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INSTRUMENT FLYING RULES (IFR)— THE LIABILITY OF THE GOVERNMENT

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INTRODUCTION

THIS ARTICLE concerns the scope of the liability placed upon the government for aircraft accidents occurring in IFR conditions. It is one of a series being written concerning the liability of the various members and users of the air traffic system. Although this article focuses on government responsibilities and liabilities, it should be noted that use of the system places responsibilities on everyone involved in it, and many of these responsibilities are overlapping.[1]

Because negligence of air traffic controllers presents the greatest potential liability to the government for accidents occurring during IFR operations, the first section of this article discusses the scope of the duties of air traffic controllers as established by the applicable Federal Aviation Administration (FAA) operations manuals. This article assumes that the FAA Administrator has engaged in a "policy making," as opposed to an "operational," activity in prescribing these duties. Therefore, the delineation of the scope of the duties of air traffic controllers falls within the "discretionary function" exception of the Federal Tort Claims Act. Accordingly, courts are not free to impose new or additional duties in situations where the manuals have prescribed the procedures to be followed. Of course, courts will inquire whether controllers exercised "due care" in carrying out their duties regardless of

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[1] For example, the regulatory framework which has evolved in aviation has placed ultimate responsibility for the operation of an aircraft on the pilot-in-command. 14 CFR § 91.3 (1978).

whether the manuals established the procedures to be followed in a given situation.

Most courts that have addressed the issue of government liability for controller negligence have implicitly accepted the foregoing delineation of the controller's duties. Nevertheless, there have been a half-dozen cases that contain language that the duties of a controller go beyond the provisions of the applicable FAA manuals. Analysis of these opinions, however, indicates that these courts have been defining the requirements of due care under the circumstances of the specific cases rather than establishing duties beyond those imposed by the FAA manuals.

The second part of this article concerns the potentially expanding area of governmental liability arising from negligently prepared weather forecasts and discusses the few reported cases in this area. Although governmental liability resulting from a negligent forecast is arguably precluded by the "misrepresentation" exception of the Federal Tort Claims Act, there are no recent appellate decisions on this issue. Since 1954, circuit courts have found it unnecessary to reach the misrepresentation issue because of lower court findings that the forecasts in question were not negligently prepared.

I. The Scope of the Duties of Air Traffic Controllers

A. *Background of the Federal Tort Claims Act and the Air Traffic System*

By the end of World War II the Civil Aeronautics Administration (CAA), the forerunner of the FAA, had established an air traffic control network in the United States to provide for the safe and expeditious handling of instrument flight operations. The CAA established criteria for the certification of air traffic controllers and issued various operations manuals which set forth standard procedures to be followed in the control of air traffic. In addition, it published the Civil Aeronautics Regulations which established "rules-of-the-road" to govern all flight operations. Today the procedures governing controllers are set out in a single FAA manual[2]

[2] In the past there have been different manuals for en route and terminal control functions. On January 1, 1976, FAA Order 7110.65 established a single Air Traffic Control manual to govern all phases of air traffic control. Although this manual is comprehensive in scope, it is recognized that the controller will be

and the "rules-of-the-road" are codified as the Federal Aviation Regulations.[3]

Early cases involving suits against the United States alleging negligence on the part of air traffic controllers gave rise to a variety of defenses under the special provisions of the Federal Tort Claims Act (FTCA).[4] Such defenses took two principle forms. First, according to the argument, air traffic control personnel perform uniquely governmental functions of a quasi-regulatory nature and the FTCA does not permit suit based upon negligent performance of these duties because there is no analagous private liability. Second, it was argued that the "discretionary function" exception[5] of the FTCA would be a bar to recovery even conceding controller negligence.[6]

These defenses were soon rejected by the courts.[7] The rationale against allowing governmental immunity based on the above defenses was set forth succintly by the Supreme Court in the landmark case of *Indian Towing Co., Inc. v. United States*.[8] In *Indian Towing*, the plaintiffs brought suit for damage to the cargo of a vessel that ran aground as a result of the alleged negligence of the Coast Guard in failing to insure the adequate performance of a lighthouse beacon used by the plaintiffs as a navigational aid. The Supreme Court held that once the Coast Guard exercised its discretion in establishing a lighthouse, it was obligated to use due care in operating it or to give warnings to potential users in the event the light was not functioning properly.

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confronted with situations not covered by it. Accordingly, Paragraph 1 instructs controllers to use their "best judgment" under such circumstances.

[3] These Federal Aviation Regulations (F.A.R.) have been codified in the Code of Federal Regulations (C.F.R.), Title 14, which deals with aeronautics and space. *See* 14 C.F.R. §§ 1-1260 (1978).

[4] 28 U.S.C. §§ 1346, 2671-2680 (1976). An understanding of the special operation and requirements of the FTCA is a prerequisite to suing successfully the United States in an aviation case. The standard handbook in this field is JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1977).

[5] 28 U.S.C. § 2680(a) (1976).

[6] *See, e.g.*, Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd sub nom.*, United States v. Union Trust Co., 350 U.S. 907 (1955), *and* Air Transp. Assoc. v. United States, 221 F.2d 467 (9th Cir. 1955).

[7] *See generally* Eastern Air Lines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *aff'd sub. nom.*, United States v. Union Trust Co., 350 U.S. 907 (1955), *and* Air Transp. Assoc. v. United States, 221 F.2d 467 (9th Cir. 1955).

[8] 350 U.S. 61 (1955).

From our vantage point almost a quarter of a century later, the approach established by *Indian Towing* seems simple and logical. At the time, however, the scope of the liabilities created by the FTCA was still being shaped by the courts and there was considerable authority for the proposition that there could be no government liability arising from operations which were uniquely governmental. The treatment of *Indian Towing* in the lower courts, and the dissenting opinion in the Supreme Court provides a prime example of this approach. The government prevailed in the trial court on a motion to dismiss on the grounds that the FTCA did not contemplate liability for the negligent maintenance of a lighthouse. This dismissal was affirmed,[9] *per curiam*, by the Fifth Circuit and then affirmed[10] by the Supreme Court which divided equally on the issue following the initial hearing. It was only on rehearing that the Court reversed itself by a five to four majority.[11]

Justice Reed's dissenting opinion pointed out that the *Indian Towing* decision marked a major departure from precedent established less than two years previously in *Dalehite v. United States*.[12] He reasoned that the liability of governments for the failure of lighthouse warning lights is as "unknown to tort law" as, for example, liability for negligence in fire fighting excluded by the *Dalehite* ruling.[13] A majority of the court rejected this reasoning, asserting that all activity is "uniquely governmental" when performed by a government.[14] Instead, the court found the government liable for negligent performance at an "operational level" of actions undertaken as a "good Samaritan."[15]

B. *The Manual Defines the Scope of the Duty*

Following the early cases, such as *Indian Towing* and *Eastern Air Lines*,[16] there was no real question of the government's liability for negligent operation of the air traffic control system. The un-

[9] 211 F.2d 886 (5th Cir. 1954).

[10] 349 U.S. 902 (1954).

[11] Indian Towing, Inc. v. United States, 350 U.S. 61 (1955).

[12] 346 U.S. 15 (1953).

[13] 350 U.S. at 75.

[14] *Id.* at 67.

[15] *Id.* at 65-68.

[16] Indian Towing, Inc. v. United States, 350 U.S. 61 (1955) and Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955).

resolved issue concerned the extent of that liability. That is, what was the scope of the duty owed by the individual controller to users of the air traffic system?

On this issue the government has taken the position that the scope of the duties of air traffic controllers is defined by the applicable FAA manuals.[17] In recognition of the fact that a manual cannot anticipate every situation that will confront a controller, the Forward to the manual states that controllers are to exercise their best judgment if they encounter situations not covered by it.[18] Of course, a controller must exercise due care in carrying out his duties regardless of whether the manual contemplates a given situation and establishes specific procedures for handling it.

In essence, the government contends that in situations where the manual has establishd specific duties and procedures, the courts are not free to create and impose different ones. The foregoing position recognizes, however, that it is the function of the "fact finder" to determine what constitutes "due care" in a given situation.[19]

Most cases that have considered the issue of controller negligence have implicitly accepted this position, the rationale for this approach being that the determination of the scope of air traffic control services is a "policy-making," as opposed to an "operational," decision that falls within the discretionary function exception of the FTCA.[20]

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[17] FAA Order 7110.65, *supra* note 2.

[18] U.S. DEP'T OF TRANSPORTATION, AIR TRAFFIC CONTROL MANUAL 1 (1978).

[19] In many instances, the distinction between the scope of the controller's duties (established by the manual) and the standard of care (due care) required in carrying out the duties prescribed in the manual, may seem to be a distinction without a difference. Analysis of the reported cases indicates, however, that no court has found a controller negligent for not performing some extra-manual action unless the controller was aware of an aircraft's being in a position of danger. Where controllers have been aware, or should have been aware, that an aircraft was in a position of danger, courts have uniformly concluded that failure to warn constituted negligence. Clearly such findings of negligence are based upon a failure to exercise due care. Thus, it can be generally stated that a finding of controller negligence must rest on a finding that the provisions of the manual were not followed or that 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.

[20] *See* Miller v. United States, 378 F. Supp. 1147 (E.D. Ky. 1974), *aff'd*, 522 F.2d 386 (6th Cir. 1975), for a case where plaintiffs not only alleged that the controllers failed to follow the provisions of the manual, but also that they should have performed services beyond those required by the manual. (The controllers

C. *Is There a Duty Beyond the Requirements of the Manual?*

Over a hundred cases have considered the issue of air traffic controller negligence. Of these, only a half-dozen contain language that the scope of the duty of air traffic controllers goes beyond the requirements of the FAA manuals.[21] Despite such language, however, an analysis of these cases reveals that these courts have not actually extended the duty of the controller beyond that required by the manuals. Rather, they focused on the requirement of due care[22] in complying with the provisions of the manual.

Of these cases, one of the earliest and most widely cited is *Hartz v. United States.*[23] *Hartz* involved wrongful death suits by the estates of the pilot and a passenger of a Beech Bonanza which crashed shortly after being cleared to takeoff behind a DC-7 airliner. Prior to the crash the pilot of the Bonanza had waited at a runway intersection as the DC-7 took off in front of it. The tower controller, in issuing the takeoff clearance to the Bonanza, had warned, "watch the prop wash!" The parties agreed that the Bonanza crashed upon encountering wing-tip vortices from the DC-7. The applicable FAA manual required cautionary warnings of rotorcraft downwash, thrust stream turbulence, and wing tip vortices of all kinds, and, further, required that standard phraseology be employed for all such communications. Cautionary information of this nature was to be phrased, "Caution, turbulence, departing Eastern DC-7."

The Fifth Circuit reversed the trial court, which had found that the sole proximate cause of the accident was the negligence of the pilot, and held, upon reconsideration after remand,[24] that the sole proximate cause of the accident was the negligence of the con-

were never aware that the aircraft was in a position of danger.) The court concluded that the discretionary function exception of the FTCA provided a complete defense to the second of these allegations.

[21] At this point it should be mentioned that although the title of this article concerns IFR operations, the scope of the duties of air traffic controllers has been largely decided in cases dealing with wake turbulence and mid-air collisions, in VFR conditions. Hence these cases are the foundations upon which those dealing with IFR operations must rest.

[22] Controllers have been held to a standard of due care (ordinary care) in the cases that have specifically considered this issue. Whether a violation of a provision of the manual constitutes negligence *per se* or is only evidence of negligence is, of course, governed by the law of the jurisdiction in question.

[23] 387 F.2d 870 (5th Cir. 1968).

[24] 415 F.2d 259 (5th Cir. 1969).

troller. In its discussion of the controller's duty, the court stated: "The trial court concluded that no duty existed 'independent of the duty created by the procedures manual.' We disapprove the view that the duty of an FAA controller is circumscribed within the narrow limits of an operations manual and nothing more . . ."[25] As authority for this statement the court cited only one appellate case, *Ingham v. Eastern Air Lines, Inc.*,[26] but the cited section of *Ingham* is authority only for the *Indian Towing* concept, that once a service is undertaken it cannot be performed negligently. *Ingham* did not address the issue of whether the duties of controllers go beyond the requirements of FAA manuals.

The above quoted statement of the *Hartz* court is clearly dictum considering the record in the case and the court's holding. The record indicated that the FAA manual required the issuance of a warning by the controller, and that this "duty to warn" was the only "duty" under consideration by the court. In its holding, the court acknowledged the existence of the duty to warn in the manual: "We hold that the controller gave Hartz a warning which was neither *sufficient under the manual* nor adequate to caution Hartz of a possible danger which was then known to the controller."[27] It seems likely that the court's statement that the duty of the controller was not circumscribed within the narrow limits of the manual was addressing the duty to use due care. Certainly the holding, quoted above, is addressing the due care issue. Accordingly, the *Hartz* case is not authority for the proposition that the duties of a controller extend beyond those established in FAA manuals.

Another Fifth Circuit decision which has been cited for the proposition that the duties of a controller are greater than those prescribed in FAA manuals is *American Airlines, Inc. v. United States.*[28] *American Airlines* involved a 727 airliner that crashed during a turn while making a night visual approach with rainshowers in the vicinity of the airport. The trial court found that neither the FAA nor the National Weather Service were negligent

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[25] 387 F.2d at 873.

[26] 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

[27] 387 F.2d at 874 (emphasis added).

[28] 418 F.2d 180 (5th Cir. 1969).

in the performance of their duties.[29] The appellate court agreed with this conclusion and affirmed the lower court judgment "in all respects."[30] Although American contended that the controllers have duties beyond those set forth in the FAA manuals, the appellate court made no such finding. The court concluded: "[T]he ultimate and inescapable result is that pilot error, repeatedly committed, was the sole proximate cause of this tragic commercial airline accident."[31]

In its extensive opinion, the court attempted to summarize the basic principles of responsibility in air traffic control. It cited two Fifth Circuit cases: *United States v. Schultetus*,[32] involving a mid-air collision in VFR conditions in which the court held that the pilot retained primary responsibility for the movement of his aircraft under such conditions; and *Hartz*. In addition, the court cited *Ingham* in support of the *Indian Towing* concept, that a service undertaken must be performed with due care. After discussing each of these cases, the court concluded:

> The following standards of duty are to be deduced from *Schultetus*, *Hartz* and *Ingham*:
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> 1. The pilot in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation.
> 2. Before a pilot can be held legally responsible for the movement of his aircraft he must know or be held to have known, those facts which were then material to its safe operation. Certainly the pilot is charged with that knowledge which in the exercise of the highest degree of care he should have known.
> 3. The air traffic controller must give the warning specified by the manuals.
> 4. The air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him . . . (but not apparent, in the exercise of due care, to the pilot).
> 5. Determined by the facts of the particular case, due care may require an air traffic controller, over and beyond the requirements of the manuals, to delay clearance for a take-off or a landing. If, however, a clearance is duly granted the operation of the aircraft is the sole responsibility of the pilot, with which

[29] *Id.* at 183.

[30] *Id.* at 197.

[31] *Id.* at 194.

[32] 277 F.2d 322 (5th Cir.), *cert. denied*, 364 U.S. 828 (1960).

> the air traffic controller is not to interfere except as specifically required by the FAA Air Traffic Control Manuals.[33]

Although these standards are certainly dicta in view of the holding in the case, analysis of them indicates that they support the proposition that courts are not imposing extra-manual duties on controllers. Standard Four is the only standard relevant to this issue.[34] Requiring controllers to warn of dangers of which they are aware is almost synonymous with requiring that they exercise due care, particularly in view of the manual's requirement that they use their best judgment in situations not covered by it.

Subsequent Fifth Circuit cases which have found negligence on the part of air traffic controllers have based their findings upon a lack of due care on the part of the controller in carrying out the duties prescribed in the manual rather than upon the creation of duties beyond those required by it. For example, in *Todd v. United States*,[35] the trial court found that a controller was negligent in giving a pilot a cruise clearance and clearing him for an approach while the plane was still some distance from the airport over mountainous terrain and in adverse weather. The court cited the standards set out in *American Airlines*, and proposed the addition of a sixth requirement: "Determined by the facts of the particular case, due care requires an air traffic controller to issue clearances in accordance with the FAA manuals, and over and beyond the requirements of the manuals the clearance issued must be reasonably designed to insure the safety of aircraft flight."[36]

Other circuits have taken the same approach as the Fifth Circuit cases already discussed. In a Ninth Circuit case, *Furumizo v. United States*,[37] the United States was held liable for the negligence of a controller who cleared a light plane for takeoff immediately after a DC-8. The controller gave the warning required by the manual, "[c]aution, turbulence, departing DC-8," but did nothing further when the light aircraft immediately commenced its takeoff.

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[33] 418 F.2d at 193.

[34] Standards One and Two are directed at the duties of pilots. Standard Three concerns duties established by the manuals. Standard Five directly addresses the duty of due care, i.e., the standard of care required in carrying out the duties prescribed in the manuals.

[35] 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977).

[36] 384 F. Supp. at 1291.

[37] 381 F.2d 965 (9th Cir. 1967).

In affirming the trial court's finding of controller negligence, the appellate court specifically refused to consider the trial court's conclusion that the controller had a duty to go beyond the provisions of the manual and withdraw the takeoff clearance. Rather, the Ninth Circuit rested its decision on the lower court's finding that the controller could not rely on having given the initial warning when he actually saw the light plane start its takeoff in apparent disregard of the warning. The court referred to the directive in the FAA manual requiring the controller to give the warning and concluded, "But we do not think this directive [in the manual] is fully complied with where, although a first warning has been given, it becomes clear to the controller that another warning is needed and none is given."[38]

In support of its conclusion, the court observed: "[T]he regulations and manual do not make mere automata of the controllers."[39] Nevertheless, the court recognized the limits of controller liability:

> [I]t may be (we do not decide) that if, after giving the warning, the attention of the controllers had been diverted elsewhere, either by their own duties or even fortuitously, so that they did not see the Piper start its takeoff in disregard of the warning, the United States would not be liable.[40]

The foregoing illustrates that the *Furumizo* court was addressing the requirements of due care within the context of the controller's duty to comply with the procedures in the manual.

The Ninth Circuit again considered this issue in the case of *Stork v. United States*,[41] which involved the crash of a C-26 twin-engine transport, chartered to carry a college football team. The crash occurred when the aircraft attempted to takeoff in weather conditions described as "zero-zero in fog." Takeoff under these weather conditions by an aircraft carrying passengers for hire was a clear violation of applicable Federal Aviation Regulations.[42]

At issue in the case was whether the tower controller should have denied the pilot a takeoff clearance under these circum-

[38] *Id.* at 968.

[39] *Id.*

[40] *Id.*

[41] 430 F.2d 1104 (9th Cir. 1970).

[42] *Id.* at 1107. Takeoff was prohibited under such conditions by 14 C.F.R. § 42.55 (1978).

stances. The trial court found: "[U]nder the then existing regulations and instructions, the controllers definitely had the power and duty to deny clearance . . ."[43] The Ninth Circuit did not specifically concur with the lower court's conclusion in this regard. The appellate court's finding of controller liability was evidently grounded upon its conclusion that, under the circumstances, the controller should have been aware that something was wrong. The court stated:

> For the pilot here to request clearance for takeoff under the circumstances was clear indication to the tower that *something* was amiss as a consequence of which the lives of passengers and crew were in grave danger and that warning was required. Any assumptions on which deference to the judgment of the pilot can normally rest were refuted by the events themselves.
>
> We conclude, as did the District Court, that silence under these extraordinary circumstances constituted a breach of duty on the part of air traffic control personnel.[44]

Citing *Furumizo*, the court re-emphasized that the obvious and extreme nature of the danger on the facts of the case compelled the controller to warn the pilot. The court stated that even assuming that the pilot was aware of the fact that clearance talks only in terms of traffic, his apparent knowledge would not obviate the need for warning when he was proceeding in the face of extreme danger known to the tower.[45] Although the *Stork* decision comes close to imposing extra-manual duties on controllers, an examination of the case reveals that the Ninth Circuit was simply defining the requirements of due care in extraordinary circumstances.[46]

Taken together, *Furumizo* and *Stork* are strong authority for the proposition that where the controller is aware that a pilot has placed his aircraft in a position of imminent peril, the standard

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[43] 278 F. Supp. 869, 879 (S.D. Cal. 1967).

[44] 430 F.2d at 1108.

[45] *Id.*

[46] The *Stork* court also placed considerable emphasis upon the ambiguity in the then existing directives concerning whether a clearance to takeoff was an "official invitation to proceed" that implied something more than clearance from conflicting traffic. The court noted that prior to passenger boarding, the pilot expressed the hope to refueling personnel that perhaps the tower wouldn't let him takeoff. *See* Stork v. United States, 430 F.2d 1104, 1108 (9th Cir. 1970). It would appear that this discussion was included to support the court's finding that the "failure to warn" was a proximate cause of the accident.

of due care requires that a warning be given and that the warning be repeated if no response is observed from the pilot. The clear implication of the *Furumizo* language, quoted in *Stork*, that "the regulations and manual do not make mere automata of the controllers" is that a controller must use common sense (due care) in carrying out the provisions of the manual. This proposition is not likely to be disputed; the conflict arises over the issue of whether an action by a controller was sensible or reasonable under the circumstances of the case. Nevertheless, such a proposition falls short of a judicial determination that the duties of a controller are not prescribed by the relevant FAA publication.[47]

None of the previous cases made mention of the provision in the Forward of the manual that instructs controllers to use their best judgment in situations not covered by it. Perhaps these courts were not referred to this provision by counsel. In any event, it seems evident that when the *Furumizo* and *Stork* courts concluded that due care required a warning under the circumstances, the judiciary was imposing the same standard of good judgment contemplated by the Administrator in the Forward of the manual.

The Fifth and Ninth Circuit cases discussed above are typical of the approach taken by the courts in determining the scope of the duties of air traffic controllers. Based upon the foregoing analysis, it can be concluded that the duties of a controller are prescribed in the relevant FAA manuals. In extraordinary circumstances, in which a pilot has placed his aircraft in a position of peril, the knowledge of the controller is relevant in determining whether his actions met the standard of due care in carrying out the provisions of the manual.

II. The Balancing Test of "Relative Position"

Given the widely varying fact situations that are involved in aviation accidents, many courts considering the alleged negligence of air traffic controllers have tried to establish a method of determining whether the conduct of the controller met the requisite

[47] Other, and more recent, Ninth Circuit cases have cited *Furumizo* and *Stork* for the general proposition that in some situations controllers must give warnings beyond those specified in FAA manuals. Nevertheless, where these courts have ultimately found no actionable negligence on the part of the United States, such statements do not represent conflicts in authority with the foregoing conclusion. *See, e.g.*, Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972).

standard of due care. A number of these courts have focused on the relative vantage points and knowledge of the pilot and the controller. *Hartz* has been widely cited as establishing a "balancing test" for the determination of controller liability, requiring a court to ascertain whether the pilot or the controller was in the "superior" position to evaluate the danger in question.[48]

In fact, however, any such balancing of relative positions is irrelevant to a determination of whether the controller exercised due care. Moreover, an examination of *Hartz* reveals that a balancing test was not employed by the court. Rather, what emerges from the case is the court's conclusion that a pilot cannot be held legally responsible for the movement of his aircraft without knowing all the material facts.[49] The court stated that the controller was better qualified than the pilot by "training, experience and vantage position" to appreciate the dangers to a light aircraft in taking off too closely behind the DC-7. Although it might be interesting to challenge the court's conclusion that a control tower operator, located a mile from the two aircraft, was in a better position to appreciate the danger of wing-tip vortices than was the experienced pilot of the Bonanza who was only fifty feet from the DC-7 as it rushed by the intersection on its takeoff roll, the relevant point is that the court addressed this issue while considering the duties of the pilot. Therefore, the appellate court undoubtedly included the discussion of the "superior position" of the controller to justify its holding that the pilot was not guilty of any contributory negligence. This conclusion is reinforced by the court's acknowledgement that the FAA manual created a duty to warn the pilot without regard to whether the controller or the pilot was in the superior position.[50] Accordingly, one cannot conclude that *Hartz* requires a balancing determination of "superior position" for purposes of considering whether a controller used due care.

A further indication that the Fifth Circuit has not established a balancing test for evaluating the conduct of air traffic controllers is contained in the opinion of *American Airlines*. As discussed

[48] *See* Gill v. United States, 429 F.2d 1072 (5th Cir. 1970), Richardson v. United States, 372 F. Supp. 921 (N.D. Cal. 1974), *and* Thinguldstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972).

[49] 387 F.2d 873. This proposition supports the holding concerning pilot responsibility established in *Schultetus*, *supra* note 32.

[50] *See* text accompanying note 27 *supra*.

above, the court in *American Airlines* set out five standards in an effort to summarize the law concerning the respective duties of pilots and air traffic controllers. In the court's initial opinion the fourth standard was phrased: "The air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him but not apparent in the exercise of due care, to the pilot."[51]

On petition for rehearing, the court modified this language to read: "The air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him."[52] This modification suggests that the court rejected an approach involving a balancing of the relative positions of the pilot and the controller to evaluate the actions of the controller. Certainly, from a public policy standpoint, due care should require that a controller issue a warning anytime he realizes that an aircraft is in a dangerous position.[53]

A definite, non-balancing approach to evaluating whether a controller used due care would involve inquiring whether the controller was aware of the danger. The knowledge of the pilot is relevant only to a court's determination of whether the pilot was contributorily negligent, and whether the alleged negligence of the FAA controller was a proximate cause of the crash. Other cases

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[51] 418 F.2d at 193.

[52] *Id.* at 197.

[53] Consider the following hypothetical situation: a pilot on a night, cross-country VFR flight calls the tower for landing instructions and states he is unfamiliar with the field. The controller clears the pilot for a straight-in approach to the runway. The controller is aware of the existence of an unmarked power line running perpendicular to the runway near its approach end. After the pilot reports visual sighting of the runway and has been cleared to land, the controller notices that the plane's approach path seems very low; nevertheless, the controller does not warn the pilot and turns his attention to some administrative duty. The aircraft hits the wire and crashes.

On these facts a compelling argument can be made that the controller failed to use the good judgment (due care) required by the manual when faced with a situation not specifically covered by it, i.e., noticing an aircraft in a hazardous position. On these facts, few would disagree that due care required a warning.

Varying the fact pattern slightly, by making the flight a local one with an experienced pilot who was aware of the existence of the wire, should not change the result. Even if the wires were lighted, due care should require that the controller issue a warning *if he actually observed that the approach was low.* Yet use of a balancing test of "relative position" in the hypothetical just described involving the experienced pilot compels the result that the controller not be found liable.

in which courts have considered the relative positions of the pilot and the controller support this approach.[54]

III. The Negligently Prepared Weather Forecast

The FAA Manual[55] establishes the duties of air traffic control personnel concerning the dissemination of weather information. Air traffic controllers, however, are not certified weather briefers, and their ability to assist pilots in the area of weather avoidance consists primarily of providing information as to areas of heavy precipitation that can be identified on the controller's radar scope.

Flight Service Station personnel, however, are generally certified weather briefers. They have only limited air traffic control functions and are engaged primarily in providing pilots with weather briefings and other services.[56] The forecasts and other information used by Flight Service Station personnel in giving weather briefs to pilots are prepared by the National Weather Service.

Although claims alleging negligence on the part of National Weather Service personnel in the preparation of weather forecasts have been rare, an increasing number of suits raising this issue have been filed in the last two years. The leading case on negligent forecasting is *National Manufacturing Co. v. United States*.[57] In *National Manufacturing* the owners of business establishments in Kansas City, Missouri, sought to hold the Government liable for extensive flood damage to their properties. The plaintiffs claimed that forecasts, containing assurances that the Kansas River would not overflow, were negligently prepared and that they failed to move certain property to higher ground in reliance on these forecasts. The Government raised several defenses, including the "misrepresentation" exception of the Federal Tort Claims Act.[58] The Eighth Circuit Court of Appeals sustained this defense, among others, and held that forecasting falls within the scope of the misrepresentation exception.

Several years later the Supreme Court, in *United States v.*

[54] *See, e.g.*, Yates v. United States, 497 F.2d 878 (10th Cir. 1974).

[55] *See* note 2 *supra*.

[56] The current Flight Services Handbook was promulgated by FAA Order 7110.10D in September, 1976.

[57] 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954).

[58] 28 U.S.C. § 2680(h) (1976).

Neustadt,[59] considered the misrepresentation exception in a slightly different context. *Neustadt* involved an allegedly negligent inspection of residential property by an FHA official. The plaintiff, the purchaser of the property, claimed that he had relied upon the FHA appraisal in agreeing on the purchase price of the house, and sued under the FTCA to recover the difference between the purchase price and the market value of the property. Although the plaintiff prevailed in both the trial court and in the Fourth Circuit, the Supreme Court held that the misrepresentation exception applied to the facts of the case.

In its discussion of the misrepresentation exception, the *Neustadt* Court specifically approved the application of the defense to the claim of negligent weather forecasting made by the plaintiffs in *National Manufacturing*.[60] The Court rejected the argument that "the bar of [Section]2680(h) does not apply when the gist of the claim lies in *negligence* underlying the inaccurate misrepresentation, *i.e.*, when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation'."[61] According to the Court, "this argument . . . is nothing more than an attempt to circumvent Section 2680(h) by denying that it applies to negligent misrepresentation."[62] The Supreme Court concluded:

> To say, as the Fourth Circuit did, that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the Government to him, i.e., the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation."[63]

The foregoing analysis of the Court, together with its express approval of *National Manufacturing*, supports the conclusion that a claim alleging negligence in the preparation of an aviation weather forecast will be defeated by the application of Section

[59] 366 U.S. 696 (1961).

[60] National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954).

[61] 366 U.S. at 703.

[62] *Id.*

[63] *Id.* at 706.

2680(h).[64] The Supreme Court has not, however, specifically decided this issue.

The issue of negligent weather forecasting arose again as a consequence of the impact of Hurricane Audrey on the Louisiana coast on June 27, 1957. Hundreds of wrongful death actions were filed against the Federal government alleging negligent forecasting on the part of the National Weather Service. In the test case, *Bartie v. United States*,[65] the trial court upheld all of the defenses raised by the United States, including the misrepresentation exception. The Fifth Circuit affirmed,[66] stating that the trial court finding that the United States was not negligent and that plaintiffs had not proved the requisite proximate cause made it unnecessary to pass on other grounds.

The most recent case on this issue, *Chanon v. United States*,[67]

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[64] In a footnote to the *Neustadt* opinion the Supreme Court stated:

> Our conclusion neither conflicts with nor impairs the authority of Indian Towing Co. v. United States, 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." PROSSER, TORTS, § 85, "Remedies for Misrepresentation," at 702-703 (1941). See also 2 HARPER AND JAMES, TORTS, § 29.13, at 1655 (1956).

366 U.S. at 711 n.26.

Some have argued that Dean Prosser's analysis of misrepresentation, as quoted by the Court, introduces uncertainty into the issue of whether Section 2680(h) bars government liability for negligent weather forecasting. Examination of the Court's discussion of *Indian Towing* and of Dean Prosser's reference to the common law action of deceit suggests, however, no necessary contradiction between the holding in *Neustadt* and the language of the footnote. As to common law actions of deceit, Theodore Plucknett, in his A CONCISE HISTORY OF THE COMMON LAW at 640-43 (5th ed. 1956), states that such actions were expanded in the fifteenth century to include claims of nonfeasance and in the following century to encompass liability for a defendant who failed to keep a promise he had made although he in no way profited from the plaintiff's injury.

[65] 216 F. Supp. 10 (W.D. La. 1963).

[66] 326 F.2d 754 (5th Cir. 1964), *cert. denied*, 379 U.S. 852 (1964).

[67] 350 F. Supp. 1039 (S.D. Tex. 1972), *aff'd*, 480 F.2d 1227 (5th Cir. 1973).

involved the deaths of two seamen who drowned when their boat sank during a storm in the Gulf of Mexico. The plaintiff's alleged that the National Weather Service had negligently prepared and disseminated the weather forecast in issue. Citing *Indian Towing*, the trial court concluded that the National Weather Service "was under the duty to use due care in gathering weather information, forecasing, and making available for broadcasting up-to-date weather information."[68] On the facts of the case, however, the court found that there was no negligence on the part of the government in the preparation or dissemination of the forecasts. As a result, the court did not pass on the issue of whether Section 2680(h) of the FTCA provides an absolute defense for the United States in such circumstances. The issue was raised on appeal, but the Fifth Circuit held that the district court's finding that the government was not negligent provided a sufficient basis for affirming the case without reaching the issue of the applicability of the misrepresentation defense.[69]

Although no appellate court since the *Neustadt* opinion has addressed the issue of whether the misrepresentation exception of the FTCA provides an absolute defense to the government in cases alleging negligence in the preparation of weather forecasts, there are currently a half-dozen cases awaiting decision in which this issue has been raised.[70] Should any of these courts conclude that National Weather Service personnel were negligent in making their forecasts, an appellate court will be forced to consider the misrepresentation defense.

CONCLUSION

There can no longer be any question that the operation of the air traffic control system, including the accurate dissemination of weather information as well as the actual control of air traffic, exposes the government to liability for any failure of FAA personnel to exercise due care in the performance of their duties. The

[68] 350 F. Supp. at 1041.

[69] 480 F.2d 1227 (5th Cir. 1973).

[70] The government also has raised the additional defense that the duties of National Weather Service personnel run to the general public, but not to specific individuals. *See* National Mfg. Co. v. United States, 210 F.2d 263, 279; *cf.* Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977).

scope of these duties is defined by the provisions of the relevant FAA manuals. In unusual situations, not contemplated by the manual, these personnel are required to exercise "their best judgment."

Since 1954, no appellate court has considered whether the misrepresentation provision of Section 2680(h) of the FTCA provides an absolute defense to the government in claims arising from an allegedly negligent weather forecast. Prevailing, yet dated, precedents suggest that the exception bars governmental liability for negligent forecasting.