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PROBLEMS OF REPRESENTATION OF AIR TRAFFIC CONTROLLERS IN MID-AIR LITIGATION

Cecile Hatfield*

INTRODUCTION

THE SCOPE OF GOVERNMENTAL LIABILITY for aircraft accidents that occur as a result of mid-air collisions and the problems of representing air traffic controllers in the resulting suits against the United States are the subject of this article. Any consideration of the defense of air traffic controllers and the potential liability of the United States for their negligence must commence with an understanding of the nature and extent of the duties owed by air traffic controllers to those who use the system. Therefore, this article is divided into three sections which delineate the various types of responsibility attributable to the United States for mid-air collisions and the difficulties of defending air traffic controllers in such accidents.

The first section of this article addresses the scope of the duties and responsibilities of air traffic controllers in avoiding mid-air collisions that occur in Instrument Flight Rules (IFR)
conditions. The second section of this article discusses the liability of air traffic controllers for mid-air collisions that occur in a Terminal Control Area (TCA) or a Terminal Radar Service Area (TRSA). The final section of this article deals with the scope of the duties and responsibilities of air traffic controllers to prevent mid-air collisions that occur in Visual Flight Rules (VFR) conditions.

IFR conditions present the greatest potential liability of the United States. There is some potential liability in TCA and TRSA situations. The least exposure to liability exists under VFR conditions.

The Federal Aviation Regulations provide two distinct methods of operating aircraft. First, under IFR, which must be used when the weather conditions are below established standards, aircraft proceed along routes at altitudes requested by the pilot and authorized by air traffic control. Controllers determine the distance between aircraft by applying relevant provisions of the air traffic control manuals. This distance is necessary during IFR conditions because the pilots are generally flying in clouds and unable to see each other. Second, under VFR conditions pilots can see outside the aircraft and fly by visual rather than instrument references.

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1 The FAA Instrument Flight Rules are codified at 14 C.F.R. §§ 91.115—127 (1982). Instrument Flight Rules conditions exist when the ceiling and/or visibility are below certain minimums set by the FAA. In such conditions pilots are required to fly by reference to instruments rather than outside visibility. J. FOYS & D. CRANE, AIRCRAFT TECHNICAL DICTIONARY 97 (1978).

2 A terminal control area is a "[c]ontrolled airspace extending upward from the surface or higher to specified altitudes, within which all aircraft are subject to operating rules and pilot and equipment requirements specified in FAR Part 91" FAA Order 7110.65C, Air Traffic Control, app. 4, 13 (1982).

3 A terminal radar service area is the "[a]irspace surrounding designated airports wherein ATC [air traffic control] provides radar vectoring, sequencing, and separation on a fulltime basis for all IFR [instrument flight rule] and participating VFR [visual flight rule] aircraft." FAA Order 7110.65C, Air Traffic Control, app. 4, 39 (1982).


5 Basic VFR weather minimums, 14 C.F.R. § 91.105 (1982). See also, supra note 1.


7 See supra note 2.
Mid-air collisions often occur in “enroute” and “terminal” air traffic environments.\(^8\) Enroute mid-air collisions generally involve at least one aircraft on an IFR flight plan and may expose the United States to liability.\(^9\) Aircraft with or without flight plans may be involved in terminal environment mid-air collisions.\(^10\) The Air Route Traffic Control Center is the Federal Aviation Administration (FAA) facility involved in en-route collisions. The control tower, approach control and departure control are the FAA facilities involved in terminal collisions.

Although this article focuses on the responsibilities and liabilities of the United States, pilots using the system also have correlative duties and responsibilities. The most important concept of VFR flight is pilot vigilance to “see and avoid” other aircraft. Such vigilance is especially important in the vicinity of airports where there is a greater likelihood of encountering other aircraft.\(^11\)

I. THE DUTIES AND LIABILITIES OF AIR TRAFFIC CONTROLLERS RELATED TO AVOIDANCE OF INSTRUMENT FLIGHT RULES MID-AIR COLLISIONS

A. Separation of Aircraft as a Primary Duty

An analysis of the exposure of the United States to liability resulting from a mid-air collision must start with the proposition that the first priority of all air traffic controllers is the

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\(^8\) Enroute and terminal environments are generally those in which approach control service or airport traffic control service is provided. FAA Order 7110.65C, Air Traffic Control, app. 4, 15, 39 (1982).


\(^11\) Flight Rules, 14 C.F.R. § 91.67(a) (1982) sets forth the concept of “see and avoid.” This concept requires that vigilance shall be maintained by each person operating an aircraft, when weather conditions permit, regardless of whether the operation is conducted under IFR or VFR. See also FAA Advisory Circular 90.48B, (Sept. 5, 1980).
separation of aircraft. In air traffic control parlance separation of aircraft is a term of art. In its broadest sense, it means keeping one aircraft from hitting another aircraft.

Separation is required by the Air Traffic Control Manual\(^{12}\) in the following situations: (1) between IFR aircraft; (2) between all aircraft in TCA and Stage III TRSA airspace; and (3) on or over the runway surface of an airport regardless of the weather conditions.\(^{13}\) If a pilot strictly adhering to an IFR flight plan collides with another aircraft, then the United States may be partially responsible for the collision. These cases are particularly difficult to defend because, as stated previously, separation of aircraft is recognized as the first priority of the air traffic controllers.

In one early case, *Cattaro v. Northwest Airlines, Inc.*\(^{14}\) the court held the government responsible for an IFR mid-air collision between a B-47 bomber and a Northwest Airlines aircraft. Although the military aircraft was proceeding under VFR, the air traffic controllers were responsible for putting the planes on a collision course. One controller monitored the Northwest airline on radar. Another controller observed the two converging airplanes on his radar scope for forty-five seconds without advising either pilot of the impending danger.\(^{15}\) The court reasoned that if the controllers had familiarized themselves with the recorded flight plans of the two aircraft or had conferred with each other, the collision could have been avoided.\(^{16}\)

Similarly, in *State of Maryland v. United States*,\(^{17}\) the United States was held liable for the failure of the air traffic controllers at the Washington Air Route Traffic Control Center to observe on radar the close proximity of a govern-

\(^{12}\) FAA Order 7110.65C Traffic Control ¶ 22 (1982) provides: "Give first priority to separation of aircraft as required in this handbook and to the issuance of safety advisories. Give second priority to other services that are required but do not involve separation of aircraft. Give third priority to additional services to the extent possible."

\(^{13}\) See FAA, AIRMAN'S INFORMATION MANUAL 1-52 (1982).


\(^{15}\) Id. at 895.

\(^{16}\) Id..

ment airplane to another aircraft and to transmit a timely warning. The government plane was flying under VFR while the other plane was flying under IFR. Commenting on the duties of the air traffic controllers at air route traffic control centers, the court stated that the controllers have a duty to observe and detect on the radar scope any VFR traffic in addition to giving appropriate clearances and information from time to time to IFR aircraft. Therefore, the controllers were negligent in failing to warn the IFR pilot of the impending danger.

Another case in which the United States was held liable for air traffic controller negligence is Allegheny Airlines, Inc. v. United States. Prior to the mid-air collision between an Allegheny Airlines DC-9 aircraft and a Piper Cherokee aircraft, the controllers failed to detect the Piper Cherokee on radar and warn the DC-9. The Piper Cherokee, which was not equipped with a transponder, was being flown on a VFR flight plan by a student pilot. The Allegheny aircraft was on an IFR flight plan enroute to Indianapolis and was being monitored by the Indianapolis approach control radar position.

Although the controller testified at trial that he did not see a target for the Piper Cherokee on his radar scope, the court concluded that the aircraft should have, and did appear on his scope in sufficient time to enable him to warn the Allegheny

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18 Id. at 772.
19 Id. The court determined that this situation was somewhat analogous to that in Indian Towing Co. v. United States, 350 U.S. 61 (1955) in which “suit was brought against the Government for damage to a vessel sustained by reason of negligence in the maintenance of a lighthouse.” The Supreme Court held that while the Government was under no legal obligation to maintain a lighthouse or undertake a lighthouse service, once it had exercised its discretion to do so, it was obligated to use due care in operating the lighthouse. Therefore, the Government “undertook” the duty of separation of aircraft by providing air traffic services and thereby was chargeable with the negligence of its employees. 257 F. Supp. at 773.
21 Id. at 1341.
22 Id. at 1346. A transponder is “[t]he airborne radar beacon receiver/transmitter portion of the Air Traffic Control Radar Beacon System (ATCRBS) which automatically receives radio signals from interrogators on the ground, and selectively replies with specific reply pulse or pulse group only to those interrogations being received on the mode to which it is set to respond.” FAA Order 7110.65C, Air Traffic Control, app. 4, 41 (1982).
aircraft of the danger. Additionally the court determined that there was no justification for the controller's failure to see the target. Allegheny Airlines was barred, however, from recovering from the United States because its crew was contributorily negligent.

As the discussion of the foregoing cases illustrates, United States' liability for controller negligence typically has been premised on the failure of a controller to warn either or both pilots of controlled aircraft of proximate traffic. While courts have not held that the duty to warn pilots of controlled aircraft of proximate traffic is absolute or that it makes the government an insurer of safety, they have held that due care must be exercised in discharging the duty. What constitutes due care in each case necessarily depends in large part on the risk involved.

B. The Air Traffic Control Manual Definition of the Controller's Duty To Separate Aircraft

Generally, the scope of an air traffic controller's duty to separate aircraft is defined in applicable FAA air traffic control manuals. Because a manual cannot anticipate all situations, controllers are expected to exercise their best judgment when confronted with situations not covered in the manual. When a controller is found to have been negligent, the finding generally is based on the determination that either the provisions of the manual were not followed or a controller failed to exercise due care when confronted with a situation where he knew, or should have known, that an aircraft was in a position of danger.

Consistent with the foregoing, in Rudelson v. United States the court stated that "it is well settled that air traffic

420 F. Supp. at 1349.
Id.
Id. at 1351.
Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979); United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964).
See supra text accompanying notes 20-25.
602 F.2d 1326 (9th Cir. 1979).
controllers' duties are not limited to the tasks prescribed by FAA manuals. The case involved a mid-air collision between a Cessna 150 and a Piper Colt about a mile south of the airport traffic control tower in Santa Monica, California. The Cessna was executing training flight touch-and-go landings on Runway 21. The Piper entered the Santa Monica airport traffic area without establishing radio communications with the tower. The Piper and Cessna collided on the downwind leg. The five FAA employees on duty in the tower did not see the Piper. The court, after noting that the air traffic controllers' duties are not limited to those contained in the FAA manuals, concluded that the controllers had a duty to monitor the Cessna's position while it was in the vicinity of the entry corridor to the traffic pattern.

Similarly, in Allen v. United States, the court stated that the duties of an FAA air traffic controller are not confined to those detailed in FAA manuals. The case involved a mid-air collision between a Cessna 150 and an Ozark Airline DC-9. Before the collision the Cessna pilot had been cleared to enter a right downwind leg for Runway 17. He did not acknowledge, however, the clearance transmission and headed in a southeasterly direction toward the extension of Runway 17. The DC-9, which was on a training flight, entered a right base leg for Runway 17. The air traffic controller saw that the Cessna was about to turn on final in front of the DC-9. He instructed the Cessna to proceed straight across the final and

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30 Id. at 1329.
31 Id. The court found that under especially dangerous conditions, controllers must take steps beyond those set forth in the manuals if such steps are necessary to ensure the safety of pilots and passengers. A person is not necessarily free from negligence just because he "may have literally complied with safety statutes or rules." Id.
33 A downwind leg is "[a] flight path parallel to the landing runway in the direction opposite to landing. The downwind leg normally extends between the crosswind leg and the base leg." FAA Order 7110.65C, Air Traffic Control, app. 4, 41 (1982).
34 A base leg is "[a] flight path at right angles to the landing runway off its approach end. The base leg normally extends from the downwind leg to the intersection of the extended runway centerline." Id.
35 Final is "[c]ommonly used to mean that an aircraft is on the final approach course or is aligned with a landing area." Id. at 16.
enter a left base leg.\footnote{38 See supra note 34.} Soon after the controller's transmission the collision occurred. After observing that air traffic controllers have a duty to prevent collisions, the court held that the air traffic controller was negligent in authorizing the two aircraft to fly a collision course.\footnote{37 370 F. Supp. at 1000.}

A review of reported cases that discuss a controller's duty to separate aircraft indicates that no court has found a controller negligent for failing to take action beyond the scope of duties defined in the FAA manual unless the controller was aware that the aircraft was in a position of danger. Courts have concluded uniformly that failure to warn constitutes negligence where controllers were aware, or should have been aware, that an aircraft was in a position of danger.\footnote{38 United Airlines v. Wiener, 335 F.2d 379 (9th Cir.), cert. denied, 379 U.S. 951 (1964).} Clearly, these conclusions are based on a determination that the controller failed to exercise due care.

II. Mid-Air Collisions in Terminal Control Areas and Terminal Radar Service Areas

A Terminal Control Area (TCA) consists of "controlled airspace extending upward from the surface, or higher to specified altitudes within which all aircraft are subject to operating rules."\footnote{39 See supra note 34.} The FAA has established TCA's at certain airports with high density traffic because of the recognized need to maintain operational safety near busy airports.\footnote{40 14 C.F.R. § 91.90 (1982).}

Duties imposed by the FAA on air traffic controllers are more stringent in Terminal Radar Service Areas (TRSA) with Stage III Service and TCA's. Except for aircraft equipment requirements, the major difference between a TRSA and a TCA is that participation in the former is voluntary, while participation in the latter is mandatory.\footnote{41 FAA Airman’s Information Manual 1-32 (1982).}

TRSA is defined in the pilot/controller glossary contained in Part I of the Airman's Information Manual as the airspace...
surrounding certain designated airports wherein Air Traffic Control provides radar vectoring, sequencing and separation on a full-time basis for all IFR and participating VFR aircraft. This service is referred to as Stage III Service.

VFR aircraft operating in a TRSA Stage III environment are given Stage III Services unless the aircraft requests otherwise. Part I of the Airman’s Information Manual states that “the purpose of this service is to provide separation between all participating VFR aircraft and all IFR aircraft operating within the airspace defined as the Terminal Radar Service Area (TRSA).” The purpose of the TCA is the same as that of the Stage III Service in a TRSA.

The defense of a lawsuit arising out of the mid-air collision between two participating aircraft within the boundaries of either a Stage III TRSA or a TCA is difficult. One of the factors making the defense more difficult is that any collisions indicate that the objective for establishing TRSA’s and TCA’s has not been achieved. A second factor making the defense more difficult is that the towers providing the services in a TRSA or TCA are equipped with Britescope radar. The availability of radar makes it easier for air traffic controllers to locate aircraft and, to some extent determine the horizontal separation. Because a controller’s ability to provide separation is greatly enhanced by the availability of radar, it is more difficult to absolve the United States of liability.

Generally, the government asserts the following defenses in lawsuits stemming from mid-air collisions that occurred within either a Stage III TRSA or a TCA: (1) the collision occurred with at least one aircraft not participating in the Stage III Service of the TRSA; (2) one or both of the aircraft failed to follow its air traffic control clearance or instruction;

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"Id.
"Id. at 1-5.
"Id. at 1-32.

A radar is “[a] device which by measuring the time interval between transmission and reception of radio pulses and correlating the angular orientation of the radiated antenna beam or beams in azimuth and/or elevation provides information on range, azimuth and/or elevation of objects in the path of the transmitted pulses.” FAA Order 7110.65C, Air Traffic Control, app. 4, 31 (1982).
(3) one or both of the aircraft entered the TRSA or TCA without communicating with the appropriate FAA facility; or
(4) the aircraft were providing their own separation and failed to do so properly.

The duty of pilots to “see and avoid” other aircraft is not reduced or abrogated while operating in a TRSA or TCA. Part I of the Airman’s Information Manual provides:

4. PILOTS RESPONSIBILITY: THESE PROGRAMS ARE NOT TO BE INTERPRETED AS RELIEVING PILOTS OF THEIR RESPONSIBILITIES TO SEE AND AVOID OTHER TRAFFIC OPERATING IN BASIC VFR WEATHER CONDITIONS, TO MAINTAIN APPROPRIATE TERRAIN AND OBSTRUCTION CLEARANCE, OR TO REMAIN IN WEATHER CONDITIONS EQUAL TO OR BETTER THAN THE MINIMA REQUIRED BY FAR 91.105. WHENEVER COMPLIANCE WITH AN ASSIGNED ROUTE, HEADING AND/OR ALTITUDE IS LIKELY TO COMPROMISE SAID PILOT RESPONSIBILITY RESPECTING TERRAIN AND OBSTRUCTION CLEARANCE AND WEATHER MINIMA, APPROACH CONTROL SHOULD BE SO ADVISED AND A REVISED CLEARANCE OR INSTRUCTION OBTAINED.46

In *Colorado Flying Academy v. United States*47 the United States was absolved of liability for a mid-air collision that occurred in a TCA because both pilots were found negligent in failing to “see and avoid” each other. The case arose out of the mid-air collision between a Piper Seneca and a Beech Bonanza west of Denver, Colorado.48

Initially, the court determined that the Denver TCA had been designed negligently.49 The FAA airspace specialist responsible for the design had not provided a “buffer zone”50 between TCA and non-TCA traffic and also had failed to include the back-course Instrument Landing System (ILS)
within the TCA airspace.\textsuperscript{81} Government liability, however, was precluded because the TCA had been designed pursuant to established FAA guidelines and thus, fell within the "discretionary function exception" to the Federal Tort Claims Act.\textsuperscript{82} Additionally, the court concluded that even if the design of the TCA had not fallen within the "discretionary function exception", the negligence of the United States was not the "primary cause" of the mid-air collision.\textsuperscript{83} The court explicitly rejected the plaintiff's arguments that "see and avoid" was an outmoded concept, and held that the pilot's failure to "see and avoid" each other was the "primary cause."\textsuperscript{84}

The United States was held liable, however, in \textit{Universal Aviation Underwriters v. United States}.\textsuperscript{85} The case arose out of a mid-air collision within the Denver TCA between a DeHavilland Twin Otter and a Beechcraft Bonanza. Evidence produced during trial indicated that shortly before the collision occurred, an air traffic controller had failed to notify the pilot of the Bonanza that a Cessna 180 was on a straight-in approach preparing to land on Runway 8 right.\textsuperscript{86} The Bonanza had been cleared to land on parallel Runway 8 left behind a Beech King Air and the DeHavilland Otter.\textsuperscript{87} Mistaking the Cessna for the Otter, the pilot of the Bonanza notified the tower that he had the Otter in sight.\textsuperscript{88} Contrary to the controller's instructions, he then turned on a base leg and collided with the Otter.\textsuperscript{89}

The Otter and the Bonanza were in each other's blind spot when the collision occurred. All of the planes had appeared on

\begin{itemize}
\item \textsuperscript{81} \textit{Id.} An ILS normally consists of a localizer, glidescope, outer marker, middle marker and approach lights. FAA Order 7110.65C, Air Traffic Control, app. 4,21 (1982).
\item \textsuperscript{82} 506 F.Supp. at 1229. In dicta, the court opined that the certification of the Seneca aircraft, which had been challenged by plaintiffs due to cockpit visibility, was likewise a discretionary function. \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 1227.
\item \textsuperscript{84} \textit{Id.} at 1227-28.
\item \textsuperscript{85} 496 F. Supp. 639 (D. Colo. 1980).
\item \textsuperscript{86} \textit{Id.} at 644.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\end{itemize}
the tower Britescope radar, and were visible through the control tower window. The controller, however, did not see the collision because his attention was diverted to other traffic.60

At trial, the United States argued that the pilots were negligent in failing to "see and avoid" each other.61 Plaintiff, the insurer of the Otter, argued that the controllers were negligent in failing to provide positive separation between the aircraft.62 The court agreed and noted that one of the reasons the TCAs were created by the FAA was the failure of the "see and avoid" policy.63 Moreover, the court found that the controller failed to utilize his Britescope correctly which caused him to give erroneous and misleading instructions to the pilots.64

The court ruled that the controllers have a duty to give clearance in accordance with air traffic control manuals and to warn of dangers reasonably apparent to them even if they are not required to do so by the manuals.65 The negligent breach of the duty to issue clearances was held by the court to have proximately caused the collision. Notwithstanding Universal Aviation Underwriters, pilots cannot rely exclusively on the air traffic controller to provide separation from other aircraft. Such reliance would violate the pilot's duty to "see and avoid."

Teicher v. United States,66 arose out of the mid-air collision of a Golden West DeHavilland Twin Otter and a Cessna 150 outside the Los Angeles TCA. The area of the accident was one where crossing north-south traffic disappeared from the radar due to tangential effect. The court stated that "it is not known whether the pilots of the Golden West Flight 261 relied upon the air traffic controller to provide separation from known or unknown traffic, but if the pilots did rely exclusively

60 Id. at 647.
61 Id. at 649.
62 Id. at 641.
63 Id. at 649.
64 Id. at 647-48. Both aircraft were in compliance with air traffic control instructions and neither pilot could see and avoid the other because each was in the other's blindspot. Therefore, neither pilot was held negligent. Id.
65 Id. at 650.
66 15 Av. Cas. (CCH) 17,533 (C.D. Cal. 1978).
upon the traffic controller, they had no right to do so." The pilots were familiar with the type of traffic in the area and knew there might be traffic outside the Los Angeles TCA. The court held that the pilots of both planes should have seen each other's aircraft in time to avoid the collision and thus, were negligent in failing to "see and avoid" one another. There is a growing trend in comparative negligence states to find both the air traffic controllers and the pilots liable for mid-air collisions. As previously stated, *Rudelson v. United States*, involved a collision between a Cessna 150 and a Piper Colt aircraft one mile south of the Santa Monica control tower under VFR conditions. The court held that the United States was twenty percent at fault because the controllers failed to scan the entry corridor area of the downwind leg of the traffic pattern for Runway 21 during a two minute period immediately preceding the collision. If the controllers had scanned the area, they would have seen that the planes were in imminent peril and could have warned the pilots in time to prevent the collision. The court held that the pilot of the Piper Colt aircraft was forty-five percent at fault because he entered the traffic pattern unannounced and failed to "see and avoid" the Cessna aircraft. The pilot of the Cessna 150 was found thirty-five percent at fault for failing to maintain reasonable vigilence so as to avoid colliding with the Piper Aircraft.

As illustrated through the discussion of the cases above, the defense of a lawsuit arising out of the mid-air collision in TCA's and TRSA's remains difficult. Britescope radar provides extensive tracking of planes within a TCA or TRSA, making it easier for controllers to monitor planes' positions. Therefore, there is little justification for failing to maintain positive separation between aircraft operating within these areas.

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67 Id. at 17,544.
68 Id. at 17,542.
69 602 F.2d 1326 (9th Cir. 1979).
70 Id. at 1328.
71 Id.
72 Id.
III. UNITED STATES LIABILITY FOR MID-AIR COLLISIONS BETWEEN PLANES OPERATING UNDER VISUAL FLIGHT RULES.

Most mid-air collisions occur during daylight hours in good VFR weather conditions. The liability of the United States for mid-air collisions between VFR aircraft in VFR weather conditions is generally nominal. The pilot, and not the air traffic controller, has the primary responsibility for preventing collisions between aircraft operating under VFR in VFR weather conditions.\(^7\) Any duties that the controllers have in this environment are purely secondary.\(^7\)

In \textit{Coatney v. Berkshire,}\(^7\) two aircraft collided one and one-half miles from Fairfax Airport in clear weather with visibility of fifteen miles. The principal allegation of negligence against the United States was that the controller failed to warn either pilot of the converging courses of their aircraft. The court found that because the pilots were operating within the Fairfax Airport traffic area, they had a duty to remain in radio contact with the controller and to monitor transmissions on the tower radio frequency. Although the controller was responsible for establishing the sequence of arriving and departing aircraft, he was not expected to give constant and exact traffic information to all aircraft in the airport traffic area.\(^7\)

The court's decision was based on its finding that there was nothing in the record to indicate that the air traffic controller in the exercise of ordinary care should have observed the pilot in a "position of imminent peril" at any time prior to the accident.\(^7\)

In \textit{Hamilton v. United States,}\(^7\) the court determined that

\(^{7}\) \textit{Coatney v. Beckshire,} 500 F.2d 290, 292 (8th Cir. 1974).

\(^{7}\) \textit{Hamilton v. United States,} 497 F.2d 370 (9th Cir. 1974).

\(^{7}\) 500 F.2d 290 (8th Cir. 1974).

\(^{7}\) \textit{Id. at} 292.

\(^{7}\) \textit{Id. at} 293.

\(^{7}\) 497 F.2d 370 (9th Cir. 1974). The case arose out of the mid-air collision of a Piper Apache with a Cessna 310 approximately one-half mile from the threshold of Runway 27 at Oakland Airport, Oakland, California. Both aircraft had been cleared for straight-in approaches to Runway 27. The Apache was given the approximate position of the Cessna by the tower. When the Apache was a mile from the runway it was cleared to land on Runway 27 right after the pilot reported that he did not have the Cessna in sight. \textit{Id. at} 372-74.
ideally a controller should warn of impending dangers as well as give instructions to prevent accidents. The court noted, however, that when a controller must make a split-second decision, it is more important that he try to give instructions to avoid the collision than to warn the pilots that an emergency exists.\textsuperscript{78} Quoting \textit{United States v. Miller},\textsuperscript{80} the court stated: "it 'would be erroneous' to conclude that the controllers have the primary responsibility for controlling aircraft so as to prevent collisions."\textsuperscript{81} The court also noted that, "a pilot is in a far better position to look for other traffic than the controller."\textsuperscript{82} Although the duty to exercise due care in aircraft navigation at airports is a concurrent one, resting on both air traffic controllers and pilots, the court determined that, under VFR conditions, the ultimate responsibility for the safe operation of the aircraft should rest with pilots, regardless of the air traffic clearance.\textsuperscript{83} Observing that an air traffic controller "is not supposed to give his attention to any one aircraft in the control zone if other aircraft are present,"\textsuperscript{84} the court held that a controller will not be held negligent for turning his attention to other aircraft within the control zone, if he reasonably believes that the pilot is carrying out his instructions.\textsuperscript{85}

Other courts have adopted the court's holding in \textit{Hamilton}.\textsuperscript{86} \textit{Thibodeaux v. United States}\textsuperscript{87} involved a VFR mid-air collision between a Piper Cherokee and a Cessna 150. After taking off on Runway 22, at Pounds Field in Tyler, Texas, the Cessna continued climbing through the downwind leg of the runway. The collision occurred shortly after the Cherokee turned onto the downwind leg of runway 22. The Cherokee had failed to give a position report five miles south of the air-

\textsuperscript{78} Id. at 376.
\textsuperscript{80} 303 F.2d 703, 710 (9th Cir. 1962), \textit{cert. denied}, 371 U.S. 955 (1963).
\textsuperscript{81} Hamilton v. United States, 343 F. Supp. 426, 431-32 (N.D. Cal. 1971).
\textsuperscript{82} Id.
\textsuperscript{83} 497 F.2d at 374. \textit{See also} Tilley v. United States, 375 F.2d 678, 682, 684 (4th Cir. 1967); United States v. Schultetus, 277 F.2d 322, 328 (5th Cir. 1960).
\textsuperscript{84} 497 F.2d at 376, \textit{citing}, Franklin v. United States, 342 F.2d 581, 585 (7th Cir. 1965).
\textsuperscript{85} 497 F.2d at 376.
\textsuperscript{86} Id.
\textsuperscript{87} 14 Av. Cas. (CCH) 17,653 (E.D. Tex. 1976), \textit{aff'd} (unreported), (5th Cir. 1978).
port, as requested by the tower.

The court observed that Federal Aviation Regulations88 require pilots to maintain vigilance, so as to "see and avoid" other aircraft whenever weather conditions permit, regardless of whether the flight is being conducted under VFR or IFR.89 The court also noted that pilots of aircraft operating under VFR within an airport traffic area are in a better position than local controllers to see other aircraft and to evaluate potential collision hazards.90

Because controllers are not required to issue advisories under VFR and may be unable to do so because of other duties, the court concluded that pilots should not rely on an expectation of traffic advisories from controllers in order to separate themselves from other aircraft91 in an airport traffic area. Thus, under VFR conditions the responsibility of separating aircraft in flight rests with the pilots regardless of whether operations are being conducted within an airport traffic area served by a control tower.92

The FAA air traffic controller’s duty to warn pilots of potential mid-air collisions centers on the pilot's and the controller's knowledge of the facts material to the safe operation of the airplane. In earlier decisions which emphasized the ultimate responsibilities of the pilot, the courts considered whether or not the controller’s warnings to the pilot of material facts were sufficient and timely. In United States v. Miller,93 the controllers failed to provide a warning to two airplanes which converged in the landing pattern at a ninety-degree angle, resulting in a mid-air collision. The tower controllers did not see the airplanes as they converged. One plane was climbing, the other plane was descending. Although the district court held that the negligence of the controller in the tower proximately caused the accident, the Court of Appeals for the Ninth Circuit reversed, and held that the pilot was

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88 14 C.F.R. § 91.67(a) (1982).
89 14 Av. Cas. (CCH) at 17,654.
90 Id. at 17,654-55.
91 Id. at 17,655.
92 Id.
93 303 F.2d 703 (9th Cir. 1962), cert. denied, 371 U.S. 955 (1963).
contributorily negligent. The court stated that pilots are primarily responsible for controlling their aircraft, so as to prevent collisions under VFR conditions. Further, the court found that the pilot’s duty was not relieved by the presence of the controllers in the tower. The court determined that the pilot’s failure to clear the area visually before entering the downwind leg of the traffic pattern constituted a violation of the right-of-way rules. This failure was determined to have been the proximate cause of the accident.

Similarly, in *United States v. Schultetus*, the Court of Appeals for the Fifth Circuit reversed a district court decision which held the government liable for the negligence of air traffic controllers. Prior to the VFR mid-air head-on collision, the tower controller asked the pilot of one plane if he had the other plane in sight. After the pilot affirmed visual contact with the other aircraft, the controller warned the pilot of the first plane that the Cessna was crossing in front of it. The court held that the controller’s warning to the pilot discharged the United States of any liability for the collision. The court noted that there may be greater duty and responsibility upon the control tower to aircraft operating under IFR, and in such a situation a lesser responsibility rests upon the pilot.

In *Union Trust Co. v. United States*, one of the earliest cases involving a mid-air collision, the court found that the air

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94 Id. at 711.
95 Id. at 710.
96 Id. at 710-11.
97 Id. at 711.
98 277 F.2d 322 (5th Cir. 1960).
99 Id. at 326.
100 Id. at 327.
101 Id. at 328.

When flying in instrument flight rules weather conditions, it is obviously impossible for the pilot to assume the responsibility of avoiding collision with other aircraft except as directed by the ground control agency. Therefore, it is of the utmost importance that all clearances issued by a control tower to pilots of aircraft under its jurisdiction be adequately concise and definite inasmuch as the pilot has no other means of ascertaining the proximity of other aircraft.

*Id.* at 327 (quoting SPEIZER, PREPARATION MANUAL FOR AVIATION NEGLIGENCE CASES 397).

traffic controller's attempts to warn of an imminent mid-air collision were inadequate and held the United States liable for the controller's negligence. The accident occurred when a Bolivian airplane collided with an Eastern Airlines airplane while both airplanes were executing final landing approaches to Washington National Airport in Virginia. The controller did not observe that the Bolivian airplane was above and behind the Eastern airplane until after he had authorized both planes to land on the same runway. After repeated attempts to warn the descending Bolivian airplane that it did not have the right-of-way, the controller instructed the Eastern airline to turn left. The mid-air collision occurred almost simultaneously with this instruction. The court found that the controller negligently cleared both airplanes to land on the same runway at approximately the same time, failed to warn either pilot of the other's approach, and failed to keep both pilots advised of the location of the other plane.103

Several recent decisions have held that the duty to prevent a VFR mid-air collision rests with both pilots and air traffic controllers.104 In Mattschei v. United States,105 the court stressed that "the duty to exercise due care to avoid accidents is a concurrent one resting on both the control tower personnel and the pilot."106 The case involved a mid-air collision in VFR conditions between a Cessna and a Cherokee airplane while both were approaching Hayward California Airport for landing. The planes were in touch with different traffic controllers on separate radio channels. The court found that the controllers were negligent in failing to warn the Cessna pilot that another plane was above and behind him.107 At trial the controller testified that there is always a possibility of a mid-air collision when two planes are in close proximity to one another. He further explained that although he thought there would be a "near miss" between the Cessna and the Cherokee,

103 Id. at 84-85.
104 Mattschei v. United States, 600 F.2d 205, 208 (9th Cir. 1979). See also Rudelson v. United States, 602 F.2d 1326, 1329 (9th Cir. 1979).
105 600 F.2d 205 (9th Cir. 1979).
106 Id. at 208.
107 Id.
he did not believe the planes would actually collide. The court concluded that the controller should have issued a traffic advisory to the Cessna because the possibility of an emergency or collision was imminent. The court also held the pilot of the Cessna seventy percent liable because he was negligent in attempting to land on the wrong runway and in failing to see and avoid the other airplane.

Aircraft operating on different radio frequencies present extra problems in the defense of a mid-air collision. Frequently, it cannot be shown that the planes knew of the presence of each other through the monitoring of their radios. In *Fikejs v. Lickteig* the court went so far as to hold that it constituted negligence on the part of the United States to have two aircraft operating on different frequencies while landing at the same airport.

The *Fikejs* court found the air traffic controllers negligent for failing to inform pilots of the presence of other aircraft. The case involved the collision of a Cessna 150 and a Bell helicopter. At the time of the collision, both the Cessna and the helicopter were in contact with the tower. The two aircraft, however, were operating on separate radio frequencies and were talking to different controllers. The Cessna had been instructed by the local controller to follow a Cessna 140 on a crosswind leg for Runway 17. The helicopter was cleared to land west of Runway 17. Neither aircraft was informed of the presence of the other aircraft.

The court stated that the United States violated its duty of reasonable care when the controllers failed to advise the Cessna and the helicopter of each other’s presence in the same immediate airspace. Although prudence requires coordina-
tion between controllers handling different aircraft operating on different radio frequencies in the same airspace, there was no coordination between the local controller handling the Cessna and the ground controller handling the helicopter. Additionally, the ground controller failed to specifically ascertain the location of the helicopter before giving it clearance to land. After finding no negligence or contributory negligence on the part of the pilots, the court stated that even if the pilots were negligent in failing to maintain proper vigilance, such negligence was not the proximate cause of the collision.

**Conclusion**

A system of air traffic control which would place the responsibility of separating VFR aircraft on controllers rather than pilots clearly would be unreliable because of the inability of the controller to accurately determine distances and the virtual impossibility of the visual search task this would impose upon controllers. Pilots must always keep in mind their responsibility for continuously maintaining a vigilant lookout regardless of the type of aircraft being flown. Most mid-air collisions occur during daylight hours in good VFR weather conditions. Controller observation of aircraft in the terminal area is often limited by distance, depth perception, aircraft conspicuousness and other normal visual acuity problems. Limitations of available radar, traffic volume, controller workload, and unknown traffic may prevent controllers from providing timely traffic advisory information to VFR aircraft. Moreover, traffic advisories are secondary to the controllers' primary duty of separating aircraft under their control and is-

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[t]he principal objective in air traffic control work is to insure the safe orderly and rapid movement of aircraft through the nation's airspace. Air traffic clearances issued by controllers are authorizations for aircraft to proceed under specified traffic conditions within controlled airspace. These authorizations are made for the purpose of preventing collisions between known aircraft.

*Id.* at 17,658.

118 *Av. Cas.* at 17,661.

110 *Id.* at 17,664.
suing safety advisories when aware of safety conflicts.

The United States is exposed to the greatest potential liability for mid-air collisions when such collisions are caused by the failure of FAA personnel to exercise due care in separation of aircraft under IFR conditions. Liability may also arise for mid-air collisions that occur in TCA’s, Stage III, and TRSA’s because the primary objective for establishing these areas is to provide for separation of aircraft. Under certain circumstances, the United States may also be liable for mid-air collisions of VFR aircraft. Pilots of aircraft, however, have concurrent duties and responsibilities to avoid mid-air collisions. They cannot rely exclusively on the air traffic controllers to provide separation from other aircraft. To do so would obviously be in violation of the duty of pilots to “see and avoid” and would place an unreasonable burden upon a delicately balanced system.