1968

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Recommended Citation
https://scholar.smu.edu/jalc/vol34/iss3/22
LEGAL RESPONSIBILITY OF GOVERNMENT FOR COMMERCIAL AIR SAFETY

BY CHARLES J. PETERS†

I. THE STATUTORY BASIS

THE STATUTORY BASIS for the legal responsibility of the federal government for commercial air safety is provided by the Federal Aviation Act of 1958. A summary of the areas of federal responsibility specified in that Act is readily available in portions of its section 103, Declaration of Policy. Section 103 requires the administrator to consider "as being in the public interest" (1) the regulation of air commerce to best promote its safety, (2) the control of the use of the navigable airspace and the regulation of both civil and military operations in such airspace in the interest of the safety of both, and (3) the development and operation of a common system of air traffic control and navigation for both military and civil aircraft. The principal sections of the Act dealing with the safety regulatory responsibilities of the Federal Aviation Administrator are section 307(a), authorizing and directing the adoption of airspace regulations; section 307(c), authorizing and directing the adoption of air traffic rules governing the flight of aircraft; and the several sections of Title VI, authorizing and making it the duty of the administrator to promote the safety of flight by prescribing minimum standards for aircraft, aircraft engines, propellers, and appliances and authorizing the issuance of certificates for airmen, aircraft, air carriers, and air agencies.

In connection with these regulatory responsibilities, the administrator is authorized by section 609 to suspend or revoke any safety certificate he issues and to initiate enforcement action leading to civil penalties under section 901 or criminal penalties under section 902 for violations of provisions of the Act or his regulations.

The installation and operation of a common system of air traffic control and navigation are authorized by section 307(b), empowering the administrator to establish, operate, and maintain air navigation facilities. The term "air navigation facility" is defined in broad, general language by section 101(8) of the Act to include air traffic control towers and air route traffic control centers. There is a very material difference between this authorization to provide air traffic control services and air navigation aids under section 307(b), and the legislative language on the rule

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making, certification, and enforcement functions of the administrator. The authorization granted the administrator to provide air traffic control and air navigation services is not coupled with a mandatory directive in the statute to do so, as his rule making functions are, but, rather, is limited to an authorization only. In addition, activities under it are expressly conditioned by the phrase in section 307(b) "within the limits of available appropriations made by the Congress."

II. THE CASE LAW

While the statutory provisions governing the responsibility of the federal government for air safety clearly delineate the functions involved, the language used by the Congress is constantly being interpreted by the cases arising from aircraft accidents. Accordingly, I will attempt to review here the more significant judicial decisions involving the federal government. The administrator's exercise of his rule making responsibility under sections 307(a) and (c) and Title VI is occasionally the subject of a lawsuit representing a petition for rule making or a petition for an injunction to prevent rule making or the application of a rule. However, there have been no noteworthy suits filed against the government seeking money damages based upon the alleged negligence of an FAA employee in the exercise of the administrator's rule making powers.

A few suits have been filed based upon the FAA performance of its certification and enforcement responsibilities. Initially, the courts were reluctant to conclude that the federal government was liable even though the available evidence indicated the federal employee involved had not performed his duties with complete perfection. The first of these cases arose from the crash of an American Airlines aircraft at Fort Leonard Wood, Missouri, on 4 August 1955. The accident was caused by an engine failure due to improper overhaul at American's base in Tulsa at which the Civil Aeronautics Administrations had stationed several aviation safety agents to monitor and inspect the air carrier's operations. The plaintiff alleged negligence on the part of the CAA inspectors, and the United States defended on the legal ground that the CAA inspectors owed no duty to individual passengers and on the factual ground that the inspectors could not physically check each operation of the carrier. The court held the air carrier liable but concluded that, under both the law and facts, the plaintiffs had failed to establish any basis for a recovery against the United States.  

During this same period, the government was also successful in a similar case involving the improper approval of a modification of a C-46 by a CAA-Designated Aircraft Maintenance Inspector (DAMI). The DAMI had issued a certificate of airworthiness even though nonconforming parts had been used in the modification of the elevator tab controls. The aircraft crashed shortly after the modification and the Civil Aeronautics Board determined that the accident was caused by the structural

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5 A predecessor agency to the Federal Aviation Administration.
6 Lee v. United States (N.D. Tex. 1957).
failure of the wing from a violent pitch-down induced by the erratic action of the nonconforming controls. The pilot's widow filed suit against the government, but the court dismissed the action on the ground that the government inspectors did not owe a duty to the plaintiff in their performance of the statutory functions entrusted to the administrator to inspect and certificate aircraft.  

In another airworthiness case, the claim against the government was based on the alleged negligence of an agency inspector in issuing a certificate of airworthiness despite a lack of compliance with an airworthiness directive. Here again, the United States was dismissed as a party in the action.

The judicial view on the extent of the FAA duty to passengers was again expressed in the case of Gibbs v. United States. Plaintiff's decedent was a passenger in a Twin Beech, operated by an air taxi operator, which crashed on takeoff due to being overloaded and having the center of gravity moved to the rear beyond the maximum allowable limit. The plaintiff alleged that the government was negligent in certificating the pilot and the airworthiness of the aircraft after modification and alteration. The court first concluded that the distinction between the government's negligence when it acts in a proprietary capacity and its negligence when it acts in a governmental role no longer existed. The court then found that the FAA inspector had apparently not made a sufficient inspection to determine whether the modification was in conformity with the supplemental type certificate and that there was a lack of proper coordination between two FAA offices. While the court found this to be "culpable negligence," it also found that the proximate cause of the accident was the pilot error in overloading the aircraft and positioning the load so as to violate the center of gravity limit. Thus, the court refused to allow the plaintiff to recover from the government. The case is noteworthy for its statement that "the Government nevertheless does not become an insurer" because of its decision to regulate the flight, repair, and modification of aircraft and the licensing of pilots. Instead, the court stated, the liability of the government "is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances."

The extent of the government's responsibility for commercial air safety in the certification of aircraft and related functions was the subject of suits resulting from the crash of a Lockheed Electra upon encountering starlings at takeoff from Logan Airport in Boston on 4 October 1960. The court found the government negligent on the following four grounds: (1) issuance of a type certificate for an aircraft with engines capable of ingesting birds with a resulting loss of power; (2) failure to prescribe in the type certificate a prohibition against use of the aircraft where birds were known to congregate; (3) failure to

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7 Lohr v. United States, 264 F.2d 619 (5th Cir. 1959).
10 Id. at 400.
devise a system under which aircraft would not be cleared for takeoff where birds were of such quantity as to be a menace; and (4) failure to require the airport operator, in the grant agreement made under the Federal Airport Act, to remove conditions at the airport which attracted birds. This decision is now on appeal in the United States Court of Appeals for the Third Circuit and, therefore, we shall refrain from any discussion of (1) the problem presented to the FAA in the type certification of aircraft with engines which may lose power due to foreign object ingestion, and (2) the scope of the term "airport hazards," as used in the Federal Airport Act and the implementing regulations.

A review of the judicial decisions involving the provision by the FAA of air traffic control and related services presents a substantially more complex picture than those involving other FAA functions. Before proceeding to that review, we might summarize the basic relationship which exists between the FAA controller and the pilot in command of an aircraft, together with their respective responsibilities and the sources of those responsibilities. In the exercise of the statutory authorization to operate air navigation facilities, the Federal Aviation Administrator operates 28 air route control centers, 269 airport traffic control towers, 332 flight service stations, and 59 combined station towers. In operating these facilities within the limits of available appropriations, the administrator has promulgated manuals of procedures which prescribe the services to be provided the aviation public and the manner in which those services are to be provided. Air traffic controllers, flight service specialists, and other FAA employees are instructed to perform their duties in accordance with these handbooks. Thus, airport traffic control tower operators may clear aircraft for takeoff or landing only in accordance with prescribed separation standards and enroute air traffic controllers are required to preserve fixed distances between enroute aircraft.

Similarly, the administrator, in accordance with the authorization and mandate given by the Congress in sections 307 and 601 of the Act, prescribes air traffic rules and related regulations governing pilots. Under these regulations, the pilot in command is "directly responsible for and is the final authority as to the operation" of his aircraft. He is required, before beginning a flight, to "familiarize himself with all available information concerning that flight." This information must include available weather reports and forecasts and alternatives available to him if the planned flight cannot be completed. These air traffic rules include a prohibition against careless or reckless operation and, also, flight rules on the right of way and operations near other aircraft, imposing an obliga-

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13 See, e.g., FAA Handbook, Terminal Air Traffic Control § 7110.8; En Route Air Traffic Control § 7110.9; Facility Operation § 7230.1.
14 14 C.F.R. § 91 et. seq. (1967).
15 14 C.F.R. § 91.3 (1967).
16 14 C.F.R. § 91.5 (1967).
tion on each pilot to maintain a lookout for other aircraft, known as the "see and be seen" or "see and avoid" responsibility."

With respect to the basic air traffic controller responsibility, i.e., the separation of aircraft from each other, landmark decisions have been handed down by the Fifth and Ninth Circuit Courts of Appeal. In *United States v. Schultetus,* the Fifth Circuit reviewed a trial court decision holding the government responsible for a mid-air collision which occurred in a control zone within view of the airport traffic controllers. The decision for the plaintiffs was based on the controller's failure to direct one pilot to alter his course and to properly space the other aircraft. The appellate court found that the aircraft were operating in Visual Flight Rules weather conditions and that the lower court had "overlooked the principle that the direct and primary responsibility for the operation of an aircraft over or in the vicinity of an airport rests upon the pilots of the aircraft." The same result was reached in *United States v. Miller.* The case involved a similar mid-air collision between a Cessna in the traffic pattern practicing landings and a Beechcraft entering the pattern. The Ninth Circuit found that the Cessna had the right of way and concluded that the failure of the Beechcraft pilot to comply with the air traffic rules was not excused by the presence of the tower controllers and the issuance of a clearance to enter the pattern. Referring to the trial court's conclusion that the tower controllers were primarily responsible for the prevention of collisions, the court stated: "Such a view would be erroneous, because the focal point of ultimate responsibility for the safe operation of aircraft under VFR weather conditions rests with the pilot. Under such conditions he is obligated to observe and avoid other traffic, even if he is flying with a traffic clearance."

Another control zone mid-air collision case arose when a formation of National Guard F-84's made a low pass across the airport in accordance with an air traffic clearance, and one of the jets collided with a Piper Tri-Pacer, killing both occupants. The Piper had entered the control zone without advising the tower of its presence or obtaining any clearance or traffic information. While the court first found that the controller was not negligent in failing to observe the Piper, it also concluded that the advisory nature of the control tower function and the collision avoidance responsibility of the pilots precluded recovery against the government.

On the same subject of traffic separation, the Fourth Circuit reversed a judgment for the plaintiff who had sought damages for injuries suffered as a passenger in a DC-8 which had skidded off a runway. The incident occurred when the pilot was attempting to turn in accordance with an ATC instruction. While the basis for government liability was extremely scanty, the decision is noteworthy for its recognition of the mandatory

17 14 C.F.R. §§ 91.9, 91.65, 91.67, 91.69 (1967).
18 277 F.2d 322 (5th Cir. 1960).
19 Id. at 328.
20 303 F.2d 703 (9th Cir. 1962).
21 Id. at 710.
23 Tilley v. United States, 375 F.2d 678 (4th Cir. 1967).
application of the administrator's air traffic control procedures to controllers and the scope of the air traffic rules which make the pilot primarily responsible for the operation of his aircraft.

Another control zone traffic separation case involving possible negligence of a tower controller arose from the collision of a landing helicopter with a truck traversing a terminal gate area. While the helicopter was proceeding under an appropriate clearance, the court nevertheless found the pilot negligent in failing to survey the landing area and, accordingly, denied recovery when the plaintiff failed to prove his freedom from contributory negligence.

The government is, of course, not always successful in litigation arising from near misses or mid-air collisions. In Cattaro v. Northwest Airlines & United States, the court held the government responsible for injuries suffered by a passenger in a near miss between an airliner and an Air Force bomber which resulted from a failure of the air carrier crew to maintain separation and the failure of the two controllers to coordinate their information and actions with respect to the two aircraft. In two other enroute collisions, the government was found liable for its failure to notify the air carrier of the use of a military instrument approach procedure in the federal airway used by civil aircraft and, in the second case, for the failure of a radar controller to transmit a timely warning to the air carrier aircraft of the presence of a National Guard jet aircraft being operated under visual flight rules.

In two control zone mid-air collisions, the court found substantial evidence of negligence in the failure of a controller to warn the pilot in the first case of possible danger from the other aircraft and, in the second case, in issuing misleading information to one of the pilots involved. The court disposed of the government's defense of VFR conditions and the consequent responsibility of the pilots to provide separation between the two aircraft by finding that the pilots were following properly and promptly the ATC clearances issued to them. The damages awarded in the latter case could be construed as a judicial compromise in that the amount granted was $30,000, and the decedent was a 42 year-old man earning $5,000 per annum who had left a widow and a nine year old daughter.

While disputes may arise with respect to the evidence of government negligence or the judicial reasoning in some of these cases in which the government was held liable for the negligent performance of its ATC aircraft separation function, it should be noted that, in general, these decisions recognized that the air traffic controllers were required to perform their duties in accordance with the FAA ATC Procedures Manual, that this manual prescribed the government standard of care, and that the pilots had a responsibility to maintain a lookout for and to avoid other

24 New York Airways v. United States, 283 F.2d 496 (2d Cir. 1960).
aircraft. Therefore, in this area of air safety, the basic principles governing government responsibility have been generally accepted.

Proceeding now to the possible liability of the government for accidents caused by weather conditions, the courts readily found in the earlier cases that the government should not be held responsible for the failure of controllers to prevent the operation of aircraft into hazardous weather conditions. Thus, a district court denied recovery on a claim based upon the tower controller's issuance of a takeoff clearance in instrument flight conditions when the pilot did not have an instrument rating. In a similar case, involving an ATC visual flight rules clearance for an approach to a landing in IFR conditions, the court denied recovery. The same result was reached in a case based on the in-flight breakup of a Cessna which resulted when the pilot became disoriented upon entering a solid overcast. The VFR pilot was being provided radar assistance for an approach in IFR conditions. The court followed the reasoning of the two earlier decisions, the Martens and Smerdon cases, in concluding that the approach controller owed no duty to determine either the qualifications of a pilot to follow clearances for a type of flight requested by a pilot or whether the aircraft was suitably equipped for that type of flight.

The government was also absolved in two recent cases involving airplane crashes in unfavorable weather conditions. Most of these cases referred specifically to the standards and procedures prescribed in the ATC manual in determining the extent of duties owed by air traffic controllers to pilots. In the cases where the court found that, under the circumstances, the controller owed a duty to furnish weather information, the court nevertheless denied recovery when it found that the failure to furnish such information was not a proximate cause of the accident.

The responsibility of the government for the furnishing of weather information to pilots was the key feature of the Second Circuit decision in the Ingham case, involving the crash of an Eastern DC-7 in the course of an instrument approach. The tower controller had advised the pilot of the 200 foot ceiling and one mile visibility but did not later advise him that the visibility had decreased to three quarters of a mile. The court interpreted the ATC manual requirement for the furnishing of a "report of current weather conditions and subsequent changes, as necessary" to require a report to the pilot of the change in visibility to three quarters of a mile. The court made this finding despite the fact that the FAA specified minimums for the approach being executed fixed one half mile as the required visibility and the air carrier's manual, in accord with the FAA regulation, required execution of a missed approach only when visual contact had not been established, or it had been lost after descent to minimums, thereby indicating that the air carrier pilot would have descended

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to his minimums in any event. On this point of causation, the court concluded that the change in visibility was information "the crew would have considered important both in determining whether to attempt a landing, and in preparing for the weather conditions most likely to be encountered near the runway." 43

A very recent decision on the government's duty to furnish weather information was issued by the United States District Court for the District of Columbia. 4 Suit was brought by the administratrix of the first officer of a Mohawk Airlines Martin 404 which crashed on takeoff in a thunderstorm. The crew had been advised of the approaching thunderstorm but was not later told that the storm had actually reached the airport. The crew had requested a clearance for a turn "as soon as practical" after takeoff "to avoid those thunderstorms coming in from the west." The clearance was granted. The court found the government negligent in not telling the pilot the thunderstorm was on the airport. In reaching this conclusion, the court stated:

The Government had a duty to provide the taxiing plane with all significant relevant weather information. This duty existed whether or not specific regulations or operating practices required that particular weather information be transmitted. If the Government has new, significant, and immediate relevant information that might have affected the crew's takeoff decision, and there was opportunity to provide it after the plane left the ramp, then the Government will be held liable, even though the regulation did not explicitly require the information to be transmitted. 45

In refusing to use the ATC manual as the standard of care governing the operations of FAA controllers, the court cited the Hartz case, 46 a wake turbulence case which will be discussed later. Since First Officer Neff was conducting the takeoff, the court was faced with the defense of contributory negligence, a total bar under applicable statutory law. The court determined from the request for a left turn that the crew did not realize that the thunderstorm was on the field. The court also determined that the decision to abort the takeoff was the responsibility of the captain, not the first officer. In reaching its conclusion on the crew's lack of knowledge of the location of the thunderstorm, the court stated:

It is highly questionable that the crew was aware that the rain wall contained a thunderstorm or were aware of the speed of its approach. Engine noises of a piston plane could muffle thunder noise; there were apparently no thunderclaps but only rolling thunder sounds. There was no evidence of lightning on the runway. Lightning may not have been particularly apparent to the crew whose view was adversely affected by the heavy rain on the windshield. It is difficult to judge speed of storms when in a cockpit on a runway. 47

43 Id. at 235.
45 Id. at 917.
46 Hartz v. United States, 387 F.2d 870 (5th Cir. 1968). Another recent decision in which the performance of a tower controller was judged by a standard not prescribed by an FAA manual is Stork v. United States, 278 F. Supp. 869 (S.D. Cal. 1967). Government negligence was found in the issuance of a clearance for a takeoff into extremely bad weather conditions. The ATC manual provisions did not authorize the controller to deny clearance under the applicable circumstances.
The last principal area of government responsibility involves wake turbulence. The problem of wake turbulence has grown with each court ruling on the subject. Wake turbulence, or as it is sometimes called, wing tip vortex, is created by the lift action of aircraft wings. The two vortices created by large transport aircraft in taking off and landing can produce excessive rates of descent and uncontrollable rolling movements in light aircraft. Their location and duration, after a short period of time, are extremely difficult to forecast with any accuracy.

The first case on the subject of wake turbulence resulted in a decision in favor of the government but contained a clear warning of future difficulties. The pilot of the light aircraft which crashed in a landing attempt employed improper techniques and did not comply with the traffic pattern. The court found the crash was caused solely by his negligence and denied recovery to all plaintiffs, including the passengers. However, the court did state that a duty existed on the part of the air traffic controller to consider wake turbulence in the issuance of air traffic clearances, even though the ATC manual was completely silent on the subject. In a similar case, involving an enroute encounter with wake turbulence, the court found insufficient evidence to establish that the government's failure to warn a private pilot of the activities of large military aircraft around an airport was the proximate cause of the accident.

Subsequent to these two accidents, the ATC manual was revised to provide for a wake turbulence warning by the controller when he believed turbulence might be present. The first decision subsequent to this revision involved a takeoff accident in wake turbulence after the warning had been provided in accordance with the manual. The Ninth Circuit Court held that the controllers should have provided a second warning when they saw that the aircraft was starting its takeoff in disregard of the first warning.

The Furumizo decision in the Ninth Circuit was followed by the Fifth Circuit in the Hartz case. A warning was given to the Bonanza pilot by the controller, but unlike the Furumizo circumstances, the phraseology prescribed by the manual was not followed. Although the DC-7 which caused the wake turbulence passed directly in front of the Bonanza in its takeoff, the court found that the warning of "prop wash" was insufficient to warn the pilot of the hazard created by the DC-7. The court then determined that the controller was "better qualified by training, experience and vantage position to estimate time and distance and it was his duty to direct and guide the Bonanza in a manner consistent with its safety and the safety of all who might be affected by its operation. It was the controller's responsibility to appropriately warn Hartz of the possible danger of wing tip vortices from the large commercial airliner which was departing immediately ahead of him." The court concluded that the FAA controller owed a duty beyond those prescribed by the ATC manual and

40 Furumizo v. United States, 381 F.2d 965 (5th Cir. 1967).
41 Supra note 36.
42 387 F.2d at 873.
that the lack of an appropriate warning imposed upon the controller "an additional duty to delay takeoff clearance for the Bonanza for such period as was reasonably necessary to permit such turbulence from the DC-7 to dissipate."

A wake turbulence case in which the controller failed to issue a warning arose when a Bonanza crashed on a takeoff attempt in the wake turbulence of a Constellation. The Bonanza pilot had requested and obtained clearance for an intersection takeoff, that is, a takeoff from a point down the runway from the normal takeoff end. While the court denied recovery for the pilot's estate, it did permit recovery to the passenger's estate on the ground that the "collision hazards" from which controllers are required under the ATC manual to separate aircraft include wing tip vortices. Based on this interpretation of the manual, the court determined that the controller had provided insufficient separation between the Constellation and the Bonanza.

The government has been attempting to acquire knowledge on the scientific phenomenon of wake turbulence for a substantial period of time. In a January, 1964 report prepared by the Douglas Aircraft Company under FAA contract it was concluded, based on flight test measurements of vortices shed from a DC-8 aircraft during takeoff and landing, that:

(1) A fairly elaborate experiment would be required to verify general theory for vortex displacement and decay because of extreme sensitivity to low level wind conditions.

* * *

(4) Recommendations for improved separation criteria were not warranted as a result of this investigation. 44

The tests and measurements of vortices have continued since the date of this report. However, efforts by the National Aeronautics and Space Administration, the Federal Aviation Administration, and government contractors have not resulted, to date, in disclosing appropriate separation standards for use by FAA controllers in the provision of air traffic control services to aircraft.

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43 Wasilko v. United States (M.D. Ohio 1967).