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# INSTRUMENT FLIGHT RULES—THE LIABILITY OF THE PILOT

DAREN T. JOHNSON\*

## INTRODUCTION

PRIOR TO A consideration of the liability of a pilot as that subject is related to instrument flight rules (IFR), it is useful to consider the basic question of whether there is anything *unique* about instrument flight rules which enlarge a pilot's liability for damages. In a very basic sense, a violation of an instrument flight rule is a violation of a Federal Aviation Regulation (FAR). A violation of an instrument flight rule which proximately causes compensable damages can lead to liability by the same judicial route as violation of any other FAR. As documented below, the FAR's are the implementation of the Federal Aviation Act of 1958<sup>1</sup> and their purpose is "to promote safety of flight of civil aircraft."<sup>2</sup> Their violation is equivalent to violation of a statute, which is equated with negligence per se or a presumption of negligence, depending on the jurisdiction whose laws are applied.

A pilot who accepts an IFR clearance is required to fly his aircraft in conformity with all applicable rules and regulations. Fundamentally, flight under the instrument flight rules involves navigating an aircraft on specified courses and altitudes. These are designated on special charts or maps carried in the aircraft, or stated to the pilot by an air traffic controller who is "working the flight." The controller's job includes directing pilots flying under instru-

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<sup>1</sup> 72 Stat. 731, as amended, 49 U.S.C. §§ 1301 *et seq.* (1976), formerly Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 [hereinafter cited as the Act].

<sup>2</sup> 49 U.S.C. § 1421(a) (1976); *Banko v. Continental Motors Corp.*, 373 F.2d 314, 315-16 (4th Cir. 1966); *see also Freeman v. United States*, 509 F.2d 626, 630 (6th Cir. 1975); *Wildwood Mink Ranch v. United States*, 218 F. Supp. 67, 70-71 (D. Minn. 1963).

ment flight rules to fly at altitudes and on courses that will ensure safe separation from terrain and other known aircraft. Listening to the rapid stream of directives from a controller who is simultaneously supervising the movement of numerous aircraft is almost like listening to a foreign language. It is also a frequent source of misunderstanding and confusion to instrument rated pilots, some of whom are strangely too shy or too vain to insist upon clarification from the controller. Regardless, the spoken directives of the air traffic controller are as binding on the pilot's conduct as if they were printed statutes.

Theoretically, there would never be an accident during an instrument flight conducted by a qualified pilot in a well maintained aircraft flying in conformity with all applicable instrument flight rules under the direction of an experienced air traffic controller. Although the reality is actually not far off that ideal, experience shows that catastrophic midair collisions and even crashes into the sides of mountains have occurred during instrument flight operations involving qualified pilots, experienced controllers, and well-maintained aircraft. When these tragedies have occurred, they have created for the courts many legal questions, such as: what assumptions can a pilot make from the fact that he has been given an IFR clearance by air traffic control; and when does negligent conduct of an FAA employee amount to a superseding cause that insulates the pilot (or his estate) from liability. Issues unique to flying under instrument flight rules have also arisen in situations where a pilot operating an aircraft in controlled airspace with an IFR clearance unilaterally decides to "cancel IFR" without communicating his intention to do so to air traffic control, and thereafter crashes into terrain at altitudes below the minimum required under instrument flight rules. This article is certainly not intended to itemize all of the issues regarding pilots' liability when flying under instrument flight rules. It is, at most, a reference to some of the more common issues.

#### INSTRUMENT FLIGHT RULES AND THE SUBJECT OF PILOTS' LIABILITY

The pilot necessarily plays a vital role in assuring the safe passage of his aircraft and passengers, but his ability to comply with

the demands of this role may be greatly diminished when operating in the weather conditions for which flight in conformity with instrument flight rules is mandatory.<sup>3</sup> In an effort to minimize the potential dangers of flight, particularly under adverse weather conditions, the Federal Aviation Administration (FAA) has promulgated a pervasive scheme of FAR's with which all pilots are obliged to comply.<sup>4</sup>

Title VI of the Act "establishes a system of safety regulations of civil aeronautics"<sup>5</sup> and authorizes the Administrator to prescribe "[s]uch reasonable rules and regulations . . . [as] necessary to provide adequately for . . . safety in air commerce."<sup>6</sup> The FAR's are promulgated under that authority and have the force and effect of law.<sup>7</sup> The Act itself makes it unlawful to operate an aircraft in violation of those regulations.<sup>8</sup>

When an aircraft is involved in an accident and a suit to recover damages is instituted, the claim is almost invariably made that the accident was proximately caused by violation of one or more FAR's. In these cases, the courts have consistently construed the FAR's as being "safety regulations"<sup>9</sup> that are relevant to the standards of care of negligence law.

The general rules of negligence law apply to aircraft accident cases in civil litigation.<sup>10</sup> Most courts have held that the violation of a safety regulation constitutes negligence *per se*, and this principle has been applied with respect to violations of FAR's, notwithstanding what might seem to be rather harsh results.<sup>11</sup>

In fact, the courts have applied some extremely rigorous in-

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<sup>3</sup> See *United States v. Schultetus*, 277 F.2d 322, 328 n.3-4 (5th Cir. 1960).

<sup>4</sup> See 49 U.S.C. § 1430(a)(5) (1976).

<sup>5</sup> 1 L. KREINDLER, *AVIATION ACCIDENT LAW* § 10.01[1] (rev. ed. 1974) [hereinafter cited as L. KREINDLER].

<sup>6</sup> 49 U.S.C. § 1421(a)(6) (1976).

<sup>7</sup> *United States v. Schultetus*, 277 F.2d at 327; *United States v. Airways Service, Inc.*, 429 F. Supp. 843, 845 (N.D. Iowa 1977).

<sup>8</sup> 49 U.S.C. § 1430(a)(5) provides, in part:

"It shall be unlawful—

"(5) For any person to operate aircraft in air commerce in violation of any . . . regulation . . . of the Administrator under this subchapter; . . ."

<sup>9</sup> See note 1, *supra*.

<sup>10</sup> *Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972); *Franklin v. United States*, 342 F.2d 581, 584 (7th Cir. 1965); *United States v. Schultetus*, 277 F.2d at 325.

<sup>11</sup> See, e.g., *Bibler v. Young*, 492 F.2d 1351, 1358-59 (6th Cir. 1974).

terpretations to the FAR's. *United States v. Miller*<sup>12</sup> is certainly a case in point. That case involved a right-of-way dispute. Defendants alleged that plaintiffs' decedent (Miller) had been guilty of contributory negligence in failing to give way as prescribed, with a fatal midair collision resulting. Plaintiffs contended that the right-of-way rules were inapplicable because, by their own terms, they "do not apply when, for reasons beyond the pilot's control, aircraft cannot be seen due to restrictions of visibility."<sup>13</sup> Plaintiffs based their contention on the trial court's specific finding that "Miller could have maintained a reasonable lookout while approaching the point of impact and not have seen the [other aircraft] because of his limited visibility and the camouflage effect of the background."<sup>14</sup>

Faced with this argument, the Ninth Circuit held that

'beyond the pilot's control' and 'cannot be seen' appear to contemplate that only physical impossibility, due to such factors as weather or terrain, should excuse application of the right-of-way rules. Had mere difficulty of recognition or perception been intended as the relevant criterion, more appropriate language would have been used.<sup>15</sup>

With particular pertinence to the legal effects of FAR's generally, the *Miller* court held:

It may be that in order to have seen the [other aircraft] against this background Miller would have had to look thoroughly and diligently in the area in which [it] was flying. . . . We believe that this is the standard imposed by the rules, and it is not for the courts to say that the standard is too exacting.<sup>16</sup>

In this consideration, it should be noted that the regulations provide<sup>17</sup> and the courts have held<sup>18</sup> that in case of an emergency,

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<sup>12</sup> 303 F.2d 703 (9th Cir. 1962).

<sup>13</sup> *Id.* at 707, citing a note then appearing under 14 C.F.R. § 60.14 (1977).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 708.

<sup>17</sup> 14 C.F.R. § 91.3(b) (1977) provides:

"In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart . . . to the extent required to meet that emergency."

<sup>18</sup> *Easten Air Lines, Inc. v. United States*, 110 F. Supp. 492, 498 (D. Del. 1952), *aff'd*, 207 F.2d 560 (3d Cir. 1953).

the pilot may deviate from the regulations. However, each pilot who does so is accountable and, upon request, must file a written report of the deviation with the Administrator.<sup>19</sup> Unfortunately for some litigants, the pilot who deviates from the regulations may not be around later to testify that his alleged violation of one or more FARs was an exercise of "emergency powers" under justifiable circumstances.

In what Dean Prosser has labeled "a considerable minority" of jurisdictions<sup>20</sup> which do not conclusively equate a statutory violation with negligence *per se*, the courts have treated FAR violations as evidence that would sustain a finding of negligence by the trier of fact.<sup>21</sup> Evidence that a pilot complied with the applicable FAR's is admissible on the question of whether he acted "reasonably"<sup>22</sup> but such evidence does not conclusively establish the absence of negligence.<sup>23</sup>

At this point it is appropriate to consider some specific issues and aspects of cases concerning pilot liability. Most of these cases involve flight conducted under instrument flight rules; some do not. As was observed in the introductory remarks, all applicable regulations are relevant, whether or not they are within the grouping described as "instrument flight rules."

In a number of more recent cases, the contention has been made that a given pilot's failure to comply with applicable FAR's was excused because it was a direct result of negligence by government personnel in providing incomplete or inaccurate information. The courts have noted in determining appropriate standards of care that the relation between the pilot and the air traffic controller

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<sup>19</sup> 14 C.F.R. § 91.3(c) (1977).

<sup>20</sup> W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 36 (4th ed. 1971).

<sup>21</sup> See L. KREINDLER, note 6 *supra*, at § 10.02[2][b], n.37.

In fact, unless there is a real threat that the jury might be "diverted from its main task by indulging in an 'extended' examination" of the proffered regulations, typewritten copies of applicable regulations should be admissible in evidence like any other exhibit. *Merrill v. United Air Lines*, 177 F. Supp. 704, 705 (S.D.N.Y. 1959).

Compare *Merrill and Citrola v. Eastern Air Lines, Inc.*, 264 F.2d 815, 817 (2d Cir. 1959) (a relatively small number of regulations sought to be admitted) with *Lobel v. American Air Lines, Inc.*, 205 F.2d 927, 931 (2d Cir. 1953) (attempt to admit the entire regulations manual).

<sup>22</sup> See L. KREINDLER, note 6 *supra*, at § 10.02[6], and cases cited therein.

<sup>23</sup> *Id.*

is unique.<sup>24</sup> In the effort to enhance aviation safety, concurrent duties have been placed upon both,<sup>25</sup> that is, "[i]n any given case, one, both, or neither could be guilty of a breach of the duties imposed."<sup>26</sup> This situation of concurrent responsibilities has, at times, been labeled a "paradox."<sup>27</sup> Whether the pilot or controller will be found "more" responsible seems to depend on the ability of the pilot to recognize and to appreciate fully a danger without the assistance of air traffic control.<sup>28</sup> Although the pilot-in-command is deemed to be "directly responsible for, and is the final authority as to, the operation of [the] aircraft,"<sup>29</sup> that direct responsibility may be significantly qualified where the government's negligence is involved.

This was an issue in *Hartz v. United States*,<sup>30</sup> where a controller failed to warn a pilot of the hazard of wing tip vortices from a large jet which had recently departed. The controller cleared the pilot for take off, and a fatal crash occurred shortly thereafter when the invisible but lethal vortices were encountered. The court held that where, as here, the pilot had a "limited ability" to perceive the hazard ("to judge movement of [other aircraft] on the field"), as a result of which he never knew nor should "be held to know all those facts which were material," the sole liability was that of the government whose controller failed to warn of the hazard of which he was "[c]learly . . . the better one qualified" to assess.<sup>31</sup> The government's liability (as distinguished from its con-

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<sup>24</sup> *Dickens v. United States*, 378 F. Supp. 845, 854 (S.D. Tex. 1974), *aff'd*, 545 F.2d 886 (5th Cir. 1977).

<sup>25</sup> *Spaulding v. United States*, 455 F.2d at 226; *United States v. Miller*, 303 F.2d 703, 711 (9th Cir. 1962).

<sup>26</sup> *United States v. Miller*, 303 F.2d at 711.

<sup>27</sup> *Richardson v. United States*, 372 F. Supp. 921, 925 (N.D. Cal. 1974).

<sup>28</sup> "[A] balancing process is involved—the vantage point of the pilot will be weighed against the Tower's superior knowledge or awareness of the pilot's danger." *Id.* at 926. *See also Black v. United States*, 441 F.2d 741, 745 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971), where the court stated, "[T]he failure of the operator [a Flight Service Station attendant] to warn the pilot of the presence of the storm in his path cannot be regarded as a continuing proximate cause after the pilot himself discovered its presence, appreciated the danger, and decided to fly ahead into it."

<sup>29</sup> 14 C.F.R. § 91.3(a) (1977).

<sup>30</sup> 387 F.2d 870 (5th Cir. 1968); *see also Spaulding v. United States*, 455 F.2d at 226; *Dickens v. United States*, 378 F. Supp. at 854.

<sup>31</sup> 387 F.2d at 873.

sent to be sued) is grounded upon basic tort principles imposing on one who undertakes a task the duty to perform it in a non-negligent manner. Since the government, through its air traffic controllers and Flight Service Station personnel, has undertaken to supply much of the information pilots require to conduct flight operations safely, there can be liability on the part of the government when this undertaking is done negligently.<sup>32</sup>

The duty of the air traffic controller is established by government regulation. The FAA publishes manuals for the guidance of air traffic controllers, copies of which can be ordered from the FAA. The air traffic controller is "required to give all information and warnings [as] specified in his manuals."<sup>33</sup> This requirement is in the nature of a minimum standard in determining whether the controller was negligent. The courts have expressly disapproved "the view that the duty of an FAA controller is circumscribed within the narrow limits of an operations manual and nothing more."<sup>34</sup>

The government's duty to provide certain information does not obviate the pilot's duty to "exercise ordinary care for the safety of his passengers and for his own safety under the circumstances which confront him."<sup>35</sup> The applicable regulation mandates that "[e]ach pilot in command shall, before beginning a flight, familiarize himself with all available information concerning that flight."<sup>36</sup>

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<sup>32</sup> *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 64-65 (1955); *Spaulding v. United States*, 455 F.2d at 226.

<sup>33</sup> *Spaulding v. United States*, 455 F.2d at 226.

<sup>34</sup> *Hartz v. United States*, 387 F.2d at 873.

For example, warnings beyond those prescribed by the aviation manuals must be given when danger is immediate and extreme, *United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967); when danger is known only to federal personnel, *United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964); when the controller is better qualified than the pilot to evaluate the actual situation, *Hartz v. United States*, 387 F.2d 870 (5th Cir. 1968) [*See also Gill v. United States*, 429 F.2d 1072, 1077 (5th Cir. 1970)]; or when the controller is able to gather more information or make more accurate observations than the pilot. *Hochrein v. United States*, 238 F. Supp. 317 (E.D. Pa. 1965).

*Spaulding v. United States*, 455 F.2d at 226 n.8.

<sup>35</sup> *In Re Air Crash Disaster at New Orleans (Moisant Field), Louisiana*, on March 20, 1969, 422 F. Supp. 1166, 1178 (W.D. Tenn. 1975), *aff'd*, 544 F.2d 270 (6th Cir. 1976). *See also* notes 53-76, *infra*, and accompanying text.

<sup>36</sup> 14 C.F.R. § 91.5 (1977).

For flight under instrument flight rules, this information *must* include "weather forecasts, fuel requirements, [alternate airports] available if the planned flight cannot be completed, and any known traffic delays of which he has been advised by ATC."<sup>37</sup> Air traffic controllers, without making inquiry, have a "right to rely upon the assumption that the pilot knows and will abide by all applicable [FAR's]," including the one just quoted.<sup>38</sup>

In this context, the United States district court decision in *Todd v. United States*<sup>39</sup> is informative. The court in *Todd* found the government negligent in giving a pilot flying under instrument flight rules a clearance which afforded him discretion to descend from a "cruise altitude" in mountainous terrain without determining the plane's position or warning him of possible obstructions should he descend in certain areas along his designated route. The greater significance of the case lies in the finding that the pilot was contributorily negligent, and that the government's negligence was merely concurrent, so that under applicable state law recovery was totally barred.

The court held that the pilot's

conduct cannot be justified by arguing either that the ATC cruise clearance authorized an avoidance of [FAR 91.119(a) pertaining to minimum terrain clearance altitudes], or that the ATC failed to warn him of the dangers of a descent in the vicinity of Cheaha Mountain. The clearance simply granted him a measure of discretion to be exercised in accordance with standards of due care and applicable regulations.<sup>40</sup>

The court concluded that the evidence compelled one of two conclusions: (1) that the pilot recklessly commenced descent with little or no visibility in known mountainous terrain; or, (2) through a lack of preflight preparation, he found it necessary to blindly descend in unfamiliar surroundings without any communication of his predicament to air traffic control. Either conclusion required

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<sup>37</sup> *Id.*

<sup>38</sup> *Baker v. United States*, 417 F. Supp. 471, 486 (W.D. Wash. 1975).

<sup>39</sup> 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977). The writer considers the *Todd* case to be must reading for its statements of numerous principles of law applicable to liability in relation to instrument flight rules, and as an excellent example of judicial handling of the interrelated duties of the government and pilots.

<sup>40</sup> *Id.* at 1293.

a finding of negligence. The court reasoned that notwithstanding the government's aforementioned negligence, had the pilot "been exercising proper care in his flight . . . he would have been aware of this potential hazard and would not have descended from the 4000 foot cruise clearance."<sup>41</sup>

Most appellate decisions adopt a hard line in emphasizing the duties of a pilot to acquaint himself with potential hazards in advance, rather than countenancing blind reliance on air traffic control or flight on the basis of unverified or unwarranted assumptions. For instance, a pilot who had been told by air traffic control to expect visual flight rules (VFR) weather conditions was held to have had a duty to obtain additional information directly from the Weather Bureau where he had actual knowledge from his own recent observations of conditions indicating he would probably encounter adverse weather on his intended route.<sup>42</sup> Likewise, a pilot in flight who became aware of potential icing conditions was held to have had a duty to inquire as to whether such hazards existed, and, if so, for how long they were expected to continue.<sup>43</sup> This point is especially emphasized where the pilot knows he is entering weather conditions which require that flight be conducted under instrument flight rules.<sup>44</sup>

As with most things, there are few absolutes. A number of well reasoned cases recognize that there are some weather conditions and air traffic hazards which cannot be fully appreciated by the pilot without the assistance of air traffic control. These cases identify a number of circumstances and fact situations in which the government's conduct is a superseding cause of the accident, so that the pilot is exonerated from liability. The previously cited case of *Hartz v. United States*,<sup>45</sup> in which the government had full responsibility for a crash resulting from the invisible wing tip

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<sup>41</sup> *Id.* at 1294.

<sup>42</sup> *DeVere v. True-Flite, Inc.*, 268 F. Supp. 226, 228 (E.D.N.C. 1967).

<sup>43</sup> *Somlo v. United States*, 274 F. Supp. 827, 839 (N.D. Ill. 1967), *aff'd*, 416 F.2d 640 (7th Cir. 1969), *cert. denied*, 307 U.S. 989 (1970). "Blind reliance on lack of information, assuming he [the pilot] did so rely, could scarcely absolve him from the affirmative duty of seeking information that was readily available on inquiry . . ." *Black v. United States*, 441 F.2d at 744.

<sup>44</sup> *Somlo v. United States*, 274 F. Supp. 827, 839 (N.D. Ill. 1967), *aff'd*, 416 F.2d 640 (7th Cir. 1969), *cert. denied*, 307 U.S. 989 (1970).

<sup>45</sup> 387 F.2d 870.

vortices, is a case in point. With respect to questions of concurrent government and pilot negligence, the case of *Gill v. United States*<sup>46</sup> is also worth reading. That case involved little more than an appellate court affirmation of findings of the trial judge on the liability issues.<sup>47</sup> It contains, however, a good treatment of "the government's duty to furnish accurately weather information in its possession once it has undertaken to supply such information."<sup>48</sup> Strictly speaking, the *Gill* case does not adjudicate a question of a pilot's concurrent negligence, and it involves some verbal gymnastics as to "a" and "the" proximate cause which probably has defense counsel in the case still blinking in wonderment. Cases dealing with concurrent negligence stress the fact that intervening concurrent negligence by the government does not exculpate the pilot. The pilot's liability for his own negligence ordinarily continues, and may, in some instances, supersede the negligence of the government.<sup>49</sup>

As mentioned at the outset, one of the problem areas pertains to the assumptions a pilot may make from the fact he has been given a clearance by air traffic control. The contention that a

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<sup>46</sup> 429 F.2d 1072 (5th Cir. 1970), *aff'd after remand*, 449 F.2d 765 (5th Cir. 1971).

<sup>47</sup> The Fifth Circuit agreed with the trial court that the air traffic controller's furnishing inexact, incomplete weather information constituted negligence, but remanded for a finding on the pilot's negligence. A ruling that the pilot, too, was negligent would have entitled the government to a one-half reduction of the judgment against it. On remand, however, the trial court found the government's negligence to be the sole proximate cause of the accident. The Fifth Circuit affirmed that decision. 449 F.2d 765 (5th Cir. 1971).

<sup>48</sup> 429 F.2d at 1077.

<sup>49</sup> For example, in *Black v. United States*, 441 F.2d 741 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971), the court held that any negligence on the part of the FAA operator in failing to warn the pilot of a storm in his path was superseded by the negligence of the pilot in deciding to proceed into the storm after observing the poor visibility conditions. *Id.* at 745. Likewise, in *Rowe v. United States*, 272 F. Supp. 462, 471 (W.D. Pa. 1964), which was relied upon and followed in *Black*, the court stated:

The intervening act of the unqualified pilot in deliberately descending into a solid overcast was not only reckless conduct, but may be regarded as so highly extraordinary as to become a superseding cause of the deaths of his passengers, Rowe and Smith. We do not think that any employees of defendant could reasonably have foreseen such conduct on the part of the pilot.

See also *Neff v. United States*, 420 F.2d 115 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1066 (1969); *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

pilot has no liability because he was relying on a clearance as an assurance that weather conditions were "safe" for conducting a flight procedure authorized by that clearance have, for the most part, fallen on deaf ears. Courts have consistently held that a clearance is permissive in nature,<sup>50</sup> and represents only that *existing* conditions meet FAA minimums.<sup>51</sup> A clearance does not in any way relieve the pilot of his continuing duty to act in the best interests of the safety of his aircraft and passengers<sup>52</sup> and to avoid operating an aircraft in a careless or reckless manner. A pilot is required to follow his clearance "not blindly, but correlative with his duty to exercise care for his own safety from everything of which he [is] aware."<sup>53</sup> If he perceives that conditions are unsafe for take-off, he must, in the exercise of due care, refuse to take off.<sup>54</sup> If, while in flight, he believes his assigned course is unreasonably hazardous, he is free to reject an assigned heading.<sup>55</sup> Regardless

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<sup>50</sup> See *Allen v. United States*, 370 F. Supp. 992, 1008 (E.D. Mo. 1973).

<sup>51</sup> "When the controller clears a pilot for visual approach he is not certifying that conditions will not change but he is saying that ground visibility then meets the minimum for the method selected." *American Airlines, Inc. v. United States*, 418 F.2d 180, 189 (5th Cir. 1969). See also *Neff v. United States*, 420 F.2d at 120, where the court stated, "[I]t seems clear that no prudent pilot would have construed a clearance for takeoff as implying anything more than the fact that visibility was above specified minimum criteria."

<sup>52</sup> The rules governing the duties of pilots, however, make it clear that none of those duties are rendered inapplicable merely because a clearance from a tower has been received. It is stated and reiterated that the function of tower personnel is merely to assist the pilot in the performance of the duties imposed, not relieve him of those duties.

*United States v. Miller*, 303 F.2d at 710-11. See also *Allen v. United States*, 370 F. Supp. at 1008.

<sup>53</sup> *Hochrein v. United States*, 238 F. Supp. 317, 319 (E.D. Pa. 1965).

<sup>54</sup> *Neff v. United States*, 420 F.2d 115 (D.C. Cir. 1969), involved the crash of an aircraft immediately after takeoff. Plaintiff's decedent (Neff) was the First Officer of the ill-fated aircraft, and piloted the aircraft during takeoff. The district court found that the United States was negligent in operating the control tower by failing to warn Neff of a thunderstorm on the field at the time he was to take off, and that Neff was not contributorily negligent. The District of Columbia Circuit reversed the decision as to the contributory negligence of Neff, finding that taking off "into an obvious thunderstorm constituted contributory negligence as a matter of law," *Id.* at 116, and that "[t]he magnitude of the flight crew's negligence is not materially lessened . . . by the clearance for takeoff which the tower communicated to the crew seconds before the fatal crash." *Id.* at 120.

<sup>55</sup> In *Re Aircraft Disaster at Boston, Mass.*, July 31, 1973, 412 F. Supp. 959, 983 (D. Mass. 1976). There is, in fact, some authority for the proposition that a pilot who encounters hazardous weather conditions *must* alter his course. In

of which type of instrument approach to landing for which he has received clearance, if he encounters visibility below the prescribed minimums, he must immediately execute a missed approach.<sup>56</sup> Air traffic controllers do not have the responsibility for determining whether a given weather situation is "safe for landing";<sup>57</sup> the final decision as to whether to undertake the landing is solely with the pilot in command.

The last area considered in this paper pertains to the situation in which a pilot operating under an instrument flight plan unilaterally decides to "cancel IFR" without communicating his intention to do so to air traffic control. There is now pending in the Superior Court of Los Angeles County a case entitled *Jones v. Jeppesen*<sup>58</sup> in which a jury was previously unable to agree upon a verdict. The case involves a claim by plaintiffs that a pilot who had been cleared for an instrument approach to an uncontrolled airport was justified in flying below the minimum IFR altitudes specified in the vicinity of the airport because he allegedly encountered VFR weather conditions and was thus free to continue flight without conforming to the instrument flight rules. Extensive research by counsel for both sides failed to reveal an appellate decision adjudicating this exact question. Plaintiffs contend that the pilot's communicating to air traffic control his intention to cancel his IFR flight plan was not a literal prerequisite of the relevant FAR's<sup>59</sup> and that a finding that he formed this intent upon encountering VFR conditions would free him of the requirement to follow instrument flight rules. Defendant claims that FAR 91.75<sup>60</sup> clearly prohibits deviation from instrument flight rules until the IFR flight plan is cancelled, and that the Airman's Information Manual<sup>61</sup>

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Black v. United States, 441 F.2d at 744, the court stated, "Good, even fundamental, flying practice dictated the avoidance of the storm front that of a certainty loomed ahead of the pilot. He should have altered or reversed his course, or better still have landed at the nearest suitable airport."

<sup>56</sup> American Airlines, Inc. v. United States, 418 F.2d at 189.

<sup>57</sup> In Re Aircraft Disaster at New Orleans (Moisant Field), Louisiana, on March 20, 1969, 422 F. Supp. at 1178, where the court stated, "[E]ven had Goertz's transmission been considered a clearance, only the pilot can make the decision to land the aircraft. A duty cannot be imposed on a controller on the ground to exercise operational control of the aircraft at decision height."

<sup>58</sup> No. C-62980 (Super. Ct., L.A. Cty. July 25, 1973).

<sup>59</sup> 14 C.F.R. §§ 91.75, 91.83 (1977).

<sup>60</sup> *Id.*, § 91.75.

<sup>61</sup> FAA, AIRMAN'S INFORMATION MANUAL, part I, at 1-58 (1977).

interprets FAR 91.83<sup>62</sup> to require communication. Without such communication, the argument continues, the pilot is required to follow instrument flight rules, including avoidance of flight below IFR altitude minimums. After receiving extensive evidence, including the expert opinion of Richard Shay,<sup>63</sup> the trial judge, Hon. Charles Older,<sup>64</sup> ruled as the law of the case that the pilot under such circumstances is required to conform to all instrument flight rules unless and until he has communicated his intention to cancel IFR either to the nearest FAA Flight Service Station or to air traffic control. Should this question be presented on appeal, it is the writer's opinion that the ruling will be affirmed. In this regard, Richard Shay's observation is highly pertinent:

Especially when one considers how many flights are made pursuant to an IFR clearance in high density traffic areas during VFR weather, if the rules permitted a pilot to deviate from his clearance without first notifying ATC, how could the controllers effect any systematic separation of aircraft? It wouldn't be a system, it would be utter chaos.<sup>65</sup>

#### CONCLUSION

The number of aircraft and the number of pilots flying them are large and increasing. According to FAA statistics published by the Aircraft Owners and Pilots Association (AOPA) as of December 31, 1976, 555,445 persons, excluding students, held Active Airmen Certificates, of whom 20.57 percent were added in 1976.<sup>66</sup> Of this total, 211,364, or 38.05 percent were instrument rated pilots.<sup>67</sup> In 1976 alone, some 31,394 new civilian aircraft were produced in the United States.<sup>68</sup> In the same year, there were 13,654,-

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<sup>62</sup> 14 C.F.R. § 91.83 (1977).

<sup>63</sup> Richard Shay was one of the principal authors of the FAA manual known as "TERPS," which is the United States Standard for Instrument Procedures.

<sup>64</sup> Although Judge Older is best known as the judge who presided over the criminal trial of the so-called "Charles Manson Family," he is a carrier-qualified instrument-rated pilot whose flying experience goes back to World War II when he was one of Chenault's Flying Tigers.

<sup>65</sup> Testimony of Richard Shay, *Jones v. Jeppesen*, No. C-62980 (Super. Ct., L.A. Cty. July 25, 1973).

<sup>66</sup> AOPA, *HANDBOOK FOR PILOTS* (1978). The statistics, for 1976, are the most recent available.

<sup>67</sup> This statistic as to the number of instrument-rated pilots was furnished to the writer by the Public Affairs Office of the FAA in Los Angeles.

<sup>68</sup> *HANDBOOK FOR PILOTS*, note 66 *supra*.

063 "Instrument Operations," which are flight operations conducted under instrument flight rules pursuant to a clearance issued by Air Traffic Control.<sup>69</sup> As the air traffic system grows, so grows the need for greater control of it. The FAA is actively responding to this need, with the emphasis on increasing the areas and instances in which flight in controlled airspace must be authorized by air traffic control, and, increasingly, may be made only by instrument-rated pilots and pursuant to an IFR clearance. The comparatively recent advent of Terminal Control Areas in most metropolitan centers is certainly witness to this change and increasing complexity.

Unfortunately, no amount of sophisticated management is going to eliminate all of the catastrophes which occur in connection with flying. Hopefully the frequency and severity of aircraft accidents will continue to diminish. When they do occur, however, they are very likely to result in damage claims in this increasingly litigious society in which we live. The inherent complexity of this litigation is demonstrated in practically every aircrash case, where all "sides" commonly retain a battery of technical experts whose voluminous tests and testimony are supposedly conducted to answer one short question: what happened? Lawyers handling litigation arising out of aircraft accidents assume a considerable burden. Hopefully the citations gathered here will facilitate that burden to some small extent.

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<sup>69</sup> *Id.*