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GOVERNMENT RESPONSIBILITY FOR DAMAGES IN AIRPLANE CRASH CASES WHEN WEATHER IS A FACTOR

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The federal government has undertaken the task of providing weather information to airplane pilots. In this article Mr. Joseph D. Jamail examines the legal problems that arise when an airplane crashes because of inadequate weather information. His analysis includes discussion of waiver of sovereign immunity in the Federal Torts Claim Act and the exceptions to that waiver, duties of government employees, and preparation for trial of weather-related cases.

DURING the past half century we have witnessed the metamorphosis of air travel from a pioneering effort to a mode of transportation that is commonplace for millions of Americans. Yet, despite the phenomenal advances that have been made in the technology of the industry, airplane crashes, often unexplained, continue to be a cause of concern. This perplexing problem is occurring in increasing numbers each day across the nation. A client may appear in the lawyer's office with the barest of facts, *i.e.* that an immediate relative has perished in a plane crash. Millions of dollars may then depend upon early recognition of the potential liabilities of airport facility operators for an aircraft accident. The lawyer must consider the number of entities that are involved in the operation of an airport. He must also consider the possibility that the employees of an airport facility may testify at the Civil Aeronautic Board's accident investigation hearing, without counsel and without the employer being aware of his potential tort liability. Moreover, by the time the Civil Aeronautic Board

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reports its findings of probable cause, the time for filing notice of claim with governmental entity facility operators may have passed. The stakes are high, the time is short, and an awareness of potential liabilities and defenses is essential.

Various agencies of the United States may be liable under the Federal Tort Claims Act[1] for airport accidents. At most airports the Federal Aviation Agency operates a ground control facility that exercises radio or visual signal control over all airplanes that are taxiing, taking off, or landing. The FAA clearance delivery facility transmits air route and altitude instructions to aviators intending to depart on instrument flight plans, while the FAA approach control and departure control facilities exercise radio and radar control of aircraft approaching and departing on instrument flight plans and provide radar traffic advisory information to other aircraft on request. The United States Weather Bureau observes, analyzes, and transmits weather information for the use of aviators, while supplementary aviation weather reporting stations operated by local public entities also provide weather information used in aviation; all stations are thereby exposed to potential tort liability. No reported decision has been found in which an airport owner[2] has been held liable for damages by reason of the location, plan, design, or construction of the airport. There are, however, some decisions from which such liability might be inferred, the most recent one being *Rapp v. Eastern Air Lines*,[3] a 1967 case. The trend implies that there may be a legitimate cause of action against airport operators in the foreseeable future. Special defenses such as governmental immunity no longer apply to the federal government because the Federal Aviation Agency must approve the airport plan or design whenever federal financial aid is used.[4] This discussion will be limited to the liability of the United States Government.

Control tower facilities and radio navigation aids at airports are usually owned, maintained, and operated by the Federal Aviation Agency, a tax supported agency of the government, rather

[1] 28 U.S.C. § 2674 *et seq.* (1970).

[2] It should be kept in mind that all of our new airports are in the main financed by the federal government.

[3] 10 Av. Cas. 17,265 (E.D. Pa. 1967).

[4] 49 U.S.C. § 1701 *et seq.* (1970).

than by the airport owner or operator. Visual aids such as wind indicators, signs, and airport lighting, which are not a part of the instrument landing system, are maintained by airport management. The decision whether to install such facilities at a particular airport is clearly within the discretionary function immunity of the Federal Tort Claims Act, but the discretionary decision to install such aids having been made, there is no immunity for negligence in their maintenance or use.[5]

In the leading case *Eastern Air Lines, Inc. v. Union Trust Company*,[6] the United States was held liable for damages arising out of a collision between two airplanes on a landing approach to Washington National Airport. The trial judge found that negligence on the part of a government employed control tower operator in clearing both airplanes to land on the same runway at approximately the same time was a proximate cause of the accident. The Government contended on appeal that the discretionary function immunity of the Tort Claims Act[7] precluded liability. This argument was rejected; the court reasoned that although discretion was exercised in the decision to operate the tower, the tower personnel had no discretion to operate it negligently. This case illustrates the distinction between discretionary decisions made at the "planning level" for which there is immunity and those made at the "operational level" for which there is not.

The doctrine of governmental immunity was asserted as a defense in *Ingham v. Eastern Air Lines, Inc.*,[8] wherein the United States was held liable for negligence on the part of an FAA approach control employee at Kennedy International Airport who failed to inform the pilot of an approaching airplane that visibility at the airport had dropped from one mile to three-quarters of a mile, although the minimum visibility for landing was one-half mile. The Government relied unsuccessfully on "execution of a regulation" immunity which provides that the Federal Tort Claims Act shall not apply to: "Any claims based upon an act or omission of an employee of the Government exercising due care in the

[5] *See* Dalehite v. United States, 346 U.S. 15 (1953); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[6] 221 F.2d 62 (D.C. Cir. 1955).

[7] 28 U.S.C. § 2680(a) (1970).

[8] 373 F.2d 227 (2d Cir. 1967).

execution of a statute or regulation whether or not such statute or regulation be valid."[9] The statute or regulation relied upon by the Government was Section 265.2 of the Air Traffic Control Procedures Manual of the FAA which provides:

> At locations where official weather reports are obtained by the controllers through routine procedures and the ceiling and/or visibility is reported as being at or below the highest circling minima established for the airport concerned, a report of current weather conditions and subsequent changes as necessary shall be transmitted as follows:
> (b) By approach control facilities to all aircraft at the time of the first radio contact or as soon as possible thereafter.

The "execution of a regulation" exception was held inapplicable because the controller did not comply with the regulation having failed to furnish information "as necessary." The purpose of the execution of a regulation immunity is to prevent tests of legality of regulations by tort actions. The Government's defense based on the discretionary functions immunity was rejected on the ground that no discretion was left to the controller whether to comply with section 265.2. The controller's decision of what weather information was "necessary" within the meaning of his procedures manual is an operational rather than a planning decision. It seems that the most difficult immunity problem raised by the Government when relying on the Federal Tort Claims Act is the provision for immunity from any claim arising out of misrepresentation.[10] The court in the *Ingham*[11] case rejected this misrepresentation exception as being too broad, saying that it would exempt from tort liability any operational malfunctions by the Government that involved communications in any form. Despite the fact that the discretionary function immunity is inapplicable to control tower operators when negligence is the basis for the cause of action and that negligence is based on a failure to warn of impending mid-air collisions, recovery is sometimes denied as a matter of law because primary responsibility for avoiding collisions under visual flight rules conditions rests with the pilots.[12] When a pas-

[9] 28 U.S.C. § 2680(a) (1970).

[10] 28 U.S.C. § 2680(h) (1970).

[11] 373 F.2d at 239.

[12] United States v. Schultetus, 277 F.2d 322 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1968).

senger is concerned, however, this would not be the case.

Collision with other objects[13] may be enough to hold the United States liable under the Tort Claims Act with responsibility being based in part on the Federal Aid for Public Airport Development Act.[14] Collision with other surface objects would probably lie outside the scope of the United States Government's duty. If, however, an airport operator notifies the FAA of the presence of surface objects such as utilities lines or other obstructions outside the airport boundary but in the approach lanes of the airport, and no action is taken by the Government to remove them, the Government may be held liable for subsequent collisions.

Private and commercial aircraft are in constant radio communication with a variety of ground facilities manned by personnel of the FAA. In a typical FAA communications center there may be as many as nine separate channels or frequencies in simultaneous communication with aircraft in various stages of flight. It is presently the uniform practice of the FAA to continuously record all such radio communications.[15] Each tape is retained by the FAA for a period of thirty days and, if there has been no accident or other mishap, the tape is then erased and reused. In the event an accident has occurred, one of the first things done by the National Transportation Safety Board investigator[16] is to sequester the tape recordings of all pertinent radio transmissions for possible future use. The business records statutes in most states allow their admission without question, provided they are properly authenticated.

The problems of proof in the cases against the Government are monumental. Generally, all of the investigation is made by a government agency, formerly the CAB, now the National Transportation Safety Board. Furthermore, taking the deposition of the investigator is at best extremely difficult. The investigators will give no opinions or conclusions; often their notes are lost and they can

[13] For example, when birds are attracted to swamps adjacent to airports.

[14] Airport and Airway Development Act of 1970, 49 U.S.C. § 1101 *et seq.* (1970).

[15] This is done on special tape recorders each of which will run for approximately twelve hours and will simultaneously record all transmissions on as many as nine different frequencies.

[16] NTSB now regulates and has all the functions and duties the Department of Commerce had at a prior time.

remember nothing specific about the case. It is a problem, however, that is not insurmountable for the regulations require that they keep any tape recordings of a relevant conversation.

Briefly, no cases have been found in which the Government has been sued under the Tort Claims Act for making certifications that were later shown to be inaccurate. The misrepresentation section[17] of the Tort Claims Act probably precludes recovery unless it can be shown first that the Government made an unreasonably inadequate inspection, and secondly, that the disaster would not have occurred had there been a proper inspection. The Government makes many different types of certification.[18] Each aircraft has an airworthy certificate issued by the United States Government; therefore, one would presume that it is safe to fly. The Government's position in matters such as this is that when it issued the airworthy certificate the aircraft was airworthy, and whatever happened to the aircraft occurred after the certificate was issued. Again the matter of proof would be difficult. We may see an assault on the issuance of airworthy certificates, generally in the nature of a breach of warranty attack; and if the misrepresentation section of the Tort Claims Act can be avoided, recovery might be had on this ground.

Pilot certification is another, graver concern, for usually a crash is accompanied by pilot error, and the Government logically takes the position that when it certified him he had not committed the error, and the certification under any circumstances cannot cause liability to attach to it. It may occur, however, that if there were acts of negligence or wrongdoing prior to the certification, the Government might be held liable for negligently licensing the pilot or certifying him to fly commercial aircraft, without which he could not fly and later crash. Certainly an assault will be made on this ground when the time comes, and the time will come when the airline in question does not have enough insurance coverage or money to compensate for loss of life and damages caused by the crash.

Military aircraft stand in the same shoes as military trucks or

[17] 28 U.S.C. § 2680(h) (1970).

[18] Certification of pilots and crew members is provided for in 14 C.F.R. §§ 60-61 (1973); certification procedures for aircraft are found in 14 C.F.R. § 21 (1973).

jeeps. If, due to the negligence of the pilot or Government in maintaining such aircraft, injury or damage occurs, then the Government will be held liable under the Tort Claims Act. There is, however, a specific provision in the act prohibiting a military person from suing the Government under the Tort Claims Act.[19] There is a growing tendency, however, for the military flier to sue the manufacturer, if there is a defect in the aircraft. There is no deterrent to this.

The problem reduces itself to the following. Usually the parties vigorously contest the responsibility of the government employees under any circumstances. The United States contends that it serves as little more than a traffic policeman operating with almost no discretion, merely applying formal rules and regulations designed to govern the movement of air traffic. It is the pilot and the crew, the United States says, that determine whether and how the flight will be made. The Plaintiff usually asserts that the contrary is true; that the flight is governed by instructions and regulations from takeoff to landing, and that the Government has the ultimate responsibility for safety at the time of takeoff, while the plane is in flight, and at landing.

Neither of these positions is completely accurate. Our system of air traffic regulation is more sophisticated and better designed to protect the public and avoid human error than either categorical view suggests. Whenever a plane is moving, whether on the ground or in the air, the captain has the final and ultimate responsibility. He is, however, in constant contact with the ground and guided by the government control facilities. The pilot can refuse to take off when cleared but cannot take off if not cleared. He can request a different runway or a different routing and, once cleared, can proceed accordingly. If he encounters weather difficulties in route he can ask permission to go in a different direction or to a different level and, again, when cleared, can proceed. When his various clearance requests are consistent with air traffic regulations and established safety procedures, the United States facilities give the permission he seeks; when permission is not granted for safety or traffic control reasons, the pilot continues to fly under conditions set from the ground.

[19] 28 U.S.C. § 2680(j) (1970). *See* Feres v. United States, 340 U.S. 135 (1950) and United States v. Lee, 400 F.2d 558 (9th Cir. 1968).

In short, there should be a close working relationship contemplated between the government-operated tower, control centers, and weather facilities on the one hand, and crew on the other. The responsibility is mutual and coordinated at all times. Each party, however, has superior knowledge than the other in some respects. The crew knows the condition and capabilities of the aircraft, and must deal with the unusual and unexpected in flight. In this age of electronics the tower personnel have superior knowledge and capability when questions of traffic control and weather are involved. While crews have weather training and know that "the air is an unforgiving element," those in the government service are in instant contact with weather stations in the area, and have available more instruments, information, and weather knowledge. The crew relies on accurate and sophisticated weather guidance from the tower, the responsibility which the Government has undertaken and must carry out fully and completely.

The Government's responsibility is to promote air safety. This responsibility includes a duty to promulgate rules and regulations to provide adequately for safety in air commerce.[20] A detailed series of procedures and regulations have been established by the Government under this general delegation from Congress governing the activities of weather stations and tower control personnel. In *Hartz v. United States*,[21] the court held that the tower's duty is not restricted to the manuals and regulations.

> We disapprove the view that the duty of an FAA controller is circumscribed within the narrow limits of an operations manual and nothing more. We approve the view expressed by the Court of Appeals for the Second Circuit in *Ingham v. Eastern Airlines, Inc.*,[22] as follows:
> 'It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently.'[23]

Although a much fuller and more detailed review of the numerous regulations and procedures could be made, it would serve no

[20] 49 U.S.C. § 1421 (1970).

[21] 387 F.2d 870 (5th Cir. 1968).

[22] 373 F.2d 227 (2d Cir. 1967).

[23] 10 Av. Cas. at 17,608. *See also* Indian Towing Company v. United States, 350 U.S. 61, 69 (1955).

purpose here. It is apparent that in the area of weather reporting and the related operations of control towers a complete responsibility has been assumed by the Government under terms and conditions that require the exercise of the highest skills to be applied according to exacting and continuously high standards as particular circumstances dictate.

Tragic accidents have resulted from pilot error. Tragic accidents can also result from weather reporting errors by those on the ground. In neither instance is the fault intentional, but in each situation the responsibility should rest when a clear and significant duty is not performed with reasonable care under the circumstances and the resulting dereliction is the proximate and immediate cause of a crash. Each airline accident must be carefully considered in the light of its particular facts. There is no automatic rule which can fix responsibility on the Government or a crew when a weather accident occurs.