrument conditions.¹⁹³ At 4:10 Pacific Daylight Time Thielmann visited the FAA's Fresno Flight Service Station for an abbreviated weather briefing.¹⁹⁴

¹⁸⁶ No. 84-7403, slip op. (C.D. Cal. Nov. 18, 1986).

¹⁸⁷ *Id.* at 13-14.

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.* at 2-3.

¹⁹⁰ *Id.* at 3.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2.

¹⁹³ *Id.* at 4. The court concluded in Finding of Fact 9 that there was "no evidence that Blankenship was flying 07V during this flight." *Id.* Pilots, however, would generally agree that for an instrument approach a second pilot would improve safety and provide assistance. Blankenship, having more than four times Thielmann's IFR experience, would quite likely have assisted. Actually, flight by either pilot was illegal. Thielmann's instrument currency requirement of 14 C.F.R. § 61.57(e) (1986) was not met. *Id.* at 3. Blankenship had never been issued a civil FAA certificate. *Id.* at 4. He had not converted his military flying certificate to a civilian FAA certificate pursuant to 14 C.F.R. § 61.73 (1986). This author contends that in the absence of legal authority for either pilot to conduct an IFR flight, there would be either 1) independent negligence by Blankenship in permitting his carriage by a nonqualified pilot, 2) independent negligence by Blankenship operating or failing to assist in the operation of N4907V (07V), or 3) imputed negligence as a joint venturer.

¹⁹⁴ *Id.* at 2-3. The testimony of the retired FSS specialist, an ex-military pilot, was to the effect that Thielmann did not appear very interested in the weather

Thielmann asked "if weather at Santa Barbara was still as bad" as when he had departed earlier that day.¹⁹⁵ The FSS specialist did not recommend visual flight rules (VFR) flight because of the weather and inquired whether Thielmann would fly IFR.¹⁹⁶ Thielmann replied that he would fly VFR en route without a flight plan,¹⁹⁷ and that he would execute an instrument approach to the Santa Barbara Airport.¹⁹⁸ Thielmann proceeded to fly towards Santa Barbara, and at about 1741:38 O7V impacted mountainous terrain northwest of Santa Barbara airport at an elevation of approximately 2700 feet above mean sea level.¹⁹⁹

The court found in Finding of Fact 7 that Thielmann had not complied with the instrument currency requirement of 14 C.F.R. 61.57(e) at the time of the accident.²⁰⁰ The court concluded that Thielmann's noncompliance with that FAR constituted negligence *per se*.²⁰¹ However, the real negligence question related to his inability to satisfactorily conduct an instrument approach and execute the missed approach procedures pursuant to the FARs.

information available and did not seem to understand that departing under IFR conditions was much easier than landing under those conditions. The specialist vividly remembered commenting to another specialist after Thielmann left the FSS that the two gentlemen looked to him "like an accident looking for a place to happen."

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* at 3.

¹⁹⁷ The FAA advises the filing of a flight plan for all flights, though it is not required for VFR flight. Filing a flight plan indicates pilot prudence. Thielmann should have obtained a complete weather report if for no other reason than to aid him in selecting an alternative for the mischosen Santa Barbara Airport.

¹⁹⁸ *Thielman*, No. 84-7403, slip op. at 3. The court found (Finding of Fact 4) that it was not unusual in the month of May for stratus clouds to move on shore at Santa Barbara, necessitating an instrument approach to pass through the layer of stratus clouds. *Id.*

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.* 14 C.F.R. § 61.57(e)(1)(i) (1986) requires six hours of logged instrument time under actual or simulated IFR conditions within the past six months. The court evidenced regulatory confusion when it found that "a legal cause of this accident was the pilot's failure to comply with the requirements for IFR flight pursuant to 14 C.F.R. § 61.57(e)(1)(i), 'recent flight experience.'" *Thielmann*, No. 84-7043, slip op. at 15.

²⁰¹ *Thielmann*, No. 84-7043, slip op. at 18.

The fact that Theilmann had not complied with the instrument currency requirement did not necessarily mean that he could not conduct the approach/missed approach procedure. Noncompliance with the currency requirement simply set the stage for his subsequent negligence in conducting an instrument approach which proximately caused the accident.

At 1716:16 PST one of the pilots (the "pilot" of 07V)²⁰² contacted the Santa Barbara Approach (SBA) controller and reported the position of 07V to be some twelve nautical miles (NM) north of Gaviota VORTAC (GVN).²⁰³ The pilot reported over GVN at 1722:30 and reported just passing GVN at 1722:57 at an altitude of 5000 feet. The pilot was "radar identified" at 1724:09 three miles south of GVN. The controller instructed him to "maintain VFR conditions²⁰⁴ and to fly heading one two zero, this will be a vector to the VOR runway two five final approach course, VOR's in use altimeter two niner nine two."²⁰⁵ The vector of 120 degrees provided the pilot with assistance in making his *initial* approach prior to issuance of the regulatory clearance for the purpose of intercepting the final approach course.²⁰⁶ The vector of 120 degrees

²⁰² The widow of Thielmann testified that she often monitored the radio at home when expecting her husband's return, and prior to the accident she recalled hearing her husband's voice making the transmission to the Local Controller at 1740:53 that "zero seven victor's in the soup." This created a very strong likelihood that Blankenship was operating the controls while Thielmann operated the radio. The court rejected this testimony, like the testimony of many other aviation customs and practices.

²⁰³ *Thielmann*, No. 84-7403, slip op. at 4. The "Gaviota" VORTAC (GVN) is a radio navigational aid located approximately fourteen nautical miles west of the Santa Barbara Municipal Airport (SBA). *Id.* at 4. It was being used by the pilot in approaching from Fresno.

²⁰⁴ IFR separation would not be provided to a VFR aircraft.

²⁰⁵ The approach controller was required by a manual (7110.65C) provision, to remind the pilot to set his altimeter correctly to the appropriate altimeter setting so that the pilot would not obtain erroneous altitude reports from his altimeter as he conducted his approach. The aircraft records of 07V disclosed noncompliance with the 14 C.F.R. § 91.170 (1986) static pressure/altimeter test and inspection within the preceding twenty-four months period, as well as a history of #2 VOR needle instability and the absence of any record of a check of its VOR.

²⁰⁶ The pilot was not given the ILS Runway 7 approach he requested because of a nonfunctioning piece of equipment. Instead he was given the VOR Runway 25

meant the pilot was to turn left to the southeast.²⁰⁷

At 1729:16 the controller gave a second vector of ninety degrees to the pilot which put 07V in a due east heading at the same altitude.²⁰⁸ At 1734:01 the controller instructed the pilot to turn left to a heading of thirty degrees and to descend to an altitude of 2300 feet.²⁰⁹ At 1735:36 the pilot reported his altitude at 2700 feet.²¹⁰ At 1736:43 the pilot advised that he was maintaining 2300 feet and the controller told him to turn left to a heading of ten degrees.²¹¹ At 1737:02 (after the pilot had flown the almost due north heading of ten degrees for twenty-six seconds) the controller advised the pilot as to the pilot's location three and one-half miles from the ZACKS intersection²¹² and told him to turn left to a heading of 310 degrees.²¹³

The controller then provided the pilot his clearance, saying "maintain two thousand three hundred until estab-

instrument approach utilized by the other pilots making uneventful approaches to SBA. Since there is no glideslope component on a VOR approach, the instrument provides less navigational assistance to the pilot. The VOR approach is utilized daily throughout the United States at airports without any ILS system. Thielmann's pilot log disclosed at least one of these approaches to SBA previously.

²⁰⁷ The tops of the clouds in the SBA area were reported on the Automatic Terminal Information Services (ATIS) as 2300 feet, which was generally confirmed by pilot reports. When the pilot reported at 1727:30 that he saw a United Airlines aircraft previously reported to him by the Approach Controller, it confirmed that 07V was flying in visual conditions. ATIS is a recorded message on a specific radio frequency providing weather and other airport information.

²⁰⁸ *Thielmann*, No. 84-7403, slip op. at 7.

²⁰⁹ *Id.*

²¹⁰ *Id.* During this period the pilot would have been able to see the mountains along the coast of Santa Barbara jutting above the clouds. Because Thielmann had been a resident of Santa Barbara for a number of years and was a pilot, the mountains were no surprise to him and certainly served to confirm his location. In Finding of Fact 26 the court acknowledged the pilot's familiarity with the topography. *Id.* at 8. The pilot's instrument approach plate depicted mountains to the north. *Id.*

²¹¹ *Id.* at 7.

²¹² The approach plate displayed the ZACKS Intersection just over six miles from Runway 25. Since 07V had not yet intercepted the GVN ninety-nine degree radial, it was necessarily south of the 279 degree final approach course. ZACKS intersection is the final approach fix for the VOR Runway 25. *Id.* at 7.

²¹³ *Id.*

lished on the final approach course cleared VOR runway two five approach."²¹⁴ The pilot acknowledged receipt of that regulatory clearance to conduct *his own* standard instrument approach when he intercepted the ninety-nine degree GVN radial and established himself on the final approach course of 279 degrees westbound to Runway 25.²¹⁵ Thus, the vectors of 07V ended, and the pilot was unquestionably required to maintain an altitude of 2300 feet until he intercepted the 279 degree final approach and turned inbound to the airport.²¹⁶ All ATC experts agreed that this clearance was "complete in itself, with no need for vectors." In Finding of Fact 13 the court erroneously concluded that "[f]rom *and after* this point in time, 07V was under the directional control of the ATC personnel in the Santa Barbara control tower" (emphasis added).²¹⁷ The plaintiffs' ATC expert convinced the court of that position although it contradicts customary ATC procedures. Quite simply put, the aviation community understands that it is the pilot's regulatory responsibility to execute a clearance to approach for landing. The ATC assists the pilot only if the pilot requests it or if the controller thinks the pilot needs assistance.

The only exhibit providing earlier flight path data as to 07V was the radar data from the Los Angeles Center's In-

²¹⁴ *Id.* at 7-8. Compliance with ATC clearance is required by 14 C.F.R. § 91.75 (1986). An ATC clearance is described in the FAA Pilot/Controller Glossary as "An authorization by air traffic control, for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled airspace (See ATC Instructions)."

²¹⁵ *Id.* at 8.

²¹⁶ The court acknowledged the pilot's duty to conduct a standard approach in Finding of Fact 25: "The VOR 25 clearance given to the pilot at 1737:02 was to conduct a standard instrument approach as depicted on an instrument approach plate, which plate is required pursuant to 14 C.F.R., Parts 116(a) and 97 to be in the possession of and utilized by all pilots making this approach. The evidence shows that the pilot was in the possession of the plate during this flight." *Id.* at 8. Apparently the court either failed to comprehend the purpose of that regulation or arbitrarily rejected the negligence *per se* rulings of the Ninth Circuit because the rulings did not fit into the court's scheme of things.

²¹⁷ *Id.* at 5.

terim Track Analysis Program (ITAP).²¹⁸ The ITAP radar data disclosed partial information based on a limited number of radar target "hits" of 07V from a 1735:02 hit 4.36 miles south of the GVN ninety-nine degree radial to the last hit at 1737:48, just south of the GVN ninety-nine degree radial.²¹⁹ Plaintiffs' ATC expert displayed the latitude and longitude of the radar hits on a chart indicating 07V's flight path with a northeasterly heading, moving left to a more northerly heading, and then veering to the right on a heading of sixteen degrees straight to the accident site. The radar data disclosed an average ground speed of 87.4 knots for the 2.89 NM between the radar hits of 1735:02 and 1737:01, and 112.5 knots for the 1.47 NM between the radar hits of 1737:01 and 1737:48. No radar hit occurred after the last hit at 1737:48 just south of the GVN ninety-nine degree radial to provide conclusive evidence of 07V turning left inbound to a heading of 289 degrees (the reciprocal of the GVN ninety-nine degree radial on the VOR final approach course).

Subsequent to the accident, the approach controller wrote a customary post-accident statement which the court did not accept. The approach controller stated that after the 1737:02 clearance acknowledgement by 07V, he observed 07V in a left turn tracking inbound to the ZACKS Intersection "slightly right of course."²²⁰ At

²¹⁸ The Center terminated its handling of 07V when it handed off 07V to Santa Barbara Approach Control.

²¹⁹ The last radar hit was some forty seconds after the approach controller's transmission directing the pilot to establish himself on the final approach course and clearing him for the VOR approach.

²²⁰ The approach controller testified that 07V was flying slightly north and generally parallel with the 289 degree final approach course as the target converged. Aircraft are not expected to be *precisely* on the 289 degree course. The court's fixation on government liability is seen in its rejection of the evidence supporting the approach controller's testimony. At 1745:49 the controller called the Flight Service Station (FSS) and noted that 07V had dropped off the scope a little east of the airport. At 1746:34 he requested the FSS to check the field at Santa Ynez to see if 07V had landed there, because he thought 07V had continued flight to the west. At 1747:31 he called the Center to report that 07V had "dropped off the radar scope" while making the approach. At 1748:55 he again called the Center to report that 07V had "dropped off the radar scope just about 5 miles east of the

1740:08 he told 07V to contact the LC on a different frequency which 07V did at 1740:24. The following transmissions took place between 07V and the LC:

1740:27	LC	Bellanca 4907V say your position now
1740:36	07V	Santa Barbara Tower Bellanca 4907 Victor
1740:39	LC	Bellanca 4907 Victor say your position
1740:44	07V	ah 07 Victor is ah lost ²²¹
1740:49	LC	07 Victor roger understand you don't have the airport in sight
1740:53	07V	07 Victor's in the soup
1740:57	LC	roger, continue inbound and report having the airport in sight are you still ah tracking inbound on the Gaviota 099 radial?
1741:05	07V	ah 07 Victor is not on the 99 as yet
1741:09	LC	roger contact departure control now 125.4

The next broken transmission from 07V came at 1741:24 on the approach/departure frequency to the same approach controller (AC) who had handled 07V previously.²²² That broken transmission was "(unintelligible) seven."²²³ The AC testified that because of his uncertainty as to what the pilot was doing, he told the LC to tell the pilot to execute the standard missed approach procedure.²²⁴ The LC advised 07V at 1741:30 to "execute the

airport, that is not unusual." (Radar coverage limitations on low flying aircraft would explain this.)

²²¹ At that point, a controller would naturally assume that the pilot would know not only his position, but also how to conduct the standard instrument approach described by the court in Finding of Fact 25. See *Thielmann*, No. 84-7403, slip op. at 8. The LC testified that he never saw the radar target of 07V. The court assumed that the LC should have understood the word "lost" to be taken in the pejorative sense, despite the fact that the pilot may not have descended sufficiently through the cloud layer to have the airport in sight. The pilot affirmed that he was still in the cloud layer when he transmitted at 1740:53 that he was "in the soup" (IFR weather). *Id.* at 9.

²²² *Id.*

²²³ *Id.*

²²⁴ The LC had already told 07V at 1741:09 to contact the AC, and the broken transmission at 1741:24 to the AC was probably from 07V. Therefore, 07V would not have received LC's instruction to conduct a missed approach at 1741:30. Of

missed approach," but, assuming the pilot had changed to the departure frequency as instructed at 1741:09, 07V would not have received that transmission.²²⁵

At 1741:37 07V made its last broken transmission saying "(unintelligible) Bellanca nine."²²⁶ All witnesses assumed the pilot of the aircraft made the transmission. The plaintiffs' experts led the court to conclude in Finding of Fact 34 that the accident occurred at or about the moment of the second broken transmission at 1741:38.²²⁷ Although no real evidence supported that conclusion, the entire decision hinged on a "projected" flight path terminating with the collision at that instant.

The United States argued that the pilot recognized his problem (and the start of an "emergency") when he said he was "lost" at 1740:44 and, though disoriented to some degree, began to consider his options. The United States further contended that the pilot, whether disoriented or otherwise, flew the inbound course toward the airport and for unknown reasons turned right in executing the missed approach rather than turning left.²²⁸ The court avoided this contention by accepting the testimony of plaintiffs' experts that, based on time and airspeed, 07V could not have flown an inbound course to within five miles of the airport, turned outbound to the northeast, and collided with the mountain at 1741:38. The experts did not testify, though, as to what the pilot's angle of bank and airspeed would have been in conducting the missed approach from the final approach course. More importantly, plaintiffs stated in their Contentions of Fact and Law that "if in fact,

course, if one were to accept the court's finding that 07V was never inbound on the ninety-nine degree GVN radial, the coordination between AC and LC would necessarily be academic.

²²⁵ The fact that the pilot never queried the controllers as to his position may well have indicated his understanding that radar contact with the LC or the AC was unavailable after he continued his descent on the final approach course.

²²⁶ See *Thielmann*, No. 84-7403, slip op. at 9.

²²⁷ *Id.* at 10.

²²⁸ Again, the court acknowledged in Finding of Fact 27 the standard missed approach procedure on the approach plate, but did not relate it to anything. See *id.* at 8.

07V was observed on radar by [the AC] at 1740:36 at the point testified to by [him] and if 07V maintained the same constant speed²²⁹ from the point where [the AC] observed it to the crash site 07V could not have arrived at the crash site until 1746:02." The fly in the ointment of that logic is that the crash actually occurred at closer to either the 1744 time found on a stopped watch in the cockpit or the 1745 time found in the NTSB report (assumedly taken from the stopped aircraft clock).

E. *The Argument Against the Factual Errors and Judicial Misunderstanding Regarding the PIC Concept in Thielmann v. United States*

1. *A Miscomprehension of Primary Responsibility*

In *Thielmann* the district court provided a classic example of a court confused not only as to the principal cause of an aviation accident, but also as to the regulatory requirements supporting the ATC system of the United States. Even if controller negligence contributed to the accident, the district court should not have placed a greater percentage of negligence on the controllers (sixty percent) than on the pilot-in-command (forty percent).²³⁰

Despite its recital in Conclusion of Law 2 that violations of the FARs are "considered negligence as a matter of law," the court undermined the significance of the FARs when it incorrectly cited 14 C.F.R., Parts 116(a) in Finding of Fact 25.²³¹ The correct cite is 14 C.F.R. § 91.116(a) (1986). In Finding of Fact 25 the court recognized that 14 C.F.R., Parts 116(a) and 97 required an instrument ap-

²²⁹ There was no testimony to the effect that a pilot executing a missed approach would maintain the same airspeed as a pilot on the descent to land on the final approach course. Because the *Thielmann* pilot was not simply executing a standard missed approach, but was so disoriented that he made a wrong turn, the airspeed and the angle of bank were impossible to estimate.

²³⁰ *Thielmann*, No. 84-7403, slip op. at 16. The court's somewhat slapdash approach to the decision is reflected in Conclusion of Law 6, in which the court erred in awarding damages to the Thielmann heirs without excluding the portion representing his forty percent negligence. See *id.* at 18.

²³¹ See *id.* at 8.

proach plate.²³² However, the court failed to address the issue of pilot noncompliance with such regulatory approach procedures, which resulted in an erroneous conclusion of law regarding the degree of pilot negligence. The court stated in Finding of Fact 34 that "07V did not intercept nor did he ever become established on the VOR runway two five final approach course."²³³ However, 07V *must have crossed* the 289 degree final approach course in its northerly heading. The legal conclusion *must* be reached that the pilot violated 14 C.F.R. § 91.116(a) and Part 97, and that such violations were the *primary* proximate cause of the accident. The pilot also failed to comply with the FAR instrument currency requirement.²³⁴ This noncompliance set the stage for his failure to comply with the regulatory approach and missed approach requirements. This failure to comply with procedures caused the aircraft to hit the mountain.²³⁵

2. *A Factious Accident Time*

Before discussing the flight path of 07V, it should initially be noted that the portion of Finding of Fact 17 stating that the pilot "had no means of directional navigation available to him other than the vectors assigned by the ATC personnel"²³⁶ was clearly wrong. The record was replete with testimony concerning the navigational radios #1 and #2 and their settings after the accident. Apparently the pilot(s) used the #2 radio for primary course guidance and the #1 radio for cross-bearing information.²³⁷ Unfortunately, the judge failed to understand that

²³² *Id.*

²³³ *Id.* at 10.

²³⁴ *Id.* at 3.

²³⁵ Despite the judge's avoidance of the regulatory approach procedures required of the pilot, judicial notice of those regulations and the fact that they require mandatory pilot compliance can be found in *Lockheed Air Terminal*, 318 F. Supp. at 918.

²³⁶ *Thielmann*, No. 84-7403, slip op. at 6.

²³⁷ The #1 navigational radio was set to the SBM ILS (110.3), but the Omni-bearing selector was set to 148 degrees, rather than seventy-three degrees; the #2 radio was set to the GVN VOR (116.5) but the Omni-bearing selector was set

the pilot(s) were trained, tested and required to provide some "directional navigation" in determining their heading by using not only a compass but also a cross-reference of their navigational radios.²³⁸ The fact that the pilot(s) received navigational heading (vectors) *earlier* was irrelevant. The instrument-rated pilot had a regulatory responsibility to provide his own directional navigation in intercepting the localizer course after the controller gave the clearance.

More importantly, the court erred in omitting any findings of fact or conclusions of law with respect to the pilot's regulatory duty after the controller provided the clearance. In Finding of Fact 17 the judge acknowledged the controller's transmission to 07V at 1724:09 as a "vector to the VOR runway two five final approach course."²³⁹ However, the judge did not make a finding of fact regarding the pilot's acknowledgement of that transmission at 1724:27, nor did she draw a legal conclusion as to the pilot's regulatory requirement to comply with the clearance by intercepting the final approach course. For the court to conclude, as it did on Finding of Fact 34, that 07V did not intercept nor become established on the VOR 25 approach course, the court would have to have found as a matter of fact that the pilot did not execute the clearance provided, and, as a conclusion of law, that the pilot violated the FARs by failing to comply with the clearance provided.²⁴⁰ The court abrogated its responsibilities in failing to make such findings or conclusions and failed to

to 279 degrees. However, it doesn't matter which navigational radio was set on which VOR.

²³⁸ The court patently erred in Finding of Fact 17 when it found that the pilot "had no means of directional navigation." See *Thielmann*, No. 84-7403, slip op. at 6 for Finding of Fact 17. This finding clearly illustrated the court's misunderstanding as to how pilots use their instruments for IFR flight. The vectors provided by ATC merely assisted the pilot in conducting an expedited flight to the final approach course. The absurdity of the court's conclusion is best represented by the theoretical question as to what the pilot would do if, as occasionally happens, he lost radio communications because of equipment malfunction.

²³⁹ *Id.*

²⁴⁰ See 14 C.F.R. § 91.75 (1986).

provide a substantial record or justification for its determination of the respective degrees of negligence under the comparative negligence law of California.

The court found in Finding of Fact 34 that 07V impacted with the mountainous terrain at approximately 1741:38,²⁴¹ the theoretical time posited by plaintiffs' experts. The court based this time on the last interrupted radio transmission from 07V at 1741:37.²⁴² Finding of Fact 34 had no real factual support and was in fact contradicted by the only real evidence as to the time of the accident. That evidence included the time of 1745 taken from the NTSB report and the time of 5:44 (1744) found on a Lord Elgin watch located amongst the instrument panel debris on the left side of the cockpit.

The last *recorded* radar target data of 07V taken from the Los Angeles Center computer disclosed nine radar returns from 07V for the time period of 1735:02 to 1737:48. The last of these radar returns from 07V occurred at 1737:48 which obviously left three minutes and fifty seconds of flight time until plaintiffs' proposed impact time. Regardless of *any* average speed computed by plaintiffs' expert, 07V could not have crashed at the impact site if the time of the accident was later than plaintiffs' theorized time of approximately 1741:38. Plaintiffs' pilot expert testified that an accident time of 1744 or 1745 would place the site of the accident so far north of where the accident actually occurred that the site would be "off the map, and their theory as to the accident time would go out the window." The court avoided the true inbound flight path of 07V as witnessed by the AC until loss of radar contact after which in all probability 07V made a right turn to the point of impact at approximately 1744-1745. This time is two minutes and twenty-two seconds to three minutes and twenty-two seconds later than the impact time found by the court, and is clearly based on the only real evidence.

²⁴¹ *Thielmann*, No. 84-7403, slip op. at 10.

²⁴² *See id.* at 9.

3. Radar Vectors in the Absence of Radar Coverage

The court evidenced significant confusion about when and where the controller lost radar contact. In Finding of Fact 39 the court found that approach controller Harrison failed "to advise 07V of deviation from his vectored course and that [Harrison] had lost radar contact with 07V."²⁴³ This finding was factually erroneous because the controller's radar vectoring responsibility to 07V terminated at 1737:02 when the controller cleared the pilot to execute a standard VOR 25 approach. The court made no finding as to when the controller lost radar contact. No real facts disputed the testimony of A.C. Harrison that the target of 07V had an inbound heading and that radar contact was typically lost during the latter stage of descent on the final approach course.

In any event, the opinion lacked findings of fact to provide support for the court's legal conclusions. The opinion was factually deficient in that the court failed to find a means by which the controllers, particularly the AC, could have advised 07V of deviations in its flight path if radar contact had in fact been lost. Since regulations required the pilot to comply with the clearance for intercepting the VOR 25 approach course, did the court erroneously conclude that the pilot could ignore the approach plate and missed approach procedure detailed in Findings of Fact 26 and 27?

The court recited in Finding of Fact 37 a series of provisions contained in the *Air Traffic Control Handbook* violated by the controller.²⁴⁴ This recital of violations was meaningless, though, because the court failed to tie the violations to specific findings of fact. By way of example, the court referred to the Paragraph 33 "Safety Advisory."²⁴⁵ The court mistakenly believed that 07V was a Paragraph 790 "Radar Arrival", even after the approach controller

²⁴³ *Id.* at 14.

²⁴⁴ *Id.* at 10-11.

²⁴⁵ *Id.* at 12.

vectored it to its final approach course, cleared 07V for the instrument approach pursuant to the manual, and subsequently lost radar contact. In that situation, how could the controller issue a safety advisory if he could no longer see the target, particularly since 07V made a right turn and flew north, rather than executing the left turn missed approach required by the regulations?

As a matter of incidental interest, Conclusion of Law 2, which stated that violations of FARs "by the pilot and controllers" are considered negligence as a matter of law, indicated the judge's superficial understanding of aviation and air traffic control. Furthermore, it represented the court's apparent inability to distinguish the difference between the secondary responsibility of air traffic control from the primary responsibility of pilots. Controllers do not "violate" federal air regulations²⁴⁶ because these regulations relate to the operation of aircraft and are addressed to pilots, not to air traffic controllers. While the FARs generally direct a controller to perform his duties pursuant to the manuals,²⁴⁷ compliance with *regulatory* requirements, such as conducting an approach to a runway after clearance from air traffic control, is solely the duty of the pilot.

In *Thielmann* the judge tragically switched the primary responsibility for operation of the aircraft from the pilot-in-command to the air traffic controllers even though such a switch contradicted the regulatory scheme of the agency most knowledgeable about the workings of the aviation system. The court concluded that despite the pilot's failure to perform as trained, tested and certified, his degree of negligence was less than that of the air traffic controller

²⁴⁶ As seen in *Doe v. Hampton*, 566 F.2d 265, 280-81 (D.C. Cir. 1977), "not every piece of paper emanating from a department or independent agency is a regulation." As articulated in *Furumizo v. United States*, 245 F. Supp. 981, 999 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967), "Whatever may be the effect of the *Air Traffic Control Procedures*, they are obviously *not adopted in accordance with 49 U.S.C. § 1348(d)*, . . . therefore, as this court sees it, they do not have the force and effect of law as do the regulations."

²⁴⁷ See 14 C.F.R. § 65.45 (1986).

whose *secondary* duty was to warn the pilot whose negligence created the emergency condition. This conclusion was pure nonsense and contrary to the entire regulatory system of the FAA.

III. A PROPOSED NEW ROUTING FOR AVIATION TORT LITIGATION UNDER THE FEDERAL TORT CLAIMS ACT.

A. *A Glimpse at the Claim/Litigation Picture*

Currently outstanding against the FAA are over forty-one billion dollars in some 350 grossly inflated claims representing 105 accidents throughout the United States. Figures available²⁴⁸ as to claims and subsequent litigation for fiscal years 1981-1985 indicated the filing of 1690 claims for a yearly average of 338 new claims. The total dollar amount demanded in lawsuits during the five year period exceeded forty-three billion dollars,²⁴⁹ with over twenty-one billion dollars being claimed in 1984 alone. During the five year period nearly 1000 complaints were filed against the United States in federal district courts. These cases represented 179 different aircraft accidents with a combined total exceeding twenty-five billion dollars.

No attempt has been made to correlate the amounts of settlements or judgments to the calendar year of the accidents involved. In 1985 the FAA paid a total of \$6,691,000 to settle \$105 million in claims, while the United States paid over thirty-three million dollars to settle pending litigation or to satisfy adverse judgments. In the absence of any settlements in 1985 relating to a major

²⁴⁸ The limited clerical staff and absence of computer data make it difficult to provide accurate figures. In any event, such information would have no direct bearing on the value of settlements or judgments.

²⁴⁹ The most sizeable litigation involved the Dallas-Ft. Worth accident of the Delta Airlines L-1011 in August of 1985. Delta's demand for the value of their aircraft, as well as personal injury and death claims, exceeded \$100 million. Other major cases include the Wings West midair collision at San Luis Obispo, California and the Aeromexico midair collision near Los Angeles on August 31, 1986.

aviation disaster, it appears fair to say that claim settlement payments by the FAA or litigation settlement/judgment satisfaction by the United States exceeding \$100 million in a calendar year involving a major accident is not unrealistic. With the marked growth in the carriage of passengers by U.S. carriers,²⁵⁰ the dollar value of aviation claims will undoubtedly continue to increase.

After aviation tragedies involving U.S. carriers resulted in 526 deaths in 1985, 1986 was the safest year since 1980 for major U.S. airlines.²⁵¹ Commuter airlines had the lowest accident rate and lowest number of deaths in ten years, with only two accidents resulting in four fatalities.²⁵² In 1986 Part 135 air taxi accidents caused the deaths of sixty-four people, and 466 general aviation accidents caused 958 fatalities.²⁵³ Though the typical level of general aviation accidents has been approximately 2500 accidents annually, the twenty-six percent decline in the sale of general aviation aircraft from 1985 to 1986 might signal a decline in future general aviation activity and accidents.²⁵⁴

²⁵⁰ See *Major Airlines Log Safe Year*, Washington Post, Jan. 13, 1987, at A10, col. 1. The Air Transport Association estimated that 415 million passengers flew last year, compared with 380 million in 1985 and 345 million in 1984. *Id.*

²⁵¹ *Id.* This does not consider the Aeromexico midair collision over Cerritos, California which may involve claims against the United States with respect to sixty-seven passenger deaths, the deaths of fifteen individuals on the ground, and considerable property damage. *Id.*

²⁵² *Id.*

²⁵³ *Id.* "Part 135" refers to Part 135 of the Federal Aviation Regulations entitled "Air Taxi Operations and Commercial Operators of Small Aircraft."

²⁵⁴ The most significant factors expressed by the General Aviation Manufacturer's Association for depressing sales are the rapidly rising costs of product liability insurance and foreign competition. The reduced sales may only signal a greater effort in the rebuilding of older aircraft, particularly in light of the relative low cost of fuel. The annual data taken from the FAA's "General Aviation Activity Avionics Survey" of recent years disclosed a probable leveling off in the number of active aircraft and hours flown annually based on a belief that the numbers forecasted for 1986 and 1987 are probably too high:

	<u>active general aviation aircraft</u>	<u>hours flown</u>
1980	211,000	41,016,000
1981	213,000	40,704,000
1982	210,000	36,457,000

B. *Determining Liability on the Merits*

The judicially created inroads into the PIC concept in recent years will probably continue to expand unless Congress amends the FTCA. When Congress enacted the FTCA in 1946, it did not wish to permit a jury to determine the liability of the United States.²⁵⁵ Forty years later, Congress must seriously consider amendment to the FTCA to stem a different problem. A judicial escape from a growing case load, coupled with either an unwillingness or an inability to comprehend the regulatory and procedural system established by the FAA, has prompted a growing number of courts to fall back on some false sense of generosity as a basis for U.S. liability in aviation accident litigation. The courts may simply not have the time to understand the aviation system and the duties and responsibilities of the pilots and controllers. What is the alternative?

After more than a decade of experience in the Chief Counsel's office of the FAA, the writer's position is that attorneys in the Litigation Division of the FAA are far better suited to objectively pass judgment on the performance of FAA employees than all but a handful of judges. Time has aptly demonstrated the objectivity of the claims/litigation process of this office, as well as its removal from administrative pressures and most bureaucratic delays.²⁵⁶ The writer knows of no situation in which an FAA official has attempted to influence an attorney's decision in the settlement of a claim or in the strategy of litigation. Similarly, no known attempt has been made to

1983	213,000		35,249,000
1984	221,000		36,119,000
1985	211,000		34,063,000
1986	estimated	228,000 forecasted	37,000,000
1987	estimated	228,000 forecasted	38,000,000

(in all probability will not exceed 210,000)

²⁵⁵ 28 U.S.C. § 2402 (1982) currently provides that "any action against the United States under section 1346 shall be tried by the Court without a jury." *Id.*

²⁵⁶ An enlarged staff of competent clerical personnel would be a condition precedent to the FAA's assignment of the additional workload.

inhibit this office's criticism of an FAA employee's performance, particularly to the extent that performance affected the course of claims/litigation. Though no system is perfect, an objective appraisal of FAA employee performance by this office generally surpasses the theoretically detached appraisal of most federal district courts by such a significant degree that there can be no real comparison.

Like the salaries of federal judges, the salaries of FAA attorneys are not conditioned upon the outcome of litigation. Aviation claims would be satisfied from the general funds of the United States rather than from the FAA's appropriated funds in order to remove the Chief Counsel's office from undue influence. A federal district court judge, burdened with constitutional issues and prioritized criminal cases, cannot be expected to absorb the technical complexities of pilot and air traffic control procedures in a relatively short period of time and dispassionately render a truly objective judgment. Docket delay has already prompted the consideration of various methods of expediting the resolution of litigation. The limited use of magistrates in the arbitration of aviation accident cases has proven ineffective because of their inability to comprehend the complexities of the aviation system and tort law in the time restrictions imposed upon them.²⁵⁷

Though the FTCA could be amended in a variety of ways, the writer believes that the most objective means of determining the liability of the United States and fairly assessing damages would be something like an "Aviation Tort Liability Board" within the Litigation Division of the Chief Counsel's Office of the FAA. This Board would provide the unappealable review²⁵⁸ of the determination of

²⁵⁷ See 9 U.S.C. §§ 1-14 (1982) for a discussion of arbitration in United States Commerce. It appears that any alternative means of dispute would suffer from the same problems experienced with the use of U.S. Magistrates. Such alternatives include voluntary arbitration, mandatory arbitration, mediation, negotiated settlements, mini-trials, facilitation, convening, etc.

²⁵⁸ The review would be unappealable unless new facts having material bearing on the cause of the accident were offered during some fixed period of time.

liability. Generally, documented claims would be submitted²⁵⁹ by a claimant or claimant's attorney with relevant documentary evidence including a memorandum/brief²⁶⁰ arguing the basis for liability and analyzing the economic damages. The claimant would have some opportunity to obtain necessary documents from the FAA in preparation of the claim²⁶¹ and to depose a restricted number of material FAA employees.

While trying to avoid the inevitable criticism of being too doctrinaire in this recommendation, suffice to say that the proposal is a concept which any impartial taxpayer would find to be:

1. a more objective means of determining the liability and damages of the United States;
2. a more expeditious and less expensive means for the assertion of aviation claims/litigation against the United States;
3. a means of eliminating litigation which has no genuine basis in fact or law and ties up courts and resources with some hope of sufficiently confusing the court;
4. a means of providing greater protection for the U.S. Treasury.

CONCLUSION

The FTCA's intent to objectively resolve negligence claims has in recent years proven increasingly ineffective in the field of aviation tort law. The growth of aviation, coupled with its increased technical complexity, has un-

²⁵⁹ Procedures would be established by regulation, similar to the Department of Justice Procedures for the filing of claims under the FTCA found in 28 C.F.R. § § 14.1-14.11 (1986).

²⁶⁰ Such brief would be limited to perhaps twenty-five pages.

²⁶¹ Without arbitrarily deciding which documents are truly "necessary," some control of discovery would have to be established. In the writer's experience, production of documents under the FRCP has been abused and an FAA manual or other publication has too often provided nothing more than an argument for technical noncompliance which was not really a proximate cause of the accident. Such technical noncompliance may have create some misunderstanding in the court's mind, but, in the vast majority of cases, it should have no real bearing on the cause of the accident.

fairly burdened federal district courts with the resolution of issues requiring the luxury of time for comprehension which, unfortunately, few courts can provide. Cases reciting FAA regulations or procedures by district courts and circuit courts of appeals are increasingly ignored by other courts and panels within that circuit or other circuits, or are "distinguished" by facts which are indistinguishable to anyone who understands aviation and the ATC system. The arbitrary rejection of FARs in tort litigation by a growing number of courts and the acceptance of testimony by ATC experts which has no basis in the regulatory responsibilities and training of pilots and controllers is becoming so debilitating to the defense of an increasing number of lawsuits by the United States under the FTCA that amendment of the FTCA is mandated.

The pressures on the judicial system caused by the overall increase in litigation over the years have too often created a judicial laxity in an appraisal of the ATC system and the responsibilities understood by its users. The result has been a growing judicial melange of factual and legal inconsistencies in direct conflict with the aviation system created and enforced by the FAA. This development justifies amendment of the FTCA to provide for the review of facts by the FAA in nonmilitary aviation accidents for the purpose of determining liability and damages.

