The Expanding Liability of Air Traffic Controllers

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THE EXPANDING LIABILITY OF AIR TRAFFIC CONTROLLERS

Since the infancy of aviation, individuals injured as a result of flight in aircraft have sought some basis by which they might be reimbursed for their loss. Their quest had, in the earliest attempts, sought a compensation system analogous to existing systems like maritime and automobile negligence law. Within a brief passage of time, negligence emerged as the most common theory under which recovery was sought.¹

A significant portion of the litigation that has resulted from aircraft accidents has involved Air Traffic Control (ATC), that function within the Federal Aviation Administration (FAA) charged with the safe control of aircraft flight. The various activities necessary for safe aircraft flight include preventing collisions between aircraft, maintaining an orderly flow of air traffic, providing advice and information to the pilot in command and notifying search and rescue organizations in the event of emergency.² To accomplish these tasks, ATC is divided into three functional categories: terminal air traffic controllers, enroute traffic controllers and flight service air traffic specialists. Each of these categories has specific responsibilities that, when coordinated, permit ATC to accomplish the mission assigned to it.³

To understand the relationship between these categories, a brief hypothetical journey in an aircraft will be helpful. After boarding a commercial carrier at the airport, the plane is taxied (after a proper clearance from the ground controller, one of the three terminal controller functions) to the runway threshold. At this time,

the pilot is operating under the instructions of the airport traffic controller (another terminal controller) and is granted a clearance to take-off. Once airborne, the aircraft remains under the control of the airport traffic controller until it is beyond the limits of the airport control zone.4 As the plane passes out of the airport control zone it is “handed off” first to the departure controller (the last terminal controller) and then to the enroute traffic controller, from whom the pilot receives his instructions regarding altitude, weather and traffic information. As the plane passes over various parts of the country, it is “handed off” to each of the successive enroute traffic controllers (who are communicating with the pilot from one of the air route traffic control centers [ARTCC], one of which exists in each geographical section into which the country is divided). As the flight nears its destination, there is another “hand off” to the approach controller who directs the aircraft into position for entry into the airport traffic. At this time, there is yet another “hand off” to the airport traffic controller who sequences the aircraft for landing and grants a final clearance. Once landed, the ground controller directs the plane’s movements to its berth.

Since the majority of commercial carrier flights are operated under instrument flight rules (IFR),5 only those ATC categories that are involved in IFR operations were mentioned. Had the hypothetical flight been conducted under visual flight rules (VFR),6 the environment in which most general aviation operations occur, the pilot would have received instructions and weather information only from the ground controller, airport traffic controller and flight

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4 Federal Aviation Adm., 14 C.F.R. § 71.11 (1973): “The control zones . . . consist of controlled airspace which extends upward from the surface of the earth and terminates at the base of the continental control area. A control zone . . . is normally a circular area with a radius of five miles and any extensions necessary to include instrument approach and departure paths.”

5 Under IFR, ATC directs virtually every movement of the aircraft by radio commands to the pilot regarding altitude, speed, rate of descent and glide slope. The system is necessary for flight during times when the pilot’s visibility is impaired by clouds, fog, rain, or other adverse weather and for commercial aviation. Federal Aviation Adm., 14 C.F.R. §§ 91.115-91.129 (1973).

6 VFR conditions are best thought of as those involving “good” weather. Federal Aviation Adm., 14 C.F.R. § 91.105 (1973). Regulations (c) and (d)(1) state that for aircraft operation within a control zone a ceiling of at least 1,000 feet is required and take-offs or landings are prohibited whenever ground visibility is less than three statute miles. For a more detailed explanation of IFR and VFR, see generally Atwell, Government Liability for Negligence of Air Traffic Controllers, 13 S. Tex. L. J. 41 (1972).
service air traffic specialist. In addition, there is another significant difference between IFR and VFR; this distinction may be termed "control." Under IFR, the aircraft is controlled in all its movements in that direction, altitude, climbs and descents are directed by ATC. Conversely, under VFR, the pilot is the controlling agent for these activities unless he is operating within a control zone; generally, the VFR pilots' responsibility for safety is to see and avoid other aircraft.

The air traffic control system is exceedingly complex. To grasp an understanding of ATC's duties and the circumstances under which the organization will be found liable for aviation accidents, a three-fold analysis must be made. Inquiry will first be directed into the past history and trend in the relationship between ATC and aircraft accidents. Then, the weakening of the traditional defenses that have been a corollary to the expansion in liability will be evaluated. In this regard, emphasis is placed upon the importance of the factual situation surrounding the accident as a determinant of liability. Finally, there will be an examination of some of the possible ramifications of this expansion of liability.\footnote{An important parameter under which this inquiry was conducted is that no attempt is made to distinguish among the various categories of ATC. Instead, the term "ATC" shall mean any of the three functional categories. From the hypothetical aircraft flight depicted earlier, however, it may be readily ascertained which control function is involved.}

I. EXPANSION OF ATC LIABILITY—A HISTORY AND PRESENT TRENDS

A. Landings

In 1955, the landmark case of \textit{Eastern Air Lines v. Union Trust Co.} established that the exemptions of the Federal Tort Claims Act (FTCA)\footnote{221 F.2d 62 (D.C. Cir. 1955), \textit{aff'd sub nom., United States v. Union Trust Co.}, 350 U.S. 907 (1955).} do not preclude recovery against the government for ATC negligence in clearing two aircraft for landing on the same
runway. Since that decision, the question no longer relates to the existence of a duty owed the pilot, but to the scope of the duty.

Subsequent to the Eastern Air Lines decision, litigation dealing with aircraft accidents and ATC involvement agonizingly attempted to mold guidelines within the traditional concepts of negligence *e.g.*, proximate cause and contributory negligence. This apparent compulsion by the courts to adhere to traditional concepts, although perhaps a manifestation of the uncertainty with which they viewed their entry into the field, has created an entanglement of judicial logic that complicates analysis on either a sequential or specific situation basis. As a result, an artificial framework must be adopted and an attempt made to mold the decisional results to the structure.

By far the majority of cases involving ATC liability have been based on accidents that have occurred during the attempted landing of aircraft. This is understandable when it is realized that it is during this critical stage of the flight that the pilot is most dependent upon ATC for instructions and assistance. Meanwhile, ATC is at this time most preoccupied with the regulation of air traffic within the relatively confined space of the airport control zone. It is the interaction of these factors then, pilot dependence and ATC preoccupation, that creates a situation most conducive to accidents.

Although existence of a duty had been recognized, there was initially an apparent reluctance on the part of the courts to establish the duty of ATC to pilots beyond that of maintaining aircraft separation. Moreover, the clearance provided by ATC was determined to be permissive, rather than obligatory, and did not relieve the pilot of the duty of exercising caution. Thus, it may be said that the court decisions placed strong emphasis upon the primary responsibility of the pilot for the operation of the aircraft even during those times when the aircraft was within the airport control zone.

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10 Smerdon v. United States, 135 F. Supp. 929 (D. Mass. 1955). Pilot's contributory negligence barred recovery when, after being informed of visibility below FAA weather minimums, he requested and was granted clearance to land and subsequently crashed after the aircraft entered a fog bank.


12 United States v. Schultetus, 277 F.2d 322 (5th Cir. 1960), *cert. denied*, 364 U.S. 828 (1960). The case involved a midair collision between a Cessna 170 and a Cessna 140 over the airfield. ATC had failed to have the Cessna 170 alter course and the Cessna 140 yield. The appellate court reversed the trial court's
In spite of the fact that several decisions involved situations in which ATC could have avoided the catastrophe by merely doing “something extra” in the way of warning,\textsuperscript{18} it was consistently held that the primary responsibility for the safe operation of the aircraft rested with the pilot. The result was not altered when the pilot’s vision was partially blocked due to the unusual attitude of the aircraft.\textsuperscript{18} The primary responsibility of the pilot was said to survive even those emergency situations in which the pilot was incorrectly informed of the status of the landing gear by instruments aboard the aircraft and ATC was in a position to determine if the landing gear were properly down.\textsuperscript{15}

The emphasis the courts have placed upon the primary responsibility of the pilot in landing situations became somewhat modified when a theory of “reciprocal” duty was developed in Maryland ex rel. Meyer v. United States.\textsuperscript{16} In holding the government liable for the negligence of ATC, the court in Meyer declared that although the pilot is primarily responsible for operation of the aircraft, there is a concurrent, reciprocal duty on behalf of ATC that is not neutralized by the pilot’s own negligence.

The real upheaval in liability concepts, however, came in Ingham v. Eastern Air Lines, Inc.\textsuperscript{17} which was perhaps the first case to assert that something more than robot-like obedience to operating procedures was required of ATC.\textsuperscript{18} This attitude was quickly reinforced when it was held in United States v. Furumizo\textsuperscript{19} that there

finding of ATC negligence by reliance on ATC's warning of “Traffic, Cessna crossing in front of you” as being sufficient.

\textsuperscript{18} Id.

\textsuperscript{19} United States v. Miller, 303 F.2d 703 (9th Cir. 1962), cert. denied, 371 U.S. 955 (1963). This was a situation in which one pilot was in a left bank while the other aircraft was approaching from the right.

\textsuperscript{16} Stratmore v. United States, 206 F. Supp. 665 (D. N.J. 1962). See also Wenzel v. United States, 291 F. Supp. 978 (D. N.J. 1968), aff'd, 419 F.2d 260 (3d Cir. 1969). Pilot was given incorrect information by ATC regarding the length of the runway. Experiencing engine trouble, the pilot overshot the runway, and while attempting a “go around” crashed 1½ miles from the field.


\textsuperscript{18} 373 F.2d 227 (2d Cir. 1967), cert. denied, 389 U.S. 931 (1967). ATC had delayed the reporting of a change in weather, a reducing ceiling, for a period of twelve minutes.

\textsuperscript{19} Id. at 235.

\textsuperscript{19} 381 F.2d 965 (9th Cir. 1967). The pilot had been given the procedures manual warning regarding wake turbulence, but he proceeded to land before the
was a duty to repeat a previous warning when it was apparent to ATC that the pilot was proceeding in disregard of the warning into obvious danger. The basis for the holding was the court's belief that there was an "overriding duty" of safety that went beyond the dictates of the procedures manual and required that the warning be repeated.  

Although the trend toward increasing liability resulted in some initial confusion, the delegation of responsibility between pilot and controller rapidly became more solidified. The pilot, as a result of this solidification, was still held primarily responsible for operation of the aircraft, but his responsibility was predicated upon his having been informed of all facts necessary for safe flight. Likewise, the controller was responsible to give the warnings specified in the manuals, warn of dangers reasonably apparent to him and delay clearance if necessary.  This duty to warn a landing aircraft of known dangers has been recently applied to fixed objects on the ground unless the dangerous condition has existed long enough to have become published in aviation advisories.  

Although a great deal of discussion by the courts relates to the question of primary responsibility, the underlying, pivotal point for determining liability has been "control." As a result, under IFR conditions, when the aircraft is under positive control by ATC, negligence is more easily imposed than during VFR conditions. Assessing liability on the basis of "control," however, does not provide a workable formula when one recognizes that while the pilot is in the traffic pattern preparing to land, he cannot deviate from prescribed procedure without prior ATC clearance except to avoid time required for turbulence to dissipate had elapsed. As he did so, ATC merely watched.

10 Id. at 968.

11 American Airlines, Inc. v. United States, 418 F.2d 180, 193 (5th Cir. 1969). The court enumerated these as "standards of duty... deduced from Schultetus, Hartz and Ingham."

12 Harris v. United States, 333 F. Supp. 870 (N.D. Tex. 1971). ATC was held negligent for failure to warn the pilot that he was below the normal height for clearance of a power line obstruction since the controller knew the pilot was unfamiliar with the field.

23 Blount Brothers Corp. v. State of Louisiana, Bd. of Comm'rs, 333 F. Supp. 327 (E.D. La. 1971). The pilot had failed to check a NOTAM (Notice to Airmen) prior to departure, regarding dangerous conditions existing at the destination airfield.

collision with other aircraft. This condition of regulated flight, in addition to the significant dependence upon ATC guidance in these situations, tends to demonstrate the impropriety of using “control” as the test of liability.

From the foregoing, it is possible to summarize the trend of expanding ATC liability in landing situations. Although a vague concept of duty was enunciated almost twenty years ago, the courts’ early experience tended to reflect their belief that the pilot’s responsibility for the aircraft was outweighed by ATC negligence only in the most extreme situations. A vague concept of “control” of the aircraft was apparently being used as the basis for imposing liability. With the birth of the concept of reciprocal duty and the subsequent upheaval of traditional concepts, however, ATC liability became more easily assessed. Since the landing situation placed the pilot in need of guidance at a time when ATC was preoccupied with several aircraft in a relatively confined space, the interdependence between the two situations came to be recognized. As a result of no longer being considered independent operatives, each is now required to fulfill all of the obligations imposed upon him by the regulation manuals. ATC, in addition, is required to warn the pilot of dangerous conditions of which the pilot may not be aware. In short, ATC has an “affirmative duty . . . to take reasonable action to prevent accidents.” If, however, the pilot proceeds after having been warned of the danger, ATC is absolved.

B. Take-Off

The general rule originally adopted by the courts in regard to take-offs was that an ATC clearance for take-off was not an instruction to take-off nor an implied representation that it was safe for the aircraft to take-off at that particular time. Rather, the ultimate decision regarding take-off rested with the pilot who, because of his personal skill and knowledge of his plane’s capabilities, was

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22 Federal Aviation Adm., 14 C.F.R. § 91.87(h) (1973): “Clearances Required. No pilot may, at an airport with an operating control tower, taxi an aircraft on a runway, or takeoff or land an aircraft, unless he has received an appropriate clearance from ATC.”


24 Reidinze v. Trans World Airlines Inc., 329 F. Supp. 487 (E.D. Ky. 1971), rev’d on other grounds, 463 F.2d 1017 (6th Cir. 1972). The judgment was reversed because there was determined to be an issue of fact regarding what information ATC had given the crew, thus precluding summary judgment.
primarily responsible for the operation of the aircraft. This is conceptually more palatable than those situations involving landings because during take-off the pilot is less dependent upon ATC for guidance. This lesser dependence is due to an interrelationship of various factors including the direction of travel and attitude. The take-off cases stressing primary responsibility of the pilot and thereby absolving ATC of negligence have dealt with all stages of preparation before take-off. Cases dealing with the preparatory stages have included improper loading of the aircraft and the pilot not having the correct type of license for the category of flight contemplated.

As with the landing cases, there has occurred a significant change in judicial concepts regarding ATC liability. This dramatic change was made apparent by Hartz v. United States, a decision that has been described as "perhaps an even harder [than Ingham] case against the Government." In the Hartz case, ATC had failed to give the required manual phraseology in warning an aircraft of wake turbulence before take-off. The words "watch the prop wash" were used by the controller; the court in Hartz, however, imposed a responsibility to "direct and guide" the departing aircraft in a manner consistent with safety. The Fifth Circuit's use of the words "direct and guide" brought into question the continuing viability of the previous position of the courts relating to the primary responsibility of the pilot. The process of expanding liability in the take-off cases has been continued by a recent decision by the Ninth

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28 Neff v. United States, 420 F.2d 115 (D.C. Cir.), cert. denied, 397 U.S. 1066 (1968). ATC had failed to warn the crew of a rapidly approaching thunderstorm; the aircraft crashed on take-off as the storm was directly over the airfield.

29 In take-off, most other aircraft in the pattern are in front of the departing aircraft. Additionally, wings are level on take-off, in relation to the pilot and not in the banked attitude encountered in turns on landing, as from downwind to base leg, or base to final.

30 Gibbs v. United States, 251 F. Supp. 391 (E.D. Tenn. 1965). Pilot's contributory negligence in overloading the aircraft to the point of moving the center of gravity rearward past the safety point was held to defeat his claim against the government.


32 387 F.2d 870 (5th Cir. 1968).


34 FAA, AIR TRAFFIC CONTROL PROCEDURES MANUAL 7110.29 § 265.2 (1964). The section required warning of "CAUTION WAKE TURBULENCE" whenever there was less than 2500 feet separation behind a heavy jet.
Circuit, *Stork v. United States.* In *Stork*, it was held that ATC had a duty to warn pilots that take-off under existing weather conditions violated FAA regulations. The basis for holding ATC negligent was the Ninth Circuit's belief that the clearance could "reasonably be read to constitute a reliable official invitation to proceed." The holding in *Stork* is at wide variance with earlier cases that had held that an ATC clearance, once given, divested ATC of any responsibility and "the operation of the aircraft [became] the sole responsibility of the pilot, with which the air traffic controller is not to interfere. . . ."

The trend toward expansion of ATC liability, as exemplified by *Hartz* and *Stork*, was quickly hailed as the proper policy choice by the courts, *i.e.* preferring safety over economy and convenience. Others, however, in agreeing with the soundness of expanding ATC liability because of heavy reliance on the service, expressed some doubt regarding the desirability of burdening ATC with the question of exercising judgment in those ambiguous situations lying between clear violation of FAA weather minimums and marginal conditions.

A recent case dealing with take-off has, to a degree, reversed the previously dramatic increase in ATC liability. From this case it appears that the duty of ATC to warn of hazards in take-off applies only to those situations in which a violation of FAA regulations exists contemporaneous with ATC's ability to warn. Therefore, once the pilot departs under VFR conditions, there is no duty to deny clearance because of the probability that he will encounter adverse weather. If the ability of ATC to warn is contemporaneous

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430 F.2d 1104 (9th Cir. 1970). A non-scheduled carrier had received take-off clearance while weather was below minimums. The crash occurred 50-100 feet after liftoff with great loss of life to a college football team returning home from a game.

46 Id. at 1108.

7 See American Airlines, Inc. v. United States, 418 F.2d 180, 193 (5th Cir. 1969).


40 Spaulding v. United States, 455 F.2d 222 (9th Cir. 1972). Pilot had been told of overcast skies and approaching thunderstorms along his proposed route. Forty-five minutes after take-off he reported that he had lost VFR conditions and although ATC had established radar contact, it was lost as the aircraft descended to the crash. The pilot alleged ATC negligence in failing to prevent the take-off or order a 180° turn to return to the departure point.
with the hazard encountered, however, it has been held that the failure of ATC to warn is negligence even when the hazard is objects on the ground.\textsuperscript{41}

The trend of expanding liability in take-off situations, although perhaps not as dramatic as in the landing situations, is nevertheless as discernible. While the earlier decisions had held that a take-off clearance was not an instruction or implied representation to proceed, recent decisions place upon ATC a duty to guide and direct departing aircraft. More significantly, this duty encompasses an obligation to warn that the take-off under existing conditions violates FAA regulations. The expanded duty to warn, however, exists only when the violation of the regulations is contemporaneous with ATC's ability to warn.

\textbf{C. Enroute Collision or Crash}

During periods when the aircraft is enroute to its destination, the pilot is less dependent upon ATC guidance than at any other time. As a result, it is understandable that those attempting to prove ATC negligence in this situation have been faced with difficult, if not insurmountable obstacles when ATC has complied with all applicable regulations. Again, the conceptual framework or test is that of "control."\textsuperscript{42} This dichotomy on the basis of "control" can be easily demonstrated by a review of case history. From this review, it becomes evident that when a pilot was under VFR conditions, it was virtually impossible to sustain an allegation of ATC negligence; alternatively, while under IFR operation, negligence was sustainable at the slightest deviation by ATC from prescribed procedures. The most striking example of the first proposition involved the collision of two light aircraft directly over a controlled airfield. A casual statement by ATC was held to have been sufficient warning to the pilot.\textsuperscript{43} This result becomes particularly disturbing when it is realized that even a slight effort by the controller could possibly have avoided the tragedy. The second proposition, that

\textsuperscript{41} Moloney v. United States, 354 F. Supp. 480 (S.D.N.Y. 1972). ATC was negligent in failing to warn the pilot of the presence of workmen near the runway. Although information could have been received listening to a local radio frequency broadcasting the condition, it was not required by regulations.


\textsuperscript{43} See note 12 \textit{supra}. See also note 14 \textit{supra}; Stanley v. United States, 239 F. Supp. 973 (N.D. Ohio 1965).
the courts impose liability readily when IFR conditions exist, is qualified to the extent that the pilot must be IFR certificated.44 Once all of the IFR requirements are met by the pilot, ATC will be held liable for the failure to warn of military aircraft maneuvers along the commercial route,45 failure to observe another aircraft on the radar scope in a collision course46 or when one ATC enroute traffic controller fails to coordinate instructions with another enroute traffic controller that results in a collision course.47

This imposition of liability on ATC when IFR situations exist is not without limit. The pilot, to create a sustainable case, must have operated his aircraft within all prescribed procedures.48 Thus, it may be said that although a special duty by ATC is owed pilots under IFR conditions, the pilot must transmit the correct information to ATC and comply precisely with all ATC instructions.49

Although a review of the judicial determinations indicates a softening of attitude toward the primary responsibility of the pilot during enroute flight, the conceptual upheaval that marked the landing and take-off situations is not as noticeable in the enroute situation. This area represents the remaining bulwark of ATC immunity when the controller has complied with all IFR operations requirements. Under VFR conditions, it is the pilot who is held to a higher standard of care.50

D. Weather

The few cases dealing with alleged ATC negligence in disseminating weather information also rest on the theory of the pilot’s

48 Sawyer v. United States, 297 F. Supp. 324 (E.D.N.Y. 1969). Pilot was over seven miles outside the authorized holding position and had also failed to notify ATC of some inoperative navigational equipment.
49 White v. Trans World Airlines, Inc., 320 F. Supp. 655 (S.D.N.Y. 1970). Two airline pilots had confirmed to ATC their altitudes which would have provided a 1,000 foot separation; ATC therefore had no way of knowing that one of the aircraft had departed from its assigned altitude which caused the collision. See also Annot., 35 A.L.R.3d 614 (1971).
primary responsibility. This concept is perhaps based on the fact that weather is an observable phenomenon that usually is gradual in affecting the flight of an aircraft (clouds gathering, icing, etc.). When weather is the critical factor, the imposition of liability appears to rest on whether or not ATC has fulfilled its duty to warn. Any failure or delay in warning of changes in weather conditions may impose liability on ATC. When, however, the latest and most correct information is provided the pilot, and he nevertheless proceeds, his contributory negligence bars recovery. Moreover, the failure of ATC to repeat weather information already given will not be considered negligence when the pilot encounters the danger gradually.

A significant change in ATC liability occurred at a time corresponding to the upheavals in the areas of landings and take-offs. Current opinion on the subject indicates that ATC has an affirmative duty to warn a pilot that a proposed flight violates FAA weather regulations. Once, however, the pilot has been given all the available weather information, the decision to continue the flight is his and he will not then be heard to complain of ATC negligence. Even this limitation on ATC's duty has been qualified by an expansive case that held that the failure of ATC to repeat warnings of approaching adverse weather as the pilot drew closer to his intended destination was negligence on the part of ATC. In so holding, the court's basis was the dependence of the pilot on ATC for correct information and guidance. Moreover, a superior duty was held incumbent on ATC because of greater experience, superior observation facilities and localized information.

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82 See note 17 supra.
84 Somlo v. United States, 416 F.2d 640 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970). The pilot had received information before departure and enroute; the crash nevertheless resulted from icing on wing surfaces.
85 See note 35 supra.
86 Spaulding v. United States, 455 F.2d 222 (9th Cir. 1972).
87 Gill v. United States, 429 F.2d 1072 (5th Cir. 1970). The pilot had been informed of adverse weather by one flight service station (FSS), but had not been given a later warning by the FSS closer to his intended destination. Also the information provided was incorrect.
88 Id. at 1077.
Since weather is an observable phenomenon and one that the pilot generally encounters gradually, it is understandable that the expansion of ATC liability has not made the inroads here that have been made in the other areas. Once the pilot receives all pertinent weather information, and if such information is both timely and correct, his decision to continue the flight will be considered an assumption of the risk.

E. Wake Turbulence

Wake turbulence is the phenomenon of whirling vortices trailing from the wing tips of large aircraft. Light aircraft are particularly susceptible to violent changes in attitude when encountering these vortices. Recently, it has been determined that medium-sized commercial airliners are also endangered by the vortices of the "jumbo jets."

Early cases dealing with ATC negligence in connection with advising of wake turbulence recognized that the phenomenon, unique to aircraft flight, is a hazard of which pilots are entitled to be warned by ATC. This warning was held to be obligatory if the existence of wake turbulence is known to the controller on the basis that safety should not be sacrificed because of the need to expedite air traffic flow. Subsequent decisions, however, appeared to engage in a process of distinguishing wake turbulence from those situations in which other factors could be considered causal. For example, a failure of the pilot to prove that the accident would not have happened but for the failure of ATC to warn of wake turbulence precluded recovery. Likewise, an experienced pilot who

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50 Encyclopedia Britannica, Aerodynamics 201 (1967).
52 Johnson v. United States, 183 F. Supp. 489 (E.D. Mich. 1960), aff'd, 295 F.2d 509 (6th Cir. 1961). A Cessna followed an Air Force B-47 in landing. ATC was held negligent despite the government's contention that the imposition of a duty on ATC to take wake turbulence into account would severely impede traffic flow.
53 Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964), aff'd, 352 F.2d 523 (3d Cir. 1965). The pilot had alleged that there was a duty of ATC to issue warnings about military aircraft's use of a navigational aid. The cause of the crash was claimed to have been turbulence from the military aircraft. See also Thingulstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972). There was no evidence that the failure to issue warnings of wing tip vortices resulted prox-
reasonably ought to have recognized the potential hazard under
the circumstances, the time lapse before encountering any tur-
bulence and lack of knowledge in the industry about wake turbulence
were in one case enough to absolve ATC of negligence allegedly
due to deficient warnings.\textsuperscript{63}

The trend toward expanding ATC liability discernible in other
areas is also evident in the wake turbulence situations. The cases
show an emerging concept of responsibility in this area. The con-
troller has a duty to consider wake turbulence when granting clear-
ances, to issue warnings when turbulence may be a factor and to
continue to reissue warnings if it appears that the pilot has not
fully appreciated the hazards. A mere warning has been held in-
sufficient when the controller should have realized that the pilot
was commencing an “extremely hazardous or suicidal”\textsuperscript{64} flight. The
warning prescribed in the regulations must be provided first,\textsuperscript{65} then
“something extra” may be required of the controller to do what
is possible to prevent the disaster. Additionally, a growing con-
cern exists among FAA officials that the traditional “CAUTION
WAKE TURBULENCE” warning may not be enough since the
frequency of use has diminished its effectiveness. This potential for
requiring more emphasis in warning has not been litigated to date,
but the continued complacency of pilots after receiving the warn-
ing, termed the “cry wolf syndrome,” has been recognized in vari-
ous FAA publications.\textsuperscript{66}

Because of the uniqueness of wake turbulence as a hazard pri-
marily encountered around airports, there is a continuing responsi-
bility of ATC to warn pilots of its potential existence. The con-
troller must, however, be aware of the danger before being held
to a duty to convey the warning. A recent decision, Lightenburger
v. United States,\textsuperscript{67} has held that when a period of time in excess of
\textsuperscript{63} Franklin v. United States, 342 F.2d 581 (7th Cir. 1965). \textit{See also} Wasilko
v. United States, 300 F. Supp. 573 (N.D. Ohio 1967), aff’d, 412 F.2d 859 (6th
Cir. 1969). ATC was found negligent, but the pilot’s contributory negligence in
failing to know the danger of vortices was held a bar to recovery.

\textsuperscript{64} 381 F.2d at 962.
\textsuperscript{65} 387 F.2d at 873.
\textsuperscript{67} 460 F.2d 391 (9th Cir. 1972). An IFR pilot, in executing a precision radar
approach, had been guided beyond the point where he had previously been told
the normal dissipation time for wake turbulence has elapsed, ATC cannot be held to have been negligent due to the lack of foreseeability of the dangerous event.

There have been two primary theories advanced to explain ATC's high duty of care in the wake turbulence situations. The first is that the controllers are considered to be in a better position to observe the take-off and landings of large aircraft that precipitate this hazard and to take some affirmative action to avert the danger. The second and more important theory is that the pilot cannot see this invisible phenomenon and when wake turbulence is encountered he can do little to extricate himself from the situation.

II. WEAKENED DEFENSES

It is uncertain whether the expansion in ATC liability is the result of technical defects in the traditional defenses or a recognition by the courts that "something extra" is required of ATC because of the significant danger to the multitudes of persons in commercial and general aviation. It cannot be disputed, however, that this expansion has had as it corollary the weakening of those defenses. As a result of this relationship, it is necessary to examine the defenses and evaluate their continuing viability in light of the physical situations involved.

A. Exceptions Under the Federal Tort Claims Act (FTCA)

Since a suit based on ATC negligence must be brought under the FTCA, it is essential that the restrictions imposed by that statute be consulted. The first defense asserted by the government was that of the "discretionary function" exception to FTCA liability. The basis of the "discretionary function" defense is that the government is not vicariously liable for the acts of its employees if the allegedly negligent act involves judgment or the exercise of discretion. If, however, the employee is merely performing the

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that guidance would terminate and had been given no warning of wake turbulence. A period of ten minutes passed between the departure of an airliner and the arrival of the light plane. Five to six minutes is normally sufficient for wake turbulence to dissipate.


89 28 U.S.C. § 2680(a) (1970): "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function . . ." (emphasis added).
operational tasks of prescribed procedures, there will be liability for any negligent acts or omissions. The defense, however, was nullified in *Eastern Air Lines v. Union Trust Company* when it was held that ATC's functions are operational. The court in *Eastern* went on to state that, "discretion was exercised when it [the government] decided to operate the tower but the tower personnel had no discretion to operate it negligently." Since the government had assumed a role that might have been assumed by private industry, it was held liable for the negligent acts of its controllers in performance of their duties. The failure of the courts to recognize that in some situations ATC does exercise discretion has been criticized. The basis of this criticism rests on the refusal of the courts to consider the discretion that a controller may exercise, rather than letting the level of operation be determinative.

Another FTCA exception that has been relied on by the government to a lesser degree is that of "misrepresentation." The basis of this defense is that the government is not liable for the acts of its employees for deception or inaccurate portrayal of a situation. Its use has been limited to those situations in which ATC has allegedly supplied the pilot with incorrect information. Although the defense was raised in several cases, the viability was impaired when the courts began to characterize the situations as not actually involving any misrepresentation by ATC. Rather, the courts emphasized that ATC errors in providing information were either the negligent performance of operational tasks or an implication of no danger. One court has even stated that although negligent misrepresentations were applicable, the exception was not sufficiently broad to cover every "operational malfunction by the govern-

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70 221 F.2d at 77. See note 8 supra.
71 *Id.*
72 *Id.* at 74. See also Dalhite v. United States, 346 U.S. 15 (1953); Indian Towing Co. v. United States, 350 U.S. 61 (1955).
75 335 F.2d at 398.
76 234 F. Supp. at 505 (dictum).
ment." Thus, it may be said that the statutory exceptions to the FTCA no longer are a viable defense for the government. Instead, the traditional defenses of common law negligence are used as the government seeks to absolve ATC of liability.

B. No Duty

The defense of "no duty" has been relied upon heavily by the government and has become one of the two most effective arguments for absolving ATC of liability. This defense has been asserted in those situations in which an accident results even though ATC has performed all of the functions outlined in the appropriate procedures manual or when ATC remained inactive and the procedures manual was silent on the specific situation giving rise to the accident. The ATC procedures manual outlines and specifies things that the controller must do in certain situations; the manual goes further in some instances to specify the exact language to be used. Once these requirements have been performed by ATC, the government contends, there is no duty to do anything else.

The defense weakened with the emergence of what has been termed the "Good Samaritan" rule. This rule holds that if ATC undertakes an act that engenders reliance, it must continue to perform that act with due care or be held negligent. The "Good Samaritan" idea was quickly followed by cases apparently imposing on ATC the duty to aid in the operation of aircraft even when what was required would be beyond the letter of the regulations, such as providing additional warnings. Thus, although ATC will be held liable in those situations where it fails to give the regulation warning, it may also be held liable when the required warning given is later deemed insufficient.

This expansion of what may be required of the controller was rapidly followed by an apparent expansion of what may be re-
quired by the ATC operating regulations. That is, not only will the controller be held to be obligated to do more than the regulations require, but the regulations may be reinterpreted to include something more than had previously been read into them. Yet, this “something extra” duty will be required of ATC only for information or warnings that the pilot could not receive elsewhere, such as aviation advisories. ATC’s duty, however, is not always paramount to the pilot’s primary responsibility and in situations where dependence on ATC is not great, the pilot must fend for himself, as when he gradually encounters bad weather. Additionally, there must always exist a causal connection between the deficiency of the ATC information given and the resultant accident or the plaintiff’s cause will fail. If the danger is unknown to the pilot, however, it has been held that a causal connection does exist.

The “no duty” defense is still very much a force to be reckoned with. There are, though, particular requirements that must be met by ATC and on which the question of duty and its breach may ultimately rest. First, ATC must complete all of the requirements imposed by the operations manuals. Secondly, the question of whether or not ATC must go beyond the manuals’ requirements apparently rests on a “reasonable man” standard; the courts will inquire into what a reasonable man with the equivalent knowledge of the controller would have done under similar circumstances. The “reasonable man” test, perhaps, is a balancing process between the immensity of harm possible and the additional burden placed on the controller under the particular set of circumstances. Lastly, the controller will be required to exercise judgment in emergency situations and not merely function as an automaton. He must do more than merely follow the dictates of prescribed procedures. The controller will not be liable, as a result, when he has done what the operating manuals require and then exercised ordinary judgment in fulfilling his obligation to do “something extra.”

430 F.2d 1104.
333 F. Supp. 327.
441 F.2d at 744-45.
460 F.2d at 397.
C. Primary Responsibility

The defense of "primary responsibility" is in reality a corollary to the "no duty" defense. The government often contends that there was no duty for the controller to act, and secondarily, that even if there were a duty, the primary responsibility for the safety of the aircraft rests with the pilot. The theory of the defense rests on the notion that the pilot is well trained and experienced and should be capable of properly operating his aircraft. The pilot's relationship with ATC, then, is that of an independent operator. Each has a separate distinct function to perform that bears no relation to the function being performed by the other.

Initially, ATC responsibility was held to terminate at the departure from the control zone. A particularly disturbing case held that even in the control zone, the negligence of ATC does not override the pilot's responsibility. These rather extreme applications of the "primary responsibility" defense were weakened when there emerged the concept of "concurrent responsibility" to describe the relationship between ATC and the pilot. Under the concept of "concurrent responsibility," both controller and pilot have flight safety functions to perform at any particular point in time. The concurrent responsibility concept later evolved into the theory of reciprocal duty. Under this theory of reciprocal duty, both the controller and pilot have a duty toward each other—their relationship is a two-way street. The benefit of the theory to plaintiffs, however, was partially abated whenever VFR flight existed and there was little dependence on ATC for guidance. Resting as it apparently did on the situation of the VFR/IFR "control" test for liability, it posed a significant obstacle for plaintiffs.

The emphasis upon "primary responsibility" of the pilot can be

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9 277 F.2d 322.
10 See note 16 supra.
11 This weakening, however, was followed by a period of vacillation and a hesitancy to depart from precedent, particularly under VFR conditions. Stanley v. United States, 239 F. Supp. 973 (N.D. Ohio 1965).
12 See note 16 supra. See also Hochrein v. United States, 283 F. Supp. 317 (E.D. Pa. 1965). ATC reciprocal duty said to arise only after it had fulfilled all of the procedural obligations with respect to warnings.
13 Tilley v. United States, 375 F.2d 678 (4th Cir. 1967).
criticized when recognition is given to the true state of affairs facing a pilot in situations within an airport traffic area where the majority of accidents occur. He is not a free agent allowed to traverse the skies unbridled. There are definite procedures relating to altitude, right-of-way and traffic direction to which he must conform or face possible suspension of his license. A heavy burden is placed on the pilot by holding him primarily responsible for aircraft operation when virtually every movement requires the prior clearance by ATC. In recognition of this situation, the courts should come to place greater emphasis on the concept of reciprocal duty. In so doing, dependency will emerge as the true test and the VFR/IFR dichotomy will be recognized as only an expression of that dependency relationship along a continuum.

III. POSSIBLE RAMIFICATIONS

The expansion in ATC liability has led to an environment whereby any party contributing to an accident will have to pay damages. This result flows primarily from the recognition of the indispensable role of the ATC in the modern aviation system and the realization that with increased reliance on government services, there must be government responsibility for failures.

Accordingly, it is possible to speculate on some of the possible ramifications. The most obvious effect is that ATC is no longer insulated from liability; therefore, plaintiffs, whether passengers, pilots or representatives of their estates, can now seek recovery from the government with a greater expectation of eventually receiving compensation. This, however, has the corresponding cost to the public of the government's defense of these suits and an increased burden upon the federal judiciary. This cost to the public, however, pales to insignificance when weighed against the injustices that result when litigants are denied reasonable access to recovery. A facet of this effect is that plaintiffs now have a financially responsible defendant; therefore, suits are no longer an exercise in

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83 See note 25 supra.
84 Only such a concept as a continuum of dependence between pilot and controller adequately conveys the true relationship between them.
86 Comment, Causes of Action in Domestic Commercial Aviation: Their Classification, Application, and Possible Solution, 7 Houston L. Rev. 461, 471 (1970).
futility because defendants cannot pay the damages awarded to plaintiffs. This aspect is of pivotal importance when a situation exists in which the plaintiff has an option of whom he shall sue. In many cases, the plaintiff who would otherwise be faced with an insolvent defendant (another pilot, small carrier, etc.) now can look to the financial resources of the United States Government. As a result, and perhaps in recognition of the fact that damages are being awarded in excess of the actual loss suffered by plaintiffs, there has been an increasing tendency by the Justice Department not to litigate cases, but to settle them out of court.97

If it is assumed that the primary purpose of ATC is to ensure the safe operation of aircraft flights, the question then arises whether this primary objective of aviation safety has been enhanced by the trend toward increasing ATC liability. In other words, does the past history of aviation accidents support a conclusion that increased liability has resulted in an improved safety record as evidenced by a decline in aviation accidents involving ATC responsibility?

Reference to the available statistics does not provide a definitive answer. For example, during the period 1965-1968, there averaged approximately twelve accidents per year in which traffic control personnel were cited as a cause while the period 1970-1971 shows an average of fifteen accidents per year.98 From this simplistic comparison, the conclusion is disturbingly attractive that the imposition of increased liability has not led to any decline in the number of accidents in which ATC was cited as a cause. When these figures are related to total aircraft activity (to provide due consideration to the significant increase in aviation activity during this period of time from 1965 to 1971), it is impossible to draw

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a conclusion because of difficulties in purifying the available data."
It can, however, be said that aircraft accidents during part of the
applicable period have shown a continuous decline in relation to
the number of hours and miles flown. The significant question
remaining unanswered, however, is whether this decline in aircraft
accidents is the result of ATC improvement, safer aircraft, more
sophisticated pilots and systems or a composite of all of these.

Additionally, the increasing liability that has been thrust upon
ATC has undoubtedly resulted in a blow to the image of the serv-
ices' professionalism within the FAA itself. Air traffic controllers,
perhaps more than any other class of persons, are aware of the
weighty burden of aviation safety they must bear. Charges of
"negligence" and "dereliction of duty" have a definite impact upon
the attitude of both ATC and FAA management toward improving
their record in order to protect their own sanity and to blunt public
criticism. This desire for improvement and fear of public criticism
has been reflected in improvements in ATC personnel and the
operational equipment at their disposal, thereby enhancing the
chances for safer skies. Yet, much more needs to be done.

The difficulties facing ATC in its efforts to improve were made
apparent to Congress when hearings were conducted into the sys-
tem in 1970 as the result of a work "sick-out" that partially para-

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Footnotes:

9 The significant increase in the volume of air traffic is reported annually as
Congress conducts hearings on the FAA budget appropriations. For the period
1965-1968, see Hearings on Dept. of Transportation and Related Agencies Ap-
propriations for 1970 Before the Subcomm. of the House Comm. on Appropria-
Hearings on Dept. of Transportation and Related Agencies Appropriations for
1973 Before the Subcomm. of the House Comm. on Appropriations, 92d Cong.,


11 Improvements have been made in both personnel and equipment. For ex-
ample, the FAA now requires (implemented since 1968) controllers to success-
fully complete a battery of aptitude tests that have a minimum qualifying score.
See FAA-AM-71-40, Air Traffic Aptitude Measures of Military and FAA
Controller Trainees 2-3, 29 (OCT. 1971). See also FAA-AM-68-14, A Com-
parative of Air Traffic Aptitude-Test Measures Involving NAVY, MARINE
Corps, and FAA Controllers (Sept. 1968). Research is also being conducted
into improved wake turbulence detection. FAA Prepares Airport Tests of Four
Wake-Vortex Sensors, Av. Week & Space Technology, Nov. 13, 1972, at 25. So-
novated satellite-ground based control systems are also being envisioned. Klass,
Promise Seen for Hybrid Air Traffic Control, Av. Week & Space Technology,
Sept. 18, 1972, at 52-3. See also Repenthal, Coping With the Aerial Traffic Jam,
lyzed the nation's aviation system and caused the following analysis to be printed:

The Nation's Air Traffic Control System Is On A Collision Course With Disaster

At present, we must depend upon an inadequate number of air controllers. These controllers must rely upon obsolete and inadequate equipment. They must cope with a growing stream of aircraft carrying increasingly larger passenger loads. The controllers must guide aircraft under their protection through airspace often crowded with hundreds of unidentified and uncontrolled aircraft. They must funnel them to and from scores of inadequate air terminals, many of which are fast approaching the outer limit of their capacity, or have reached a point of dangerous saturation.

Meanwhile, the Federal Aviation Administration, which Congress created in 1958 to provide the Nation with an adequate traffic control system, has stumbled badly in a second attempt to apply modern technology to the growing traffic control problem.103

The increasing liability being thrust upon ATC creates more pressures in a profession already fraught with pressure. It would be mere conjecture, moreover, to state that the increased liability to which the controllers are subjected will encourage them to perform their functions with more care. The public is now aware of the stress experienced by controllers as evidenced by the testimony of the controllers themselves concerning the pressures they must endure.103 The constant execution of life or death decisions in short time frames and the consistent adherence to strict standards of perfection is a threat to the rational thought processes of controllers. FAA proficiency tests indicate that controllers' abilities to make


Mr. Stamper: Mr. Raga talked about numbers of aircraft and you seemed interested in it. I have a letter in my own file, a letter of commendation for having worked 32 aircraft at one time. This was sheer chaos!

Mr. Yates: I am glad I wasn't in one of those planes.

Mr. Stamper: They commended me for this. I didn't even know my own name, I was so busy. I talked incessantly for a period of about 20 minutes. It was really chaos, trying to keep those planes from colliding.
quick decisions and to anticipate trouble begin to slide after the age of forty.104 Added to this complex situation is the fact that controllers often view themselves in an adversary role with pilots, thereby making cooperation between the operatives in the air safety system more difficult.105 Yet, despite the public awareness of the near-bedlam environment in which the controller functions, and the realization that the aviation industry has demonstrated astronomical growth, there has historically been a decline in FAA funding and staffing.106 Only recently has there been legislation to provide for early retirement and second career training for controllers.107

Since the problems involved in aircraft crash litigation are myriad, including: lengthy litigation, expensive discovery procedures, duplication of attorney fees and pressures on federal dockets,108 an alternative to the present system needs to be found. There are, however, few willing to abandon the present tort liability system.109 Rather, there is a call for increased regulation by imposing strict liability upon the government for aircraft accidents at controlled facilities.110

IV. CONCLUSION

Although never precisely enunciated by any court, it is apparent from the foregoing review of case history that liability of ATC now exists on what may be called a "continuum of dependence." Briefly

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106 This relationship has been presented graphically. Hearings on Dept. of Transportation and Related Agencies Appropriations for 1968 Before the Subcomm. of the House Comm. on Appropriations, 90th Cong., 2d Sess., pt. 2, at 92 (1967).
110 The proposal has already been made regarding the imposition of strict liability upon the commercial carriers, limiting passenger recovery and financing the system through additional ticket costs. Comment, Domestic Commercial Aircraft Tort Litigation: A Proposal for Absolute Liability of the Carriers, 23 Stan. L. REV. 569 (1971). The costs of this system could be borne by all of the users, prorated upon some equitable basis. For a general discussion of the mechanical considerations involved in devising such a system, see Rottenberg, Liability in Law and Economics, 55 Am. Econ. Rev. 107 (1965).
stated, this continuum ranges from the one end where the pilot is almost totally dependent on ATC for guidance to a situation in which he is almost totally independent of any ATC presence. An example of the total dependency situation would be one in which the pilot is landing an aircraft under IFR, in adverse weather in the presence of possible wake turbulence. In this situation, ATC has a duty not only to provide all the information and warnings required by the manuals, but also to do whatever is reasonably possible to prevent harm to the pilot. Conversely, at the other end of the spectrum, is the pilot flying under VFR conditions enroute to his destination. Here, the pilot is totally responsible for the safety of the aircraft and ATC will only be accountable for what it can reasonably do when the pilot communicates that he is in danger. All of the previously-discussed fact situations can be placed somewhere along this continuum. There is a consistency in the courts' decisions in ascribing liability to ATC whenever it fails in the particular duty incumbent upon it at the time by virtue of the particular situation. Thus, it may be said that the duty of ATC to pilots is not absolute, rather it is relative to the particular fact situation involved.

Having evolved to the current position of using dependency as the true test of liability, the courts have necessarily had to hold invalid the traditional defenses arising from the exceptions to the FTCA. As a result, government attempts to absolve ATC of liability presently center around the common law defenses of "no duty" and "primary responsibility." Each of these defenses has likewise been circumscribed by the courts' adherence to a principal of reciprocal duty that places upon both the pilot and controller a significant responsibility for safety. From this review of the development of expanded ATC liability, it is possible to predict that future government actions will be limited to a defense on the facts, rather than a reliance on the traditional defenses that were viable in an earlier day.

With the recognition of the correlative emergence of these two phenomenon—expanded ATC liability and weakened government defenses—the question of effect upon the air traveling public arises, but must remain unanswered. Assuredly, deserving litigants now have a reasonable hope for recovery, but this is not enough. There would be few who would argue that a reasonable possibility for
recovery in a negligence suit is as attractive an alternative as the accident having never occurred. This then, safer air travel, must be the primary goal of any judicial attention to the aviation industry. Yet, it cannot be statistically verified that the courts' assessment of liability by reference to the "continuum of dependence" has had the offsetting effect of improved safety. Improvements have been made, but it is submitted that focusing attention entirely upon ATC as the defect is shortsighted. Speaking from the standpoint of practical experience, it is doubtful that the actions of pilot or controller are greatly influenced by the threat of potential legal liability. The decisions made and the actions taken by both pilot and controller are the ones each deems appropriate under the circumstances, unrelated to any considerations of future liability. Safety and concern for the welfare of others undoubtedly dominates the choices made by pilot and controller. Mistakes happen, accidents occur and lives are lost in the execution of decisions involving aircraft flight, but it is the entire system that requires correction rather than merely singling out one element as the cause of all misfortune. If the expansion in ATC liability be the first step in greater recognition of the entire problem, then it has served a needed function. If so, the reliance by the courts upon what has been termed the "continuum of dependence" is commendable as a recognition of the true state of the relationship between ATC and pilot. It is a recognition that the relationship is really a system in dynamic equilibrium between man and machines. To improve the safety of the system, each of the components must be improved—pilot, controller, machinery and interaction—rather than placing the burden upon only a few of the constituent parts.

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