

1992

Aviation--Duty of Aviation Safety Inspectors and Designated Flight Examiners

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Recommended Citation

Robert H. Johnston III., *Aviation--Duty of Aviation Safety Inspectors and Designated Flight Examiners*, 57 J. AIR L. & COM. 1019 (1992)
<https://scholar.smu.edu/jalc/vol57/iss4/7>

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AVIATION—DUTY OF AVIATION SAFETY INSPECTORS AND DESIGNATED FLIGHT EXAMINERS—In conducting a flight test, a Federal Aviation Administration (FAA) safety inspector served as the director of the flight and crew. The inspector had a duty to direct the test with due regard for the safety of the flight for purposes of a negligence claim under Texas law, notwithstanding the facts that the pilot-applicant being tested qualified as “pilot in command” for purposes of the test flight and that the copilot or safety pilot was to back up the pilot-applicant if she erred. *Hayes v. United States*, 899 F.2d 438 (5th Cir. 1990).

Nancy Yates, a pilot with Jet East Inc., sought a type rating for a Gates Learjet Model 35. On December 20, 1984, she took the necessary flight examination. Jack Hayes, her colleague from Jet East, served as safety pilot, and Marcus Belcher, her personal friend, was the FAA aviation safety inspector for the test. The flight test ended with the crash of the Learjet at Madison Cooper Airport in Waco, Texas.¹ Nancy Yates perished in the crash, and both Jack Hayes and Marcus Belcher were seriously injured.²

On a typical flight examination for a Learjet type rating, the applicant sits in the left seat, the pilot’s seat, and the FAA inspector or designated flight examiner sits in the right seat, the copilot’s seat.³ Belcher, the inspector, lacked enough recent experience to be qualified as a safety pilot. Jet East had a policy requiring one of its pilots to serve as safety pilot; therefore, Belcher sat in the

¹ Since the accident occurred, Waco Madison Cooper has been renamed Waco Regional Airport.

² *Hayes v. United States*, 899 F.2d 438, 443 (5th Cir. 1990).

³ An aviation safety inspector is an FAA employee. A designated flight examiner, on the other hand, is not an FAA employee but is authorized by the FAA to give flight tests. *Id.* at 444 n.6.

passenger compartment behind the copilot, while Hayes functioned as the safety pilot. From his position behind the cockpit Belcher could only see Hayes by leaning forward.⁴

The flight examination for a Learjet type rating requires the applicant to demonstrate certain maneuvers, including a "V1 cut."⁵ A "V1 cut" in a Learjet requires the applicant to demonstrate a takeoff with a simulated engine failure at a speed in excess of V1. "V1" is the takeoff decision speed, that is, the velocity at which, when reached, the departing aircraft must take off, and below which the takeoff may be safely aborted.⁶

On the day of the accident, the three participants flew the Learjet from Dallas to Waco. Before reaching Waco, Yates satisfactorily executed various maneuvers. In Waco, Belcher instructed Yates to conduct a V1 cut.⁷ After reaching V1 on the takeoff roll, Hayes reduced power to the right engine to simulate a power failure. While a yawing to the right was expected with the power reduction, the aircraft yawed to the left and lifted off the runway.⁸ The yawing to the left stopped with a sudden jerk,

⁴ *Id.* at 442.

⁵ For the type rating test requirements, see generally 14 C.F.R. § 61 App. A (1991) and FAA Advisory Circular AC 61-77 (1991). AC 61-77 applies to the examination of applicants for the Airline Transport Pilot Certificate or a type rating on that certificate. AC 61-77 provides in relevant part:

When the applicant's final performance of any required maneuver or procedure is unsatisfactory, the practical test is unsatisfactory In addition to the specific factors considered for a particular maneuver or procedure, the examiner will evaluate the applicant's performance on the basis of the judgment, knowledge, accuracy, and smoothness he displays. Any procedure or action, or lack thereof, which requires the intervention of the examiner to maintain safe flight will be disqualifying.

Id. (quoted in *Hayes*, 899 F.2d at 444 n.7).

⁶ AOPA's AVIATION USA 705 (1991).

⁷ One aviation expert has criticized the inspector's choice to perform the "V1 cut" in the Learjet when FAA-approved simulators were available. John W. Olcott, *Learjet Safety: Facts and Fiction*, 61 BUS. & COM. AVIATION 40 (1987).

⁸ *Hayes*, 899 F.2d at 442. Movement about the vertical axis of the aircraft is referred to as "yaw." JEPPESEN-SANDERSON, PRIVATE PILOT MANUAL 1-23 to 1-24 (1984).

apparently caused by the intervention of the safety pilot, Hayes. After this attempt, Yates landed the aircraft.

Belcher determined that the attempted V1 cut was neither satisfactory nor unsatisfactory, but that it constituted "gray area." Neither Hayes nor Yates objected to Belcher's determination, and Belcher instructed Yates to attempt a second V1 cut. While waiting for clearance from the control tower, Belcher discussed with Yates the basic control inputs necessary during a V1 cut.⁹ On the second attempt, Hayes reduced power to the left engine upon reaching V1. Again, the aircraft yawed to the left and became airborne. The aircraft continued to yaw rapidly to the left until the left wing-tip struck the ground and the Learjet crashed.¹⁰

Jet East Inc., Hayes, and his wife, Jennifer Hayes filed claims against the United States. The plaintiffs predicated the claims on the theory that the FAA inspector acted negligently in that he: 1) negligently omitted the necessary pre-flight briefing concerning the roles of the flight crew during the test; 2) negligently gave the applicant a second chance at the V1 cut; and 3) negligently gave flight instruction to Yates.¹¹

The district court found Yates, Hayes, and Belcher negligent. Because the lower court found Belcher fifty-five percent negligent in causing the crash, the court entered judgment against the United States. Hayes received fifty-five percent of his damages, which amounted to over \$2.5 million. In addition, the district court awarded \$75,000 to Jennifer Hayes for her losses and \$660,000 to Jet East, representing fifty-five percent of its property loss.¹²

⁹ *Hayes*, 899 F.2d at 442.

¹⁰ *Id.*

¹¹ *Id.* at 443. Granite State Insurance Company and Nation Union Fire Insurance Company intervened and sought to recover over \$1,000,000 in worker's compensation paid to Hayes and death benefits paid to Yates' survivors. The intervenors, however, voluntarily dismissed all of their claims arising from Yates' death on the first day of trial. The plaintiffs and intervenors had also sued Gates Learjet Corporation on products liability claims but dismissed these claims prior to trial. *Id.*

¹² *Id.*

The United States appealed from the judgment, arguing that the FAA inspector had no duty, as he was merely an observer for the purpose of the flight test. The Court of Appeals for the Fifth Circuit affirmed judgment against the United States and held that Texas negligence law imposed a duty on the FAA flight safety inspector, who was the director of the flight and crew, to direct the test with due regard for the safety of the test flight.¹³ The court rendered this judgment even though the pilot-applicant qualified as "pilot in command" for purposes of the test flight, and a second pilot acted as copilot to back up the pilot-applicant if she erred.¹⁴

I. LEGAL BACKGROUND

A. ORDINARY NEGLIGENCE RULES APPLICABLE

Under Texas law, ordinary negligence rules are applicable to aircraft accidents.¹⁵ The plaintiff must establish the basic elements to prevail on a claim of negligence: a duty of reasonable care; breach of this duty; and damages proximately caused by the breach.¹⁶ The existence of a duty is a question of law,¹⁷ whereas the issues of breach and proximate cause are questions of fact.¹⁸

B. SOURCES OF DUTY

Texas recognizes two sources of legal duty. First, the law provides for a common law duty of reasonable care based on the principle of foreseeability.¹⁹ Second, a duty

¹³ *Hayes*, 899 F.2d at 445-47.

¹⁴ *Id.* at 450-51.

¹⁵ *Brooks v. United States*, 695 F.2d 984, 987 (5th Cir. 1983); *see also* *United States v. Schultetus*, 277 F.2d 322 (5th Cir.), *cert. denied*, 364 U.S. 828 (1960) (stating that liability growing out of operation of aircraft is to be determined by the ordinary rules of negligence and due care). The action in *Hayes* was brought under the Federal Tort Claim Act (FTCA), 28 U.S.C.A. §§ 1346, 2671 (West 1992). FTCA actions are governed by state law. *Brooks*, 695 F.2d at 987.

¹⁶ *See, e.g.*, *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987); *see also* *Brooks*, 695 F.2d at 987 (detailing the essential elements of actionable negligence).

¹⁷ *See* *Shankle v. United States*, 796 F.2d 742, 745 (5th Cir. 1986).

¹⁸ *El Chico*, 732 S.W.2d at 309.

¹⁹ *Id.* at 312.

can be created by a penal statute.²⁰ The common law duty imposed is to exercise reasonable care to avoid foreseeable injury to others.²¹ Therefore, if a party creates a situation that reasonably appears to be dangerous to others, the party has a duty to prevent foreseeable injuries.²²

A statute that sets a standard of conduct also may be a source of duty. The statute must be enacted to protect the class to which the injured person belongs and must protect against the type of injury involved.²³ The unexcused violation of such a statute constitutes negligence per se.²⁴ Under Texas law, the duty may also arise from a regulation promulgated by an administrative body or from a penal statute.²⁵ There will still be questions as to

²⁰ *Id.* at 312. In *El Chico*, the Supreme Court of Texas held that an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to patrons that the licensee knows to be intoxicated. The duty was based on the Texas Alcoholic Beverage Code. *Id.*

²¹ *El Chico*, 732 S.W.2d at 311.

²² *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109, 110 (1942).

²³ *El Chico*, 732 S.W.2d at 312.

²⁴ *Id.* See also *Nixon v. Mr. Property Mgt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985) (holding that a city ordinance defines the duty owed to an injured party specifically protected by such ordinance); *Missouri Pacific R.R. v. American Statesman*, 552 S.W.2d 99, 102-03 (Tex. 1977) (holding that the imposition of a fine by statute foretells the level of duty owed to parties specifically protected by such statute). See generally, William L. Prosser, *Contributory Negligence as Defense to Violation of a Statute*, 32 MINN. L. REV. 105 (1948).

²⁵ *Continental Oil Co. v. Simpson*, 604 S.W.2d 530 (Tex. Civ. App.-Amarillo 1980, writ ref'd n.re.). In *Simpson*, the survivors of a truck driver brought a wrongful death action against the consignee. The judge found that the defendant had breached a duty by not complying with the terms of a tariff rule promulgated by the railroad commission and rendered judgment for the plaintiffs. *Id.* at 533. On appeal, the lower court's decision was reversed and rendered upon the determination that the tariff was not intended to protect the class of persons to which the decedent belonged. *Id.* at 536.

With regard to imposing a duty based on administrative regulations, the *Simpson* court noted:

Most of the authorities speaking to the negligence per se rule address its application to a legislative enactment. But, inasmuch as administrative rules and regulations ordinarily are construed like statutes, *Lewis v. Jacksonville Build. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976), the rules of construction which apply to statutes apply with equal force to administrative rules and regulations. *Texarkana & Ft. S. Ry. Co. v. Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S.W.2d 284, 287 (1932). Hence, although most of the authorities hereafter cited for rules of construction speak of statutes, the cita-

the causal connection between the violation and the injury to the plaintiff, and, possibly, defenses of contributory negligence and assumption of the risk.²⁶

C. DUTY OF FAA AVIATION SAFETY INSPECTORS AND DESIGNATED FLIGHT EXAMINERS

Prior to *Hayes*, no court had imposed a duty on aviation safety inspectors or designated flight examiners for the safety of a flight test. The FAA's regulation delineating the status of FAA inspectors and flight examiners appeared to place the responsibility for the safety of the flight with the pilot-applicant, unless the examiner affirmatively accepted the responsibility.²⁷ The regulation stated the status of the examiners as follows:

An FAA inspector or other authorized flight examiner conducts the flight test of an applicant for a pilot certificate or rating for the purpose of observing the applicant's ability to perform satisfactorily the procedures and maneuvers on the flight test. The inspector or other examiner is *not pilot in command of the aircraft during the flight test* unless he acts in that capacity for the flight, or portion of the flight, by prior arrangement with the applicant or other person who would otherwise act as pilot in command of the flight, or portion of the flight.²⁸

The declaration that the inspector or flight examiner is not "pilot in command" (PIC) is significant because of the responsibilities assigned to one in the position of PIC.

The PIC generally has the ultimate responsibility for

tions are pertinent to, and are given for, the application of the same principles to administrative rules and regulations.

Simpson, 604 S.W.2d at 534. The *Simpson* court indicated that the prime concern in such cases is whether the purpose of the regulation is to improve protection to the class of persons to which the injured party belongs, and that the determination is based on the agency's intent. *Id.*

²⁶ See generally W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36 (5th ed. 1984) (discussing standard of conduct required of a reasonable person).

²⁷ 14 C.F.R. § 61.47 (1991). For the difference between "inspectors" and "designated flight examiners," see *supra* text accompanying note 3.

²⁸ 14 C.F.R. § 61.47 (1991) (emphasis added).

the safety of the aircraft.²⁹ Considering this assignment of responsibility, along with the FAA regulation stating that the inspector or flight examiner is not the PIC for the test flight, it seems unlikely that a duty should be imposed on the inspectors or examiners to provide for the safety of the flight.

II. *HAYES v. UNITED STATES* - THE COURT'S ANALYSIS

The issue before the court in *Hayes* was whether the FAA aviation safety inspector had a duty with regard to the safety of the flight test. The FAA argued that the aviation inspector was merely to "observ[e] the applicant's ability to perform satisfactorily the procedures and maneuvers on the flight test."³⁰ The district court found a duty to declare the first attempt at the V1 cut a failure and to disallow a second attempt.³¹ Additionally, the district court found that the inspector had violated an FAA rule prohibiting issuance of flight instructions.³²

The *Hayes* court announced that it would review *de novo* the legal issue of whether Belcher had a duty to ensure the safety of the flight test.³³ In addition, the court indicated that Texas law governed the claim since it was brought under the Federal Tort Claims Act (FTCA),³⁴ which requires application of pertinent state law.³⁵ Texas law applies the normal negligence rules to aviation accidents.³⁶

The *Hayes* court indicated two possible sources of a

²⁹ 14 C.F.R. § 91.3 (1991). The glossary accompanying the notice and invitation to comment on then-proposed § 61.47 defined "pilot in command" as follows: "'Pilot in command' means the pilot responsible for the operation and safety of an aircraft during flight time." 37 Fed. Reg. 6012 (1973) (codified at 14 C.F.R. § 61.47) (proposed Mar. 23, 1973)).

³⁰ *Hayes*, 899 F.2d at 443.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 443 n.4.

³⁵ *Id.* at 443.

³⁶ *Brooks*, 695 F.2d at 987.

legal duty: the general common law duty of due care and a duty arising from statute.³⁷ The court emphasized the statutory duty and noted that the district court had found that it was Belcher's duty to prohibit a second attempt based on "FAA regulations, orders, procedures, and official policies."³⁸

The FAA argued to the court of appeals that, even if Belcher violated regulations, and even if the regulations imposed a standard of conduct, the regulations could not be used as a basis for liability since they were not designed to protect the safety of those participating in the flight examination. The FAA further argued that the purpose of the relevant regulations was to determine the eligibility of the applicant for the type rating sought and that the safety of the plane was solely the responsibility of the pilot and copilot.³⁹

In response, the *Hayes* court stated, without a citation, that the "voluminous record" before the court indicated that, at least in part, the regulations were designed to protect the participants' safety during the flight test.⁴⁰ Although the court refrained from stating whether the regulations alone gave rise to a general statutory duty in tort, it held that "Texas law clearly impose[d] a duty on the inspector or designated flight examiner in charge of a flight test to conduct a test with due care for the safety of those operating the aircraft under his direction."⁴¹

The court also alluded to a duty arising to some degree from the common law duty of due care. While not reaching the question of whether Belcher's violations consti-

³⁷ *Hayes*, 899 F.2d at 443-44.

³⁸ *Id.* at 444. The court indicated that the relevant regulations, orders, and policies were contained in the following: 14 C.F.R. § 61.43; 14 C.F.R. § 61 App. A; F.A.A. Order 8710.4; The Southwest Supplement to F.A.A. Order 8710.4; and Advisory Circular 61-77. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* The FAA did not comment on the provision, § 61.47, when proposing the rule or when announcing it in final form. See 37 Fed. Reg. 6012 (1973) and 38 Fed. Reg. 3166 (1973). Section 61.47 has not been amended since its introduction in 1973.

⁴¹ *Hayes*, 899 F.2d at 444.

tuted negligence per se, the court indicated that the regulations supplied the standard of competence required to execute a VI cut safely, and that Belcher should have foreseen the danger posed by a second attempt. Therefore, the court found a duty on the part of Belcher to order Yates not to attempt a second VI cut.⁴²

The *Hayes* court next addressed the FAA's argument that the inspector or flight examiner could be no more than an observer since the FAA regulation explicitly stated that the examiner was not the PIC.⁴³ Section 61.47 states that "[t]he inspector or other examiner is not pilot in command of the aircraft during the flight test."⁴⁴ The court acknowledged that typically there is only one PIC, who is ultimately responsible for the safety of the flight. The court declared, however, that, in the event of a flight test, the participants shared the responsibility of the PIC for the safety of the flight.

The court explained that, because the pilot applicant's abilities are in doubt during the flight test, the flight examiner, who is usually the copilot, must assume certain duties of the PIC.⁴⁵ The court further explained that when the examiner delegated the duty of copilot to a safety pilot, a total of three people shared the duty of PIC.⁴⁶ The *Hayes* court, however, acknowledged some difficulty with its position.⁴⁷

The Fifth Circuit recognized that section 61.47, on its face, seemed to suggest an alternative interpretation.⁴⁸ The court explained that the regulation itself ignored the

⁴² *Id.* The *Hayes* court noted the directive of AC 61-77 that "[a]ny procedure or action, or lack thereof, which requires the intervention of the examiner to maintain safe flight will be disqualifying." This language was significant since the record indicated that Hayes had intervened in the first VI cut. Under the regulation, Yates should have failed the flight test automatically when Hayes intervened.

⁴³ 14 C.F.R. § 61.47 (1991).

⁴⁴ *Id.*

⁴⁵ *Hayes*, 899 F.2d at 445.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* The court said, "We acknowledge that 14 C.F.R. § 61.47 is susceptible in some measure to an interpretation that would contradict our conclusion." *Id.*

special situation created by a flight test.⁴⁹ The Fifth Circuit indicated that the regulation merely reinforced that Yates was PIC for purposes of the flight test and therefore was ultimately responsible for the safety of the aircraft; however, the fact that she was PIC did not relieve Belcher of all duties normally placed on the PIC. The court noted that Yates' unproven abilities required Belcher to assume some of the duties of PIC, and further, that Belcher made decisions as to "what, where, when, and how they would fly."⁵⁰ The court placed the duty to act as Yates' backup on Hayes. Thus, all three shared duties.⁵¹

Because the three participants shared the duties and responsibilities, the court said that there was a need to explain before takeoff what the roles of the crew members would be during the test flight.⁵² The court indicated that Belcher failed to brief the parties on the details of the test and that such briefing was his duty as the director of the flight. The court also emphasized Belcher's position of "significant control responsibility."⁵³

The *Hayes* court noted that the control aspect of the case distinguished it from *Shankle v. United States*.⁵⁴ In

⁴⁹ *Id.* The court stated:

On its face, the provision seems to support the government's contention that Belcher cannot be held liable for failing to direct the test in a safe manner. The argument would be that if the inspector is not the pilot in command during a flight test, and if the pilot in command is ultimately responsible for the safety of the plane, then the inspector cannot be responsible for failing to preserve safety. . . .

Once again, this logic ignores the special situation of the flight test.

Id. at 445-46.

⁵⁰ *Hayes*, 899 F.2d at 446.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 796 F.2d 742 (5th Cir. 1986). In *Shankle*, two planes, a Citabria and a Stearman, crashed on Randolph Air Base. On the day of the crash, a colonel who commanded a squadron on the base saw the two planes at a nearby civilian airport and had taken a ride in the Stearman. When the civilians explained their plan to make a formation flight near the base, they were told not to cross the active runway and to contact Randolph's tower before approaching the base. The two planes contacted the tower and flew over the base but crossed over the active runway. Shortly thereafter, they crashed, perhaps distracted by a T-37 that had to take evasive action on final approach to landing on the active runway. The district

Shankle, the Fifth Circuit reversed the holding of the district court and found that the government was not liable for an aviation accident precipitated by a formation flight of two civilian aircraft across a military base.⁵⁵ The court reasoned that the government had no duty to control the actions of others unless they were under the "control" of the government.⁵⁶ The *Hayes* court distinguished the case at hand from *Shankle* on grounds that Belcher was in control of the flight test and directed maneuvers of the test.⁵⁷

The Fifth Circuit stated that Belcher was responsible for the plane and was the director of the flight and crew.⁵⁸ Because of his position as director, and the control that accompanies that position, he had a duty to direct the flight with due regard for its safety.⁵⁹ The court characterized the government's no-duty argument as a "legal technicality which [was] contrary to reality and common sense."⁶⁰

The *Hayes* court next addressed the government's argument that, even if there was a duty, there was no breach of that duty because Belcher had reasonably relied on Hayes, as safety pilot, to serve as back-up to Yates in case she erred. Once again, the court indicated that this argument failed to take into account the nature of the flight test.⁶¹ The court explained that, during the flight test, the participants shared the responsibility and duties of PIC.⁶² The safety pilot is not to interfere, if at all possible, with the test of the applicant's ability. The safety pilot's duty not to interfere combined with the knowledge, derived from the first attempted V1 cut, that Yates probably

court found the government negligent in approving the flight, but the Fifth Circuit reversed because the Air Force officer did not have "control" and did not have a legal duty to protect plaintiffs from the risk they took. *Id.* at 743-47.

⁵⁵ *Id.* at 747.

⁵⁶ *Id.* at 746-47.

⁵⁷ *Hayes*, 899 F.2d at 446.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 446-47.

⁶¹ *Id.* at 447.

⁶² *Hayes*, 899 F.2d at 447.

would fail the second attempt, made any reliance on Hayes to rescue them from Yates' mistakes unreasonable.⁶³

III. PRACTICAL IMPLICATIONS

Hayes unequivocally holds that FAA safety inspectors and designated flight examiners have a duty with regard to the safety of the test flight and share the responsibilities of PIC with the pilot-applicant,⁶⁴ despite FAA regulations that would seemingly indicate otherwise. The court's decision will cause complications on flight tests because the participants all share PIC responsibilities. No longer will there be one person responsible for the ultimate safety of the flight. In addition to the possible confusion and complications of sharing PIC duties, the sharing also will make the flight inspector's or flight examiner's decision more difficult.

The flight examiner must evaluate the applicant's ability to assume generally the role of PIC. This evaluation requires the examiner to focus not only on the performance of the maneuvers but also on the applicant's judgment as it relates to the knowledge needed to be PIC.⁶⁵ Because the pilot-applicant is not the sole PIC for purposes of the test flight, evaluation of the applicant's ability to assume that role alone will be difficult. Additionally, the flight examiner's focus on the safety of the flight test and sharing of duties may detract from the examiner's ability to evaluate the applicant's skills as PIC.

In imposing a duty on the examiner or inspector, the

⁶³ *Id.* Having found a duty, the court then found a breach of the duty and the ensuing damage as the proximate cause. The court also agreed with the district court's finding that Hayes was 45% negligent. The final argument by the FAA was that Belcher's decision was discretionary under 28 U.S.C. § 2680(a). The court dismissed this argument and affirmed the district court. *Id.* at 448-51.

⁶⁴ *Id.* at 445-46.

⁶⁵ See FAA Advisory Circular AC 61-77 (1991). AC 61-77 states in relevant part: "In addition to the specific factors considered for a particular maneuver or procedure, the examiner will evaluate the applicant's performance on the basis of the judgment, knowledge, accuracy, and smoothness he displays." *Id.* (cited in *Hayes*, 899 F.2d at 444 n.7); see *supra* text accompanying note 5.

court placed emphasis on the unique nature of the test flight, particularly the unproven ability of the pilot applicant. The court's analysis does not, however, consider the function of flight instruction. During flight instruction, the student learns to assume the duties of PIC. Furthermore, the flight instructor is only to recommend students for flight tests who have proven themselves capable of assuming the responsibilities of PIC. FAA regulations require the instructor to state that he prepared the student for the test and that the student is competent to pass the test.⁶⁶ Thus, the student is not as unproven as the court suggests.

Despite FAA regulations that indicate that the inspector or examiner is not the PIC for the flight test, the *Hayes* court imposed some PIC duties on the flight inspector based on the unique nature of the flight test. The court's decision ignored the balance of the FAA's system for preparing new pilots to assume the duties of PIC and has altered this balance by focusing on one aspect of the system, the flight test.

IV. CONCLUSION

FAA regulations seemed to make it clear that "[t]he inspector or other examiner [was] not pilot in command of the aircraft during the flight test."⁶⁷ Nevertheless, the *Hayes* court found that some of the duties of PIC fell on the flight inspector and that a duty existed for purposes of the negligence claims under Texas law.⁶⁸ The *Hayes* court did, however, acknowledge that its interpretation was susceptible to debate and that, on the face of the provision, it

⁶⁶ 14 C.F.R. § 61.39 (1991). The regulation in relevant part states:

To be eligible for a flight test for a certificate, or an aircraft or instrument rating issued under this part, the applicant must . . . [h]ave a written statement from an appropriately certificated flight instructor certifying that he has given the applicant flight instruction in preparation for the flight test within 60 days preceding the date of application, and finds him competent to pass the test

Id. (emphasis added).

⁶⁷ 14 C.F.R. § 61.47 (1991).

⁶⁸ *Hayes*, 899 F.2d at 451.

appeared that none of the duties of PIC could be imposed on the flight inspector.⁶⁹

The court stated that the flight inspector or designated flight examiner was the director of the flight and crew and had a duty to conduct the test with due regard for the safety of the flight test participants.⁷⁰ The court primarily found the duty to arise from regulations that the court said, without reference, "were designed at least in part to protect the participants' safety."⁷¹ In finding a duty on the examiner or inspector, the court placed emphasis on the unique nature of the test flight, particularly pointing to the unproven ability of the pilot applicant.

The court's analysis does not, however, consider the function of flight instruction or the need to test the applicant's ability to function as the sole pilot in command. By not taking into account the entire FAA system for training new pilots, the *Hayes* court has altered the balance in the system.

Robert H. Johnston, III

⁶⁹ *Id.* at 445.

⁷⁰ *Id.* at 451.

⁷¹ *Id.*

Current Literature

