

2010

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Recommended Citation

Asten Joe Van, *Air Traffic Controller Liability - First Circuit Undermines FAA's Efforts to Incorporate Redundancy into Aviation Safety Procedures: Wojciechowicz v. United States*, 75 J. Air L. & Com. 213 (2010)
<http://scholar.smu.edu/jalc/vol75/iss1/8>

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**AIR TRAFFIC CONTROLLER LIABILITY—FIRST CIRCUIT
UNDERMINES FAA’S EFFORTS TO INCORPORATE
REDUNDANCY INTO AVIATION SAFETY
PROCEDURES: *WOJCIECHOWICZ V. UNITED STATES***

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IN *WOJCIECHOWICZ v. United States*, the First Circuit held that an air traffic controller owed no duty to a pilot involved in a tragic plane crash that killed the pilot and four of his passengers; and, ultimately, concluded that the pilot was solely at fault.¹ In so holding, the First Circuit seemingly ignored Federal Aviation Administration (FAA) regulations and undermined the FAA’s goals of enhancing aviation safety through redundant or concurrent responsibilities between a pilot and an air traffic controller. The FAA deliberately created redundant operations procedures between pilots and air traffic controllers that “intentionally overlap . . . to compensate . . . for failures that may affect safety.”² The First Circuit’s holding in this case potentially weakens aviation safety and accident prevention procedures by not recognizing the air traffic controller’s concurrent duty to make a reasonable effort to prevent such accidents. Instead, the more prudent holding would have been to remand the case to the district court to apportion liability between the pilot and the air traffic controller, thereby upholding the FAA’s efforts to incorporate redundant safety procedures.

At roughly 2:00 p.m. on January 5, 2005, a Cessna Conquest airplane took off from Culebra Island in Puerto Rico heading for San Juan International Airport, near the El Yunque mountain peak.³ The pilot of the plane, Alexander Wojciechowicz, chose to fly that day under Visual Flight Rules (VFR), as op-

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¹ 582 F.3d 57, 61 (1st Cir. 2009).

² FAA, U.S. Dep’t of Transp., Aeronautical Info. Manual § 5-5-1(e) (2008).

³ *Wojciechowicz*, 582 F.3d at 61–62.

posed to Instrument Flight Rules (IFR), which meant he would navigate simply by observing his surroundings rather than relying on his instruments.⁴ Among other proscriptions, VFR prohibits a pilot from flying into clouds or areas of reduced visibility, yet Wojciechowicz did exactly that shortly before the crash.⁵

About eighteen minutes after Wojciechowicz and his passengers left Culebra Island, he contacted the San Juan airport to request to land.⁶ At 2:18:30 p.m. Marcos Santiago, the air traffic controller at the San Juan Airport, asked Wojciechowicz to “squawk” into the airplane’s transponder so that Santiago could identify him on his radar screen.⁷ Wojciechowicz complied and at 2:19:54 p.m. Santiago, now able to see the plane on his radar screen, provided Wojciechowicz with approach instructions so that he could land at the airport.⁸ Santiago’s radar scope displayed the plane’s altitude above sea level and the prominent obstructions, including El Yunque, but it did not display the elevation of the terrain or the plane’s altitude above the ground.⁹ At 2:21:18 p.m., shortly before the accident, the plane disappeared from the radar screen.¹⁰ At that point, the plane was 4.7 miles away from the peak of El Yunque, 1600 feet above sea level, and traveling at roughly 3 miles per minute.¹¹ After the plane lost radar contact, the radar scope entered into “coast” mode, where the scope estimates the planes current position.¹² At 2:21:42 p.m., the radar stopped displaying the “coast” data, and the plane never returned to the radar screen.¹³ Santiago did not attempt to initiate radio contact again until practically the time of impact.¹⁴ The plane crashed into the side of the mountain at approximately 2:23 p.m., 1.43 miles from the peak of El Yunque at 1,561 feet above sea level (El Yunque is 3,637 feet tall at its peak).¹⁵

⁴ *Id.*

⁵ *Id.* at 62.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 63.

¹⁰ *Id.*

¹¹ *Id.* at 62.

¹² *Id.* at 63.

¹³ *Id.*

¹⁴ *Id.* at 77 (Lipez, J., dissenting).

¹⁵ *Id.* at 63.

Wojciechowicz's surviving relatives, the registered owner of the airplane, and the airplane's insurer sued the United States under the Federal Tort Claims Act alleging that Santiago acted negligently and was partially at fault for the accident.¹⁶ Plaintiffs conceded that Wojciechowicz acted negligently since he flew into the cloud before the crash, but they claimed that Santiago failed to separate the plane from the El Yunque peak as required by P 5-5-9 of the Air Traffic Controllers Manual (ATCM).¹⁷ After a bench trial, the district court entered judgment in favor of the United States, holding that the provisions of the ATCM did not apply in this situation; therefore, Santiago had not violated any duty.¹⁸ The district court also held that Wojciechowicz's negligence was the sole cause of the accident.¹⁹ The First Circuit, in a split decision, affirmed the judgment.²⁰

The First Circuit had to decide: 1) whether P 5-5-9 of the ATCM applied to this situation, so as to impose a duty on an air traffic controller (either in the context of negligence per se or ordinary negligence); if so, 2) the scope of that duty; and 3) whether a breach of that duty occurred.²¹ First, the majority held that the provisions of the ATCM did not have the full force and effect of law as does a regulation; and therefore, that any violation of the ATCM would not constitute negligence per se.²² Second, even assuming that the ATCM did have the effect of a regulation, the majority maintained that no violation of P 5-5-9 occurred because the scope of P 5-5-9 did not extend to planes that had dropped off the radar as Wojciechowicz's plane had.²³ Finally, the majority held that since any duty Santiago had ended when the plane dropped off radar, he acted reasonably and could not have foreseen that Wojciechowicz would act negligently.²⁴

The majority rejected the idea that operations manuals published by the FAA, such as the ATCM or the Aeronautical Information Manual (AIM), had the same effect as an FAA regulation.²⁵ Instead, the court considered the manuals to be

¹⁶ *Id.* at 61.

¹⁷ *Id.* at 63–64.

¹⁸ *Id.* at 65.

¹⁹ *Id.* at 66.

²⁰ *Id.* at 60–61.

²¹ *Id.* at 68.

²² *Id.*

²³ *Id.* at 69.

²⁴ *Id.* at 70.

²⁵ *Id.* at 68.

“merely an indication of the standard of care.”²⁶ Furthermore, as an apparently better indication of the standard of care than P 5-5-9 of the ATCM, the court looked to the AIM, which provides in P 5-5-8 that the pilot “is responsible to see and avoid other traffic, terrain, or obstacles.”²⁷ Therefore, the court concluded that a violation of P 5-5-9 of the ATCM cannot constitute negligence per se but can only be persuasive as to the standard of care.²⁸ However, according to the court, the more persuasive indication of the standard of care in this situation was P 5-5-8 of the AIM, which places the responsibility of avoiding terrain and obstructions on the pilot.²⁹

The majority next maintained that even if P 5-5-9 of the ATCM defined the relevant duty in this situation, the scope of that duty did not extend to an airplane that had lost radar contact; therefore, Santiago could not have violated a duty.³⁰ According to P 5-5-9, which is titled “Separation from Obstructions,” an air traffic controller must “‘separate aircraft from prominent obstructions depicted on the radar scope . . . by . . . 3 miles.’”³¹ When Wojciechowicz’s plane dropped off radar, it was located 4.7 miles from the peak of El Yunque and was not within the 3-mile buffer.³² Because an air traffic controller could not know the course or altitude of a plane flying under VFR once radar contact ceases, and because pilots could change course or altitude at anytime (as opposed to IFR, where a specific flight plan is followed), Santiago could not have known for certain if the plane came within 3 miles of El Yunque.³³ Therefore, the court concluded that Santiago reasonably assumed that Wojciechowicz was complying with his duties to avoid terrain and stay out of cloud cover, and accordingly did not violate P 5-5-9.³⁴

Finally, even if Santiago breached a duty under P 5-5-9, the majority held that there was no proximate cause between the

²⁶ *Id.* at 64 (citing *Fed. Express Corp. v. Rhode Island*, 664 F.2d 830, 835 (1st Cir. 1981)).

²⁷ *Id.* (quoting FAA, *supra* note 2, § 5-5-8(a)).

²⁸ *Id.* at 67 (citing *In re N-500L Cases*, 691 F.2d 15, 28 (1st Cir. 1982); *Fed. Express Corp.*, 664 F.2d at 835).

²⁹ *Id.* (citing *In re N-500L Cases*, 691 F.2d at 31; *Fed. Express Corp.*, 664 F.2d at 836-37).

³⁰ *Id.* at 69.

³¹ *Id.* at 64 (citing FAA, *supra* note 2, § 5-5-9).

³² *Id.* at 63.

³³ *Id.* at 69.

³⁴ *Id.*

breach and the accident; more specifically, that the accident was not foreseeable to Santiago.³⁵ The majority held that Wojciechowicz's decision to fly into a cloud at low altitude and high speed over mountainous terrain was the sole cause of the accident.³⁶ Furthermore, Santiago could not have reasonably foreseen that Wojciechowicz would act in such a negligent way.³⁷ Ultimately, however, the majority affirmed the district court's decision finding that Santiago never owed a duty to Wojciechowicz or his passengers in the first place, assigning the liability solely to Wojciechowicz without apportioning any liability to Santiago or the government.³⁸

The First Circuit majority misperceives both First Circuit precedent and FAA regulation to craft an opinion that sets a precedent concerning an air traffic controller's duty of care that undermines the important concept of redundancy in aviation safety. The majority's first conclusion that P 5-5-9 of the ATCM does not have the full force and effect of law—and ultimately, that Santiago owed no duty in this situation—seemingly ignores clearly stated FAA regulation to the contrary.³⁹ Federal Aviation Regulation 14 C.F.R. § 65.45(a) plainly states that “[a]n air traffic control tower operator shall perform his duties in accordance with . . . the procedures and practices prescribed in air traffic control manuals of the FAA.”⁴⁰ Thus, the regulations themselves essentially incorporate the manuals, giving them the force and effect of law. The majority goes on to apply *Federal Express* much too broadly in stating that the case stands for the proposition that these manuals do not have the force and effect of law.⁴¹ Instead, *Federal Express* merely stated that courts should not construe every minor deviation from the manual as constituting negligence and should instead focus on “substantial and unjustified failure[s] to follow procedures made mandatory by the Manual.”⁴² Even if the manuals were considered only as a persuasive indication of the standard of care—as the majority contends—the majority incorrectly implies that P 5-5-8 of the

³⁵ *Id.*

³⁶ *Id.* at 70.

³⁷ *Id.*

³⁸ *Id.* at 61.

³⁹ *Id.* at 72–73 (Lipez, J., dissenting).

⁴⁰ *Id.* at 73 (quoting 14 C.F.R. § 65.45(a) (2009)).

⁴¹ *Id.*

⁴² *Id.* at 73 n.20 (quoting *Fed. Express Corp. v. Rhode Island*, 664 F.2d 830, 835 (1st Cir. 1981)).

AIM, which states that pilots are responsible to avoid terrain or obstacles, somehow supplants or relieves the air traffic controllers of their duty to maintain separation between the airplane and obstacles when a pilot is flying under VFR.⁴³ The dissent correctly points out that "controllers and pilots have a concurrent duty to maintain safety."⁴⁴ In fact, P 5-5-1(e) of the AIM clearly stresses the importance of this concurrent duty: "The responsibilities of the pilot and controller intentionally overlap in many areas providing a degree of redundancy. Should one or the other fail in any manner, this overlapping responsibility is expected to compensate, in many cases, for failures that may affect safety."⁴⁵

Furthermore, nothing in the language of P 5-5-9 of the ATCM excludes VFR flights from a controller's duty to maintain separation.⁴⁶ It seems apparent that Santiago had a duty to give a reasonable effort to maintain separation between Wojciechowicz and El Yunque.

The majority still argues, however, that if such a concurrent duty existed, the scope of Santiago's duty did not extend to a plane that lost radar contact; therefore, Santiago acted reasonably in making no effort to maintain separation.⁴⁷ However, nothing in the language of P 5-5-9 limits the duty to airplanes that maintain constant radar contact.⁴⁸ Of course, the circumstances of Wojciechowicz flying that day under VFR and his plane losing radar contact changes what kind of effort would be considered reasonable given those limitations, but those limitations certainly do not allow for zero effort on the part of Santiago to maintain separation. Instead, Santiago reasonably could have advised Wojciechowicz that, according to the last data available to Santiago, Wojciechowicz could be within the 3-mile buffer and may need to take action accordingly. Roughly one minute and forty seconds passed between the time that radar contact was lost and impact.⁴⁹ In that time, Wojciechowicz could have exited the cloud he was flying through and made a

⁴³ See *id.* at 64-65.

⁴⁴ *Id.* at 74 (Lipez, J., dissenting) (citing *Delta Air Lines, Inc. v. United States*, 561 F.2d 381, 392 (1st Cir. 1977)).

⁴⁵ *Id.* (quoting FAA, *supra* note 2, § 5-5-1(e)).

⁴⁶ *Id.*; FAA, *supra* note 2, § 5-5-9 (stating that an air traffic controller must "separate aircraft from prominent obstructions depicted on the radar scope . . . by . . . 3 miles").

⁴⁷ *Id.* at 75.

⁴⁸ *Id.*

⁴⁹ *Id.* at 63.

corrective maneuver in time to prevent the crash, even if Santiago had waited the 30–40 seconds it would have taken for the plane to enter the 3-mile buffer based on its last known direction and speed.⁵⁰ Additionally, the notion that Santiago's breach could not have been the proximate cause of the accident because Wojciechowicz's negligent conduct was unforeseeable seemingly contradicts the FAA's intentional establishment of concurrent, redundant responsibility.⁵¹ The redundancy of responsibilities built in by the FAA "effectively incorporates an assumption that pilot negligence is foreseeable."⁵² Santiago not only had a duty, but also breached that duty by failing to make a reasonable effort to maintain separation, which would have provided a foreseeably negligent Wojciechowicz with ample time to make a corrective maneuver. Therefore, the First Circuit majority should have reversed and remanded the case to the district court to apportion liability between Wojciechowicz and the government.

Without question, the lion's share of responsibility for this accident falls squarely on Mr. Wojciechowicz. But by failing to acknowledge that Santiago failed in his duties as an air traffic controller, the First Circuit undermines the FAA's clearly stated intention to build in redundancy as a part of the aviation safety regulations. The courts can play an important role in cementing the FAA's goal of redundancy by applying the theory of concurrent responsibility. As one commentator noted: "To prevent [aviation] accidents, it is imperative that all of those who can influence safety fulfill their duties. . . . Any party with access to information that could prevent an accident must be held responsible to air travelers."⁵³ Holding that an air traffic controller has no duty to act in this situation or that a controller may assume a pilot is not acting negligently seems to contradict the paramount goal of safety and accident prevention—especially considering that the effort required to act is relatively minimal

⁵⁰ According to expert testimony, Wojciechowicz would have only needed 17–18 seconds to perform a corrective maneuver. *Id.* at 76 (Lipez, J., dissenting). Given the planes position, direction, and speed—4.7 miles from the peak of El Yunque, heading towards the mountain at a speed of about 3 miles per minute—it would have taken about 30–40 seconds for the plane to make up the 1.7 mile distance between its last known position and the 3-mile buffer. *See supra* text accompanying note 11.

⁵¹ *Wojciechowicz*, 582 F.3d at 75 (Lipez, J., dissenting).

⁵² *Id.*

⁵³ Kathleen McChesney Goodman & Scott Davis, *Free Flight and the Pilot-in-Command Concept—A Recipe for Disaster?*, 62 J. AIR L. & COM. 653, 672–73 (1997).

and the risk of inaction can be quite clearly disastrous. It seems likely that the vast majority of times that a controller makes an effort to maintain separation in these circumstances it would be completely unnecessary. However, the one time that it is necessary, which in turn prevents an accident, more than justifies the controller's previously unneeded efforts and is exactly the point of redundancy. While it may be overdramatic to claim that the First Circuit's holding makes flying less safe; at the very least, the holding does nothing to solidify the FAA's laudable and necessary redundant safety procedures. Courts should, in an effort to uphold the FAA's goals in aviation safety, acknowledge the concurrent duty of the air traffic controller in this situation and apportion liability between the pilot and the controller.