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Control Zone Accidents - Allocation of Liability between Air Carriers and Control Tower

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CONTROL ZONE ACCIDENTS—ALLOCATION OF LIABILITY BETWEEN AIR CARRIER AND CONTROL TOWER

THE INCREASING number of air accidents in airport approach zones and air traffic lanes has focused attention upon the division of legal responsibility between the air carrier and the traffic control tower, which is operated in most instances by the United States government.[1] Liability for these accidents may be placed on either the control tower operator or the airline, or, as a third alternative, it may be charged to the tower operator and the carrier jointly. The problem in this area is not the availability of remedy to an injured passenger, but in the adaptation of tort liability doctrines to the air accident situation so that legal responsibility will be properly divided between tower and carrier.

Two recent cases provide useful examples for a discussion of the division of liability between carrier and tower. *Eastern Airlines, Inc. v. Union Trust Co.*,[2] involved a mid-air collision between two planes flying within

[1] The United States government maintains and operates 165 of the nation's 200 air traffic control towers (1949 statistic) CAA Statistical Handbook on Civil Aviation, p. 21 (G.P.O. 1953). The operators of the non-Government control towers are subject to CAA licensing and must follow prescribed CAA procedures. 7 Fed. Reg. p. 742, Pt. 26 § 26.55 (1941).

[2] Union Trust Co. v. Eastern Airlines, 113 F. Supp. 80, 221 F. 2d 62 (D.C. Cir. 1955) aff'd as to U. S., rev'd as to Eastern, 350 U. S. 907 per curiam, rehearing granted 76 S. Ct. 429 (1956) (final decree pending). In the rehearing, the case was remanded to the Court of Appeals to allow that court to pass upon the several issues left undecided by the reversal. The crux of the Eastern litigation is a mid-air collision between the DC-4 operated by Eastern and a P-38 owned by the Bolivian government. The collision occurred within the traffic control zone of the National Airport when the P-38 struck the airliner from above as both ships were attempting to land on the same runway. This litigation was commenced by Union Trust Co., as executor of the estate of one of the deceased Eastern passengers. The suits were tried simultaneously in United States District Court and resulted in a jury verdict against Eastern and a bench decision against the United States, as operator of the control tower. On appeal, the Court of Appeals for District of Columbia affirmed the judgment against the United States and reversed the judgment against Eastern. The Supreme Court in a per curiam decision reversed the Court of Appeals on the liability of Eastern; subsequently on rehearing the Court modified the reversal, remanding the case to the Court of Appeals for hearing on the issues its decision left undecided. Certiorari on the case against the United States was denied.

This article will discuss the decisions against the United States and Eastern on the negligence issue. However, there were two other main issues in the case which should be mentioned.

One of the contentions presented by the United States was that the government had not consented to be sued for the negligence of its control tower employees. The basis of this defense was the Federal Torts Claims Act, 62 Stat. 983 (1948), 28 U.S.C. § 2680 (1952), which immunizes the United States from claims arising from the performance of a discretionary function. Both the District Court and the Court of Appeals held that the United States exercised its discretion when it decided to operate control towers, and once the Government operated a control tower, it could be sued for negligent operation. The courts reach this conclusion on the authority of Costley v. United States, 181 F. 2d 723 (5th Cir. 1950); Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951); and United States v. Gray, 199 F. 2d 239 (10th Cir. 1952).

The other main issue was the conflicts of law question—whether the Wrongful Death Statute of Virginia or of the District of Columbia was applicable. The Court of Appeals held that the Virginia Statute applied because the Federal Torts Claims Act states the law of the place where the government's negligence occurs is applicable.

an area regulated by an air traffic control tower. There the air carrier and control tower were held jointly liable. In *Smerdon v. United States*,[3] the question of responsibility for a landing accident was raised when the control tower granted the pilot's request for a visible flight rule clearance when instrument landing conditions existed.[4] The United States District Court of Massachusetts adjudged the air carrier responsible. Thus, a proper apportionment of liability for accidents of this nature may depend on the respective duties of the carrier and control tower to the injured air passenger and on an inquiry into the exclusive liability of the control tower when the carrier is not negligent in the performance of its duties.

THEORIES OF LIABILITY

At common law an air carrier is regarded as a common carrier and must exercise the highest degree of care for the safety of its passengers.[5] By application of common law concepts of tort liability, the control tower operator may also be held liable for a breach of duty which culminates in the crash of an aircraft relying on its instructions, if the instructions were negligently given or if its landing instruments were not kept in good repair.[6] The rationale of this doctrine, the "affirmative act" theory, is that

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[3] Smerdon v. United States, 135 F. Supp. 929 (D.C. Mass. 1955). The relevant facts are: A plane owned by Old Colony Aviation, Inc. was approaching Logan International Airport in Boston under poor visibility conditions. The plane had an IFR (instrument flight rules) clearance, but on being able to see the end of the runway, the pilot requested a VFR (visible flight rules) clearance which was granted. As the plane drew nearer the airport, it encountered an area of fog and subsequently crashed into Boston Harbor, drowning one of the passengers. This action was brought against the United States as operator of the control tower by the administrator of the deceased's estate. The court held that the control tower had fulfilled its duty by reporting weather conditions at the airport to the pilot and had no duty to dispute the pilot's report that he could see the runway.

[4] A knowledge of the mechanics of air traffic control and the terms used will aid the reader in understanding this subject. An airplane landing at a controlled airport must obtain a clearance from the control tower when it enters the airport's approach zone. 14 C.F.R. § 60.18(b) (Revised 1952). Once in the approach zone, the plane must fly the prescribed traffic patterns of the airport until the tower grants the ship permission to land, a final clearance. 14 C.F.R. § 60.18(b)(c)(d) (Revised 1952).

The type of landing procedure depends upon the weather conditions. If visibility is good the pilot will land under visual flight rules, VFR; in a VFR landing a pilot brings his plane in by what he observes and the advice given him by the tower. 14 C.F.R. § 60.30 (Revised 1952). If visibility is bad, an instrument landing will be executed in which the pilot must depend wholly upon the control tower. 14 C.F.R. § 60.40, 43 (Revised 1952). There are two methods of instrument landing. In the first type, radio waves sent out from the tower appear on a gauge in the cockpit of the plane; the pilot, by watching this gauge and flying his ship so that the lines remain in correct relation to one another, is enabled to make a safe landing. The principle of the other method is for the tower to watch the approach of the aircraft on ground radar and "talk" the pilot in for his landing from what appears on the screen.

[5] The common instruction stating the air carrier's degree of care is similar to this one: an air carrier ". . . is bound to exercise the highest degree of practical care and diligence, and is liable for all matter against which human prudence and foresight might guard." Allison v. Standard Air Lines, 1930 U. S. Av. R. 292 (S.D. Cal.), aff'd 65 F. 2d 688 (9th Cir. 1933); Wilson v. Colonial Air Transport, 278 Mass. 420, 180 N.E. 212 (1932). This court in stating the air carrier's duty of care defined it as a high duty of care analogous to that imposed on other common carriers.

[6] Marino v. United States, 84 F. Supp. 721 (W.D. N.Y. 1947). The control tower was held liable for a ground collision between a plane and a maintenance tractor. See also, Johnson v. Western Air Express Corp., 45 Cal. App. 614, 114 P. 2d 688 (1941); Georger, Adm'x v. United States, 2 CCH Avi. L. Rep. 14,859 (E.D. Va. 1949). These cases do not hold the control tower liable because they

a rescuer (the tower) when it offers aid to a person in danger (the plane) is responsible for negligence on its part in the rescue operation if the victim relies upon its aid.[7] Joint liability would seem to be a proper solution in instances where the evidence indicates (1) that the air carrier was not exercising the highest degree of care; (2) that the tower was negligent in the manner in which it was attempting to help the airliner; and (3) it is impossible to determine whose negligence was responsible for the accident.

Even though the *Air Traffic Rules* of the Civil Aeronautics Authority do not determine legal responsibility, they are indicative of the respective duties of pilot and tower operator with respect to the proper operation and landing of the plane. The pilot is vested with final authority for the operation of his aircraft, and the regulations sanction his deviation from control tower instructions in emergency situations.[8] The regulations also require the control tower to issue clearances and other information for purposes of preventing collisions between aircraft, and aircraft and surface obstructions.[9]

THE EASTERN CASE AND DIVISION OF RESPONSIBILITY

In *Eastern Airlines, Inc. v. Union Trust Co.*,[10] which arose as the result of a mid-air collision between two planes (an air carrier and a P-38 fighter plane) which were circling an airport under the instructions of the control tower, joint liability was imposed upon the tower operator and air carrier. The grounds for the air carrier's liability was the jury's finding that the pilot was negligent in that he deviated from the traffic pattern and made a final circle of the airport in preparation for landing before receiving *final* clearance from the control tower. The District Judge reserved to himself the question of the control tower operator's negligence and found the tower negligent for (1) failure to warn the airliner of the position of the P-38 on its final approach; (2) failure to inform the P-38 that the airliner had final clearance; (3) failure to keep both planes aware of the other's position; and (4) clearance of both planes to land on the same runway at approximately the same time.[11]

The Court of Appeals for the District of Columbia affirmed the trial judge's conclusion in regard to the tower's liability but reversed the verdict of the jury on the negligence of Eastern. The ground for reversal was that

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accredit the accident to an act of God, but the tower would have been liable if the cause of the accident could have been traced to the tower's negligence. *Contra*, Finfera v. Thomas, 1 Avi. 949 (6th Cir. 1941). Tower is not liable for a ground collision.

[7] This theory is the one suggested by Mr. Eastman in his 1950 article in this journal on the Liability of the Ground Control Operator for Negligence. Eastman, Liability of the Ground Control Operator for Negligence, 17 J. Air L. 170 (1950).

[8] 14 C.F.R. § 60.2 (Revised 1932). The theory back of vesting ultimate responsibility appears to be based on the premise that the pilot, not the control tower operator, has the physical control of the airplane and legal sanction must be given the pilot to deviate from the regulations in an emergency. Such a sanction is consistent with the purpose of the regulations which is to make air travel as safe as possible.

[9] 14 C.F.R. § 617.21 (Revised 1952).

[10] Union Trust Co. v. Eastern Airlines, 113 F. Supp. 80, 221 F. 2d 62 (D.C. Cir. 1955) aff'd as to U. S., rev'd as to Eastern, 350 U. S. 907 per curiam, rehearing 76 S. Ct. 429 (1956) (final decree pending). This standard must be modified by saying that the Supreme Court recently modified its reversal of the Court of Appeals decision in favor of Eastern, remanding the case to the Court of Appeals for decision on the issues left undecided by their reversal. See note 2, *supra*, for a complete statement of facts.

[11] Ibid at p. 79.

sufficient evidence did not exist to show that Eastern had *not* received final clearance from the tower, and therefore, the trial judge should have directed the jury to answer the final clearance question in favor of Eastern. The Supreme Court reinstated the jury's verdict, holding that it was not within the province of the Court of Appeals to reverse the jury's conclusions on the evidence, and on rehearing, remanded the cause to the Court of Appeals for decision of questions left unsettled by its ruling.

The question presented by the *Eastern* decision is the application of joint liability in landing accident litigation where the control tower operator and the air carrier are co-defendants. Joint liability might be the correct decision in the *Eastern* case, if the air carrier did digress from the approach pattern without receiving final clearance, and if it is impossible to determine whose negligence caused the collision. By making these assumptions, the necessary elements of joint liability are present, *i.e.*, negligence on the part of both defendants and the impossibility of determining whose mistake was the cause of the accident. It would seem, however, that even if joint liability were the proper remedy, the procedure followed in arriving at this result was questionable. The decision was not the product of one trier of fact (either the judge or the jury) deciding the entire case, but the work of two triers of fact, each deciding a part of one case. The trial judge should have sent the question of the control tower's negligence to the jury with the question of the air carrier's negligence and instructed the jury to find either or both defendants responsible.

However, a finding of joint liability should never result if one defendant is at fault and the other is not. In the landing accident situation, the control tower should be liable if final clearance were given and the collision subseuently occurred. On the other hand, the airline should be liable if final clearance was not given and the crash occurred while the plane was out of flight pattern. The proper allocation of liability rests upon the determination of whether the tower or the carrier was the one who violated his duty immediately prior to the accident and whether this violation of duty could have caused the crash.

Several Conclusions—Division of Liability Between Control Tower and Air Carrier

It is suggested that liability should be placed on the carrier or tower under the following circumstances:

1. Clearly the carrier should be liable if an accident occurs while the pilot is disobeying the instructions of the tower, and no emergency exists.[12]

2. The carrier should be liable even if following instructions of the tower if it is proved that the pilot through the usual powers of observation attributable to pilots should have been aware of the danger and avoided the crash.[13]

3. The control tower should be liable for negligently given instructions or for unworkable landing instruments, if they cause an accident and it is shown that the pilot could not have observed the danger and avoided the accident.[14]

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[12] The basis of this conclusion is 14 C.F.R. § 60.2 and 60.10 (Revised 1952).

[13] 14 C.F.R. § 617.21 (Revised 1952). This conclusion is consistent with the purpose of the regulations—safety. In order to achieve the highest possible degree of safety the regulations attempt to impose a duty on the person who had the last chance to avoid the accident.

[14] See note 6 *supra*.

4. The air carrier and control tower should be jointly liable only if both are negligent and it is impossible to determine whose negligence caused the accident.

RESPECTIVE LIABILITY IN LANDING ACCIDENTS

In *Smerdon v. United States*,[15] an action arising out of a crash which occurred on a visible landing attempt when instrument landing conditions existed, the United States District Court of Massachusetts held that the control tower operator was free from negligence. While recognizing that the control tower must maintain aircraft in his control zone safe from collision with one another and from danger arising from obstructions on the surface of the airport, the court held that the legal responsibility of the control tower did not include a duty to forbid a VFR landing when weather conditions on the field would render such an attempt hazardous.[16] The court ruled that it was the pilot's responsibility to decide the landing procedure to use on the basis of his own observations and the weather forecasts transmitted by the control tower.

Since the purpose of air traffic regulations is safety, the legal duties of control tower operators should not be restricted to the prevention of collisions. No satisfactory distinction can be made between acts which would make the control tower liable in collision cases and not liable for failure to forbid landings if weather conditions make them hazardous. An attempted distinction adversely affects the law of control zone accidents, because it makes liability turn on the classification of factual situations.

In allocating responsibility for landing accidents the courts should consider that the control tower has a duty to provide the pilot with information necessary for a safe landing, and that the control tower operator is in a better position to know landing conditions at the airport. To offset these responsibilities of the tower operator, the court must remember that the pilot is still "captain of his ship" and has physical control of it, and that the accident might have been an act of God.[17]

The court should consider these factors in this manner. First it should recognize that the tower, because of its location at the place where the plane will actually land, is in the best position to know if a landing may be safely attempted. The tower operator will have this knowledge from actual observation of the weather conditions and from reports of the pilots of aircraft that have previously landed. On the basis of this weather information available to the tower, the courts may determine if the tower transmitted proper landing orders to the incoming plane. If the evidence indicates that the plane crashed while following negligent orders of the tower and the pilot could not have had knowledge of the tower's negligence in time to avoid the accident, the tower should be liable. If the pilot disregarded the instructions of the tower or should have observed the immediacy of disaster and could have avoided it, the air carrier should be liable. If the evidence indicates that the accident cannot be attributable to either the air carrier

[15] 135 F. Supp. 929 (1st Cir. 1955). See note 3 *supra* for a more detailed statement of facts.

[16] 135 F. Supp. at 931. The court was basing its decision on § 617.4 of Title 14 C.F.R. which lists as the duties of the control tower (a) preventing collisions between aircraft and between aircraft and obstructions in the movement area; (b) expediting and maintaining an orderly flow of traffic; (c) assisting the person in command of an aircraft by providing such advice and information as may be useful for the safe conduct of a flight.

[17] See Johnson v. Eastern Air Express Corp., 45 Cal. App. 614, 114 P. 2d 688 (1941).

or the control tower but to a freak of nature, both should be relieved of liability under the theory of an act of God.

The present Regulations are not interpreted to impose upon the control tower the duty of closing the airport for the purpose of visible landing attempts under hazardous weather conditions. The *Smerdon* case has construed the regulations as not imposing a duty to forbid landing attempts if weather conditions render them unsafe. In order to impose the responsibility on the tower the Air Traffic Control Rules should be amended to include a provision which will make the control tower responsible for failing to forbid a landing attempt if conditions at the airport make an attempted landing unsafe.

The responsibility of the control tower is of a different character when only instrument landings are possible. Conditions which would make a visible attempt hazardous will not affect the safety of an instrument attempt if the equipment of the tower is in good working order. Thus, the tower in forbidding visible landing attempts should be permitted to sanction instrument landings. Because the pilot has little opportunity to observe danger under instrument landing conditions, the control tower has a greater legal obligation for safe completion of instrument landings than it has for visible attempts.[18] Thus, liability for an accident occurring during an instrument landing should be placed on the control tower unless it can be shown that the pilot made no attempt to fly by the instruments or instructions of the control tower.

The following suggestions are guides for allocating liability in landing accidents.

1. The control tower should have a duty to close the airport for visible landing attempts if weather conditions make such attempts unsafe.
2. The control tower should be liable if weather conditions exist which warrant the closing of the airport to visible landings, and a crash occurs during a visible landing attempt, unless the evidence shows that the plane had notice that visible landings were forbidden but attempted such a landing notwithstanding their prohibition.
3. The air carrier should be liable if the pilot could have observed the danger and avoided the accident or if negligent execution of the landing apart from the control tower's breach of duty caused the accident.
4. A freak of nature should relieve both tower and carrier from liability.
5. The control tower should be subjected to strict liability for accidents which occur on instrument landing attempts.

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[18] 14 C.F.R. § 617.21(b)(2) (revised 1952). See Johnson v. Western Air Express Corp., 45 Cal. App. 614, 114 P. 2d 688 (1941); Georger, Ad'x v. United States, 2 CCH Avi. Rep. 14,859 (E.D. Va. 1949). This case involved the crash of an airliner flying on instruments, but not within an airport control zone. However, the instrument flight principle involved are similar to those appearing in an instrument landing crash.

The reason the control tower has a more strict liability for instrument landing accidents is that there is less opportunity for the pilot to observe danger. Therefore, the "captain of his ship" doctrine will not operate to shift liability to the air carrier. Yet, it is possible that if the control tower operator shows that the pilot could have observed the danger and avoided the accident, liability will shift to the air carrier.

CONCLUSION

The cause of any controlled approach zone accident is either the negligence of the air carrier or the control tower unless an act of God absolves both from liability. When the instructions of the control tower place the plane in the position from which the accident results, and the pilot could not have been aware of the danger and avoided the accident, the operator of the control tower should have to pay the damages. When the pilot could have observed the danger and avoided the catastrophe, the air carrier should be liable. The air carrier should also be liable if its pilot disobeys the tower. Joint liability should be the verdict only if there is a showing of negligence on the part of both the tower and carrier, and it is impossible to determine the primary tortfeasor.

The remedies for the present difficulties are: (1) to indicate to the courts the undesirability of joint liability and (2) to amend the Air Traffic Rules to require the control tower to determine whether or not a given weather condition is safe for a landing.