THE LIABILITY OF AIR TRAFFIC CONTROL AGENCIES

by

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ABSTRACT

The role of the Air Traffic Control Agencies (ATCA) has increased dramatically over the last decade and civil aviation has become more and more dependent on air traffic control, flight and weather information and other ground services. Pilots, who traditionally bore the sole responsibility for the safety of crew, aircraft and passengers are now recognized by the courts to share that duty with controllers and other ATCA employees.

While the liability of the carrier has been regulated early by international convention, that of the ATCA is still governed by national legislation. Since States have an obligation under the Chicago Convention to provide these services, it becomes ultimately a question of State liability which makes international regulation a more complex task.

The first part of this work studies the evolution of the jurisprudence and tries to determine the extent of the duties imposed of ATCA by the courts of the United States and Canada. The second part reviews the work done by ICAO towards international regulation of the liability of these agencies and discuss whether or not there is a need for an international convention on the subject. The last chapter examines some of the more important points to be included in such a convention.

RESUME

Le rôle des organes de contrôle de la circulation aérienne s'est accru de façon dramatique au cours des dernières décennies et l'aviation civile est de plus en plus tributaire des services de contrôle, d'information de vol, de renseignements météorologiques et autres aides au sol. Les cours reconnaissent que le pilote, traditionnellement seul responsable de la sécurité de l'équipage, de l'appareil et des passagers, partage maintenant ce devoir avec les contrôleurs et les autres employés de ces organes.

La responsabilité du transporteur a été règlementée très tôt par convention internationale; celle des organes de contrôle de la circulation aérienne est encore régie par les lois nationales. Etant donné que les Etats ont, d'après la Convention de Chicago, l'obligation de fournir ces services, cela devient une question de responsabilité de l'Etat et rend la tâche d'élaborer une règlementation internationale beaucoup plus complexe.

Dans la première partie de ce travail, nous étudions l'évolution de la jurisprudence et essayons de déterminer l'étendue des obligations imposées à ces organes par les cours des Etats-Unis et du Canada. Dans la deuxième, nous passons en revue le travail effectué par l'OACI en vue d'élaborer une règlementation internationale sur la respon-

sabilité de ces organes et ensuite nous discutons s'il y a besoin ou non d'une convention internationale sur le sujet. Dans le dernier chapître, nous examinons quelques-uns des points importants qui pourraient être inclus dans une telle convention.

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I N T R O D U C T I O N

In the primitive early days of aviation, air traffic control was unknown. Pilots maintained a course by using a compass and landmarks on the ground; they would follow rivers, roads, railroad tracks and occasionally drop to a lower altitude to read the names on the stations. They avoided other aircraft by following the rule "see and be seen" and pilots were alone responsible for their own safety and that of their passengers.[1]

En Europe, prior to World War II, the use of aircraft as a rapid means of transportation for pleasure and commerce remained marginal. Not only was it very expensive, it was also reserved to those possessed of a pioneering spirit. Only on the North American continent had the use of aircraft by the general public advanced to a stage where the need was felt for a ground organization to regulate flights and assist in the safety of the operations.[2] Field comments:

> "This early North American experience was to have a profound effect upon the methods which the rest of the world was to adopt for the control and regulation of air traffic..."

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(1) Borins, Sandford F., The Language of the Skies, Kingston and Montreal, 1983, at 7.

(2) Field, Arnold, The Control of Air Traffic, Eton, 1980. Excellent overview of the various operations of ATC.

In the late twenties the governments built the first control towers in the United States and in Canada and a simple form of air traffic control was initiated by means of signal lights. While on the downwind leg, the pilot would look at the tower: a green light meant that he was allowed to land and a red light that he should overfly the runway and rejoin the circuit.

In the thirties the use of two-way radio was added to the signal lights to coordinate air traffic. It simplified navigation as it enabled pilots to maintain contact with the tower as well as keep track of one another, thus contributing to safer flying in poor weather conditions. Ultimately, this was followed by the construction in the two countries of hundreds of VORs (Very High Frequency Omnidirectional Radio Ranges) which became the basis for a system of airways between major points. VOR stations broadcast VHF signals which radio-equipped aircraft used to stay on course. Thus, navigation became a matter of flying from VOR station to VOR station and, as one author puts it, "as easy as following a highway".[3]

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(3) MacDonald, Sandy A.F., From the Ground up, Ottawa, 23rd ed., at 157.

It is at this point that flight rules separated into two categories, Visual Flight Rules (VFR) and Instruments Flight Rules (IFR), a distinction which, as we shall see later, has very much influenced jurisprudence involving ATC operators. IFR flight further increased the need for air traffic control, since pilots were now able to fly at night, into the clouds or in marginal weather conditions. In the forties en route control was established and airways were assigned to controllers through the establishment of Flight Information Regions (FIRs). The use of radar was introduced for en route controllers, in 1946 for the United States and in 1958 for Canada.

Air traffic control remained relatively easy until the mid-fifties. All aircraft were propeller-driven and operated at similar speeds. Coexistence between IFR and VFR pilots posed little difficulty: if the weather was good, everybody used VFR rules, if not, VFR pilots stayed home, therefore reducing traffic on the circuit.

The situation changed dramatically in the late fifties and early sixties with the commercialization of the new jet aircraft and the enormous increase in traffic that it brought about. The jets were much faster, thereby creating hazards for the slower propeller-driven aircraft,

such as the little-known phenomenon of wake turbulence or wing-tip vortices. They were also able to fly much higher, encroaching on the space up to then reserved to military aircraft. Moreover, because of their size and the position of the pilot in the cockpit, it became impossible for him to see around his aircraft and maintain his own separation.

This new development influenced air traffic control in three major aspects: the positively controlled airspace was expanded, additional air traffic control positions were established and radar became much more sophisticated.[4]

The appearance of the wide-bodied jets, in the seventies, further increased dependence on air traffic control services. More research was done to improve radar technology and the use of computerized equipment was introduced gradually during the same decade.

Needless to say, these rapid changes have made the air traffic controllers' job more demanding as their duties grew more complex and as they found themselves with the daily responsibility of making, often in fractions of seconds,

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(3) Borins, *supra* n.1.

decisions which would affect the safety of hundreds of lives. As they became more and more responsible for aircraft movements, errors in judgment could result in disaster. The question of their liability, therefore, inevitably arose.

Delegates at the 1944 Chicago Conference recognized that air traffic control was an essential element of the structure of civil aviation and understood the necessity of standardizing ground support facilities in order to ensure higher levels of safety and efficiency throughout the world. They accepted that responsibility for the provision of those services should fall upon the State and incorporated this principle in article 28 of the Chicago Convention:

> Art. 28 Each Contracting State undertakes, so far as it may find practicable, to:
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> (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;

ICAO provisions on air traffic are contained in parts of Annex 2 (Rules of the Air), in Annex 11 (Air Traffic Services), in the Procedures for Air Navigation Services - Rules of the Air and Air Traffic Services (PANS-RAC) and the Regional Supplementary Procedures (SUPPS).

The objectives of the air traffic control services are defined in Chapter 2 of Annex 11 as follows:[4]

(1) prevent collisions between aircraft;

(2) prevent collisions between aircraft on the manoeuvering area and obstructions on that area;

(3) expedite and maintain an orderly flow of air traffic;

(4) provide advice and information useful for the safe and efficient conduct of flights;

(5) notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required.

When a State undertakes to provide air traffic control services in accordance with Annex 11 of the Convention, it usually discharges that undertaking directly, through one of its departments, or indirectly, though a corporation owned by it. Therefore, the liability of the employees of these services will involve ultimately the liability of the State which, for the present time, is governed by the legal principles of public law of each country.

During the course of his duties, the controller may incur both civil and criminal liability. His civil

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(4) Art. 2.2

liability will, in most cases, be concurrent with his employer's, that is, the relevant government agency, but his criminal liability will not be shared with anyone else. Criminal liability, arising from deliberate or premeditated acts, will not be dealt with herein. It should be pointed out however that there are countries which enforce criminal law against controllers, making their position still more vulnerable and the need for a clearer definition of liability rules more pressing.[5]

This research will be directed essentially to the study of the civil liability of the air traffic control agencies. As mentioned earlier, both the liability of the controller as an individual or his liability as an employee of the State are left to national legislation and consequently, lack uniformity. Efforts towards the elaboration of international rules on this matter, started more than twenty years ago in ICAO, have not yet been successful. Our purpose is to examine whether or not the present situation causes problems of sufficient magnitude as to make the drafting of such international rules worthwhile.

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(5) In consequence of the Zagreb, Yugoslavia, mid-air collision of September 10, 1976, eight controllers were tried in a criminal court; seven were acquitted but one was sentenced to seven years imprisonment. On appeal to the Supreme Court, the sentence was reduced to 3 years and 6 months. See MARN, Peter, "Comparative Liability of Air Traffic Services", unpublished thesis, McGill, 1980.

In the first chapter, we will study the existing legislation providing the legal basis for ATC liability in the United States and the manner in which the courts have applied it, with a view to defining the evolution of the duties imposed on controllers. The process will be repeated in the second chapter for Canada. This will be followed by a review of the work done by ICAO in regard to this question and by an analysis of the opinions and proposals put forward by the Contracting States over the years. Then, we will discuss in a fourth chapter the main reasons given in favour or against a new international convention on ATC liability and, should there be one, the main principles on which it should be based.

PART I

THE LIABILITY OF AIR TRAFFIC CONTROL AGENCIES IN THE UNITED STATES AND IN CANADA

CHAPTER 1: THE UNITED STATES

1.1 The Federal Tort Claims Act and the Air Traffic Controller.

1.1.1 The Doctrine of Sovereign Immunity

In most jurisdictions, air traffic controllers are public employees. As a result, the government of the jurisdiction involved will be the defendant party in a suit against a controller and the claimant could be faced with a plea of sovereign immunity.

The origin of sovereign immunity in the United States as applied in suits against the federal government is said to be unclear but the doctrine is based on the premise that the United States cannot be sued without its consent. While it may or may not have its roots in Roman law, sovereign immunity existed as part of English common law and may have been carried over to colonial America in its English form. The ideas underlying the theory in common law seem to have been that "the King can do no wrong", together with the divine right of kings and the feeling that it was a contradiction of his sovereignty to allow him to be sued in his own courts.[6]

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(6) Prosser, William L., Law of Torts, 4th ed., 1971, at 970.

Prosser wonders "just how this feudal and monarchistic doctrine ever got itself translated into the law of the new and belligerently democratic republic in America". Nevertheless, the United States was surprisingly slow in changing it: in spite of its obvious unfair consequences it survived until as late as 1946.

Originally, sovereign immunity absolutely barred any suit in damages against the federal government arising from common law torts. The only way for a citizen to seek relief for injuries caused by a government employee in the course of his duties was by way of private bill to the Congress. The mounting volume of these bills became over the years an increasing burden. Moreover, since the Congress was ill-equipped to determine the facts of the cases on which it had to vote, capricious results would often follow.[7] These reasons, added to the need to mitigate the harshness of the doctrine, led to the adoption of the Federal Tort Claims Act of 1946 (FTCA), allowing for the United States to be sued in tort.[8]

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(7) Wright, William B., The Federal Tort Claims Act, New York, 1957, at 3.

(8) For a complete legislative history of the FTCA, see *Dalehite* v. U.S., 346 U.S. 15 (1953), 74 S. Ct. 956.

1.1.2 The Waiving of Immunity

The FTCA by itself does not create any new system of liability: it simply states the consent of the United States to be treated as a private individual, wihout claim of immunity, in cases where the proven negligence of its agents or employees has caused damages to a third party.

The relevant stipulation reads as follows:[9]

> "Subject to the provisions of chapter 171 of this title, the district courts... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The Act was initially acknowledged as "a general waiver of governmental immunity in tort, limited only by enunciated exceptions".[10]

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(9) 28 USC 1346 (b)
(10) Comment, "The Federal Tort Claims Act", 56 Yale L. J. 534, 1947, at 536.

1.1.2.1 As a Private Person

The meaning of "private person" is not discussed in the legislative history of the FTCA but the words have been put before the courts for interpretation on several occasions. The government has argued that they should be read as excluding its liability for the performance of activities which private persons do not perform : that is, there would be no liability for the negligent performance of a uniquely governmental function.

Had this argument been accepted, it would have considerably diminished the usefulness and efficiency of the FTCA. Fortunately, in *Dahlstrom v. United States*,[11] the court refused to give it such a narrow construction, stating:

> "While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, all governmental activity is inescapably uniquely governmental... There is nothing in the tort claims act which shows that Congress intended to draw distinctions so finespun and capricious as to be incapable of being held in the mind for adequate formulation... The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws".

(11) 228 F.2d 819 (8th Cir. 1956).

This refusal to restrict the import of the FTCA was well-received and followed in subsequent cases.

1.1.2.2 Employee of the Government

Employees have been defined in the Act to include officers or employees of any federal agency, member of the military or naval forces of the United States and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, with or without compensation. It includes corporations acting as instrumentalities or agencies of the United States but excludes any contractor with the U.S.[12]

The Federal Aviation Act of 1958 created a special agency, the Federal Aviation Agency, later the Federal Aviation Administration (FAA) which was given the mandate, *inter alia*, to develop and operate a common system of air traffic control for both military and civil aircraft.[13]

In 1967, the FAA lost its independent status and was transferred as an entity to the newly established Department of Transportation (DOT) as one of a number of administrations within the DOT.[14]

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(12) 28 USC 2671
(13) Federal Aviation Act of 1958, 72 Stat. 737-806 as amended, 49 USC 1301-1342 (1964)
(14) The Department of Transportation Act (in force April 1, 1967), 89 Stat. 931, as amended, section 6(d).

Before the creation of the FAA, the Civil Aeronautics Administration (CAA), its forerunner, had established an air traffic control network for the safe and efficient handling of instrument flight operations. The CAA had set criteria for the certification of air traffic controllers and published standard procedures to be followed in the control of air traffic.[15] Therefore, the air traffic control personnel of the United States, working under the jurisdiction of the FAA, within the DOT, undoubtedly fall into the category of government employee as described in the FTCA and are subjected to its provisions.

1.1.2.3 "Acting within the scope of Employment"

The government can be held liable for the negligence of its employees or agents only in cases in which those were acting within the scope of the authority actually conferred upon them. The liability of the government is thus limited to the same extent as the liability of the private employer under the doctrine of *respondeat superior* or vicarious liability.

"The course of employment", says Fleming, "is an expansive concept which provides ample scope for policy

(15) Tigert. John J., "Instrument Flying Rules (IFR) - The Liability of the Government", 44 J. Air L. & Com. 333, 1978, at 334.

decisions and, despite the vast volume of case law, has failed to acquire a high degree of precision".[16]

The FAA, in accordance with its mandate to take charge of the air traffic control system, has issued over the years various operations manuals for the air traffic controllers. They describe the services to be provided and the manner in which they are to be provided. As of January 1, 1976, procedures governing controllers have been condensed in a single FAA manual[17] and the rules therein have also been codified in the Federal Aviation Regulations.[18]

Although, as we will see later, the scope of the duties of the controllers remains a very controversial issue, the provisions of the manual are a starting point to ascertain whether or not the controller was acting within the scope of his employment.

Private claims against an air traffic controller for the negligent performance of his duties will involve the liability of the United States government under the FTCA. The principle has been stated very clearly in the

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(16) Fleming, John G., The Law of Torts, 6th ed., 1983, at 349.
(17) FAA Order 7110.65C (1982)
(18) The Federal Aviation Regulations (F.A.R.) can be found in the Code of Federal Regulations (C.F.R.) at Title 14.

landmark case of *Eastern Air Lines v. Union Trust Co.*[19] This was an action arising out of a collision which occurred between an airliner and a military aircraft on final approach for landing at the Washington National Airport. All 55 persons aboard the passenger plane were killed; only the pilot of the military aircraft survived. The proximate cause of the accident was found to be the negligence of the control tower operators who cleared both planes for landing on the same runway at approximately the same time.

One of the arguments put forward by the government for its defence was that the air traffic control personnel performed uniquely governmental functions of a quasi-regulatory nature and that the FTCA did not permit suits based upon the performance of such duties because there was no similar private liability. Reviewing the history of air traffic control in the U.S., the court reasoned that before the government undertook to provide those services itself there was no reason why a private individual or a private corporation could not construct an airport and operate a control tower manned by its own operators certicated by the CAA. Such an individual or corporation would

(19) 221 F.2d 62 (D.C. 1955).

certainly have been held liable for the negligence of its privately employed tower operators. It followed therefore that when the United States entered the business for itself, it assumed a role which might be and was assumed by private interests. "Hence...", the court said, "the government is liable for the negligent acts or omissions of its control tower operators in the performance of their functions and duties..."[20]

The ruling of *Eastern Air Lines* is now well established and stands fast despite subsequent efforts on the part of the U.S. government to overturn it.

1.1.2.4 Cause of Action

The cause of action envisaged by the FTCA is the negligent or wrongful act or omission of the government employee. These refer to the general concepts or the law of negligence. Courts have held on various occasions that the rules of negligence apply to the air traffic controller, but what constitutes negligence for an air traffic controller has evolved significantly over the past years and will be discussed hereinafter.

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(20) *Idem*, at 74.

1.1.2.5 Law Applicable

According to the FTCA, the actionable act or omission of the government employee is to be appreciated "in accordance with the law of the place where the act or omission occurred". This is contrary to the traditional conflicts of law rule that the law of the place of the harmful impact governs tort liability.[21] The discrepancy between the statutory language and the traditional rule was solved in *Richards v. United States*.[22] The Supreme Court said that the forum had to apply the entire law of the place of the act or omission including the law governing the choice of law.

A good illustration of this rule, as applied in an air traffic control case, is *Deal v. United States*.[23] Deal's plane crashed in Arkansas allegedly because of the negligence on the part of the controllers located in Memphis, Tennessee. In following the Richards approach, the court referred first to Tennessee conflicts law since it was the place where the negligent act had taken place. Under Tennessee law, the law which governs actions for wrongful

(21) Leflar, Robert A., American Conflicts Law, 3rd ed., 1977), chapter 13.
(22) 369 U.S. 1; 82 S. Ct. 585 (1962).
(23) 413 F. Supp 630 (W.D. Ark. 1976).

death is the law of the place of harmful impact. Since the accident had occurred in Arkansas, the second step was to look into the Arkansas comparative negligence statute to find out the rights of the parties.

The choice of the *lex loci delicti* can have very important effects in air traffic control accidents where deaths are involved, which is too often the case. At common law, no private cause of action arises from the death of a human being. Therefore, the dependents and relatives of a deceased person must refer to the relevant state statute for their right to recover under the FTCA. The Wrongful Death Acts, as they are called, do vary from one state to the other. Persons entitled to bring the action, the extent of recovery, the effect of contributory negligence, admissible heads of damages, are but a few of the elements which may differ. In other words, the result of a suit may change according to which control tower was in charge of the flight.

A good example for this is the above-mentioned case of *Eastern Air Lines*. The passengers of the Eastern airliner were killed when it crashed in the District of Columbia because the government control tower operators in Virginia failed to issue timely warning that another plane was also on final approach. The U.S. Court of Appeals for the District of Columbia held that when the death occurs in a state other

than the one where the wrongful act or omission occurred, the FTCA obliges us to disregard the law of the place of injury and to apply the law of the state where the tort occurred. In Eastern, the death statute of Virginia, which at the time limited the recovery to $15 000 was applied instead of the statute of the District of Columbia in which recovery was unlimited.

However, the FTCA prescribes its own limitations periods and state laws will not apply on this point. A claim will be barred if the action is not filed within two years and the courts have always applied this provision very strictly.

1.1.2.6 Jurisdiction

The FTCA confers on the federal District Courts exclusive jurisdiction for actions filed under it. It also provides that civil suits against the United States under the Act shall be tried without a jury.[24] This might represent a distinct advantage for the air traffic controller: it has often been said that in suits against air carriers, juries tend to be overly influenced by the human circumstances of the case, with the corresponding effect this has on the amount of the awards.

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(24) 28 USC 2402

The Courts of Appeals have jurisdiction of appeals from the final decisions of the District Courts except where a direct review may be had in the Supreme Court.[25]

1.1.3 Exceptions

The government did not however completely abandon its immunity to suit. The FTCA contains no less than thirteen situations to which the waiver of immunity does not apply.[26] Thus, the FTCA is only a limited waiver of immunity and the United States may be found liable only in the manner and to the degree to which it has consented.[27]

Early cases involving suits against the United States alleging negligence on the part of air traffic controllers gave rise to a variety of defences based on these special provisions of the Act. We will review hereinafter the ones most commonly used by the U.S. government in attempting to exclude the ATC employees from the application of the FTCA.

1.1.3.1 Discretionary Function

By far the most controversial and the most litigated of the exceptions contained in the FTCA is the first one,

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(25) 28 USC 1291
(26) 28 USC 2680
(27) *Wright v. U.S.*, 568 F.2d 153 (10th Cir. 1978), cert. denied 439 U.S. 824, 99 S. Ct. 94 (1978).

which provides that it will not apply to claims based upon the exercise or performance or to the failure to exercise or perform a discretionary function.[28]

The general idea underlying that exception is that the government will not be liable for the acts of its employee if the negligent act in question involves judgment or the exercise of discretion. If, however, the employee is merely performing tasks in accordance with prescribed procedures, there will be liability for any negligent act or omission.

A major problem encountered in analyzing this exemption is the statutory meaning of the term "discretion". Neither the Act itself nor its legislative history provides us with a clear definition and jurisprudence on this matter seems quite hesitant to offer one.[29]

The exception of "discretionary function" was the second argument put forward by the government in *Eastern Air Lines v. Union Trust*. The government alleged that "tower operator duties are public in nature and involve the exercise of discretion and judgment" which barred any claim against the U.S.

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(28) Blakeley, Brian., "Discretion and the FAA: an Overview of the Applicability of the Discretionary Function Exemption of the Federal Tort Claims Act to FAA Activity", 49 J. Air L. & Com. 143, 1983.
(29) Reynolds, Osborne M., "The Discretionary Function Exception of the Federal Tort Claims Act", 57 Geo. L. J. 81, 1968.

The court rejected the argument and held that although discretion was exercised when the FAA decided to operate the control tower, the tower personnel had no discretion to operate it in a negligent manner. It went on to state unequivocally:[30]

> "We hold that tower operators merely handle operational details which are outside the area of the discretionary functions and duties referred to in s. 2680 (a); and that, consequently, the Tort Claims Act permits the Government to be sued for damages sustained because of their negligence".

The court added that the negligent acts and omissions found by the Court in the case were not "decisions made at a planning level" and did not involve any consideration important to the practicability of the government's program of controlling air traffic at public airports; the court repeated that the tower operators had acted, or failed to act, at an operational level.[31]

In so ruling the court had relied on the earlier decision of *Dalehite v. United States*[32] in which the Supreme Court made for the first time a detailed examination of the discretionary function exception and attempted to set its boundaries.

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(30) *Supra*, note 19, at 75.
(31) *Idem*, at 78.
(32) *Supra*, note 8.

Dalehite was an action to recover damages for a death resulting from a disastrous explosion in Texas City of ammonium nitrate fertilizer produced at the instance, according to the specifications and under the control of the United States for export to increase the food supply in areas under military occupation during World War II.

Although no precise definition was given, the court said in *Dalehite* that "where there is room for policy judgment and decision, there is discretion" and that decisions "responsibly made at a planning level rather than operational level involve important considerations for government programs and are therefore discretionary within the terms of the statutory exception".

The next significant Supreme Court decision interpreting the discretionary function exception was *Indian Towing v. United States*.[33] In it, the United States was held liable for damages attributable to the Coast Guard's negligence in permitting a lighthouse to become inoperative after it had exercised its discretion to provide lighthouse service. In discussing the application of the discretionary function exception to the acts in

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(33) 350 U.S. 15 (1953), 76 S. Ct. 122.

question, the Court used the tort law principle of the "Good Samaritan" and said that once the Coast Guard exercised its discretion to provide a lighthouse and engendered reliance on its continued existence, it was under a duty to exercise reasonable care to ensure its proper operation.

Dalehite and *Indian Towing* are said to have developed three lines of analysis in determining the scope of s. 2680 (a): the "planning-operational", "Good Samaritan" and "quality of decision".[34] Most decisions involving air traffic controllers cite one or the other.

The ruling in *Eastern Air Lines* that the ATC functions are merely operational and the failure of the courts to recognize that in some situations the controllers do exercise discretion has been criticized.[35] It has been suggested that determination of government liability should be made according to the quality of decisions which the operator's job entails rather than on the operational versus planning level distinction. As Rosen puts it:

> "Rather than invariably comparing the status of subordinates, such as mail truck drivers and air traffic controllers;

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(34) Garrett, John R., "Scope of the Discretionary Function Exception under the FTCA", 67 Geo. L. J. 879, 1979, at 887.
(35) Rosen, Thomas E., "The Federal Tort Claims Act: Discretion and the Air Traffic Controller", 38 J. Air L. & Com. 413, 1972, at 420.

> it is more reasonable for the courts to recognize that there are qualitative differences in certain of their decisions".

In support of this argument, it is worth mentioning that the FAA Air Traffic Control Manual recognizes that the controller will be confronted with situations not covered by it; accordingly, paragraph 1 instructs controllers to use their "best judgment" under such circumstances.

The government tried again in subsequent cases to argue that the functions of the air traffic controllers involve discretion but the court held fast to the rule that the "discretionary function" exception does not protect the government from liability for the negligence of its controllers. In *Ingham v. Eastern Airlines Inc.*[36] the failure of the controller to give to the crew notice of adverse weather change and reduction in ground visibility was found to be the proximate cause of the crash. This omission of the controller, the judge determined, constituted evidence of negligence on the part of the government because a specific provision of the Air Traffic Control Procedures Manual required that changes in the weather conditions, when they fell under a specified minimum, were to be reported to

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(36) 373 F.2d 227 (2nd Cir. 1967), cert. denied 389 U.S. 931 (1967).

the pilot as necessary. Once again, the government argued that reporting weather changes when the visibility was still above the minimum was a "discretionary function" and therefore could not serve as a basis for imposing tort liability under s. 2680 (a). The court rejected this contention, reiterating the positions held in *Dalehite* and in *Indian Towing* and later in *Eastern Air Lines* that "discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently".

It seems well established now that the courts will not accept a defence of discretionary function when the negligence of an air traffic controller is involved. However, according to Blakeley,[37] it could have an effect in determining the standard of care by which to judge the acts of the controllers. He cites the case of *Miller v. United States*[38] in which the court found that the crash was not the result of the negligence of the controllers who had complied with FAA procedures. The judges rejected the plaintiff's argument that the FAA should be held liable for the crash because it had failed to promulgate more stringent procedures. It was held that the decision not to adopt stricter regulations is within the scope of the discretionary function

(37) *Supra*, note 28, at 163.
(38) 522 F.2d 386 (6th Cir. 1975).

exception, thereby recognizing implicitly the "policy-making" character of that governmental activity.

1.1.3.2 Misrepresentation

The government has also relied occasionally on the defence of "misrepresentation", another of the exceptions provided by the FTCA.[39] The basis of this defence is that the government will not be liable for the acts of its employees for deceit or inaccurate portrayal of a situation. The leading case for the correct interpretation of this exception is *United States v. Neustadt*[40] in which it was held: (1) the exception of misrepresentation comprehends claims arising out of negligent as well as willful misrepresentation; (2) where the misrepresentation is merely incidental to the gravamen of the claim, the exception is inapplicable.

The defence has especially been raised in cases where the controllers have provided the pilots with inaccurate information as in the case of *Ingham* where the airliner crashed while attempting to land on a runway which at the time of the accident was engulfed in swirling ground fog. Failure of the part of the approach controller to report important weather changes was the cause of the accident.

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(39) 28 USC 2680 (h)
(40) 366 U.S. 696 (4th Cir. 1961), at 702.

In that case, although the court agreed with the government that the misrepresentation exception applied to negligent as well as to intentional misrepresentation, and that a misrepresentation could result from the failure to provide information as well as from providing wrong information, it refused to accept it as a defence in the case at hand, stating that:

> "Where the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon s. 2680 (h) to absolve itself of liability".

This position had already been taken in *United Air Lines v. Wiener*,[41] a mid-air collision case between a commercial airliner and a U.S. Air Force jet fighter. The government had also tried to plead misrepresentation therein because the flight plan had been approved by the controllers which implied that the airway was clear when in fact it was not. Here again, the court rejected the claim of misrepresentation as being "misplaced" since the real cause of action was negligence, in this case, failure of a duty to warn, rather than misrepresentation.

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(41) 335 F.2d 379 (9th Cir. 1964), cert. denied 379 U.S. 951 (1964).

Thus, the point has been well-answered and this exception to the FTCA does not constitute a viable defence for the government in air traffic control cases any more than the "discretionary function" exception.

1.2 The Law of Negligence and the Air Traffic Controller

It has already been mentioned that the FTCA does not create a new system of liability; it only applies to the government the rules applicable to a private person, that is, the traditional concepts of negligence law.

This was clearly expressed in *King v. United States*.[42] In that case, the plaintiff, Mrs. King, had sued the United States under the FTCA to recover damages caused by a student flyer of the U.S. Air Force when he crashed a training plane into her house, setting fire to and destroying the house and its contents. At the beginning of their judgment, the judges made the following statement:

> "There are no special statutory provisions that regulate or govern the responsibility of persons owning and operating airplanes. In the absence of such statutes, the rules of law applicable generally to torts govern. The ordinary rules of negligence and due care are invoked".

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(42) 178 F.2d 320 (5th Cir. 1950).

King has been quoted approvingly in several subsequent cases and its principle is not questioned.[43]

What constitutes negligence is, under the FTCA, to be determined by the law of the place where the act or omission occurred. In most jurisdictions, actionable negligence consists of a duty, a violation thereof and consequent injury. We will thus examine how the courts have applied these basic concepts to the air traffic controllers.

1.2.1 Duty of Care

1.2.1.1 Existence of a Duty

The first attempt to have the judicial authorities recognize the existence of a duty for the air traffic controller was the 1941 case of *Finfera v. Thomas*,[44] an action for personal injuries suffered as a result of a ground collision between two aircraft at the Detroit City Airport. Finfera had completed his landing and was proceeding to taxi when he was struck by Thomas then about to take-off. Plaintiff insisted that he had a right to "rely on

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(43) See *Schultetus v. U.S.*, 277 F.2d 322 (5th Cir. 1960), at 325; *Franklin v. U.S.*, 342 F.2d 581 (7th Cir. 1965), at584; *American Airlines v. U.S.*, 418 F.2d 180 (5th Cir. 1969), at 191; *Spaulding v. U.S.*, 455 F.2d 222 (9th Cir. 1972), at 226.
(44) 1 AVI 949 (C.A. 6th Cir. 1941).

light and radiosignals from the airport signal tower" and that "no signal; neither red, white, nor green lights were flashed; nor did any message by radio came to him from the tower...". Plaintiff's plea was unsuccessful; the court said that no duty existed because of the rule of the Board of Aeronautics of Michigan that "upon landing upon an airport, a pilot shall assure himself that there is no danger of collision..." and because the City of Detroit, which maintained the tower, regulated ground traffic only "as a matter of accomodation" and therefore could not be held liable.

Eight years later, in *Marino v. United States*,[45] it was recognized that controllers do owe a duty of care. Marino was a tractor operator who was severely burned after his tractor was struck by an army airplane taxiing on the airfield where he was working. Plaintiff had been instructed to watch the tower constantly for signals when planes were moving on the taxiway. Before the accident in question, he had not received any. The court held that the tower operator had a duty to exercise reasonable care and that it was "unecessary to discuss whether these duties were

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(45) 84 F. Supp. 721 (E.D. N.Y 1949). For a similar, more recent case, see *Moloney v. U.S.*, 354 F. Supp. 480 (S.D. N.Y. 1972). A gardener, cutting grass at the end of the runway, sustained injuries when he was struck by jet blast from an airplane. Although Moloney's contributory negligence barred recovery, according to N.Y. State law, the U.S. was found negligent. The court found that the tower had a duty to notify the departing planes to look out for the grass cutters.

primarily for the protection of pilots and planes, or of civilian workers and equipment". Plaintiff was thus entitled to receive compensation for his injuries from the United States under the FTCA.

In the better-known case of *Eastern Air Lines v. Union Trust Co.*, after a careful review of cases involving other services provided by the government, the court concluded to the existence of a duty for the air traffic controller and held that in case of negligence of the controller to fulfill this duty, the government was liable.

To whom is this duty owed? Air traffic controllers have a duty towards third parties and objects on the ground and to pilots, according to *Marino* and *Eastern Air Lines*. It extends to the aircraft, passengers, crews and cargo, as said in *Ingham*. In a 1975 case,[46] the court added that there was "no reason to exclude parachutists".

1.2.1.2 The Good Samaritan or Reliance Doctrine

In the *Finfera* case, plaintiff had argued that, according to the Good Samaritan rule of common law, he had a right to rely on the control tower personnel.

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(46) *Freeman v. U.S.*, 509 F. 2d 626 (6th Cir. 1975).

This rule of tort liability holds that whenever one voluntarily comes to the aid of another and the latter relies upon such an undertaking, there is imposed upon the former a duty of care at least to the extent of not placing the person acting in reliance in a more disadvantageous position that he was prior to the voluntary undertaking.[47]

Although the argument did not succeed in *Fingera*, it became in subsequent cases the basis on which courts predicated government liability.

When the statutory exceptions of "discretionary function" and "misrepresentation" of the FTCA failed to be received by the courts, the government often tried to rely on the common law defence of "no duty". However, each time the defence of "no duty" was raised, the court reaffirmed that when the government undertakes to perform services, which in the absence of specific legislation would not be required of it, it will nevertheless be liable if these activities are performed negligently.[48]

1.2.1.3 Extent of the Duty

If the existence of a duty of care is now fully admitted, there is however far less agreement when it comes

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(47) Eastman, Samuel E., "Liability of the Ground Control Operator for Negligence", 17 J. Air L. & Com. 170, 1950, at 175.
(48) The first case to state the rule explicitly is *Wiener v. U.S.*, *supra* n. 41.

to defining the scope of that duty and the standard of care imposed on the air traffic controller.

Shawcross and Beaumont admit that it is impossible at present to express any general opinion as to these duties and liabilities, but offer the following suggestions:[49]

(i) that persons exercising air traffic control are under a duty to take reasonable care in giving instructions, permissions or advice which the person to whom they are given is legally bound to obey or obtain and they and those responsible as their employers would be liable for any damage caused by a breach of this duty;

(ii) that they are probably under a similar duty and liability in respect of any instructions or advice issued with the intention that they should be acted on, even if not falling within the categories of instructions which the recipient is legally bound to obey;

(iii) that they are probably also under a duty to take reasonable care to give all such instructions and advice as may be necessary to promote the safety of aircraft within their area of responsibility, and would therefore be liable for negligently omitting to give such instructions or advice as well as for negligently giving incorrect instructions or advice.

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(49) Shawcross and Beaumont. On Air Law, 4th ed., London, 1977.

Over the past thirty-five years the courts of the U.S. have been trying to shape guidelines which would keep pace with the fast developing civil aviation and at the same time reflect their concern for the safety of the public in general.

Various authors have analyzed the relevant jurisprudence since the *Marino* case of 1949 and have concluded to a definite trend towards a greater expansion of the controller's liability.[50] We will study hereinafter the successive stages of this evolution.

Separation of Aircraft

At first, the U.S. courts were considerably reluctant to impose affirmative duties on the air traffic controller. *Marino v. U.S.* had limited his obligations to advising aircraft of ground obstacles or other aircraft which the controllers know or should reasonably have known to constitute a collision hazard.

In the 1955 case of *Smerdon v. United States*[51] a controller accurately informed a pilot that visibility

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(50) See Levy, Stanley J., "The Expanding Responsibility of the Government Air Traffic Controller", 36 Fordham L. Rev. 401, 1968; Early, Stephen B. *et al.*, "The Expanding Liability of Air Traffic Controllers", 39 J. Air L. & Com. 599, 1973; Rutledge, Eugene W., "Expanding Liability of Traffic Controllers for Aviation Accidents", 37 Alabama Lawyer 551, 1976.

(51) 135 F. Supp. 929 (D. Mass. 1955).

was below FAA weather minimums for a VFR landing but nevertheless granted him a clearance to do it; the aircraft entered fog and crashed. The plaintiff tried to argue that the control tower operator had a duty to assist the pilot and his passengers by providing advice and information for a safe landing and that he had breached that duty by allowing the pilot to land VFR when he knew that weather did not permit that type of landing. The court absolved the controller from all liability on the grounds that he had adequately warned the pilot of weather conditions. The court ruled that it was the pilot's responsibility to decide the landing procedure to use on the basis of his own observations and the weather forecasts transmitted by the control tower. Moreover, in a dictum, the court added that the operator's duties were limited to maintaining control of the airways to prevent collisions between aircraft within the control zone and to prevent danger arising from obstacles on the movement area.

In *New York Airways Inc. v. United States*[52] an helicopter, cleared to land, descended onto a truck, parked on the touchdown area. The owner of the helicopter brought action against the United States on the ground that the

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(52) 283 F.2d 496 (2nd Cir. 1960).

controller had been negligent in issuing the clearance at that particular moment. The judges did not accept this allegation, saying that a pilot who has received a clearance "may not fly blind and rely on the flight controller for his eyes". The clearance provided by the controller was deemed to be permissive in nature and not mandatory, and did not relieve the pilot of his duty of exercise "a reasonable degree of caution in executing the provisions of the clearance".

Primary Responsibility of the Pilot

The U.S. government has often contended that the primary responsibility for the safety of the aircraft rests with the pilot. This defence is based, first, on the Federal Aviation Regulations[53] and on the argument that the pilot, being a well-trained and experienced professional should be fully capable of operating his aircraft.

The responsibility of the controller in the *Smerdon* case, had been held to terminate at the departure from the control zone. Five years later, in the case of *Schultetus v. United States*[54] an even narrower approach was taken.

(53) Part 91 F.A.Rs. s. 91.3 (a): The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.
(54) *Supra* n. 43.

The action arose out of a mid-air collision, in a control zone and within view of the traffic controllers, of two planes, owned and operated by flying schools. The District Court found the U.S. negligent in that the controller failed to instruct the pilot to alter his course and to properly space the two aircraft. The Court of Appeals reversed the judgment; it held that "when flying in visual flight rules weather conditions it is considered the direct responsibility of the pilot to avoid collision with other aircraft". The Court relied on the Civil Air Regulation which provides that the pilot has the ultimate authority as to the operation of his aircraft. The issuance of clearances and information to the pilot by the controller were held to "aid" pilots in avoiding collisions. The Court admitted that there might be a greater duty and responsibility upon the control tower of aircraft operating under instrument flight rules, and a lesser responsibility on the pilot in such a situation. However, in the present case, the judges went as far as saying that even in the presence of negligence of ATC, there was no cause of action in a VFR situation.

The same reasoning prevailed in *Miller v. United States*[55] where the court reiterated that the function of

(55) 303 F.2d 703 (9th Cir. 1962). cert. denied 371 U.S. 955 (1963).

tower personnel is merely to assist the pilot in the performance of his duties and that the ultimate responsibility for the safe operation of the aircraft under VFR conditions rests with the pilot.

It has been pointed out however that perhaps the defence of primary responsibility of the pilot is not a valid one.[56] While it is true that one F.A.R. states that the pilot is primarily in control of his aircraft, there is also another delineating the controller's responsibility which provides:[57]

> "Except in an emergency, no person may, in an area where air traffic control is exercised, operate an aircraft contrary to an ATC instruction".

Considering the language of this provision, "the primary responsibility argument appears strained", say the authors.

Whatever the case may be, it remains one of the most basic principles of aviation law.

The Control Theory

The reason most often given by the judges in order to justify the primary responsibility of the pilot theory

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(56) Winn, Joan T. & Douglass, Milton E., "Air Traffic Control: Hidden Danger in the Clear Blue Skies", 34 J. Air L. & Com. 255, 1968.
(57) Part 91 F.A.R.s, s. 91.75 (a).

is the "control" theory. In simple words, it is the pilot who runs the aircraft, not the controller. In *Sawyer v. United States*[58] The District Court of New York refused to hold the U.S. government responsible for the death of 128 persons killed in a mid-air collision because the FAA employees in the control tower were "merely giving instructions and affording aid to the pilot in making the approach and landing" and because "they were not in control of the plane". The pilots were said to have exclusive physical control of it[59] and the courts took a "dim view of the notion that an airline can justify a disregard of regulations and proper procedures by pointing the finger of guilt at an air traffic controller".

Concurrent or Reciprocal Duty

This harsh position was somewhat softened in later cases by introducing the theory of "concurrent" or "reciprocal" duty. This concept places the burden of insuring the safety of the aircraft on both the pilot and the ATC; the pilot is still held primarily responsible but his responsibility is predicated upon his having been informed of all the facts necessary for a safe flight.

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(58) 297 F. Supp. 324 (E.D. N.Y. 1969). Illogically, in that case, although the U.S. was found not negligent, the pilots were found guilty of contributory negligence.

(59) In *Lobel v. American Airlines*, 192 F.2d 217 (2nd Cir. 1951), the judge said that the pilot had "complete physical control of the mechanism, even to the point of disregarding regulations for the immediate safety of his passengers".

In *State of Maryland v. United States*[60] a collision occurred when a U.S. Air Force T-33 jet airplane flying VFR overtook on final approach a commercial Viscount airliner flying IFR. All occupants of the commercial plane were killed; the Air Force pilot parachuted to safety. The evidence revealed that the controller in charge had seen the T-33 on his radarscope for about 80 to 100 seconds prior to the collision and had failed to communicate the information to the pilot of the Viscount. The government counsel claimed that the primary duty for the safety of his aircraft rests on the pilot.

This time the judges were reluctant to accept the argument. They said:

> "There is obviously no doubt that the pilot is under an obligation to use a high degree of care and vigilance in navigating his airplane. This obligation, however, does not detract from the reciprocal duty devolved on other persons, such as the controllers in the Traffic Control Center. As has been already stated, negligence of two or more persons may concur in causing an accident, and in that event each is liable for the result". (Emphasis added)

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(60) 257 F. Supp. 768 (D.C. 1966)

In *Hochrein v. United States*[61] the court agreed that the main responsibility for the safe conduct of an aircraft flying in the control zone under VFR is the pilot's under the rule of "see and be seen". However, said the court, the controller had the duty to pass on information which may be necessary for the pilot to discharge his responsibility for his own safety. The judge found that the controller was negligent in failing to warn Hochrein when he cleared him to land that another plane, also flying VFR, was practicing "touch and go" landings[62] on the same runway. The controller had signalled twice the other airplane to exercise caution but his signals had not been acknowledged.

The judge drew a comparison between the controller and a traffic officer at an intersection and reasoned:

> "If a traffic officer signals a car to proceed through an intersection knowing that the driver cannot see an approaching vehicle, which the officer knows has just passed through two other signals to stop, would it not be incumbent upon the officer to at least warn the driver of the other's presence? We think it should".

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(61) 238 F. Supp. 317 (E.D. Pa. 1965)

(62) In a "touch and go" landing the pilot brings the airplane down in a normal approach as if he intended to land, and, upon touching its wheels, the pilot applies power to the airplane and takes off again.

The theory of shared responsibility between pilot and controller has not been uniformly applied, particularly in cases where flight was under VFR conditions. The basis used by the courts for determining liability was the said notion of "control". In IFR conditions, when the aircraft is under positive control by the ATC, negligence is more easily imposed on the controller than in VFR conditions where the pilot must provide his own separation from obstructions and from other aircraft.

Although the new approach has certainly not displaced the old principle of "primary responsibility of the pilot", it seems now well accepted in recent cases. In two 1979 cases, *Mattschei v. United States*[63] and *Rudelson v. United States*,[64] the U.S. Court of Appeals does not hesitate in affirming that the "duty to exercise due care is a concurrent one resting on both control tower personnel and the pilot".

Procedure Manuals

The duties of the air traffic controllers are established by government regulation and published in the applicable FAA manual.[65]

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(63) 600 F.2d 205 (9th Cir. 1979)
(64) 602 F.2d 1326 (9th Cir. 1979)
(65) *Supra*, n. 17 and 18.

Air traffic controllers must comply with the instructions of the procedures manual. This requirement represents a minimum standard in determining whether or not the controller was negligent.

However, the jurisprudence is divided as to whether these rules and regulations have the force and effect of law. *Hochrein* says, relying on *Schultetus*, that they do. So does *Tilley v. United States*.[66] Others, such as *Baker v. United States*[67] do not agree.

Another question has often been raised in regard to those manuals: does a violation of the manual constitute negligence *per se* or at least evidence of negligence? This is analogous to the tort principle which holds that violation of a statute or administrative regulation is either negligence *per se*[68] or evidence of negligence.[69]

One fairly recent case[70] has adressed the two questions and stated firmly that since the functions of the air traffic controller involves judgment and discretion

(66) 375 F.2d 678 (4th Cir. 1967)
(67) 417 F. Supp. 471 (W.D. Wash. 1975)
(68) Restatement of Torts, 2d, s. 288 B(1).
(69) *Guinan v. Famous Players-Laskey Corporation*, 276 Mass. 501, at 516; 167 N.E. 235, at 242 (1929)
(70) *Supra*, n. 67.

in the handling of thousands of different situations, and since the elements of judgment and discretion may be more relevant in a given situation than the express provisions of the manual, it was impossible to say that failure to follow express provisions of a manual constitutes negligence, let alone negligence *per se*. The court went on to say that the characterization of the procedures manual as the "Bible" of air traffic control, or as "regulations having the force of law" was equally unacceptable, since the manual "had not been promulgated in accordance with legislative or administrative procedure for enactment of law or regulation".

This is however a District Court decision. In *Delta Air Lines v. United States*[71] the Court of Appeals held that while it might not be negligent to deviate from established procedures in the face of a higher priority concern, nonetheless, a substantial and unjustified failure to follow procedures made mandatory by the manual is persuasive as an indication of lack of due care.

Although coming from a higher level of court, one might consider that words such as "substantial and unjustified" and "persuasive and an indication" do not

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(71) 561 F. 2d 381 (1st Cir. 1977), cert. denied 434 U.S. 1064 (1978)

demonstrate a very strong position and certainly leave room for argument.

The government has often taken the position that the procedures described in the manual were exhaustive and that the courts were not free to impose new or additional duties to controllers beyond the requirements of the manual.

This defence was definitely set aside by the Court of Appeals in the leading case of *Hartz v. United States*.[72] Hartz, in his small private plane, crashed shortly after being cleared to take off behind a departing DC-7 airliner. It was established that the small Bonanza had been caught in the wing-tip vortices[73] of the larger aircraft. The controller when issuing the clearance had warned Hartz by saying: "watch the prop wash". In the FTCA actions which

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(72) 387 F.2d 870 (5th Cir. 1968)

(73) A vortex is created at the tip of a wing in motion as the wing sheds a horizontal sheet of air. Because of its shape, the airflow under the surface of a wing reaches the trailing edge sooner than does the airflow over the upper surface. This causes the lower airflow to reach a higher pressure than the upper airflow. The difference in pressure causes the lower airflow to roll up over the trailing edge of the wing. At the wing tip this action causes a vortex, or cone of circular winds, which trails the aircraft parallel to the direction of flight. In the case of large aircraft these vortices attain high velocities and may last up to three minutes. An aircraft encountering a wing-tip vortex will tend to roll about its longitudinal axis. A strong vortex presents a definite hazard to light aircraft. 1 Encyclopaedia Britannica, Aerodynamic 201 (1967).

followed, the United States contended that the air traffic controller had no legal duty, statutory or otherwise, to do anything more than maintain separation between aircraft sufficient to avoid collisions, and filed as evidence the ATC Control Procedures Manual. The trial court concluded that the sole proximate cause of the crash was the negligence of Hartz and that no duty existed "independent of the duty created by the procedures manual".

The judgment of the lower court was reversed in appeal; the judges held that a duty to warn existed and that the warning given had been insufficient. They added:

> "We disapprove the view that the FAA controller is circumscribed within the narrow limits of an operations manual and nothing more".

In *Furumizo v. United States*,[74] also a wake turbulence case, the controllers had given the proper warning but the pilot started to take off in apparent disregard of that warning. The controllers did nothing further and the plane crashed. Again the government pleaded that, having fully complied with the manual, it could not be held liable. The court countered that the regulations and manuals "do not make mere automata of the controllers" who had the duty to exercise reasonable care and judgment in the presence

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(74) 381 F.2d 965 (9th Cir. 1967)

of what they knew or should have known to be very dangerous circumstances. The court stressed the concept of concurrent responsibility pilot-controller and concluded that the controller was not slavishly bound to follow the book but was expected to exercise judgment and had the authority, even under his own manuals, to lengthen the separation between aircraft in case of obviously imminent danger.

The case of *American Airlines v. United States*[75] can also be cited in support of the proposition that the duties of a controller are greater than those imposed by the FAA manual. In an attempt to summarize the basic principles of responsibility in air traffic control, as set forth in *Schultetus*, *Hartz* and *Ingham*, the court determined that due care may extend "over and beyond" the requirements of the manual.

In spite of opinions to the contrary[76] the point seems well settled and taken for granted in the more recent cases and attempts on the part of the government to rely any longer on that defence would be futile.

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(75)418 F.2d 180 (5th Cir. 1969)
(76) See Tigert, John J., "Instrument Flying Rules (IFR) - The Liability of the Government", 44 J. Air L. & Com. 333, 1978, at 341.

Duty to warn

Hartz represents a major step towards expanding the duties of ATC. The pilot still has the ultimate power of decision but, said the court, before he can be held legally responsible for the movement of his aircraft he must know all the facts which were then material to the safe operation of his aircraft.

The controller is then expected to exercise independent judgment and warn the pilot of hazards which he knows or should have known in reason of his training and superior observation post. He has the duty to direct and guide the aircraft in a manner consistent with safety. The court based its new policy on the increasing reliance that commercial air carriers have placed on controllers and the resulting need for higher standards of air traffic control.[77]

Additional Duty in Emergencies

In *Furumizo*, the duty to warn was extended even further. The court held that in cases of extreme danger or emergencies, the controller had an "overriding duty"

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(77) Note, 24 Vand. L. Rev. 180, 1970, at 195.

of safety; when a first warning has been given, if it becomes clear that another warning is needed, the controller must give it.

The rule was subsequently applied in the tragic case of *Stork v. United States*[78] involving the crash of an aircraft chartered to transport a California college football team to and from Toledo, Ohio. In spite of almost non-existent visibility and weather conditions way below FAA minimums, and notwithstanding the fact that scheduled flights had already been cancelled, the controller cleared the plane for take-off. After attaining an altitude of 50 to 100 feet, the plane stalled and crashed on the runway, killing 20 of the 48 occupants. The United States insisted that even under these extreme circumstances controllers had no authority to deny clearance; that the controller's concern is limited to traffic conditions and that "judgment as to weather conditions once all relevant information is at hand, is the sole responsibility of the pilot".

The Court of Appeals ruled against the government. Even if they were going to accept these argument, the controller, said the judges, knew that the flight was

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(78) 430 F.2d 1104 (9th Cir. 1970)

forbidden by FAA regulations because of substandard weather conditions, and knowing it, he had the duty to accompany the clearance with a clarifying warning to that effect. The court cited with approval the *Furumizo* holding for the duty to warn in the face of extreme danger known to the tower.

However, this broadening of the controller's liability has not been applied consistently. *Spaulding v. United States*[79] arose of the crash of a plane flying VFR, due to bad weather conditions. Plaintiffs argued that the accident was due to the failure of U.S. employees to adequately "warn, assist, advise, instruct, control, manage and direct" the flight. The flight service personnel at Houston, Texas, where the pilot had taken off, had told him that the weather was adequate for a VFR departure but that low ceiling and overcast conditions existed and were forecast over virtually the entire flight area between Houston and destination (El Paso) and that a cold front was expected to cross the flight path.

The court found no breach of duty owed to the pilot or his passengers: the flight service station had provided accurate information and had no duty to comment

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(79) *Supra*, n. 43.

upon it. Moreover, the take-off was neither forbidden by regulation as it had been in *Stork*, nor inadvisable as in *Furumizo*.

Neither was *Stork*'s principle accepted in *Miller v. United States*[80] where the judges stressed that *Furumizo* had established the controller's standard of conduct in the narrow area of emergency situations, not a broad duty always to be followed by controllers.[81]

From the foregoing, it becomes easily apparent that, in spite of the occasional step backwards, the assessment of the liability of the air traffic controller has undergone, over the last thirty years, considerable changes in the direction of a greater expansion.

1.2.2 Proximate cause

There is no need to elaborate greatly on that basic requirement of all systems of liability that there be a connection between the conduct of the defendant and the damages for which the plaintiff seeks to be compensated.

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(80) *Supra*, n. 55.

(81) See also *Hamilton v. U.S.*, 497 F.2d 370 (9th Cir. 1974), at 375. "When", the judges said, "the controller must make a split-second decision, it is more important that he try to avoid the collision by giving instructions than warn the pilot that an emergency exists".

Though the acts or omissions of the controller may be found to be below the requisite standard of care, they will not be actionable unless they are also shown to be the proximate cause of the injuries plaintiff has suffered. Moreover, the party alleging that the air traffic controller's negligent behaviour caused the said injuries has the burden of persuading the court of this fact. The kind and degree of evidence required in order to establish this will be determined by the law of the jurisdiction of the case.

1.2.3 Contributory Negligence

Contributory negligence of the plaintiff completely bars recovery in the law of certain states of the U.S. while in others damages will be apportioned in accordance with the parties' degree of fault. The defence of contributory negligence must be specially pleaded and proven by the defendant.

Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's fault, in bringing about his injury.[82] It may consist not only in

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(82) Restatement of Torts, 2nd, s. 463.

failure to discover or appreciate risks which would be apparent to the reasonable man but also in an intentional exposure to danger of which plaintiff is aware.

In *Todd v. United States*,[83] the court found the controller negligent in giving the pilot cruise clearances of 4 000 feet, without determining the plane's position, under adverse weather conditions and over mountainous terrain. However, the evidence also revealed that Todd recklessly started descent with little or no visibility, in unfamiliar surroundings, without communicating with the control tower. His widow was denied recovery under the law of Alabama in which contributory negligence is a complete defence to a claim of negligence, except when willful or wanton negligence of the defendant can be proven which was not found to be the case in *Todd*.

It must be pointed out that the negligence of the pilot is in no way attributable to his passengers and cannot exculpate the controller or relieve the government of liability if their negligence also contributed to causing the accident.[84]

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(83) 384 F. Supp. 1284 (M.D. Fla. 1975)
(84) In re Air Crash Disaster at New Orleans (Moisant Field v. U.S., 544 F.2d 270 (6th Cir. 1976)

1.3 Standard of Care of ATC in U.S. Jurisprudence

1.3.1 VFR - IFR Conditions

Nowhere is the theory of "primary responsibility of the pilot" more strictly applied as in VFR conditions. The courts have always held the pilot to a much higher standard of care and were always much more reluctant to impose liability on the controller when the case involved planes flying under visual flight rules. The main reason for this is the traditional rule of "see and be seen" or "see and avoid" by which each pilot is supposed to look out for obstacles and aircraft on the ground and in the air, maintain his own separation and insure his own safety and that of his passengers. Another reason is the "control" theory devised by the courts by which they try to assess who, pilot or controller, had the ultimate power of decision at the moment the accident occurred. The pilot has been held to retain full control of his aircraft in VFR conditions whereas in IFR conditions he has to rely on the control tower to a degree.

A rather disturbing example of this dual approach is the case of *Schultetus v. United States*[85] where two

(85) *Supra*, n. 43.

light aircraft collided in a control zone under the eyes of controllers. One of the pilots had been casually warned by the control tower: "Traffic, Cessna crossing in front of you" but the other had not. No visual light signal had been flashed to either pilot and no further effort been made to try to prevent the accident. Yet the Court of Appeals found that the controllers had fully discharged the "responsibility of the tower to give information for preventing collision between aircraft".

The judges made the following statement which has been cited and followed, unchanged, to this day:[86]

> "When flying in visual flight rules weather conditions (regardless of the type of flight plan or air traffic clearance), it is the direct responsibility of the pilot to avoid collision with other aircraft".

When at least one of the planes involved in a collision is flying under instrument flight rules and ATC is controlling that plane, it will be held liable in negligence. The pilot must first meet all the requirements and observe all the rules of IFR flying. For instance,

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(86) Cited and followed, for example, in *Miller v. U.S.*, *supra*, n. 55; in *Wiener v. U.S.*, n.41, at 389; in *Stanley v. U.S.*, 239 F. Supp. 973 (N.D. Ohio 1965), at 979; in *Hochreun v. U.S.*, n. 61, at 319; in *Tilley v. U.S.*, n. 66, at 682; in *Coatney v. Berkshire*, 500 F.2d 290 (8th Cir. 1974), at 292; in *Baker v. U.S.*, n. 67, at 495; in *Wenniger v. U.S.*, 234 F. Supp. 499 (D.Del. 1964), aff'd 352 F.2d 523 (3rd Cir. 1965), at 517.

as said in *Kullberg v. United States*,[87] a controller has no duty to determine either the qualifications of a pilot to follow clearances for the type of flight requested or whether the aircraft has suitable equipment for such flight. The pilot must also transmit accurate information to the controller and comply with the instructions he has received from him.[88] Moreover, when a pilot affirmatively acknowledges a directional command, the controller has the right to assume that the pilot is proficient enough to execute the procedure.[89]

One author raises an interesting point.[90] What is the situation when a pilot operating under an instrument flight plan unilaterally decides, without communicating his intention to air traffic control, to "cancel IFR" because he has encountered VFR weather conditions?

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(87) 271 F. Supp. 788 (W.D. Pa. 1964). Kullberg lost control of his plane and crashed after requesting assistance from the controller for instrument landing without telling him that he was not licenced for this type of landing.
(88) *White v. TransWorld Airlines Inc.*, 320 F. Supp. 655 (S.D. N.Y. 1970). Mid-air collision which occurred when one pilot failed to adhere to altitude assigned by ATC and maintain the standard 100 feet separation just after having confirmed his position.
(89) *Kiester v. U.S.*, 18 AVI 17101 (S.D. Fla. 1983) Pilot was unable to execute proper instrument landing on badly located airport.
(90) Johnson, Daren T., "Instrument Flight Rules - The Liability of the Pilot", 44 J. Air L. & Com. 353, 1978, at 364.

Johnson cites the only case he has found dealing with this issue[91] in which the judge ruled that the pilot under such circumstances is required to conform to all instrument flight rules unless and until he has communicated his intention to cancel IFR either to the nearest FAA Flight Service Station or to air traffic control.

This solution seems reasonable; it then implies that any negligence of the controllers in the handling of that plane would involve their liability.

We have traced the rules of liability of ATC in respect to aircraft flying in IFR, the evolution of which we have discussed in a preceeding section of this paper. Specific applications of these principles will be detailed more fully hereinafter.

1.3.2 Landing

It was in a landing case, *Eastern Air Lines v. Union Trust Co.* that a duty to act with reasonable care was first imposed on an air traffic controller. However, the extent of that duty was still vague and restricted. Since then the courts have recognized that nowhere is the pilot

(91) *Idem*, at page 364, citing *Jones v. Jeppesen*, No. C-62980. Superior Court, L.A. City, July 25, 1973.

more dependent on ATC than in the landing phase. Consequently, it is for that part of the operations that the responsibilities of the controller have been extended most.

The early cases tended to be lenient towards the controllers, arguing that the pilot, having final authority, had the option of ignoring the controller's instructions if he felt the situation warranted it. *Stratmore v. United States*[92] is a good illustration of that attitude. Stratmore, having lost power in one of his two engines, requested permission for an emergency landing. The controller granted it and when he sighted him on approach informed him that his landing gear was not down. The pilot replied that he was aware of this and was then in the course of pumping it down.[93] When he was about to land, the tower mistakenly reiterated its statement about the gear position and instructed him to "go around". Although all the instruments in the cockpit indicated that the gear was lowered, the pilot complied. In attempting to execute the manoeuver, the plane stalled and crashed; Stratmore and his passenger were seriously injured. The court found that the sole proximate cause

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(92) 206 F. Supp. 665 (D. N.J. 1962)
(93) Small planes are equipped with an hydraulic pump for lowering and retracting the landing gear. In case of failure of the hydraulic pump, the pilot also has a manual pump.

of the accident had been the negligence of the pilot who failed to heed his instruments and use his experience to land the aircraft safely.[94]

The earlier cases also frequently said that the air traffic controller was not supposed to give his attention to any one aircraft in particular in a control zone if other aircraft were present, but had to devote his attention to all of them.[95] Consequently, when the controller had several airplanes to direct at the time of the accident, the courts were more likely to absolve him from liability.

With the dramatic growth of civil aviation, particularly the arrival of jet airplanes, combined with the ever increasing number of inexperienced pilots flying private airplanes, placing the sole burden of safety at landing on the pilot's shoulders soon proved to be unrealistic. Nowadays, controller and pilot are no longer considered to operate independently and the notion of concurrent and reciprocal duty is applied.

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(94) See also *Wenzel v. U.S.*, 291 F. Supp. 978 (D. N.J. 1968), aff'd 419 F.2d 260 (3rd 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 1½m. from the field. He was not entitled to recovery; the court found that he had not fully discharged his burden of proving that the false information was the proximate cause of the accident.

(95) See *Franklin v. U.S.*, *Supra* n. 43. The plane crashed when it ran into the turbulent wake of an helicopter which had also been cleared to land. In addition to the reason given above, ATC was exonerated because wake turbulence was unknown in aviation at the time.

First, each of them must fulfill at the obligations imposed upon him by the relevant regulations. In addition the controller has a duty to warn the pilot of dangerous conditions that he knows to exist. In *Foss v. United States*,[96] the widow and children of a pilot killed when his aircraft crashed into a radio tower less than two miles away from the runway sued the United States government. The FAA had published a traffic pattern calling for an 800 foot downwind approach when there was an 819 foot radio tower situated at that place; in addition, Foss was in a blind spot as a result of the position of the sun and of a haze layer. The Court of Appeals rejected the U.S. plea of "primary responsibility of the pilot" and found both the FAA negligent in failing to revise the pattern and the controller in failing to broadcast a warning.

We have seen that controllers have also been held at a very early stage to a duty to warn of persons and objects on the ground, as in *Marino* and *Moloney*. Another illustration of this rule is the case of *Harris vl United States*,[97] similar to the *Foss* case. The District Court judge found the controller in the case, who had noticed

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(96) 623 F.2d 104 (9th Cir. 1980)
(97) 333 F. Supp. 870 (N.D. Tex. 1971)

that the approaching aircraft had descended below the normal height and who knew that the airport conditions were not known to the pilot, was negligent in not continuing to observe the aircraft and in failing to warn its pilot of electrical power poles and lines at the end of the runway.

But, once the controller has fulfilled its duty to warn of hazardous conditions, if the pilot chooses to proceed, ATC will be exonerated.[98]

1.3.3 Take-off

The principles elaborated by the courts in landing situations can also be applied to take-off situations. One frequent cause of accident at take-off is wake turbulence or wing-tip vortices which will be dealt with separately.

The air traffic procedure regulations of the FAA provide that the controller shall issue and relay clearances for taxiing and for taking off. Regulations also state that clearances are predicated upon known or observed traffic and conditions which, in the judgment of the controller, affect safety in aircraft operations.

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(98) *Reidinger v. TransWorld Airlines, Inc.*, 329 F. Supp. 487 (E.D. Ky. 1971), rev'd on other grounds 463 F.2d 1017 (6th Cir. 1972)

However, the pilot retains the ultimate power of decision and may disregard the instructions of the controller if he feels that execution would jeopardize the safety of the plane and its passengers.[99]

Generally, the courts have held that an ATC clearance to take off is neither an instruction to take off nor does it imply that it is safe for the aircraft to take off at that particular moment. The pilot is in a better position to judge his own skills,[100] the plane capabilities[101] and the load he is carrying.[102]

Plaintiffs have occasionally tried to plead that the controller had a duty to withhold or delay clearance in certain circumstances. *Furumizo* was one such case; but the Court of Appeals refused to take position, saying:

"This theory we neither accept nor reject..."[103]

Whether the controller has the power to deny clearance was discussed again in *Stork*[104] with the government

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(99) *Tilley* v. *U.S.*, 375 F.2d 678 (4th Cir. 1967)
(100) *Martens* v. *U.S.*, 5 AVI 17465 (D.C. S. Cal. 1957). Although the cause of the accident was never clearly established, pilot did not hold a licence to fly IFR and it seems he was unable to follow instructions given by the tower.
(101) *Neff* v. *U.S.*, 420 F.2d 115 (D.C. Cir. 1968), cert. denied 397 U.S. 1066 (1968). ATC failed to warn pilot taking off of approaching thunderstorm. The plane veered out of control and crashed. Pilot was held responsible: his training should have enabled him to observe the obvious signs of danger.
(102) *Gibbs* v. *U.S.*, 251 F. Supp. 391 (E.D. Tenn. 1965). The cause of the crash was found to be the result of pilot error in overloading the aircraft thus displacing its center of gravity.
(103) *Supra*, n. 74.
(104) *Supra*, n. 78.

arguing strongly that no such power exists "even under extreme circumstances". Although no conclusive answer was given on that particular issue, the court found the controller negligent in failing to accompany the clearance with a clarifying warning that the flight was forbidden by regulations.

So, as in landing cases, the departure traffic controller must warn the pilot of dangers that he is aware of. In *Harris v. United States*[105] the proximate cause of the crash, the judge concluded, was the failure of the control tower to timely observe and advise the departing aircraft of its perilous sharp left of course path which caused it to crash barely two minutes after take-off. The evidence showed that the departure controller, if he had watched his radar scope, could have advised the crew and avoided the accident. When the pilot became confused and asked the tower for correct position, ATC answered too late to avoid the crash.

1.3.4 Wake Turbulence and Wing-Tip Vortices

Wake turbulence is the phenomenon of whirling vortices trailing from the wing-tips of large aircraft; although invisible, it creates a dangerous hazard to smaller and medium-sized aircraft.[106]

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(105) 12 AVI 17411 (N.D. Tex. 1971). The *Harris* case also presents a good review of the duty to warn and its evolution in American jurisprudence.

(106) *Supra*, n. 73.

The turbulent air generated in the wake of an aircraft in flight can certainly cause accidents; but the possibilities of serious consequences are the greatest when wake turbulence occurs during the landing and take-off phases of operations, because arriving and departing aircraft follow essentially the same vertical path. The hazard is made even greater by high traffic density, low airspeed margins and low altitudes.[107] A pilot caught in the wake of a bigger aircraft experiences a rapid loss of lift and a violent rolling motion which in those conditions he will probably not be able to control.

Claims against the government in turbulence-related crashes have been predicated, first, on the failure of the air traffic controllers to maintain adequate separation between aircraft so as to give the turbulent air sufficient time to dissipate and secondly, on the failure to discharge a duty to warn of the possible presence of turbulent air.[108]

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(107) For further discussion of the technical aspects of wake turbulence. see Winn & Douglass, *Supra*, n. 56.

(108) The Federal Air Regulations and the ATC Procedure Manual do not provide explicitly for a duty to warn but state the language to be used should a warning be given:

437 PHRASEOLOGY
Phraseology shall be employed as set forth below.

439.18 To issue cautionary information regarding possible rotorcraft downwash, thrust stream turbulence, and/or wing-tip vortices:

CAUTION, TURBULENCE (Traffic information)

EXAMPLE: CAUTION, TURBULENCE, DEPARTING AMERICAN ELECTRA.

One of the earliest cases in which ATC negligence was alleged in connection with warning of wake turbulence is *Johnson v. United States*.[109] Plaintiff's claim in that case was rejected because the evidence disclosed that the proximate cause of the crash was the negligence of the pilot in flying at low altitude and in a poor traffic pattern rather than the failure of control tower personnel to take into consideration turbulence hazards when giving the aircraft clearance to land. However, the court recognized that when the controller is aware of the possibility of wake turbulence, he has the duty to warn the pilot of the danger.

Franklin v. United States[110] was an action resulting from a crash at landing when the aircraft ran into turbulent wake of an helicopter which had passed the same path a few seconds before. Plaintiff was unable to establish that the controller knew of the phenomenon and the court agreed that there could be no duty without knowledge.

For the first time, in the important case of *Furumizo v. United States*,[111] controllers were found negligent in a wake turbulence case and the government held responsible. The court cited the *Johnson* case and agreed that "control tower employees in the exercise of reasonable care do have a duty to take into consideration turbulence

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(109) 183 F. Supp. 489 (E.D. Mich. 1960), aff'd 295 F.2d 509 (6th Cir.1961)
(110) *Supra*, n. 43.
(111) *Supra*, n. 74.

hazards when giving clearance to take off, as well as to land", and "had a duty to exercise judgment to attempt to avoid danger where such danger was, or should have been, obviously imminent". Consequently, when the first warning was ignored by the pilot, held the judge, in order to fully discharge its duty, the controller was required to take additional measures and reissue the warning.

Hartz v. United States[112] defined and further expanded the responsibility of the air traffic controller and is considered to be the landmark case for wake turbulence cases.

Hartz, flying VFR, crashed at take-off, caught in the wing-tip vortices of a departing DC-7. The controller had told him, when he issued the clearance: "watch the prop wash". The District Court applied the rule that in VFR conditions, the ultimate responsibility for the take-off rests with the pilot and refused to hold the government responsible. On appeal, the following questions were put before the court:

> 1. Did the controller have a duty to give Hartz a warning which would include possible danger from wing-tip vortex?

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(112) *Supra*, n. 72.

2. If the controller did owe Hartz such a duty, was the warning which he gave Hartz sufficient to discharge that duty?

While recognizing that regulations place the primary responsibility on the shoulders of the pilot, the court stated that "before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to know, those facts which were then material to the safe operation of his aircraft".

Following a reasoning similar to that in *Furumizo*, the court held that the controller was "better qualified by training, experience and vantage position to estimate time and distance" and consequently, had a duty to warn Hartz; it held further, in answering the second question, that the warning given was "neither sufficient under the manual, nor adequate, to caution Hartz of the possible danger which was then known to the controller".

The liability of the controller has been greatly broadened by that decision and "failure of a duty to warn" has now become the basis on which most of the recent cases are pleaded.[113]

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(113) A. Claims for the wrongful dealths of the passengers who were on board the Korean Air Lines Flight 007 on September 1st, 1984 have been filed *inter alia* against the U.S. Government for negligence of their air traffic services of Anchorage, Alaska, in discharging their duty to warn the crew of KAL 007 that it was headed for danger. See Speiser, Stuart M., "Update: Korean Air Lines Flight 007 Litigation", West's International Law Bulletin, Vol. 2, Issue 4, Fall 1984, at. 45.

One author reports a growing concern among FAA officials that the traditional "CAUTION, WAKE TURBULENCE" warning may not be enough since the frequency of use has diminished its effectiveness. He mentions that "the continued complacency of pilots after receiving that warning, termed the "cry wolf syndrome" has been recognized in various FAA publications and "might lead to more litigation in the future".[114]

1.3.5 En route or Mid-Air Collisions

The scope of the duties and responsibilities of air traffic controllers in avoiding mid-air collisions vary according to where and how the accident occurred.

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(113) B. Miscellaneous cases involving wake turbulence are: *Wenniger v. U.S.*, 234 F. Supp. 499 (D. Del. 1964), aff'd 352 F. 2d 523 (3rd Cir. 1965): action dismissed because plaintiff failed to establish that failure to warn was the proximate cause of the crash. *Wasilko v. U.S.*, 300 F. Supp. 573 (N.D. Ohio 1967), aff'd 412 F.2d 859 (6th Cir. 1969): ATC was found negligent but pilot's contributory negligence in failing to know the dangers of vortices barred recovery. *Thingulstad v. U.S.*, 343 F. Supp. 551 (S.D. Ohio 1972): evidence indicated that crash was caused by heart failure of pilot rather than failure to warn of wingtip vortices. *Lightenberger v. U.S.*, 460 F.2d 391 (9th Cir. 1972): action dismissed because vortices created twelve minutes earlier were both unprobable and unforeseable. Also: *Felder v. U.S.*, 543 F.2d 657 (9th Cir. 1976); *Dickens v. U.S.*, 545 F.2d 886 (5th Cir. 1977); *Neal v. U.S.*, 562 F.2d 338 (5th Cir. 1977)

(114) *Supra*, n.

The three following situations can be distinguished: 1) collisions occurring in VFR conditions; 2, collisions occurring in IFR conditions, and 3, collisions occurring in a Terminal Control Area (TCA) or a Terminal Radar Service Area (TRSA). These situations will be dealt with separately.[115]

Generally speaking however, the trend toward a greater expansion of the liability of the air traffic controller in U.S. jurisprudence has not been as noticeable in the en route phase as it has been in the take-off and landing phases. The courts, in applying the "control" theory, have reasoned that the pilot is less dependent on ATC guidance in the en route portion of the flight than at any other time and have been less willing, when the controller had complied with all the relevant regulations and procedures, to impose additional duties on him.

Eastern Air Lines, *Schultetus* and *Miller* are the controlling cases for mid-air collisions under VFR conditions: they have been studied in preceeding sections of this work.[116] A review of more recent cases indicates that the rules enunciated in those cases are still the ones retained

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(115) Hatfield, Cecile, "Problems of Representation of Air Traffic Controllers in Mid-Air Litigation", 48 J. Air L. & Com. 1, 1982.
(116) *Supra*, page 38 (*Schultetus*); page 38 (*Miller*); page 16, 22 and 33 (*Eastern Air Lines*).

and cited today, that is, primary responsibility of the pilot, but concurrent duty of the controller to warn of known dangers.

In *Coatney v. Bethurum*,[117] two aircraft flying VFR collided approximately one and one-half miles from Kansas City Airport in clear weather and visibility of fifteen miles. The contention of plaintiff was that the controller had been negligent in failing to warn either pilot of the converging course of their aircraft. The court found that since at the time of the accident both pilots were operating within the airport traffic area, they had a duty to remain in radio contact with the controller and to monitor transmissions on the tower radio frequency. The controller, although responsible for establishing the sequence of arriving and departing aircraft, was not expected to give constant and exact traffic information to all aircraft in the airport traffic area.

The same year, in *Hamilton v. United States*,[118] the court determined that the controller has an obligation to act when he knows that an emergency situation exists and when there is sufficient time to do so; but, when he has to

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(117) 500 F.2d 290 (8th Cir. 1974)
(118) 497 F.2d 370 (9th Cir. 1974)

make a split-second decision, it is more important that he try to give instructions to avoid the collision than to warn the pilots that an emergency exists.

Moreover, in VFR conditions, said the court, the controller is under no duty to inform each of the two aircraft of the other's position: the rule of "see and be seen" applies.[119]

Several more recent decisions, although abiding by the "ultimate responsibility" theory, have found that there are "concurrent duties" between pilot and control tower personnel even in VFR conditions.

Mattschei v. United States[120] is one such case. It involved a mid-air collision between a Cessna and a Cherokee on approach: the two planes were in touch with different traffic controllers on separate radio channels. The court concluded that the controllers were negligent in failing to warn the Cessna pilot that another plane was above and behind him. (The controller had testified that although he thought there would be a near-miss, he did not believe the planes would actually collide). The court also

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(119) See also *Thibodeaux v. U.S.*, 14 AVI 17653 (E.D. Tex. 1976)
(120) 600 F.2d 205 (9th Cir. 1969)

held the pilot of the Cessna seventy percent liable because he was negligent in attempting to land on the wrong runway and in failing to see and avoid the other airplane.

The situation is different when at least one of the planes involved in a mid-air collision was flying under IFR conditions. The controller is then much more likely to be found negligent, the rationale being that separation of aircraft is recognized as the primary duty of air traffic controllers and the pilot who had filed a flight plan has the right to depend on him. In those situations, the duty to warn has been imposed much more strenously and consistently than in VFR conditions.

In the early case of *Cattaro v. Northwest Airlines Inc.*,[121] a near-miss case, injuries were caused to a passenger when the airliner was forced to take violent evasive action to avoid colliding with a B-47 bomber. Although the military aircraft was flying VFR, both planes had filed flight plans. One controller monitored the airliner on radar; another controller observed the two converging airplanes on his radar scope for forty-five seconds without warning either pilot of the impending danger. The court held the U.S. government negligent, stating:

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(121) 236 F. Supp. 889 (E.D. Va. 1964)

> "A government air traffic controller cannot authorize an airplane to fly a collision course with another airplane, then being monitored by another government controller, and escape liability by claiming that neither controller had a duty to separate them".

The government was similarly found guilty of negligence in *State of Maryland v. United States*[122] for the failure of the air traffic controllers at Washington National Airport to observe on radar the close proximity of a government jet flying VFR and to transmit timely warning of its presence to the pilot of a commercial airplane flying IFR, so as to avoid the collision that followed. The court repeated that the controllers have a duty to observe and detect on the radar scope any VFR traffic in addition to giving appropriate clearances and information from time to time to IFR aircraft.[123]

Thirdly, it will be even more difficult for the government to escape liability in any mid-air collision occurring in a TCA or TRSA whose very purpose is to provide separation between participating VFR aircraft and IFR aircraft operating within its boundaries. However, it is worth noting that the duty of pilots flying VFR to "see and avoid"

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(122) *Supra*, n. 60.
(123) See also *Allegheny Airlines Inc. v. U.S.*, 420 F. Supp. 1339 (S.D. Inc. 1976)

is not abrogated while he is in a TCA or TRSA so that the government can still rely on that defence and plead that the aircraft failed to maintain their own separation properly and were contributorily negligent.

The argument was accepted in *Colorado Flying Academy v. United States*[124] in which two small aircraft collided inside the Denver TCA. Failure to "see and avoid" each other was found by the court to be the proximate cause of the accident. Although plaintiff had forcefully pleaded that this was an outmoded concept, the judge said that since it still represented the state of the law, he had no choice but to apply it.

In *Universal Aviation Underwriters v. United States*[125] the controllers were found negligent when an Otter and a Bonanza collided with each other. The two planes were in each other's blind spot when the accident occurred. They had appeared on the tower Britescope radar and had also been visible through the control tower window but the controller failed to see the accident because his attention was diverted to other traffic. The court agreed that the controllers had been negligent in failing to provide separation between

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(124) 506 F. Supp. 1221 (D. Colo. 1981)
(125) 496 F. Supp. 639 (D. Colo. 1980)

the aircraft and noted that one of the reasons for the FAA to create the TCAs was the failure of the "see and avoid" policy. The court found that the controller failed to utilize his Britescope correctly which caused him to give erroneous and misleading instructions to pilots.

This case notwithstanding, pilots operating within a TCA or TRSA cannot rely exclusively on the controllers to provide separation. In spite of the sophisticated radar equipment, the pilot is still bound by the duty to "see and be seen".[126]

1.3.6 Weather Services

Rain, thunderstorms, fog, snow, ice and wind can greatly affect the safety of flight operations and a large percentage of aircraft accidents, particularly when light aircraft are involved, are caused by hazardous weather conditions.[127]

The U.S. Weather Bureau is required by the Federal Aviation Act to furnish reports to the FAA and to assist in the dissemination of weather reports "in order to promote safety and efficiency in air navigation to the highest possible degree."[128]

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(126) See also *Teicher v. U.S.*, 15 AVI 17533 (C.D. Cal. 1978)
(127) The worst aviation disaster to date, the Tenerife accident of March 27, 1977, which made 578 victims, was caused by fog on the runway.
(128) F.A.A. Act, *supra*, n. 13, section 803.

The first time the U.S. government was brought before the courts in a weather reporting case was in *Smerdon v. United States*.[129] In this first case and in all subsequent cases, the courts recognized for the controller a duty to furnish the pilot with weather reports. In *Smerdon* that duty was limited: it was said that the controller did not have the responsibility to determine whether these conditions were safe or not. Once he had supplied accurate weather information, he had discharged his duty and the pilot was left to decide if the conditions were suitable or not for flying.

The same idea was still prevailing, twelve years later in *Somlo v. United States*,[130] a crash accident due to icing conditions. The court repeated that government had the duty to furnish weather data to pilots but added that once the pilot became aware of unfavourable conditions, he was under a duty himself to avoid these conditions.

But the leading case on the issue of weather reporting is *Ingham v. United States*.[131] Failure of ATC to report weather conditions for seventeen minutes to

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(129) *Supra*, n. 51. Another early case is *Bright v. U.S.*, 149 F. Supp. 620 (E.D. Ill. 1956), in which a railroad employee died when the canopy of a military aircraft fell and struck him during a thunderstorm. The Air Force Base controller was found negligent in not reporting the thunderstorm to the pilot.
(130) 274 F. Supp. 827 (N.D. Ill. 1967), aff'd 416 F.2d 640 (7th Cir. 1969), cert. denied 397 U.S. 989 (1970)
(131) *Supra*, n. 36.

incoming aircraft when visibility was rapidly deteriorating was found to be a proximate cause of the accident. An applicable provision of the FAA procedures manual required the controller to keep the pilot advised of significant changes in the weather, as necessary. Although the court agreed with the government's contention that the final decision to land rests in the pilot's hands since he is in the best position to observe the weather, the court said:

> "If the pilot does decide to attempt a landing, information concerning recent and significant changes in weather conditions is essential to his mental computations and the exercise of his judgment... Thus, it was of the utmost importance that the crew not be lulled into a false sense of security. The pilot should have been told that weather conditions were becoming marginal, and that he might well encounter less than minimum visibility upon reaching the runway".

Thus, in *Ingham*, and since, the courts have imposed a duty upon the controllers to report the most accurate, complete and latest weather information. Most courts have also ruled that the controller must exercise due care in providing this information. The basis is said to be the heavy degree of reliance that pilots, carriers and the flying public have placed on the governmental undertaking to provide this service.

We must again refer to *Stork v. United States* in which it was ruled that ATC had a duty to warn the pilot not to take off in dangerous weather conditions.

Stork has been criticized by one author as not going far enough.[132] He questions the assumption that the court seems to make that the accident would not have happened if a warning had been given. He says that if the court's goal is safety, then it should require that air traffic controllers deny clearance when weather conditions are below minimums. Up to now, the question of whether the controller has the authority to do so is still unresolved.

There is no question that if the information transmitted by the air traffic controller is inexact, incomplete or misleading, he will be found negligent and the government will be held liable.[133] If, however, the latest and most correct information is provided to the crew and the pilot chooses to proceed in spite of it, no liability will rest on the controller.[134] Neither will he be held liable if the pilot, having been warned of possible hazard along the route, does nothing to avoid them.[135]

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(132) Cotellesse, David P., Notes, 49 Texas Law Review 406, 19
(133) *Gill v. U.S.*, 429 F.2d 1075 (5th Cir. 1970)
(134) *DeVere v. True Flight Inc.*, 268 F. Supp. 226 (E.D. N. Ca. 1967)
(135) *Somlo v. U.S.*, *supra* n. 130.

In summary, once the pilot has received all the pertinent weather information and if the information is both timely and correct, his decision to continue the flight will be considered an assumption of the risks.

1.3.7 Hijacking

This crime of modern society poses a real threat to the safety of the travelling public. What are the duties of a controller faced with a hijacked aircraft?

Although we have found no case involving a controller sued for negligence under such circumstances and although one might consider it a very unlikely possibility, it is not totally useless to try to apply the preceeding rules to that situation.

There is no doubt that a hijacking constitutes an emergency situation and consequently the utmost consideration for the controller should be the safety of crew and passengers; as said in *Furumizo*, the controller has an "overriding duty of safety".

One author submits that the controller has the obligation to give a hijacked aircraft priority for landing even if he has to act against superior instructions. He says:[136]

(136) Avgoustis, Andreas, "Hijacking and the Controller", 3 Air Law 91, 1976.

> "No doubt that a hijacked aircraft is an aircraft in dire emergency and must be helped to land immediately to the nearest airfield".

The problem might be a hypothetical one since we have seen that the courts have not, for the time being, recognized any authority to the air controller to deny clearance either for take-off or for landing.

CHAPTER 2: CANADA

2.1 The Crown Liability Act

2.1.1 Sovereign Immunity in Canada

Canada, an English colony which later became independent but remained a member of the Commonwealth, inherited British constitutional and legal traditions and customs, including the rule that "the King can do no wrong". It followed that here, as in England, no claim existed in tort against the Crown for the negligent act or omission of one of its servants.

Canada was even slower than its American neighbour in changing this situation. However, when it finally did, the rule of sovereign immunity had already suffered a gradual erosion over the years which had made its application much less stringent. We will trace briefly the major steps which led to the adoption of the 1953 Crown Liability Act.

In 1867, at the first session of the newly created Canadian Federal Parliament, a statute was passed providing for the nomination of official arbitrators whose functions *inter alia* were to evaluate compensation for loss or damages

caused by the expropriation of land for public works, or by the execution of a contract for public works.[137] In 1870, their powers were extended to include claims arising from death, injuries and damages to property resulting from the execution of such contracts. The door had been opened to recourse against the Crown, but only if it was based on a contract, and it was restricted to the field of public works.

Five years later, pursuant to the powers conferred upon it by section 101 of the British North America Act, the Federal Parliament created the Supreme Court and the Exchequer Court.[138] At the same session, it voted a statute allowing for the Crown to be sued for certain claims, again based solely on contracts, by way of a procedure called "petition of right".[139] Apart from enumerating very restrictively the events for which the procedure could be used, the new Act also provided that in each case, the petition of right had to be submitted first to the approval of the Governor-General who could accept or refuse it. Only when this first step was completed could the action go before the Exchequer Court who

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(137) An Act respecting the Public Works of Canada. A.C. (1867) 31 Vict. c-12.
(138) An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada. S.C. (1875) 38 Vict. c-11.
(139) An Act to provide for the institution of suits against the Crown by Petition of Right, and respecting procedure in Crown suits. S.C. (1875) 38 Vict. c-12.

had been given jurisdiction for those cases.[140] The statute was also careful to add, in its last paragraph that:

> 21. Nothing in this Act contained shall
>
> 1. Prejudice or limit otherwise than is herein provided the rights, privileges or prerogatives of Her Majesty...

Then, in 1887, the Act concerning the official arbitrators was abrogated and their powers conveyed to the Exchequer Court, with a new element: the court was given jurisdiction over claims against the Crown arising from death, injuries and damage to property occurring on a public work and resulting from the negligence of a servant or employee of the Crown while he was acting within the scope of his employment.

Although the amendment represented the first substantial breach of the traditional rule of immunity of the Crown in tort, it was soon found insufficient and judges were prompt to comment on the lack of logic and unfairness of a law which compensated victims of the negligence of the Crown only if they happened to suffer the consequences of that negligence while standing on the grounds of a public work.

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(140) *Supra*, n. 138, s. 58 & 59. See also Immarigeon, H., La responsabilité extra-contractuelle de la Couronne au Canada. Montreal, 1965, at 10 *et seq*.

After a timid and ineffectual amendment in 1917, the words "on every public work" were definitely struck from the Exchequer Court Act in 1927[141] making recourse available whenever there was negligence on the part of an employee or servant of the Crown.

Over the following years, other legislative amendments further accelerated the process. Still, many members of Parliament and jurists desired to see the federal government subjected to the same rules of liability as private citizens. Quite legitimately so, since some of the provinces, following the adoption in the United States of the 1946 Federal Tort Claims Act, then the 1947 Crown Proceedings Act in England, and the existence of similar statutes in other countries of the Commonwealth[142] had already done so themselves.[143]

The Crown Liability Act (CLA) was only the next logical step in this evolution; therefore, when it was put before Parliament in 1953, it was sanctioned without difficulty.

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(141) (1927) R.S.C. c. 34.

(142) Australia: The Judiciary Act (1903) Part IX: "Suits by and against the Commonwealth and the States".
South Africa: Act No. 1 (1910)
New-Zealand: Crown Suits Amendment Act (1910) No. 54.

(143) Manitoba: Proceedings against the Crown Act, S.M. (1951) c. 13.
Nova Scotia: Proceedings against the Crown Act, S.N.S. (1951) c. 8.
New-Brunswick: Proceedings against the Crown Act, R.S.N.B. (1952) c. 176.
Saskatchewan: Proceedings against the Crown Act, R.S.S. (1953) c.79.

2.1.2 The Waiving of Immunity

As its full title indicates, the Crown Liability Act deals with "torts and civil salvage".[144] We will ignore the second aspect of it since only the first is relevant to our study of the rules of liability of the air traffic controller.

> Section 3 of the CLA states the following:
>
> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (a) in respect of a tort committed by a servant of the Crown, or
>
> (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

It is certainly the most important provision of the Act since it fully recognizes the tortious liability of the government. The first part renders the government responsible for the torts of its servant: as in its American counterpart, the Federal Tort Claims Act, it is a vicarious liability, flowing from the rule of *respondeat superior*; for the Crown liability to be involved, the servant has to be proven negligent. The second part goes further than the the FTCA and imposes a direct liability on the Crown for the property which it owns or controls.

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(144) An Act respecting the liability of the Crown for torts and civil salvage. (1970) R.S.C. c. C-38.

Authors agree however that the Crown prerogative of sovereign immunity was not abolished by the new Act.[145] According to article 16 of the Interpretation Act, an express provision to that effect would be required in order to set it aside.[146] Special statutes, such as the Crown Liability Act, are said to constitute only exceptions to the rule rather than abrogate it. As a result, and in spite of the fact that it does not contain the long list of exceptions enumerated in the FTCA, the CLA has generally been given a strict interpretation, in contrast with the attitude of the courts in the U.S. which affirmed very early that the broad purpose of the FTCA to end sovereign immunity was not to be frustrated by refinements of contruction.

2.1.3 Torts, Delicts, and Quasi-Delicts

2.1.3.1 Law Applicable

Whereas the FTCA provides that the law of the state where the negligent act or failure to act of the government employee took place would govern the case, the Crown Liability

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(145) Immarigeon, H., *supra*, n. 140, at 52. Also Pépin, G. & Ouellette, Y. Principes de contentieux administratif, Montreal, 1979, at 351, and Ouellette, Y., "La responsabilité extracontractuelle de l'Etat fédéral au Canada", unpublished doctoral thesis, Université de Montréal, 1965, at 31.

(146) (1970) S.R.C. c. I-23, s. 16:

> 16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to".

Act is silent on this matter. The omission was criticized but, in practice, did not create any real problem; as early as 1884, in decisions rendered under s. 19 of the Exchequer Court Act, the judges had applied the law of the place where the tort was committed and they continued to do so under the 1953 Act.[147] Provincial law determining whether an act or omission is a tort or delict or what constitutes negligence is then applicable.[148] This means the civil law of delictual or extra-contractual liability in the Province of Quebec and the common law of negligence in the nine other provinces. It would seem that this was also the solution envisaged by Parliament since s.2 mentions specifically that the word "tort" in respect of any matter arising in the Province of Quebec means "delict" or "quasi-delict".

What if, as in the American case of *Eastern Air Lines v. Union Trust Co.*, damages are sustained in one province because of the negligence of an air traffic controller located in another? This was the situation in the case of *Churchill Falls Corporation v. The Queen*[149] in which the plane crashed at Wabush, Labrador, Newfoundland, while being monitored by the controllers of Moncton, New-Brunswick.

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(147) Abel, A.S. Laskin's Canadian Constitutional Law, 4th ed., Toronto, 1973, at 796.
(148) Goldwater, Sam, "The Application of Provincial Law in Matters of Delictual and Quasi-Delictual Responsibility of the Crown", 12 Themis 173, 1962, at 180.
(149) 13 AVI 18442 (Fed. Ct. of Canada, Trial Div. 1974)

The question is not discussed in the judgment but, had the controllers been found negligent, the *Eastern* rule would have been the correct solution. Then, the acts of the controllers would have been appreciated and compensation awarded according to the negligence law of the Province of New-Brunswick.

A second, more difficult question, was also raised: what is the content of the provincial law to be applied? Is it the law as it was in 1953 when the CLA was passed, or the law as it has evolved up to the time the tortious act occurred?

The question was discussed in *Schwella v. The Queen*[150] in which Mr. Schwella was seeking compensation for personal injuries sustained when the aircraft in which he was a passenger crashed, allegedly as a result of the negligence of the employees of the Department of Transport. After restating that the law of the province where the negligence occurred had to be applied, in the present case the Negligence Act of Ontario, the judge added that the said law had to be considered as it was when the Crown Liability Act entered into force, that is, on the 14th of May, 1953.

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(150) (1957) Ex. C.R. 226

The reasoning behind this, is that the provincial legislatures cannot impose obligations on the Federal Parliament without the latter's consent.

On the other hand, as the judge reminds us in *Schwella*, the Crown, although not bound by provincial statutes, has a recognized right to take advantage of any of them if it chooses to do so.

These two principles seem in direct contradiction with the original purpose of the CLA which intended to subject the government to the same rules of liability as private citizens and these privileges make the words of s. 3(a) "if it were a private person of full age and capacity" more illusory than real. However, as impractical and debatable as these rules may be, they still represent the state of the law and are still followed today.

Provincial law will apply only if not incompatible with the CLA; special provisions dealing, for instance, with notices of claim, prescription, modes of service, evidence, costs and execution of judgments supersede provincial law.

2.1.3.2 Servant of the Crown

There has been considerable debate in the jurisprudence over the years as to who is a "servant of the Crown"

since no explanation of the term was furnished by the Act itself save mentioning that "servant includes agent".[151] It is unnecessary for us to review this debate: in the case of the air traffic controllers, there can be no doubt as to their status.

The Department of Transport of Canada, now the Ministry of Transport (MOT), was formed in 1936 and assumed the responsibility for civil aviation which had previously been under the jurisdiction of the Department of National Defence. The Aeronautics Act,[152] among the duties assigned to the Minister of Transport, confers upon him the task of supervising all matters connected with aeronautics[153] and the power, subject to the approval of the Governor in Council, to "make regulations to control and regulate air navigation over Canada" and prescribe "aerial routes, their use and control".[154]

The powers of the Minister to regulate air traffic control are confirmed in the Air Regulation 600:[155]

> 600. The Minister may, subject to these regulations, make such directions as he deems necessary:

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(151) s. 2.
(152) (1970) R.S.C. c. A-3.
(153) *Idem*, s. 3(a).
(154) *Idem*, s. 6(1) and 6(1)(h).
(155) Passed 29 December, 1960, P.C. 1960-1775, SOR/61-10, as amended.

> (a) respecting the provision of air traffic control service within such portions of the airspace and at such airports as may be specified by him; and
> (b) respecting the standards and procedures to be followed in the operation of any air traffic control service or at any air traffic control unit.

All Canadian air traffic controllers are recruited, trained and employed by the MOT which makes them civil servants, or "servants of the Crown". Consequently, the provisions of the CLA apply to them.

2.1.3.3 Acting within the Scope of Employment

The FTCA mentions expressly that the negligence of the government employee must have taken place "while acting within the scope of his office or employment" for the United States to be found liable. While the CLA does not require it formally, the position is the same since, as we have already discussed, it has been held that provincial law governs its application: it is a basic requirement of both common law and civil law that in order for the master to be held responsible for the acts of his servant, the latter must have acted or failed to act in the course of his employment.

The standards and procedures to be followed by controllers are found, first, in Series V of the Air Navigation Orders (ANOs), titled "Rules of the Air" and second,

in the Air Traffic Control Manual of Operations (MANOPS) also issued by the Ministry of Transport. Both give detailed instructions for the control of air traffic and the provision of other air traffic services. The objectives of air traffic control service, according to the MANOPS are:

> a) to prevent collisions between IFR flights operating within controlled airspace and between all flights operating within the block airspace;
>
> b) to maintain a safe, orderly and expeditious flow of air traffic under the control of an IFR unit.

Whether the violation of a provision of the MANOPS amounts to statutory negligence has not yet been discussed in a Canadian court. Summarizing the most recent U.S. jurisprudence on this question,[156] we submit that: a) in case of emergencies or serious situations, departure from prescribed procedures would not constitute negligence; but b) substantial and unjustified deviations would indicate lack of due care.

That a duty exists beyond the requirements of the MANOPS has not either been clearly established. However, as the question has been definitely settled across the border since 1967[157] it would be surprising to see a Canadian judge decide otherwise.

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(156) *Supra*, p. 44 *et seq.*
(157) In *Hartz v. U.S.*, *supra* p. 47.

2.1.3.4 Cause of Action

Section 4(2) of the CLA provides that no recourse against the Crown exists in respect of any act or omission of its servant "unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort" (or, according to section 2, a delict or quasi-delict in the Province of Quebec) "against that servant of his personal representative".

First, this implied that the negligent servant had to be identified which, given the complexities of public administration and the growing use of modern technology, laid a heavy burden on the claimant. Fortunately, this requirement was set aside by the jurisprudence;[158] it is sufficient to demonstrate that the negligent act or omission was done by a servant of the Crown in the scope of his employment. Consequently, although the evidence is in general easily obtainable, once the negligence of the air control service has been proven, it will not be necessary to prove which of the controllers was personally involved.

The second effect of this stipulation is to refer us to the traditional concepts of negligence law, another of the similarities the CLA shares with the FTCA.

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(158) Pépin, G. & Ouellette, Y., *Supra* n. 145, at 369; see footnote 115 for list of cases.

The application of negligence law to aviation cases predates the adoption of the CLA. As early as 1939, in the first Canadian case involving commercial flying, the judge said:[159]

> "Passenger transport started with Shank's mare. There have been many stages in its development and Flying is simply the latest. There are, however, no new basic principles involved in it such as have not arisen in regard to other incidents of human life and commerce. Negligence and all other questions of Common law were certain to arise out of Aviation and our case law automatically applies... Unless and until, therefore, statutory provision is made to the contrary in Canada, Common law principles must guide the Courts in dealing with cases which arise in transport by air".

Although there is as yet no case stating it explicitly, it seems evident that, through the combined provisions of the CLA and the Aeronautics Act, and the application of this jurisprudential rule, ordinary rules of negligence also apply to the air traffic controller.

Given the special situation existing in Canada, is the Quebec air traffic controller in a different juridical situation than that of his colleagues of the other provinces in the application of the Crown Liability Act?

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(159) *Galer v. Wings Ltd.*, (1939) 1 D.L.R. 13.

The Canadian common law approach to negligence law is, except for minor differences, essentially the same as the American:[160] negligence is a breach of a duty to take care imposed by common law or statute law resulting in damage to the plaintiff. Three elements must be proven: a) the duty of care; b) the breach of that duty; and c) the damage. Once it has been shown that a duty existed, it becomes necessary to consider the standard of care to be applied. At common law, the yardstick is the conduct of the "reasonable man" or "reasonable care under the circumstances".

As for the civil law of the Province of Quebec, article 1053 of the Civil Code contains the basic principle of delictual liability:

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill".

Plaintiff is required to prove: a) the fault of the defendant; b) the damage, and c) that the fault was in law the direct cause of the damage.[161] The standard is either imposed by law or by the conduct of the "bon père de famille".

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(160) Linden, Allen M., Canadian Negligence Law, Toronto, 1974, at 5.
(161) *Regent Taxi and Transport Ltd. v. Co. des Petits Frères de Marie*, [1928] 46 B.R. 96; (1929) R.C.S. 650; (1932) 53 B.R. 157.

There are numerous definitions trying to circumscribe the notion of fault; most speak either of a breach of duty or a violation of a standard of conduct.[162] Essentially,[163]

> "every wrongful act, whether of omission or of commission, which causes damage to another constitutes a fault".

Intentional wrongful acts are delicts whereas unintentional acts are called quasi-delicts.

It has sometimes been said that the civil law notion of fault is wider in scope than the common law tort of negligence;[164] the basic elements of the two systems are similar enough however, so that in practice, the same standards would be applied to all controllers.

Traditionally, an important difference between the two systems was the treatment of contributory negligence; apportionment has always been the rule in civil law but, in common law, it completely barred plaintiff's recovery. Ontario was the first province to enact an apportionment statute in 1924; in the next few years all the other common law provinces followed suit. The rule is then uniform all

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(162) Beaudoin, J.L. La responsabilité civile délictuelle. Montreal, 1973, at 42.
(163) Goldenberg, H. Carl. The Law of Delicts. Montreal, 1935, at 10.
(164) *Magda v. The Queen*, (1953) Ex. C.R. 22, aff'd (1964) S.C.R. 72.

across Canada, unlike the United States, where some States still accept contributory negligence as a complete defence to negligence.

2.1.4 Property of the Crown

2.1.4.1 Law Applicable

Both the Federal Tort Claims Act and the Crown Liability Act regulate the government's vicarious liability as an employer. The CLA goes further in that it also renders the government directly liable for any property which it owns, occupies or controls.[165]

The Act offers no definition of the word "property" but, from the wording of section 5(1), it is apparent that both personal and real property (or, for civilists, moveables and immoveables) are meant to be included.

The recourse is subjected to rigorous formal conditions: claimants will lose all right of action of they do not serve, in the proper manner, a notice of claim in the very short delay of seven days from the date of the damage, except in the case where the person injured has died.[166] Provincial law applies once these specific requirements of the CLA have been met.

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(165) s. 3(1)(b).
(166) s. 4(4) & (5).

2.1.4.2 Application to ATC Services

There have been few cases based on section 3(1)(b) and most dealt with falls or accidents suffered in poorly lighted or maintained government buildings.

Nevertheless, it might become relevant to a problem, likely to happen frequently in the future, that is, accidents caused by the failure of computerized equipment of the ATC services. For those cases, in which no negligence of the controller or any other employee can be invoked, the government cannot be sued as an employer. But since it owns and occupies every control tower in Canada and all the equipment therein, it could be held directly liable through the application of this provision of the CLA.

2.1.5 Jurisdiction

Originally, the CLA gave jurisdiction to the Exchequer Court for claims against the Crown; since the adoption of the 1970 Federal Court Act, these actions are brought, by way of "statement of claim" before the Trial Division of the Federal Court.[167]

(167) (1970) R.S.C. (2nd Supp.) c-10.

Section 17(1) reads as follows:

> "The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases".

A suit against the Crown, as employer of air traffic controllers, falls clearly under the provisions of section 17(1). However, as Pépin & Ouellette point out, it must be kept in mind that in the case of a joint suit against the Crown and other codefendants, the Federal Court must have jurisdiction over each one of the defendants.[168] Otherwise, plaintiffs must split the case and institute a separate action before the competent provincial court.

The question is particularly relevant to aviation litigation for which the negligence of the carrier, aircraft and component manufacturers, airport authorities, and others might be invoked.

In addition to the exclusive jurisdiction of section 17(1), the Federal Court Act gives the Trial Division concurrent jurisdiction with the provincial courts for certain other matter in section 23:

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(168) *Supra*, n. 145, at 380.

> 23. Bills of exchange and promissory notes, aeronautics and interprovincial works and undertakings:
>
> The Trial Division has concurrent original jurisdiction as well between subject and subject as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of the Parliament of Canada or otherwise in relation to any matter coming within any following class of subjects, namely bills of exhange and promissory notes, aeronautics, and works and undertakings connecting a province with any other province or extending beyond the limits of a province, except to the extent that jurisdiction has been otherwise specially assigned.

This ambiguous provision has produced a peculiar result in air transport. The Trial Division seemed at first unsure of the extent of its jurisdiction over aeronautics and the early decisions are confusing. Then, in *Bensol Customs Brokers Ltd. v. Air Canada*[169] the Appeal Division held that the basic prerequisite to the exercise of jurisdiction by the Federal Court being the existence of valid federal legislation,[170] since the case involved international air transport falling under the Carriage by Air Act,[171] it was properly brought before the Federal Court. Given the fact that no existing federal legislation regulates

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(169) (1979) 2 C.F. 575.
(170) *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, (1977) 71 D.L.R. (3d) 111.
(171) (1970) R.S.C. c. C-14.

domestic air transport in Canada, the following problem arises: a joint suit against the carrier and the controller (Crown) can be brought before the Federal Court only if the flight was international within the meaning of the Carriage by Air Act (reproducing the Warsaw Convention). If the case involved domestic flight, two different actions will have to be instituted.

When it comes to the manufacturer, there is even less change of being able to bring him before the Federal Court jointly with the controller. The most recent case dealing with the issue of jurisdiction over aviation matters is *Pacific Western Airlines Ltd. v. The Queen*.[172] The action arose from the crash at landing of an airliner flying from Calgary, Alberta, to Cranbrook, B.C. The airline sued to recover its hull loss alleging negligence of the Crown, as employer of the air traffic controllers, of various aircraft and component manufacturers, and of the City of Cranbrook and its employees. All the defendants, except the Crown, successfully challenged the jurisdiction of the Federal Court on the ground that the actions were not based on existing federal law on which a claim of negligence could be founded. The Court rejected the argument of plaintiff that the

(172) (1979) 2 F.C. 476.

Federal Court Act, the Aeronautics Act and Regulations, and a bilateral treaty between Canada and the United States were sufficient basis to attract its jurisdiction. The carrier was then forced to bring actions against the defendants other than the Crown in the Superior Court of the Province of British Columbia.

This multiplication of proceedings creates a deplorable situation as the judge himself admits in *Pacific Western*. Not only does it greatly increase the costs of litigation and cause a myriad of procedural problems, it also carries the distinct possibility of different courts delivering conflicting judgments.[173]

2.1.6 Right of Action

The CLA grants to any individual who has suffered damages due to the negligence of an air traffic controller the right to bring action against the Crown for his own damages. But, who has a recourse when the victim dies of his injuries without having been compensated? Once more, reference has to be made to provincial law.

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(173) Lane, E.M. & Garrow, D.B. "Canadian Procedural Law in Aviation Litigation", 46 J. Air L. & Com. 295, 1981, at 302.

Traditional common law held that the right of action died with the victim. The obvious unfairness of that principle was corrected in England by the adoption in 1846 of the Fatal Accident's Act (better known as the Lord Campbell's Act) enumerating the persons who could recover the damages they had suffered because of the victim's death. The year after, Canada voted a similar statute.[174] Although this was unnecessary, a right of action being transmissible in civil law, it was incorporated into the Civil Code of Quebec.[175] The law was made uniform for the ten provinces, unlike the situation in the United States where the Wrongful Death Statutes may differ from state to state.

Then, in Canada, if an air traffic controller negligently causes the death of somebody, the consort of that person, his ascendant and descendant relatives have the right, within a year of his death to sue for their damages.

The uniformity stops however in a joint action against the controller and the carrier if the flight was

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(174) (1847) 10-11 Vict. c-6.
(175) 1056 C.C.

one governed by the Carriage by Air Act. Then, the list of members of the family having a right of action against the carrier is much more liberal[176] and the delay extends to two years intead of one.[177] This signifies that different persons would be allowed to recover depending on who is found responsible, controller or carrier, and that in case of contributory negligence some of the claimants would recover only part of their damages.

2.1.7 Defences

No specific defence is mentioned in the CLA. However, non observance of special mandatory provisions of the Act, such as the ones relating to the notice of claim, could bring the rejection of the action.

Otherwise, all the available defences to a negligence action, factual, procedural or legal, can be used by the government.

2.2 Standard of care of ATC in jurisprudence

2.2.1 Canada

There are still very few cases involving air traffic controllers in Canada; this makes it difficult to

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(176) Carriage by Air Act, Schedule II, art.1:
"In this paragraph the expression "member of family" means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, stepchild, grandchild.

(177) Art. 29.

ascertain precisely to which standards they would be held.

The earliest case was *Grossman v. The King*[178] in which a pilot and his passenger sought to recover the damages they had suffered when they landed at the Saskatoon airport and ran into the side of an open drainage ditch. Plaintiff's action was dismissed because the Exchequer Court came to the conclusion that the pilot had failed to take reasonable care by not calling the radio range or taking any other step to inform himself of the conditions on the landing field. Evidence had revealed that the ditches constituted no danger and were easy to avoid by pilots having previous knowledge of them. However, the judge agreed that, had not the obstructions been obvious to those using reasonable care, the Crown would have been liable for negligence in failing to give adequate warning. One way of discharging that duty to warn, according to the judge, was through control towers or radio ranges located at the airport.

The following principles can be drawn from the *Grossman* case: a) control towers employees do owe a duty of care, at least when it comes to warning of obstructions on the ground; and b) if they fail to discharge that duty, the Crown can be sued for negligence.

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(178) 3 AVI 17472 (Exchequer Court of Canada, 1950).

The next case, *Sexton v. Boak*[179] came more than twenty years later. The action arose out of the crash of a small Aztec aircraft in the vicinity of Vancouver airport where he was supposed to land. None of the four occupants survived. The accident was found to have occurred as a result of wake turbulence created by a Boeing 707 which had landed just before. The pilot of the Aztec had not yet sought or received clearance to land but while on approach controllers had advised him and the pilot of the Boeing of each other's presence.

The widows of two of the passengers brought an action against the estate of the pilot and against one controller; the estate took third party proceedings against that controller and one of his colleagues. The allegations of negligence against the controllers referred to failure either to warn of turbulence or to direct a separation distance that would avoid the hazard.

The judge reviewed the leading U.S. wake turbulence decisions, including *Hartz*, but held that prior to landing clearance, and while on visual flight rules, the responsibility for adequate separation lies with the pilot and was not the concern of control tower operators.

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(179) 12 AVI 17851 (British Columbia Supreme Court, 1972).

Two elements seem to have influenced this decision. First, the fact that the accident happened before clearance had been given and second, the fact that the pilot was flying VFR. The judge recognized that control tower personnel take on a much larger share of the responsibility in IFR conditions and when the aircraft is close to the runway. He admitted also that if the controllers see a dangerous situation developing they "may" be under a duty to warn. Although reluctant to go as far as they do, the judge in the *Sexton* case was clearly influenced by contemporaneous American jurisprudential rules.

Two years later, in 1974, the *Churchill Falls Corporation* case was judged by the Federal Court.[180] The facts were the following: on November 11, 1969 a small jet aircraft left Churchill Falls expecting to land 23 minutes later at Wabush: both places are in Labrador, Newfoundland. It crashed into a sheer vertical rock face in an open pit mine at Wabush, killing everybody on board.

Controllers at the Moncton, New-Brunswick, area control center who were responsible for the region were sued for negligence. They had issued a clearance according to a

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(180) *Supra*, n. 149.

procedure and on a beacon that had been cancelled by the Ministry of Transport six months earlier. Controllers and pilots had been given advance information concerning the new procedure and the new beacon and been instructed to destroy the old plates containing the procedure on the old beacon and replace them with the new ones. The pilots, having only the new plates, followed the new procedure but on the old beacon, missed the runway and crashed.

To summarize, the airplane executed the only currently approved instrument approach pattern but on the wrong beacon, as instructed by air traffic control.[181] Yet, the court concluded that the crash had been caused solely by the negligence of the pilots and that although the air traffic controller had failed to exercise the degree of reasonable care required of him, it was not the cause or even a partial cause of the accident.

The court based its rather surprising conclusions on the grounds that when a pilot received a clearance he has a choice to accept it or question it and if he accepts it he is responsible for executing it. Once accepted, it

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(181) See Keenan, John T., Case Law and Comments, 42 J. Air L. & Com. 28, 1976.

is not the controller's duty to monitor the aircraft's descent; separation of airplanes is his primary concern and duty.

In trying to establish the standards to be applied to ATC services, the judge states that "aviation safety requires the efforts of air traffic controllers and pilots, their efforts complement each other..." which would lead us to believe that he is going to apply the theory of concurrent duties. However, he soon reverts to the earliest concept of separation of aircraft as only responsibility of ATC.

The decision has been properly criticized[182] as presenting a refusal to even consider the established principles of American jurisprudence on the matter. The criticism is justified particularly since the case involved IFR flying.

As expressed in *Todd v. United States*[183] the clearance given "was not reasonably designed to insure the safety of the aircraft" and therefore should have been regarded as negligent.

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(182) *Idem*, at 30.
(183) *Supra*, n. 83.

2.2.2 Australia

A few cases involving air traffic controllers have come before the Australian courts; it is appropriate to look at them since Australia and Canada share the same common law traditions.

The existence of a duty, owed by ATC services to aircraft operators, to take due care for the safety of aircraft under their control has been recognized in *Trans Oceanic Airways Ltd. v. The Commonwealth of Australia*.[184] Plaintiff's seaplane had crashed because the buoys marking the landing path had moved with the tide. The fact was known to ATC but they failed to warn the crew. The Commonwealth was held to be bound to give clear warnings of special precautions to be taken by crew before a landing strip controlled by ATC could be used safely.

The next case, *Nichols v. Simmonds*[185] involved the collision at landing of two small aircraft flying VFR. The court found both pilots equally negligent in that they failed to keep a proper lookout. But, the controller was found to be guilty of even greater negligence, because he

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(184) High Court, 1956 (unreported).
(185) (1975) W.A.R. 1 (Supreme Court of Western Australia).

had been aware that both planes were in the course of landing and took no action to try to avoid the accident. The court held that a duty of care was imposed on the air traffic control officer, if no other competing duty precluded him from doing so, to keep a lookout for aircraft monoeuvering in controlled airspace in the vicinity of the tower and warn them of dangerous situations. In the court's opinion, the fact that both planes involved in the case were flying VFR did not substantially modify the extent of ATC's duty. Consequently, the judges assessed the liability of the parties as follows: 30% for each pilot and the remaining 40% to the controller.

Liability was apportioned the same way in *Australian National Airlines Commission v. The Commonwealth of Australia and Canadian Pacific Airlines*.[186] In that case, a Trans Australia Airlines aircraft taking off from Sydney airport collided with a Canadian Pacific airliner which had just landed on the same runway. It appears that the crew of the CPA airliner misunderstood taxiing instructions of the tower and backtracked into the departing TAA aircraft. CPA airline was found negligent in that its pilot had not questioned

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(186) (1975) High Court

what should have seemed a surprising instruction; TAA was found negligent in the same proportion since its pilot had done nothing to abort take-off or climb at a faster rate once he saw the other aircraft on the runway. But the controller was found liable to a higher degree for issuing a take-off clearance without checking first if the runway was clear which the court held to be "a serious departure from the standards of the reasonable man". Safety in the prevention of collisions was held to be the primary responsibility of ATC services.

It is apparent that if the standard of care applied to controllers by the Australian courts are not quite as onerous as the American, they are certainly a lot stricter than the Canadian. One interesting feature of the last two cases is that, unlike American judges, the Australian courts do not find the need to fix responsibility on one party only. This flexibility, besides being more consistent with the realities of aviation accidents, renders unecessary the use of what one author has called "tortuous techniques of legal reasoning"[187] in order to find the proximate cause of the accident and probably produces more equitable results.

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(187) For a more detailed comparison of U.S.-Australia decisions on ATC liability, see Booth, Ian Jeffrey., "Governmental Liability for Aviation Accidents caused by Air Traffic Control Negligence", 1 Air Law 3, 161, 1976.

PART II

INTERNATIONAL REGULATION

OF THE LIABILITY OF AIR TRAFFIC CONTROL AGENCIES

CHAPTER 3: THE WORK OF ICAO

3.1 The Draft Convention on Aerial Collisions

Liability arising from aerial collisions had long preoccupied the international community. In the thirties, CITEJA studied the problem and prepared various draft conventions but saw its work interrupted by World War II. After the war, it was carried on by the Legal Committee of ICAO, jointly with the drafting of the 1952 Rome Convention.[188] In 1949, it was decided that the two problems, aerial collisions and damages to third parties on the surface, should be treated separately and the Legal Committee prepared a first draft convention on aerial collisions which was ready in 1954. The Assembly decided in 1959 that in view of the new developments in civil aviation, the draft should be revised and the Legal Committee undertook the revision at its 13th Session, held in Montreal in 1960.[189]

It was during the discussion over the draft Convention on Aerial Collisions that the question of the liability of the air traffic control agencies first came up.

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(188) ICAO Doc. 7601-LC/138, Annex C. Also Matte, Nicolas M. Treatise on Air-Aeronautical Law, Carswell, 1981, at 581.

(189) Mankiewicz, René H., "The ICAO Draft Convention on Aerial Collisions", 30 J. Air L. & Com. 375, 1964.

The Delegate of Switzerland pointed out that a large part of the collisions were due to acts or omissions of air traffic control employees. Considering the ever growing number of aircraft in service and the increasing speed and height they would be able to attain, the role of these agencies was likely to become more and more important in the future. He commented on the international aspect of air traffic control, whereby an agency located in a particular country controlled aircraft flying outside that country. Consequently, he said, there was a distinct interest in drafting uniform international regulations concerning their liability.[190]

It soon appeared however that the subject raised a series of very complex problems. In most countries, air traffic control was provided by government bodies and there were deep divergencies in the national laws regarding State liability, ranging from liability without limits to complete immunity from liability. Furthermore, it was submitted that the liability of ground control authorities did not arise in relation to aerial collisions only but could be implicated in several other types of accidents. The Committee then adopted a proposal not to deal with the matter within the

(190) ICAO Doc. 8137-LC/147-1, at 171.

framework of the Convention on Aerial Collisions but to include it as a separate item on its Work Programme, among the subjects of no priority and the Secretariat was asked to gather documentation for the Members. In the meantime, the work on a new draft Convention on Aerial Collisions was to be continued and a new Subcommittee was appointed to that effect.

The General Assembly met in Rome in 1962 for its 14th Session; during this meeting the subject of the liability of the air traffic control agencies was given priority by the Legal Commission who further recommended that it be first studied by a subcommittee. The Legal Committee met soon thereafter and decided to establish such a subcommittee whose broad terms of reference would be to "study the liability of air traffic control agencies". Several Delegates were not convinced that international regulation was necessary or even possible but they agreed that the problem should be explored.

Two documents were filed at the 14th Session: one by the Secretariat of ICAO and the other by Switzerland. The Secretariat's paper provided a brief description of the various components of air traffic control services and a survey of how some Contracting States approached their liability. The comments of Switzerland expanded on the views

it had expressed at the 13th Session concerning the importance of studying the problem and outlined the direction they felt the study should take.[191]

3.2 The 1963 Questionnaire

The Subcommittee organized its work with the following basic objectives in mind: a) to ascertain whether it was necessary or desirable that there should be international regulation of the problems relating to the liability of air traffic control agencies with respect to cases which have an international character, and b) to ascertain what methods should be used to settle the problem: amendments to existing convention, a new separate convention dealing exclusively with the liability of ATC, or a convention dealing with ATC and aerial collisions.[192]

In addition to the two documents mentioned earlier, Members of the Subcommittee also relied on the answers to a questionnaire sent by the Secretariat in December 1963, first to the States represented on the Subcommittee and later on to other Contracting States.[193]

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(191) ICAO Doc. 8302-LC/150-2, at 158 and 184.
(192) ICAO Doc. 8582-LC/153-2, at 13.
(193) LC/SC/LATC No. 1 (questionnaire); LC/SC/LATC No. 3 to 14 (replies); See Appendix A.

Replies were received from twenty-seven governments; all of them were responsible for the provision of ATC services in their country, either directly or indirectly or through association with other countries, or, in one case, through the establishment of a private company in which the government was the major shareholder and for which it assumed liability.[194]

While none of these States had enacted specific legislation to regulate the liability of their ATC services, twenty-four of them allowed suits against the government, based on tort or delict, in cases where damages occurred as a result of a negligent act or omission of an ATC employee. In every case, if fault was proven, compensation was allowed without limits. Two countries retained State immunity except for very specific exceptions, among which negligence of ATC was not included;[195] one accepted liability based on contract only.[196] Only one State had a system based on objective liability[197] and none had presumed liability; one country consented to be sued only when the employee or agency did not possess sufficient assets to compensate for the damages caused.[198]

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(194) Switzerland.
(195) Philippines and Sweden.
(196) Trinidad & Tobago. Moreover, a *fiat* had to be obtained first from the Governor-General.
(197) Spain.
(198) Mexico.

Although the point was not discussed in each of the twenty-seven sets of answers, it seems that most also allowed the claimants to sue the negligent employee personally if they chose to do so; only Japan assumed exclusive liability for government employees. In some cases, the State could ask its employee to reimburse the amounts paid, sometimes as a general rule, other times only in cases of gross negligence or willful misconduct of the employee.

3.3 Report of the First Subcommittee on the Liability of ATC Agencies

The Report of the Subcommittee was introduced at the 15th Session of the Legal Committee, in September 1964.[199] The Members had reviewed the various reasons in favour and against the establishment of an international regime and reached the conclusion that such international rules would be useful and that their usefulness would even increase in the future. They felt unable however to predict the extent of the difficulties that this undertaking would entail due to the limited amount of information available.[200]

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(199) LC/SC/LATC No. 19.

(200) While preparing this Report, the Subcommittee had only the answers to the questionnaire sent to States represented on the Subcommittee; later, the Secretariat also sent it to all Contracting States and their replies were also considered during the 15th Session.

The relationship that the new rules would have with existing private air law conventions such as Warsaw and The Hague, Rome and the Draft Convention on Aerial Collisions were examined and the Members foresaw the possibility of conflicts. No definite conclusion was reached concerning the necessity of a separate convention but if there was going to be one, the following topics might be included:

(1) Scope of Convention;

(2) System of liability;

(3) Limitation of liability;

(4) Parties liable;

(5) Parties entitled to bring actions;

(6) Defences;

(7) Security of liability;

(8) Jurisdiction;

The Subcommittee offered comments and suggestions on each of these topics. The Report was considered by the Legal Committee during the 15th Session and the decision was taken to pursue the study. The Committee reached an agreement on several points, namely:

a) the definition of ATC services falling within the scope of the Convention would be a broad one;

b) the Convention would apply whatever the posture of the aircraft, whether in flight, on the surface, in movement or not, provided that it was under the control of an ATC service;

c) the Convention should have a system of liability based on fault;

d) it should provide for a limitation of liability in a reasonably high amount.

There was no agreement on questions of direct and recourse action, apportionment of liability and the provision of security.[201]

It was further decided that a second questionnaire would be sent to Contracting States asking for their opinions on these points agreed upon by the Committee. A second Subcommittee would study the replies and then consider whether it was appropriate to draw international rules and, if so, either prepare a draft convention or at least formulate precisely the points which should be considered by the Legal Committee. The second Subcommittee was also instructed to explore the possibilities which might arise in relation to other conventions.

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(201) ICAO Doc. 8582-LC/153-1, at 131 *et seq.*

During the 15th Session, the Legal Committee also studied and revised the new draft Convention on Aerial Collisions but decided to delay its presentation to a diplomatic Conference until the views of States on the relationships between aerial collisions, the liability of air traffic control services and the Rome Convention were better known.

3.4 The 1964 Questionnaire

In accordance with the decision of the Legal Committee a second questionnaire was sent to the States in November 1964.[202] Then, the second Subcommittee convened in Montreal in 1965 to study the replies and comments received by the Secretariat. A report was prepared and later presented to the 16th Session of the Committee, in September 1967.[203]

Of the forty answers received, a substantial majority was in favour of establishing international rules for the settlement of damages caused by ATC activities, or of studying the formulation of such rules. If a new Convention were to be drafted, most States preferred that it contain a system of liability based on proof of fault, with limits, although it was agreed that to try to recommend specific ones would be premature.

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(202) See Appendix B.
(203) LC/SC/LATC No. 32.

The answers were far more diversified when it came to defining the services and facilities to which the proposed convention would apply. The Subcommittee recommended that a broad definition be retained and that "all navigation services and facilities provided for a pilot for the safe operation of the aircraft" be included.

In its report, the Subcommittee fully endorsed the view that it would be appropriate to draw up international rules concerning the liability of ATC agencies but felt that this objective should be attained in two stages. The first stage would involve the formulation of principles which would serve as the basis for the new rules and the second would be the actual drafting of the rules.

At the 16th Session, the Legal Committee agreed with the opinion of the Subcommittee that the new international regulation should be comprised in a separate convention but without prejudice to any future action towards the consolidation of various related conventions. It was further decided that the Subcommittee should continue its study of the question. However, since the major part of the seventies was dedicated to solving the more urgent problem of aerial piracy, the Subcommittee did not hold any other meeting and work was also suspended at the Legal Committee on this matter during the next decade.

3.5 Recent Developments

The subject of the Liability of Air Traffic Control Agencies resurfaced in 1979 when the 24th Session of the Legal Committee undertook to revise its Work Programme. Some Delegates believed the study of the Legal Status of the Aircraft Commander to be more important; others felt that ATC liability presented more pressing problems. Some said that because of their close connection the two issues should be considered together; other thought wiser to amalgamate the questions of Aerial Collisions and ATC liability.

The following order was finally adopted: 1) Legal Status of the Aircraft Commander; 2) Liability of Air Traffic Control Agencies; 3) Aerial Collisions.[204]

During the 23rd Session of the Assembly, the Legal Commission reviewed the General Work Programme of the Legal Committee in order to adjust it to the anticipated developments and requirements of the international civil aviation of the eighties.[205] The Commission determined that only problems of sufficient magnitude and practical importance

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(204) ICAO Doc. 9394-LC/184
(205) ICAO Doc. 9314-A23-LE

requiring urgent international action should be put before the committee and this should be the test in the future for any item to be included on the Work Programme.

Following those recommendations, the Assembly decided that a new, more precise and detailed questionnaire would be sent to States and international organizations in order to ascertain whether or not the subject of ATC liability conformed to the test.

3.6 The 1980 Questionnaire

The Secretariat prepared a questionnaire, under the instructions and directives of the Panel of Experts on the General Work Programme of the Legal Committee which was to analyze the answers.[206] Thirty-seven States sent replies and comments but only twenty-two of those were received in time to be considered by the Panel.

In its report, submitted to the 104th Session of the Council in August 1981,[207] the Panel of Experts pointed out that a great majority of States, according to what they wrote, had not yet encountered any practical problems in this field. Consequently, conflicting views could be

(206) See Appendix C.
(207) ICAO Doc. 9359-C/1066

found among the experts themselves as to whether the study should be pursued, given a lower priority or simply abandoned altogether. In the end, they recommended that the item be retained but not presented to a subcommittee or to the Legal Committee itself without first having been researched thoroughly by the Secretariat or Rapporteurs and that nothing be done before that basic research was completed.

However, one has to be cautious when drawing conclusions from the report of the Panel of Experts. Out of ICAO's then total membership of 148 States, only 32 sets of answers were furnished to the Panel. While this may be because of lack of interest or lack of problems, it might also indicate lack of relevant information and lack of time, financial resources and manpower to research it. It is also to be noted that some States which had claimed to be faced with pressing problems concerning ATC at the 24th Session of the Legal Committee answered in the negative to that particular point in the questionnaire. It seems equally anomalous, even if one keeps in mind other factors, that so few cases concerning ATC operators have been filed before the national courts of most countries while there were so many in the courts of the United States.

According to the Panel, the following points, *inter alia*, deserve further study:

- the delimitation of the jurisdiction of the ATC agencies in relation to the authority of the aircraft commander;

- the delimitation of problems falling under private law and public law;

- the problem of liability in case of failure of computerized ATC equipment;

- the protection of the individual controller against excessive liability.

Discussions over the report continued at the 25th Session of the Legal Committee, in April 1983.[208] After more than twenty years, States still could not agree that a new international instrument was desirable. Many of them reiterated that the matter should be taken care of by domestic legislation; one suggested that international regulation of technical nature, incorporated to the Annexes of the Chicago Convention, would prove more practical and easier to achieve.

Once again, the consensus was to the effect that more study was required, specially since the technical, operational and social developments in the field might have

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(208) ICAO Doc. 9397-LC/185.

made the earlier work of the Legal Committee irrelevant today. The Delegates shared the opinion of the Panel that such research should be performed either by the Secretariat or by Rapporteurs.

3.7 Argentina's Preliminary Draft Convention

Argentina firmly believes that ATC liability must be regulated at the international level and has started serious work on the question in the early seventies.[209] A committee was appointed to prepare a draft convention which was first presented at the VIth National Argentine Conference on Air and Space Law held in Buenos Aires in 1972. Studies were continued afterwards and the draft was again submitted at the 25th Session of the Legal Committee in 1983.[210]

Briefly, the Draft Convention present the following basic features:

- it favours a very broad definition of the services and of the kinds of aircraft the Convention would cover (art. 1 & 5);

- it identifies the international elements and circumstances and the type of damages which would make the convention applicable (art. 3 & 4);

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(209) Perucchi, H.A., "History of the Draft Convention on Liability of Air Traffic Control Agencies", 8 Air Law 241, 1976.
(210) LC/25-WP/875-39. See Appendix D.

- it supports a system of liability based on fault, except in the case of failure of electronic equipment or failure to disclose documentary evidence for which there would be a presumption of liability (art. 7 & 8);

- it states that the liability must be limited and links the limits, according to the damage caused, to the existing air law conventions (art. 10, 11, 12 & 14).

Moreover, the Argentine Preliminary Draft Convention on the Liability of Air Traffic Control Agencies deals with most other legal and procedural aspects of an action against these services: international or multinational ATC agencies, evidence, jurisdiction, applicable procedural law, currency conversion, prescription, guarantees, etc. It constitutes a concrete and valuable contribution to the study of this question and provides useful guidelines for further work.

CHAPTER 4: A NEW CONVENTION

4.1 The Need for International Regulation

States have never been able to reach a consensus when it came to deciding whether or not there was a real need for an international solution to the liability of ATC agencies. Today, many still feel that the matter is well taken care of by domestic legislation and that no problem of sufficient magnitude justifies such a complex and time-consuming undertaking. On the other hand, others feel that an international agreement is, if not necessary, at least desirable.

We will review hereinafter the arguments most frequently given in support of either position.

4.1.1 Uniformity in Private Air Law

The need, or wish, to make the rules of liability in private air law as uniform as possible is the motive most often put forward in favour of drafting international regulation of ATC liability. Collaboration to achieve the highest practical degree of uniformity in regulations and organization in relation to "aircraft, personnel, airways and auxiliary services" is one of the obligations States have

contracted when they signed the Chicago Convention;[211] uniformity had also been the raison d'être of the Warsaw Convention.[212] Such uniformity was said to play an important role in the improvement of air navigation and in the promotion of safety.

While uniformity for its own sake might not have sufficient validity as a goal, let us see if the lack of it, between national laws and between other international conventions, could cause serious problems in accidents where the negligence of ATC services is involved.

4.1.1.1 National Laws

Although ATC employees perform according to the international standard and practices of Annexes 2 and 11, and although civil aviation operations are conducted under conditions which have been internationalized to a high degree, their liability is evaluated according to the varying norms of national legislation. In other words, "the controller comes under the aegis of national law while carrying out international law".[213]

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(211) Art. 37
(212) Preamble
(213) McCluskey, E., "Legal Liability of the Controller", The Controller, Vol. 19, No. 1, 1980, at 23.

According to the replies to the 1980 Questionnaire, no country has yet enacted a specific legislation concerning the liability of its ATC services. Consequently, the general principles of law in force in the country apply, creating vast disparities in the treatment of ATC employees from one country to another.

First, the controller is dependent on the legal system of the country which employs him. In socialist States, the controller has a legal duty to apply the provisions of the aviation code and other rules issued by the competent Ministry. When a violation of these rules leads to an accident causing damage to person or property, the controller is held criminally responsible; moreover, criminal liability can be invoked even when no accident has occurred but the risk of accident has been created.[214] The controller is better protected against criminal suits in civil and common law systems in which intent, gross negligence, or recklessness amounting to intent, would have to be proven for the offence to be treated as a criminal one.[215] The possibility, however, cannot be ruled out. The International Federation of Air Traffic Controllers Associations (IFATCA) cites as an example the decision of the Appeal Court of Cagliari

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(214) *Idem*, at 25.
(215) Avgoustis, Andreas, "The Controller's Legal Liability", The Controller, Vol. 14, No. 4, 1975, at 19.

(Italy) of February 21, 1984 regarding the crash of a DC-9 into a mountain close to the airport and for which the Italian controller was given a 28-month prison sentence.[216]

Civil liability also receives a different treatment from one legal system to the other. In all cases the employer is liable, according to an IFATCA study based on the "International Survey of Civil Liability of Workers" done on behalf of the International Labour Organization (ILO).[217] But it also appears that in most cases the liability of the employer does not prevent simultaneous or parallel action against the employee who caused the damage.

In the socialist countries of Europe, the liability of the employer is based on the principle of the liability of the economic unit to third parties. But, if the employer has had to compensate the victims on behalf of the controller, he may seek recourse against him through a special provision of the code of these countries called "material responsibility", a form of liability *sui generis* which allows the employer to recover damages from the employee.

In civil law countries, the liability of the employer is based on the fact that he is the commettant; the

(216) IFATCA '85, WP-66, dated January 16, 1985.
(217) IFATCA '77, WP-34, dated February 10, 1977.

government will be held liable for the fault of the controller provided the latter was acting in the course of his employment. If the fault is judged to be a personal one, the controller could be sentenced to pay for the damage himself. Some countries have made by legislation the employer solely responsible to third parties for what they considered to be "special risks", such as railways, road transport, aviation and mining; a very small number have excluded the possibility of recourse action against the employee in all cases, but most other civil law countries have retained the right to obtain from the employee a contribution to indemnities paid by them to third parties.

Under common law systems, the State will be sued as employer of a controller through the rules of vicarious liability only if it has waived its privilege of sovereign immunity; otherwise, claims will be directed to the controller personally.[218]

The fact that countries share the same legal system does not offer any guarantee of uniformity however: the notion of fault or negligence varies from one to the other. Even within the same country, particularly in federations, confederations or other types of unions, important

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(218) For further discussion see McCluskey, E., "Legal Liability of the Controller", The Controller, Vol. 19, No. 2, 1980, at 27.

differences can be found, sometimes because the States, provinces or other units of those countries have enacted different laws, sometimes because they apply the same law differently. We have already observed that in the United States, the application of state law to cases brought under the Federal Tort Claims Act could lead to uneven judgments depending where the controller was located when he directed the flight. The same could occur in Canada where provincial law governs cases under the Crown Liability Act and where two legal systems coexist.

Seen from the claimant's point of view, uniformization of the procedural and jurisdictional conditions to be fulfilled in order to file a claim for the negligence of a controller would also be advantageous. At the present time, suits against the State often involve compliance with a series of preliminary steps which often delay compensation and might even cause the loss of the right of action.

Curiously, this diversity among national laws viewed by many as one of the more convincing arguments in favour of drafting uniform international rules, is held by others to be the main reason not to attempt to do it. They believe that those differences are already substantial enough as to create a major obstacle towards reaching an international agreement and that it would be futile to draft a convention which stands no chance of being ratified.

4.1.1.2 International Conventions

In recent years, concern over the possibility of conflicts or overlaps of conventions has often been expressed and advocates for a single, unified system which would encompass the rules of liability of all participants in international air transport are becoming more numerous.[219]

The Warsaw system, regulating passenger liability, is now composed of eight instruments, nine if we are to count the Montreal Interim Agreement, all in various stages of ratification. One author has counted eighty possible combinations or formulas of liability within the system;[220] another comments that the Warsaw system "presents itself by now in such a chaotic magnitude of variations that it probably deserves neither the qualification as "uniform" nor the qualification as a "system".[221]

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(219) Böckstiegel, Karl-Heinz, "Coordinating Aviation Liability", Annals of Air and Space Law, McGill, Vol. II, 1977, 15. Böckstiegel, Karl-Heinz, "Some Recent Efforts for Fundamental Reconsideration of the International Aviation Liability System", Annals of Air and Space Law, McGill, Vol. V, 1980, 17. Mankiewicz, René H., "A Galaxy of Unified Laws will Replace the Uniform Regime Created in 1920 in Warsaw, or the Death-Blow to the Uniform Regime of Liability in International Carriage by Air", Air Law, Vol. I, No. 3, 1976, 157. Matte, Mircea M., "Should the Warsaw System be Denounced or Integrated", Annals of Air and Space Law, McGill, Vol. V, 1980, 201.

(220) Bédard, Charles, "Le système de Varsovie: complexités, flexibilité", Annals of Air and Space Law, McGill, Vol. II, 1977, 3.

(221) *Supra*, n. 219.

The Rome Convention, which deals with the liability for damage caused by foreign aircraft to third parties on the surface, is based on a system of absolute liability of the operator. It has had up to now a poor record of ratification and work towards its revision has not made it more successful. As for the Draft Convention on Aerial Collisions, which contained a dual system of fault and presumption of fault liability, it has known no further developement since 1964.

Apprehension has been expressed that this intricate and confusing situation might render claims against controllers increasingly attractive, as has been the trend these past years for the aircraft and components manufacturers. Not only are the governments, as employers of control tower operators, generally solvent defendants, there is also the added benefit of unlimited liability. Since there is little hope of consolidating the Warsaw system in a near future, and even less of introducing a single regime under which all liability for damage resulting from air traffic accidents would be channeled, some consider it necessary to establish rules which would define clearly the extent and modalities of ATC liability in order to afford them and their employers better protection against lengthy and costly litigation.

Against this argument are those who are reluctant to add one more international instrument to this maze, believing it would simply generate more confusion. They point out that the present system has served us well and still works in spite of its complexities and that several of the difficulties envisioned over the years were of a purely academic nature and have never materialized.

4.1.2 International Character of ATC Services

Theoretically, employees of ATC services are subjected to the municipal law of the juridisdiction which employs them. In practice however, the situation is far more complicated than this statement would lead us to believe. McCluskey notes that, unlike any other professional, the controller can be involved with several legal systems while never leaving his place of work. He cites a study conducted by IFATCA on this question which was presented at its 1979 Brussels Conference.

The study tried to determine the number of FIRs where there was a different legal system right across their boundary, whether of civil law, common law or socialist law. This is relevant for several reasons, for instance:
a) the adjoining FIR may be delegated airspace where the controller performs under different legislation;

b) it may be part of the High Seas over which only the Rules of the Air apply;

c) various anomalies may also affect the status of a FIR such as States claiming international waters as national, boundary disputes, States not complying with ICAO procedures.

With the collaboration of its Member Associations plus independent States and international organizations which provide ATC, IFATCA examined more than 170,000 FIRs. McCluskey summarizes the findings as follows:

> "Out of 52 Member Associations not one could guarantee to be controlling under its own Municipal Law, 50 were involved with dissimilar systems, 47 were involved with control over the High Seas and 23 were faced with political anomalies. Looking at the rest of the world, again no controller was guaranteed never to work outside his own system of Municipal Law; of the 115 States examined, 94 control over the High Seas, 86 have dissimilar systems with neighbouring States and 60 have known political anomalies. There story is equally bleak in the 42 overseas territories examined." 222

These results have convinced IFATCA that an international convention is urgently needed to solve this problem: if there were important reasons for the international community to standardize the operations and the

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(222) *Supra*, n. 213, at 24.

procedures, there are just as important reasons to standardize the liability attaching to the performance of the same procedures.

Another facet of this argument is sometimes put forward in support of reaching an international agreement: there are at present three regional organizations which provide ATC services each in their part of the world.[223] That kind of cooperation between States has several advantages and is likely to increase under one form or another in the future. Presumably, the extent and the modalities of their liability will be fixed in their constitutional Act. It has been said that in time, this would bring a *de facto* international regulation of the liability of ATC services which would perhaps be better taken care of in a larger, more representative forum, such as ICAO.

4.1.3 The Controller

Protection of the controller is another argument offered in favour of an international convention: controllers themselves feel that the present legal uncertainty in which they have to perform creates an important source of stress in a profession which demands a clear state of mind.

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(223) EUROCONTROL, ASECNA and COCESNA are discussed at p. 160 *et seq.*

One of their main concerns is the possibility of being faced with a criminal suit following an accident. While they recognize that deliberate and premeditated acts should be punished, they would like that proof of intent be clearly established before criminal liability is involved.

IFATCA has adopted the following policy concerning criminal liability:[224]

> "IFATCA can never support any controller who is guilty of a deliberate act which impairs air safety nor can IFATCA support any controller who is guilty of criminal negligence but the Federation must reserve the right to use any legal means available to it to protect any member who is accused of such crimes.
>
> IFATCA defines that it should be necessary to prove *mens rea* (a guilty mind) beyond all reasonable doubt before a crime can exist.
>
> All other cases where *mens rea* cannot be proved must fall under Civil Law as opposed to Criminal Law..."

Controllers also worry that because at present, unlike the carrier, no convention exists that limits their liability, which might make suits against them and their employers more attractive. The fact that the scope of their duties is so ill-defined also makes them all the more vulnerable. They fear that leaving that definition to the

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(224) IFATCA '77; also included in their Draft Convention, art. 9.

courts might not take into account the realities of their profession and weigh the scales in favour of one side to the detriment of the other. They would like to be protected against excessive financial burdens imposed on them either through direct liability or through recourse actions when their employers have had to pay damages. They also want to know under which legal system their acts are to be judged so that they can get proper insurance or defend themselves adequately if the need arises. These goals, according to them, can only be reached through an international convention.

A Meeting of Experts on Problems concerning Air Traffic Controllers was convened in 1979 in Geneva by the International Labour Organization (ILO). Their conclusions concerning the controllers' liability were presented to the Legal Committee of ICAO at its 25th Session.[225] They stressed the present incoherence of the law whereby, in some countries, ATC employees may be held liable and found guilty either for strictly adhering to the rules and regulations or for departing from them in the interest of safety. They recommended that in the interest of safety and for the protection of the controller, steps be taken to harmonize the law.

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(225) ICAO Doc. LC/25-WP/875-33

The main concern of ILO is the protection of the controller as an individual: the Organization urged ICAO to ensure, if a new Convention is ever adopted, that the controller will not be individually and independently sued for damages over and above the limits stipulated by that convention. They said:[226]

> "If an instrument on the liability of air traffic control agencies were to deal only with the limitation of liability of the agencies themselves, a serious risk might arise that the purpose of the instrument could be frustrated by leaving it open to claimants to proceed against an air traffic controller personally - who would not benefit from any such limitation - and without regard to any degree of personal fault involved, merely in the hope of recovering more than would be possible from the agency".

Protection of the controller and other ATC employees is, in my opinion, a more practical and convincing argument than the theoretical search for uniformity in air law. Protection of the government agencies which employs them is also to be considered. Steps have been taken very early to protect carriers, mainly for economic reasons; these reasons have the same validity when applied to governments whose financial resources are not finite.

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(226) ICAO Doc. LC/25-WP/875-33

4.1.4 The Pilot

The pilot, and therefore the carrier, would also benefit from an international convention on ATC liability. The subject of the status of the aircraft commander has been on the Work Programme of the Legal Committee of ICAO even longer than ATC liability and has not known better success. It is recognized that the two problems are closely related and the solution to one would provide at least a partial solution to the other. There has been over the years a shift in the respective duties of pilot and controller. What was before the "primary responsibility of the pilot" has become a "concurrent duty" for the two of them and a clearer delimitation of the jurisdiction of the ATC in relation to the authority of the aircraft commander would be advantageous to both.

A convention on ATC would also be useful to determine whether or not the pilots have an obligation to obey the instructions of ATC, to what extent and the consequences of disregarding them.

4.1.5 The Claimant

The main advantage a claimant would derive from a Convention on ATC liability is that States which still retain their privilege of sovereign immunity would waive it upon

ratification or adhesion. Then in cases where the cause of the accident is attributed to the negligent act or omission of a government ATC employee, the claimant would not be prevented from recovering his damages.

It might well be the only advantage since an international instrument on ATC liability is more than likely to incorporate limits of liability whereas for the time being, in most national legislation on State liability recovery is unlimited.

4.1.6 IFATCA's Draft Convention

At IFATCA's 15th Annual Conference, held in 1976 at Lyon (France), a draft Convention called "Limitation of Legal Liability of the Controller" was submitted by the Chairman of the Eurocontrol Subcommittee to the VIIth Standing Committee.[227] It was subsequently amended and adopted at the 1977 Conference "to become IFATCA policy for discussion with other International Organizations, e.f. ILO, ICAO, with a view to have the principles.... eventually accepted as the basis for an International Convention".[228]

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(227) IFATCA '76, WP-31, dated February 2, 1976
(228) IFATCA '77, WP-59, dated March 8, 1977. See Appendix E.

Although very different in style from the Argentinian Draft, its basic principles are similar: broad definition of personnel and events to be covered, liability for fault limited to the amounts of Warsaw, as amended. In addition, it contains several provisions intended to regulate the liability of the ATC employee as an individual: article 14 limits the amount of his personal liability in a direct suit to one year salary after taxes, to be shared with other negligent parties; it prohibits imprisonment for civil negligence and the use of information obtained during disciplinary action in court proceedings. Article 15 lists defences available to ATC personnel: contributory negligence, assumption of risk by the pilot or owner, written superior orders and act of God. Article 16 forbids recourse actions from the employer against the employee when the former has been sentenced to pay damages unless it is proven that the employee acted outside the scope of his employment. It even allows in some cases for the employee who has paid for the damages to recover them from the government agency which employs him.

IFATCA's draft also sets forth an elaborate protocol for signature and ratification and prohibits any reservation.

4.2 Bases for an International Convention

There are valuable arguments in favour of an international convention on ATC liability; but, much of the value of such a convention, for all parties involved, depends very much on what its scope of application would be, which system of liability would be retained and on the monetary limits which will indubitably be incorporated to it. All its chances of attracting widespread ratification rest on whether States can reach an agreement on those modalities.

We have stated what preferences States have expressed in ICAO, i.e. limited liability based on a proof of fault system; they are well-reflected in the Preliminary Draft Conventions of Argentina and IFATCA. We will hereinafter go over some of the more important features of a new convention and discuss them in more detail.

4.2.1 Scope of the Convention

4.2.1.1 Definition of ATC Agencies

Annex 11 divides air traffic services in the following manner:[229]

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(229) Chapter 2, art. 2.3

(1) air traffic control services, subdivided in three parts as follows:

- area control service;
- approach control service;
- aerodrome control service;

(2) flight information service;

(3) alerting service.

Portions of the airspace and aerodromes have been given special designations in Annex 11, according to the type of services they provide: air traffic control services will be provided to IFR flights in control area or control zones and to both IFR and VFR flights in controlled airspace and at controlled aerodromes.[230] Flight information services and alerting services are offered in portions of airspace designated as flight information regions (FIR).[231] Within FIRs, flight information centres are in charge of providing them, unless they have been assigned to an air traffic control unit[232] possessing adequate facilities to do so. However, when an ATC unit provides both flight information service and traffic control service, the latter must take precedence whenever it is required.[233]

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(230) *Idem*, art. 2.5
(231) *Idem*, art. 2.6
(232) Air Traffic Control Units:
- Area control center;
- Approach control office;
- Aerodrome control tower;

(233) Chapter 4, art. 4.1.2

Flight information services include the provision, to both IFR and VFR flights of pertinent information on SIGMET,[234] changes in the serviceability of navigational aids and in the conditions of aerodromes and associated facilities, and any other information likely to affect safety. IFR flights may receive, in addition, information on the actual weather conditions and forecast at departure, destination and alternate aerodromes, plus communication of collision hazards to aircraft operating outside of control areas and control zones and, upon request, for flight over water, available information on surface vessels in the area. VFR pilots can obtain information on weather conditions along the route likely to make VFR impracticable.[235]

Alerting service is provided automatically to all aircraft under control and, insofar as practicable, to all those whose pilots have filed a flight plan or which are otherwise known to air traffic services; it is also provided to any aircraft known or believed to be the subject of unlawful interference. The service alerts rescue coordination centres when an aircraft is reported or suspected to be in a state of emergency, when it fails to communicate or to arrive on time, or when it has made a forced landing or is

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(234) Significant Meteorological Information
(235) Chapter 4, art. 4.2

about to do so. Procedures are set forth in Annex 11 for the service to notify and set in motion the appropriate rescue and emergency organizations which can provide immediate assistance when it is required.[236]

In 1962, the Secretariat of ICAO, in its paper presented to the 14th Session of the Legal Committee proposed the following definition of the services which might fall within the scope of a new convention:

> "units which have been established to provide air traffic control service, flight information service and alerting service within control areas, controlled zones and controlled aerodromes, and which, if authorized by the establishing authority, may provide flight information service and alerting service within a flight information region."

As may be noted, the definition does not include the flight information centres which provide only flight information service and alerting service but no air traffic control service. Alternatively, the Secretariat suggested either a narrower definition which would only include air traffic control services or a broader one which would then comprise the flight information centres.

The 1964 report of the first Subcommittee, deposited at the 15th Session of the Legal Committee, discussed the

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(236) Chapter 5.

opportunity of including, in addition to the above-mentioned services of Annex 11, the following ones:

(a) the air traffic advisory services;

(b) the air navigation facilities;

(c) the airport facilities;

(d) the meteorological services;

(e) the search and rescue services.

The Subcommittee stated the pros and cons but did not draw any specific conclusion concerning these services. Larsen, one of the first authors to write extensively on the subject of ATC liability[237] proposed that they be included whenever they are related to or performed by an ATC agency.

When one examines the replies and comments to the last two questionnaires and the opinions expressed within the Legal Committee, one sees a definite preference for a broad definition. Argentina's Draft supports this view: any agency providing services "for the protection and regulation of flights" would be subject to the rules of liability set forth in the Convention.[238] IFATCA's definition is also very wide and covers employees and trainees of every sector of ATC operations.[239]

It appears that all of them have based their choice of a broad definition on the assumption that whatever

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(237) Larsen, Paul B., "The Regulation of Air Traffic Control Liability by International Convention", Unpublished thesis, McGill, 1965.
(238) Appendix D, art. 1
(239) Appendix E, art. 1

the form the new international regulation would take, it would be based on a proof of fault system. We will then come back to this point when we discuss systems of liability.

4.2.1.2 Civil, Military and Other State Aircraft

The rapid expansion of civil aviation which started in the fifties produced the following consequence that the new jet aircraft, for operational and economic reasons, had to use the upper regions of the airspace which had been up to then reserved almost exclusively to military jet aircraft. This raised the possibility of collisions between military and civil aircraft and the Council of ICAO recommended that close connections be established and maintained between civil and military air traffic control authorities. The Council did not however determine the methods by which this cooperation would be achieved by the States.

Field suggests three models:[240]

(1) Total Integration

A single unified service provides Air Traffic Services to all aircraft irrespective of the operation authority of the aircraft concerned;

(240) *Supra*, n. 2.

(2) Partial Integration

The organization is composed of staff belonging to both civil and military services and Air Traffic Services are provided jointly by both authorities.

(3) Procedural Coordination

Air Traffic Services are provided separately by the civil and military authorities and cooperation exists entirely through coordination procedures.

He cites as an example of total integration the United States where a single authority, the FAA, provides air traffic services to both civil and military users, and the United Kingdom as an example of partial integration which works as well: the services are provided jointly and coordinated by the National Air Traffic Service.

Whatever the system may be in a particular country, several questions arise:

- if an accident occurs while the plane was controlled by a civilian controller, should we allow claims when only a military plane is involved?

- if the plane was controlled by military ATC, and again, only military planes were involved in the accident, should that fall within the scope of the convention?

- conversely, what of a civilian plane crashing while under military ATC control?

The Subcommittee proposed in 1964 that military or civil ATC directing military aircraft should not be included but that military ATC directing civil aircraft should. In other words, as soon as a civil aircraft is involved, the convention would apply. They recognized that this might raise problems for those States where military personnel enjoy certain immunities.

This opinion is shared by IFATCA who has adopted the following policy: they would like to see military authorities and controllers subjected to the same legislation either when they are controlling general air traffic or when an accident occurs involving general air traffic (civil) and operational air traffic (military).[241]

The following decision seems to indicate that courts will rule according to these principles. In July 1980, the Administrative Tribunal of Nantes (France) had to decide on the liability of the parties in the mid-air collision of two Spanish aircraft in French airspace. At the time of the accident, both planes were under positive control of French military air traffic controllers, operating from their own installations and substituting for civilian controllers who had been on strike for a week. The Tribunal found the

(241) IFATCA '77, WP-59, dated March 8, 1977.

controllers 85% liable on various grounds: failure to maintain proper separation between two converging aircraft, inadequate radar and telephone equipment which had delayed transfer of the aircraft between two control centers, insufficient training of military controllers, etc. The remaining 15% was attributed to the pilot of one of the aircraft for lack of vigilance and failure to react which, according to the court, contributed to a certain extent to the accident. Two years later, following an appeal to the Conseil d'Etat, the decision was reversed and the French government sentenced to pay the full amount of damages in consequence of the "faute lourde" of the controllers; the Conseil d'Etat found no fault attributable to the pilot.[242]

It might be pointed out that there is a French regulation allowing for military controllers to provide services in case of strike of regular employees. So, had the question come up, if might have been resolved with other legal arguments, such as the civil law theory of "temporary employer" ("le patron momentané"). Nevertheless, it provides a good illustration of the liability of military ATC when civilian traffic is involved.

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(242) Tribunal Administratif de Nantes, July 1980; Conseil d'Etat, judgment rendered July 1982.

In the Argentine Draft Convention "military, customs, police and other State aircraft exercising public functions"[243] would be equally subjected to the Convention. Unfortunately, it allows for a reservation which is in my opinion far too broad:[244] States may reserve the right to exclude the liability of its ATC agencies for damages caused by:

> A. all or specific classes of State aircraft of other Contracting States;
>
> B. the State aircraft of the Contracting State itself.

Permitting that kind of reservation would result in too many different combinations, specially when it comes to military traffic, and diminishes the efficiency of the convention. If, as we have seen previously, our goal is uniformity, such reservations are not conducive to it.

Larsen also believes that all military ATC provided to civilians should be included within the scope of the Convention.[245] Otherwise, he says, it would be easy for certain countries to exempt their entire ATC system from liability. He would also include military aircraft which follow ICAO requirements, as is now the case in countries belonging to the EUROCONTROL organization.

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(243) Art. 5(a).
(244) Art. 42(3).
(245) Larsen, *supra*, n. 237, at 57.

This is as far as one can realistically go at present; complete equality of treatment between military and civil systems, although desirable, will not be attained, for obvious reasons. However, it is of paramount importance for the safety of both, since they use the same airspace, that differences be reduced to a minimum. One must also remember that military aircraft have been expressly kept out of the Chicago Convention and those which follow ICAO standards and recommended practices do so on a voluntary basis. [246]

The Chicago Convention also excludes customs, police and other State aircraft but there seems to be no logical reason to do the same in a Convention dealing with ATC liability when the State aircraft was operating under ICAO rules, flying in controlled airspace and using the same ATC and airport facilities as general traffic. If the negligent act or omission of the ATC of a country is found to be the cause of an accident involving a State aircraft of another country, the latter should be entitled to recovery.

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(246) Art. 3: Civil and state aircraft

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

(d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

4.2.1.3 International Elements which would make the Convention Applicable

What criteria would make the flight an international one for the purposes of an ATC convention? The 1964 Subcommittee report discussed several of them:

(1) the flight plan;

(2) the documents of carriage;

(3) the nationality or domicile of the person suffering the damage if such nationality or domicile were different from that of the air traffic control agency;

(4) the registration of the aircraft;

(5) the place where the ATC agency performed its functions;

(6) the place where the damages occurred.

The first two were rejected because these documents are written by third parties and their accuracy is outside the control of ATC services; the third one was judged unpractical. Registration of the aircraft was considered to be more suitable; as to the last ones, each could be used only in combination with at least one of the others.

IFATCA's Draft Convention does not deal with this question since it recommends that its provisions apply to both domestic and international carriage.

The best solution can be found in article 3(1) of Argentina's Preliminary Draft which stipulates that the convention shall apply in the following circumstances:

> (a) When an aircraft performs an international flight and is within the territory of a Contracting State other than the country of its flag and under the control of an ATCA of that other State or of another Contracting State;
>
> (b) When an aircraft performs an international flight and is within the territory of a Contracting State other than the country of its flag, but under control of an ATCA of its own country, and has caused damage in the other Contracting State;
>
> (c) When an aircraft makes an international flight and is within the territory of a Non-Contracting State, under the control of an ATCA of a Contracting State other than that of its flag;
>
> (d) When an aircraft makes a flight between two points of the country of its flag but under the control of an ATCA of another Contracting State.

4.2.1.4 Regional Organizations

The commitment State have undertaken to provide standardized navigation facilities on their territory has laid a heavy financial burden on some of them; the costs of sophisticated electronic equipment and salaries of trained specialized personnel kept rising and could not entirely be recovered through the imposition of user's charges. This eventually led groups of neighbouring States to set up regional agencies for the collective provision of these services.

Reasons other than economic have also motivated the creation of these agencies, at least in Europe and in Central America. One author sees two categories: technical necessities and the limits and geographic situation of the national territory of some States.[247] The first arose from the transition from piston engine and turboprop to jet aircraft. Their higher speed and altitude and the huge increase in traffic that they generated soon created new problems for air traffic controllers. These problems were compounded by the territorial situation of countries in these particular regions of the world: some could be now be crossed in a matter of minutes with the new aircraft which implied rapid an unnecesary transfers from one en route ATC centre to another. A more rational and efficient arrangement had to be found.

There are now three jointly operated air traffic agencies: ASECNA, COCESNA and EUROCONTROL.

ASECNA (Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar) provides facilities and services to eleven African States and to Madagascar. Its Statutes and Agreement, generally referred to as the Dakar Convention, were signed on the 12th of December, 1959.[248]

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(247) Bosseler, C., "International Problems of Air Traffic Control and Possible Solutions", 34 J. Air L. & Com. 467, 1968, at 468.
(248) Tékou, T., "L'Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar (ASECNA)", Unpublished thesis, McGill, 1982.

COCESNA (Central American Corporation for Air Navigation Services) groups five States from Central America also with the purpose of providing services to increase the reliability and efficiency of their international air navigation. The COCESNA Agreement was signed at Tegucigalpa, Honduras, on the 26th of February, 1960.[249]

EUROCONTROL was established by the International Convention relating to Cooperation for the Safety of Air Navigation, signed on the 13th of December 1960 at Brussels, to provide ATC services to six Western European States. (It has now eight Members and three Associate Members). The basic difference between EUROCONTROL and the other two agencies was that its mandate was limited to the upper airspace of the participating States.[250] Another was that its initial mandate was limited to twenty years after which it had to be revised. Accordingly, the Protocol amending the EUROCONTROL Convention was adopted in November 1980 and signed in February 1981; it modified extensively the role of EUROCONTROL which will now confine itself to planning and policy-making activities rather than the provision of services.

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(249) Vallejo, A., "The Central American Air Navigation Services Corporation (COCESNA)", Unpublished thesis, McGill, 1978.
(250) Huner, J., "Responsibility of States for the Provision of Air Traffic Control Service: The Eurocontrol Experiment", Unpublished thesis, McGill, 1977.

The creation of these agencies has involved no transfer of sovereignty of the airspace over the territory of their Members: the responsibility for providing ATC services has simply been delegated to them. Neither of them enjoys supra-national powers; they possess no rule-making authority and only apply the regulations in force in the country whose airspace they manage.

The question of their non-contractual liability and whether or not they should be included in a convention on the liability of air traffic control agencies was raised early in ICAO. It was suggested that leaving them out would create conflicts between regimes of liability: on the other hand, their inclusion posed a highly complex problem.

For the time being, each regional organization deals with its liability in a different manner.

ASECNA:

The ASECNA Convention differentiates between two types of damages: those resulting from the air traffic services operations themselves and those caused by the lack of maintenance of its buildings and facilities. Article 13 of the Cahier des Charges requires the Agency to contract insurance in a sufficient amount to cover the risks of legal proceedings by third parties with respect to the first type. When its

international activities are involved in a suit, the Agency may implead everyone of its Member States; for a national activity, it may implead the State on whose territory the accident happened. Article 17 deals with the second type of damage and stipulates that the Agency itself will be liable for them; however, it allows for recourse actions against whoever personally caused them.

COCESNA:

The COCESNA Convention, in its article 5, also states that the Corporation must acquire insurance against third party liability and against damages to installations used for its operations.

Although neither of these provisions from the ASECNA and the COCESNA Conventions expressly mentions any principle of liability, they have been interpreted as including liability for negligence.[251]

EUROCONTROL:

The EUROCONTROL Convention is more explicit; article 25, paragraph 2 states that "the Organization shall make reparation for damage caused by the negligence of its organs, or of its servants in the scope of their employment, in so far as that damage can be attributed to them". The

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(251) *Supra*, n. 247, at 471. Also Magdelénat, J.L., "Règlementations internationales actuelles en matière de responsabilité des services de contrôle de la navigation aérienne", 3 Rev. Franc. Dr. Aérien 266, 1982, at 273.

second sentence adds that this "shall not preclude the right to other compensation under the national law of the Contracting Parties".

To summarize, all three Conventions have a system of liability based on the notions of fault and unlimited liability.

Article 6(2) of the Argentine Draft Convention proposes that the regime of liability set forth in the Convention also apply to ATC agencies "formed by various countries or by agencies authorized by various countries". It does not make any suggestion as to the modalities through which this should be achieved. Larsen points out that since they are not supranational, their inclusion would not have the effect of binding their Member States. He suggests two ways of doing it:[252]

a) either amend the international organization conventions so as to permit them to sign a special convention on their liability;

b) or, each Member State can agree that its signature will bind both himself and the organization to which he belongs.

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(252) *Supra*, n. 237, at 58.

4.2.2 System of Liability

4.2.2.1 Fault Liability

With very few exceptions, national laws allowing for the State to be sued for the negligent acts or omissions of its employees are based upon a proof of fault system. Analysis of the answers given to ICAO questionnaires also shows that an overwhelming majority of States wanted a proof of fault system in a new convention on ATC liability in 1964 and had maintained that opinion in 1980.[253] All three international regional organizations, EUROCONTROL, ASECNA and COCESNA have also adopted a proof of fault system in their respective conventions.

Argentina's Preliminary Draft is also based on the fault of the officials, employees or agents of the ATC agencies, but with a presumption of fault when the damage arose from failure of the electronic equipment or when the State, for reasons of national defence or other reasons, refuses to make documentary evidence available.

IFATCA's statement of policy goes further: for a controller to be held liable in a civil suit, it wants that fault be proven "beyond all reasonable doubt", a degree of proof normally reserved for criminal offences.

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(253) See answers to 1964 and 1980 Questionnaires in Appendix B and C.

The choice of a system of liability must reflect a careful balancing of the interests involved. In this case, we must protect the victim's right to recovery but we must also avoid imposing an excessive financial burden on the controller as an individual, or on his employer, where it would ultimately be passed along to the taxpayer.

A proof of fault system tips the scales considerably in favour of the defendant, specially if it is associated with limits of liability. It is therefore not surprising that States favour it so strongly for an ATC Convention. Having just recently, and in several cases only partially, renounced the benefits of sovereign immunity, they are understandably reluctant to let the pendulum swing too far the other way. One author enumerates the advantages of the proof of fault system as follows:[254] (1) it allows the greatest number of defences, v.g. no causal relationship between the ATC's act or omission and the damage, contributory negligence of plaintiff, force majeure, plaintiff's waiver of liability or his assumption of the risk; (2) the difficulty of proving fault will make recourses under other conventions more attractive, even when the amount of recovery might be lower because of limitations, thus keeping the number of actions against governments lower.

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(254) Larsen, Paul B., "Air Traffic Control: A Recommendation for a Proof of Fault System without a Limitation on Liability", 32 J. Air L. & Com. 3, 1966, at 9.

It is submitted however that a proof of fault system would create problems which might well outweigh its advantages in ATC litigation. First, we doubt that it would reduce sensibly the number of potential suits. The rapidity and efficiency of accident investigation methods and procedures are constantly improving and the cause of accident can in most cases be established accurately. When *prima facie* evidence points to ATC services, they will be exposed to suits, if not always directly, at least through third-party proceedings or recourse action of the carrier who has had to pay the damages. Then, plaintiff's attempts to prove fault could be very unpleasant for the ATC employee who will se his whole conduct and previous record put before the court.

There are also other disadvantages related to a proof of fault system. First, it forces the court to decide on very complex questions of choice and conflicts of laws. Secondly, the difficulty for a lawyer to present a case in a field that is so technically intricate and for the judge to understand it offers no guarantee that the outcome will be fully equitable for the parties. Thirdly, a proof of fault system, in addition to greatly increasing delays and costs for both sides, invariably leaves a small percentage of the victims without compensation for their injuries.

Moreover, it will always remain extremely difficult to define the exact nature and scope of ATC duties and the standard of care to apply to them is bound to change constantly, following developments in aeronautical engineering and ATC technology. To leave its definition to the courts of each country through a proof of fault system would certainly not afford the best protection to either ATC employees or to their employers.

It has been assumed from the beginning of ICAO's work on the liability of ATC agencies that opting for a proof of fault system would allow for the adoption of a much broader definition of ATC services to be included within the scope of a convention. There is some merit in this opinion: the farther one gets from the chain of persons directly involved with the flight, the harder it becomes to determine their contribution to its safety.

4.2.2.2 Strict Liability

Fault and negligence are relatively new comcepts in common law; they were introduced during the nineteenth century when society deemed necessary to protect the interests of emerging commerce and industry. Fault was also thought to be a more moral standard: early common law imposed liability simply by looking for the cause of damage, disregarding the conduct of the defendant.

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(255) Fleming, John G., The Law of Torts, 6th ed., at 300.

At the beginning of the twentieth century, when work toward the elaboration of the Warsaw Convention began, the fault principle was firmly embedded into the common law. On the contrary, in civil law countries, public carriers were subjected to an "obligation of result", a concept which is closer to strict liability.[256] U.S.S.R. and other socialist countries already had a system of strict liability of the operator for all damages caused by the operation of the aircraft.

Liability for fault was chosen for the Warsaw Convention: the desire to protect an industry still in its infancy and the opinion that the passenger, once he had elected to board an airplane rather than a train, had assumed the risks inherent to this mode of travel, were the prevailing arguments for this choice. Presumption of fault was adopted as a compromise between the two main legal systems and as a *quid pro quo* for the low limits of liability.

Over the past decades, tort liability had been moving away from the fault principle towards strict liability in several areas of general law involving accidental injuries, v.g. car accidents, workmen's compensation, products liability.

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(256) Senkiko-Kasara, Pauline., "The Trend from Fault Liability to Strict Liability in Private International Air Law and its Relationship to Developments in the Law of Torts", Unpublished thesis, McGill, 1978.

This trend was also reflected in private air law when, in 1966, the Montreal Interim Agreement was accepted by a number of airlines; it was pursued in 1971, when the Guatemala City Protocol replaced the liability for fault rule of Warsaw by the rule of strict liability.[257] The carriers were ready to accept the change; many of them already operated under a regime of strict liability for their domestic carriage, insurance was widely available and the industry's record of safety was good enough to withstand a no-fault system. Many felt also that because of the difficulty of exonerating themselves through the defence of "all necessary measures" and the liberal use that the courts of the United States allowed of the rule of *res ipsa loquitur*, Warsaw had become a *de facto* strict liability convention.

The Guatemala City Protocol has not yet entered into force; this has more to do, as we know, with the controversy surrounding the amounts of limits than with the principle of strict liability itself which was fully accepted by governments and carriers. In this context, a convention based on proof of fault for ATC agencies represents a step backwards from what is becoming the generally accepted norm in international aviation.

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(257) Art. IV, replacing art. 17 of the Warsaw Convention.

A system of strict liability offers several practical advantages.[258] It ends uncertainty over choice of law and in this way can contribute to the formulation of a more uniform and reliable standard of care for ATC employees. It eliminates difficulty of proof, thereby making recovery less dependent on the lawyers' ability to present the facts and the judge's comprehension of them. It solves the problem of attributing liability for accidents caused by the failure of computerized equipment. Associated with unbreakable limits, set at reasonable amounts, it also curtails litigation and favours out-of-court settlements, reducing costs and delays in the payment of indemnities. In addition to saving time, inconvenience and mental anguish to all concerned, it ensures that more of the money goes to the victim and that all victims get compensated.

From a policy point of view, strict liability spreads economic losses over all of society instead of on individuals; with the introduction of limits and the excellent safety record of the industry, the burden would not be an intolerable one for the taxpayer. Anyway, the uncompensated victim of ATC negligence will presumably end up being supported by society.

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(258) Stern, Peter., "Domestic Commercial Tort Litigation: A Proposal for Absolute Liability of the Carriers", 23 Stan. L. Rev. 569. 1971, at 578.

Evidently, these limits will not be sufficient to cover extensive damages or loss of the aircraft which can easily run to millions of dollars; this problem requires different solutions, one of them being adequate insurance schemes.

Theoretical arguments may also be added: if we want international regulation of ATC liability in order to attain a higher degree of uniformity in air law, and if our ultimate goal is to consolidate all the rules of liability in private air law into a single instrument, then opting for the same system as we have already chosen for the carrier in the Guatemala City Protocol is more logical. It is also more consonant with the realities of modern aviation: if the safety of the aircraft is now the concurrent and reciprocal duty of both pilot and controller, both should share the liability equally.

4.2.2.3 Limited v. Unlimited Liability

Much has been written in support or against limiting liability in private air law, a review of which would fall outside the scope of this study.[259] Even if one were against them, the fact that every international private air law

(259) Tobolewski, A., "Monetary Limitations of Liability in International Private Air Law", Unpublished D.C.L. thesis, McGill, 1981.

convention, protocol or agreement carry limits would make that position unrealistic when discussing a new convention on ATC liability.

Some of the reasons given to justify their adoption are more or less relevant today[260] but some retain their validity, such as better loss distribution and spreading of risks, quicker settlements and, more importantly, the *quid pro quo* to an aggravated system of liability, which was the deciding argument during the negociations of the Guatemala City Protocol.

Since the beginning of ICAO's work on ATC liability, States have stressed their preference for a proof of fault system accompanied by limits. Such a convention would be entirely to the benefit of governments. For the claimant, the burden of proof remains the same as under most existing national legislation; however, should he succeed, he stands

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(260) The classic list of these reasons can be found in Drion, H., Limitation of Liabilities in International Air Law, The Hague, 1954:

"1. analogy with maritime law with its global limitation of the shipowner's liability;
2. necessary protection of a financially weak industry;
3. catastrophical risks should not be borne by aviation alone;
4. necessity of the carrier's or operator's being able to insure against these risks;
5. possibility for the potential claimants to take insurance themselves;
6. limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator (*quid pro quo*);
7. avoidance of litifation by facilitating quick settlements;
8. unification of the law with respect to the amount of damages to be paid.

to receive less than full compensation. The ATC employee, while still exposed to a lengthy and painful trial, gets no protection against recourse actions or claims for the unpaid amount of damages. The carrier, even if the results of the accident investigation point to ATC, will not see the amount of direct claims filed against him sensibly diminished since it will remain easier for the victim to proceed in this way.

Argentina's Draft Convention proposes that limits be set according to existing air law conventions; that is, for passengers, baggage and cargo, those of the Warsaw Convention. Those limits are notoriously low and have aroused endless controversy over the years; their adoption would ruin any chance the convention would have of being ratified by several important countries.

A convention providing for strict liability, with limits similar to those set forth for the carrier in Guatemala, indexed whenever those are indexed, with the possibility for each country to supplement them if they wish to do so, appears to be a more viable alternative. The amounts of recovery should be unbreakable and non-cumulative, without possibility for the victims to claim the unpaid balance of their damages either from the carrier or the ATC employee personally.

Limits are, by definition, arbitrary and sometimes unfair; so is the imposition of strict liability. It is however the most rapid and efficient way to secure equitable relief for the injured victims without taxing too heavily the aviation industry and the governments; it is therefore better adapted to the social and economic requirements of our times.

CONCLUSION

This work has presented a broad review of the questions related to the liability of air traffic control agencies and of the reasons which might induce us to regulate it at the international level. Some important problems have been deliberately left out because their complexity would have led us far outside the scope of this study. The whole matter of jurisdiction is one such problem: since ATC liability involved the liability of the State in most instances, it cannot be discussed without going into the intricacies of foreign sovereign immunity. The focus has also been kept on the liability of the State as employer rather than on the individual ATC employee. We have avoided discussing recourse actions and administrative or disciplinary sanctions which could be taken against him by his employer. Since those who are most affected by the present uncertainty of the law are ATC personnel, that aspect of the question deserves a study in itself.

Other problems of lesser importance have been left out because a solution for them can easily be adapted from other air law comventions: types of damages to be compensated, procedural matters, list of persons entitled to recovery in case of death, etc.

It is obvious however that the most important question and also the most difficult remains the definition of the exact nature and scope of the duties of these agencies. Each of the services described in Annex 11 must be first studied separately; then, the problem of their coordination and of their relationship with the pilot must be examined. If we fail to do this, definitions will be provided by the courts, whose competence to supply them can be questioned.

Whether or not a new international convention dealing exclusively with ATC liability is the best means to achieve this result is not proven. Other possibilities which have been suggested deserve further study: amendments to Annexes, amendments to existing conventions, new convention dealing with both aerial collisions and ATC liability.

If we opt for a convention, we must look not only at its chances of being ratified but also at its future usefulness; both rest largely on the system of liability and the amounts of limits we choose for it. A convention based on a proof of fault system and on Warsaw limits, as has been recommended, would probably attract a large number of ratifications since it is advantageous to most States. However, it is likely to result in as many attempts to break these limits and produce the same confusing and illogical jurisprudence that the Warsaw convention has known. That such

low limits would be accepted by the more advanced countries is also doubtful. Strict liability, with the Guatemala limits, seems a more equitable arrangement for all concerned; but the fate of such a convention would be automatically linked to that of the the Guatemala City Protocol, which, for all its merits, has not yet entered into force. In any event, we are faced with the dilemma that any limit set at an amount lower than the carrier's will make a convention on ATC pointless but higher limits will shift claims from the carrier to the ATC agencies.

It should be strongly recommended that any form of agreement State might adopt toward the international regulation of the liability of ATC agencies be also applied to their domestic carriage so as to avoid the creation of another parallel system.

And, more important than the desire for uniform legal rules and the attempts to secure adequate protection for all participants should be the commitment of States to achieve the highest degree of safety in civil aviation. Any decision concerning the regulation of ATC agencies has to be taken with prevention uppermost in mind.

LIST OF CASES

UNITED STATES

Allegheny Airlines Inc. v. United States, 420 F. Supp. 1339 (S.D. Ind. 1976)

Allen v. United States, 370 F. Supp. 992 (E.D. Mo. 1973)

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

Baker v. United States, 417 F. Supp. 490 (W.D. Wash. 1975)

Black v. United States, 303 F. Supp. 1249 (N.D. Tex. 1969), rev'd on other grounds 441 F.2d 741 (1971), cert. denied 404 U.S. 913 (1972)

Bright v. United States, 149 F. Supp 620 (E.D. Ill. 1956)

Brock v. United States, 14 AVI 18246 (E.D. Va 1977)

Cattaro v. Northwest Airlines Inc., 236 F. Supp. 889 (E.D. Va 1964)

Coatney v. Berkshire, 500 F.2d 290 (8th Cir. 1974)

Colorado Flying Academy Inc. v. United States, 506 F. Supp. 1221 (D. Colo. 1981)

Dalehite v. United States, 346 U.S. 15 (1953) 74 S.Ct. 956

Dahlstrom v. United States, 228 F.2d 819 (8th Cir. 1956)

Deal v. United States, 413 F.Supp. 630 (W.D. Ark. 1976)

Delta Air Lines Inc. v. United States, 561 F.2d 381 (1st Cir. 1977), cert denied 434 U.S. 1064 (1978)

DeVere v. True Flite Inc., 268 F. Supp. 226 (E.D. N.Ca 1967)

Dickens v. United States, 545 F.2d 886 (5th Cir. 1977)

Eastern Air Lines Inc. v. Union Trust Co., 221 F.2d 62 (D.C. 1955)

Fair v. United States, 234 F.2d 288 (5th Cir. 1956)

Felder v. United States, 543 F.2d 657 (9th Cir. 1976)

Finfera v. Thomas, 1 AVI 949 (C.A. 6th Cir. 1941)

Foss v. United States, 623 F.2d 104 (9th Cir. 1980)

Franklin v. United States, 342 F.2d 581 (7th Cir. 1965)

Freeman v. United States, 509 F.2d 626 (6th Cir. 1975)

Furumizo v. United States, 381 F.2d 965 (9th Cir. 1967)

Gibbs v. United States, 251 F. Supp. 391 (E.D. Tenn. 1965)

Gill v. United States, 429 F.2d 1072 (5th Cir. 1970)

Hamilton v. United States, 498 F.2d 370 (9th Cir. 1974)

Harris v. United States, 333 F. Supp. 870 (N.D. Tex. 1971)

Hartz v. United States, 387 F.2d 870 (5th Cir. 1968)

Hennessey v. United States, 12 AVI 17410 (N.D. Cal. 1971)

Hochrein v. United States, 238 F. Supp. 317 (E.D. Pa 1965)

Indian Towing v. United States, 350 U.S. 15 (1953) 76 S.Ct 122)

Ingham v. Eastern Air Lines Inc., 373 F.2d 227 (2nd Cir. 1967), cert. denied 389 U.S. 931 (1967)

In re Air Crash Disaster at Moisant Field at New Orleans v. United States, 544 F.2d 270 (6th Cir. 1976)

Jenrette v. United States, 14 AVI 17798 (C.D. Cal. 1977)

Johnson v. United States, 183 F. Supp. 489 (E.D. Mich. 1960), aff'd 295 F.2d 509 (6th Cir. 1961)

Kiester v. United States, 18 AVI 17101 (S.D. Fla 1983)

King v. United States, 178 F.2d 320 (5th Cir. 1950)

Kullberg v. United States, 271 F. Supp. 788 (W.D. Pa 1964)

Lightenburger v. United States, 460 F.2d 391 (9th Cir. 1972)

Marino v. United States, 84 F. Supp. 721 (E.D.N.Y. 1949)

Martens v. United States, 5 AVI 17465 (S.Cal. 1957)

Mattschei v. United States, 600 F.2d 205 (9th Cir. 1979).

Mitchelmore v. United States, 299 F. Supp. 1116 (D.C.Cal. 1969)

Miller v. United States, 522 F.2d 386 (6th Cir. 1975)

Miller v. United States, 587 F.2d 994 (9th Cir. 1978)

Moloney v. United States, 354 F. Supp. 480 (S.D.N.Y. 1972)

Neal v. United States, 562 F.2d 338 (5th Cir. 1977)

Neff v. United States, 420 F.2d 115 (D.C. Cir. 1968), cert. denied 397 U.S. 1066 (1968)

New York Airways Inc. v. United States, 283 F.2d 496 (2nd Cir. 1960)

Penny v. United States, 12 AVI 17919 (S.D. Ohio 1973)

Reidinger v. TransWorld Airlines Inc., 329 F. Supp. 487 (E.D. Ky 1971), rev'd on other grounds 463 F.2d 1017 (6th Cir. 1972)

Richards v. United States, 369 U.S. 1, 82 S. Ct 585 (1962)

Rudelson v. United States, 602 F.2d 1326 (9th Cir. 1979)

Sawyer v. United States, 297 F. Supp. 324 (E.D.N.Y. 1969)

Schultetus v. United States, 277 F.2d 322 (5th Cir. 1960)

Smerdon v. United States, 135 F. Supp. 929 (D. Mass. 1955)

Somlo v. United States, 274 F. Supp. 827 (N.D. Ill. 1967). aff'd 416 F.2d 640 (7th Cir. 1969), cert. denied 397 U.S. 989 (1970)

Spaulding v. United States, 455 F.2d 222 (9th Cir. 1972)

Stanley v. United States, 239 F. Supp. 973 (N.D. Ohio 1965)

State of Maryland v. United States, 257 F. Supp. 768 (D.C. 1966)

Stork v. United States, 430 F.2d 1104 (9th Cir. 1970)

Stratmore v. United States, 206 F. Supp. 665 (D. N.J. 1962)

Teicher v. United States, 15 AVI 17539 (C.D. Cal. 1978)

Thibodeaux v. United States, 14 AVI 17653 (E.D. Tex. 1976), aff'd (unreported) (5th Cir. 1978)

Thingulstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972)

Tilley v. United States, 375 F.2d 678 (4th Cir. 1967)

Todd v. United States, 384 F. Supp. 1284 (M.D. Fla 1975)

United Air Lines Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), cert. denied 379 U.S. 951 (1964)

United States v. Neustadt, 366 U.S. 696 (4th Cir. 1961)

United States v. Miller, 303 F.2d 703 (9th Cir. 1962), cert. denied 371 U.S. 955 (1963)

Universal Aviation Underwriters v. United States, 496 F. Supp. 639 (D. Colo. 1980)

Wasilko v. United States, 300 F. Supp. 543 (N.D. Ohio 1967), aff'd 412 F. 2d 859 (6th Cir. 1969)

Wenninger v. United States, 234 F. Supp. 499 (D. Del. 1964) 352 F.2d 523 (3rd Cir. 1965)

Wenzel v. United States, 291 F. Supp. 978 (D. N.J. 1968). aff'd 419 F.2d 260 (3rd Cir. 1969)

White v. TransWorld Airlines Inc., 320 F. Supp. 655 (S.D. N.Y. 1970)

Wright v. United States, 568 F.2d 153 (10th Cir. 1978), cert. denied 439 U.S., 99 S. Ct. 94 (1978)

CANADA

Bensol Customs Brokers Ltd. v. Air Canada, (1979) 2 C.F. 575

Churchill Falls Corporation v. The Queen, 13 AVI 18442 (Fed. Court of Canada, Trial Div. 1974)

Galer v. Wings Ltd., (1939) 1 D.L.R. 13

Grossman v. The King, 3 AVI 17472 (Exchequer Court 1950)

Magda v. The Queen, (1953) Ex. C.R. 22, aff'd (1964) S.C.R. 72

Pacific Western Airlines Ltd v. The Queen, (1979) 2 F.C. 476

Regent Taxi and Transport Ltd. v. Co. des Petits Frères de Marie, (1928) 46 B.R. 96; (1929) R.C.S. 650; (1932) 53 B.R. 157

Secton v. Boak, 12 AVI 17851 (B.C. Supreme Court 1972)

AUSTRALIA

Australian National Airlines Commission v. The Commonwealth of Australia and Canadian Pacific Airlines, (1975) High Court

Nichols v. Simmonds, (1975) W.A.R. 1 (Supreme Court of Western Australia)

Trans Oceanic Airways Ltd. v. The Commonwealth of Australia, High Court, 1956 (unreported)

BIBLIOGRAPHY

BOOKS AND ARTICLES

ABEL, A.S., Laskin's Canadian Constitutional Law, 4th ed., Toronto (1973)

AVGOUSTIS, A., "Hijacking and the Controller", 3 Air Law 91 (1978)

AVGOUSTIS, A., "The Controller's Legal Liability", The Controller, Vol. 14, No. 4, 19 (1975)

BACELLI, G.R., La collaboration internationale en matière aéroportuaire, Montreal (1979)

BARNES, L. & MACDONALD, W., "Search for the Legal Liability of Air Traffic Controllers", Transportation Law Journal, 187 (1970)

BARRA, B., "ATC:Need for an Improved Legal Protection", The Controller, Vol. 21, No. 2, 10 (1983)

BEAUDOIN, J.L., La responsabilité civile délictuelle, Montreal (1973)

BEDARD, C., "Le système de Varsovie: complexités, flexibilité", Annals of Air and Space Law, McGill, Vol. II, 3 (1977)

BHATT, S., "Responsibility in International Air Law: Some Aspects of the Problem of Air Traffic", 8 Indian Journal of Int. Law, 413 (1968)

BHATT, S., "Safety in Air - Recent Developments"., 14 Indian Journal of Int. Law, 386 (1974)

BLAKELEY, B., "Discretion and the FAA: An Overview of the Applicability of the Discretionary Function Exception of the Federal Tort Claims Act to FAA Activity", 49 J. Air L. & Com. 143 (1983)

BÖCKSTIEGEL, K.H., "Coordinating Aviation Liability", Annals of Air and Space Law, McGill, Vol. II, 15 (1977)

BÖCKSTIEGEL, K.H., "Some Recent Efforts for Fundamental Reconsideration of the International Aviation Liability System", Annals of Air and Space Law, McGill, Vol. V, 17 (1980)

BOOTH, I.J., "Governmental Liability for Aviation Accidents caused by Air Traffic Control Negligence"., 1 Air Law 161 (1976)

BOOTSMA, R., "International Aspects of Air Traffic Control Liability"., The Controller, Vol. 22, No. 1, 3 (1983) (Part I); The Controller, Vol. 22, No. 2, 5 (1983) (Part II); The Controller, Vol. 22, No. 3, 12 (1983) (Part III); The Controller, Vol. 22, No. 4, 5 (1983) (Part IV)

BORINS, S.F., The Language of the Skies, Kingston & Montreal (1983)

BOSSELER, C., "International Problems of Air Traffic Control and Possible Solutions", 34 J. Air L. & Com. 467 (1968)

BRYDGES, L.W. & FAGAN, P.T., "The Federal Tort Claims Act as it relates to Aviation Accidents"., Insurance Counsel Journal 48 (1981)

Comment, "The Federal Tort Claims Act", 56 Yale L. J. 534 (1947)

Control Zone Accidents - Allocation of Liability Between Air Carrier and Control Tower, 23 J. Air L. & Com. 239 (1956)

COTELLESSE, D.P., Notes, 49 Texas Law Review 406 (19)

DRION, H., Limitation of Liabilities in International Air Law, The Hague (1954)

EARLY, S.B., GARNER, W.S., RUEGSEGGER, M.C., SCHIFF, S.S., "The Expanding Liability of Air Traffic Controllers", 39 J. Air L. & Com. 599 (1973)

EASTMAN, S.E., "Liability of the Ground Control Operator for Negligence"., 17 J. Air L. & Com. 170 (1950)

FIELD, A., The Control of Air Traffic, Eton, (1980)

FLEMING, J.G., The Law of Torts, 6th ed. (1983)

FLYNN, P.P., "Air Traffic Control - Technology and Law", Transportation Law Journal 249 (1970)

GARRETT, J.R., "Scope of the Discretionary Function Exception Under the Federal Tort Claims Act", 67 Geo. L.J. 879 (1979)

GOLDENGERG, H.C. The Law of Delicts, Montreal (1935)

GOLDWATER, S., "The Application of Provincial Law in Matters of Delictual and Quasi-Delictual Responsibility of the Crown", 12 Themis 173 (1962)

GROSSMAN, M.A., Case Notes, 41 J. Air L. & Com. 537 (1975)

GUERRERI, G., "Governmental Liability in the Operation of Airport Control Towers in the United States", Term paper, McGill (1960)

GUILLAUME, G., "L'unification internationale en matière de responsabilité dans le domaine de l'aviation civile", Nat'l Research Council Conference, Rome, May 26, 1983.

GUILLAUME, G., "La responsabilité des services de la circution aérienne en France", Annals of Air and Space Law, McGill, Vol. III, 133 (1978)

HATFIELD, C., "Problems of Representation of Air Traffic Controllers in Mid-Air Litigation", 48 J. Air L. & Com. 1 (1982)

HUNER, J., "Responsibility of States for the Provision of Air Traffic Control Service: The Eurocontrol Experiment", Unpublished Thesis, McGill, (1977)

IMMARIGEON, H., La responsabilité extra-contractuelle de la Couronne au Canada, Montreal (1965)

JOHNSON, D.T., "Instrument Flight Rules. The Liability of the Pilot", 44 J. Air L. & Com. 353 (1978)

KEENAN, J.T., Case Law & Comments, 42 J. Air L. & Com. 28 (1975)

KEHRBERGER, P.H., "The German ATC Go-slow Action", 3 Air Law 175 (1978)

KREINDLER, L.S., "The Responsibility of Air Traffic Control Facilities", 13 N.Y. L. Forum 518 (1967)

LANE, E.M. & GARROW, D.B., "Canadian Procedural Law in Aviation Litigation", 46 J. Air L. & Com. 295 (1981)

LARSEN, P.B., "The Regulation of Air Traffic Control Liability by International Convention", Unpublished thesis, McGill (1965)

LARSEN, P.B., "Air Traffic Control: A Recommendation for a Proof of Fault System without a Limitation on Liability", 32 J. Air L. & Com. 3 (1966)

LEFLAR, R.A., American Conflicts Law, 3rd ed. (1977)

LEVY, S.J., "The Expanding Liability of the Government Air Traffic Controller", 36 Fordham L. Rev. 401 (1968)

LINDEN, A.M., Canadian Negligence Law, Toronto, (1974)

MACDONALD, S.A.F., From the Ground up, Ottawa, 23rd ed. (1983)

MAGDELENAT, J.L., "Réglementations internationales actuelles en matière de responsabilité des services de contrôle de la navigation aérienne", 3 Rev. Franc. Dr. Aérien 266 (1983)

MANKIEWICZ, R.H., "The ICAO Draft Convention on Aerial Collisions", 30 J. Air L. & Com. 375 (1964)

MANKIEWICZ, R.H., "A Galaxy of Unified Laws will Replace the Uniform Regime Created in 1929 in Warsaw, or the Death-Blow to the Uniform Regime of Liability in International Carriage by Air", 3 Air Law 157 (1976)

MARN, P., "Comparative Liability of Air Traffic Services", Unpublished thesis, McGill (1980)

MATTE, M.M., "Should the Warsaw System be Denounced or Integrated", Annals of Air and Space Law, McGill, Vol. V, 201 (1980)

MATTE, N.M., Treatise on Air-Aeronautical Law, McGill (1981)

McCLUSKEY, E., "Legal Liability of the Controller", The Controller, Vol. 19, No.1, 23 (1980) (Part I); The Controller, Vol. 19, No.2, 27 (1980) (Part II); The Controller, Vol. 19, No.3, 27 (1980) (Part III)

McGILCHRIST, N.R., "Air Traffic Control - The Operator's Liability", Lloyd's MCLQ 204 (1977)

NAGANO, I., "Liability in Operating Air Traffic Control and Conflict of Laws", Term paper, McGill (1962)

Note, 24 Vand. L. Rev 180 (1970)

OUELLETTE, Y., "La responsabilité extracontractuelle de l'Etat fédéral au Canada", unpublished doctoral thesis, Montreal (1965)

PEPIN, G. & OUELLETTE, Y., Principes de contentieux administratif, Montreal (1979)

PERUCCHI, H.A., "History of the draft Convention on Liability of Air Traffic Control Agencies", 8 Air Law 241 (1983)

PETERS, C.J., "Legal Responsibility of Government for Commercial Air Safety", 34 J. Air L. & Com. 479 (1968)

PROSSER, W.L., Law of Torts, 4th ed. (1971)

Recent Decisions, 33 J. Air L. & Com. 497 (1967)

Recent Cases, 24 Vand. L. Rev. 189 (1970)

REYNOLDS, O.M., "The Discretionary Function Exception of the Federal Tort Claims Act", 57 Geo. L.J. 81 (1968)

ROSEN, T.E., "The Federal Tort Claims Act: Discretion and the Air Traffic Controller", 38 J. Air L. & Com. 413 (1972)

RUTLEDGE, E.W., "Expanding Liability of Air Traffic Controllers for Aviation Accidents", 37 Alabama Lawyer 55; (1976)

SENKIKO-KASARA, P., "The Trend from Fault Liability to Strict Liability in Private International Air Law and its Relationship to Developments in the Law of Torts", Unpublished thesis, McGill (1978)

SHAWCROSS & BEAUMONT, On Air Law, 4th ed., London (1977)

SPEISER, S.M., "Update: Korean Air Lines Flight 007 Litigation", West's Int'l Law Bulletin, Vol. 2, No. 4, (1984)

STERN, P., "Domestic Commercial Tort Litigation: A Proposal for Absolute Liability of the Carriers", 23 Stan. L. Rev. 569 (1971)

TEKOU, T., "L'Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar (ASECNA)", Unpublished thesis, McGill (1982)

TIGERT, J.J., "Instrument Flying Rules (IFR) - The Liability of the Government", 44 J. Air L. & Com. 333 (1978)

TOBOLEWSKI, A., "Monetary Limitations of Liability in International Private Air Law", Unpublished D.C.L. thesis McGill (1981)

TRICK, D.A., "The Practical Problems of Approach and Landing Procedures from the Perspective of the Air Traffic Controller", 42 U. Air L. & Com. 47 (1976)

VALLEJO, A., "The Central American Air Navigation Services Corporation (COCESNA)", Unpublished thesis, McGill (1978)

WINN, J.T., "Government Liability - Air Traffic Controllers - Duty of Care". 33 J. Air Law & Com. 185 (1967)

WINN, J.T. & DOUGLASS, M.E., "Air Traffic Control: Hidden Danger in the Clear Blue Skies", 34 J. Air L. & Com. 255 (1968)

WRIGHT, W.B., The Federal Tort Claims Act, New York (1957)

ICAO DOCUMENTS

ICAO Doc. 7601-LC/138
ICAO Doc. 8137-LC/147-1
ICAO Doc. 8302-LC/150-1
ICAO Doc. 8392-LC/150-2
ICAO Doc. 8582-LC/153-1
ICAO Doc. 8582-LC/153-2
ICAO Doc. LC/SC/LATC-1
ICAO Doc. LC/SC/LATC-3 to 14
ICAO Doc. LC/SC/LATC-19
ICAO Doc. LC/SC/LATC-32
ICAO Doc. 8787-LC/156-1
ICAO Doc. 8787-LC/156-2
ICAO Doc. 9394-LC/184
ICAO Doc. 9397-LC/185
ICAO Doc. LC/25-WP/875-33
ICAO Doc. LC/25-WP/875-39
ICAO Doc. 9314-A23-LE
ICAO Doc. 9359-C/1066

IFATCA DOCUMENTS

IFATCA '76 - WP 31
IFATCA '77 - WP 34
IFATCA '77 - WP 59
IFATCA '79 - WP 62
IFATCA '85 - WP 66

APPENDIX A

THE 1963 QUESTIONNAIRE*

I. Body which provides ATC Services

What is the legal status of the bodies which, in your State, are in charge of air traffic control services:

A. Governmental

(a) Federal
(b) State (Provincial)
(c) Municipal

B. Private (e.g. operating on own behalf at a private airport, or operating under a contract with a public authority)

C. Mixed Government and Private

D. An International Agency

II. Legal Regime

1. Using the questions below as example, could you describe the legal regime in your State governing civil liability in respect of the operations of ATC agencies in relation to accidents to aircraft, passengers, crew and cargo, arising out of such operations?(1)

2. Is there any specific legislation applicable to the civil liability of an ATC agency in cases mentioned above?

3. To whom does liability attach, e.g., the ATC agency, its employee?

3.1 May claims be brought against the governmental body which may be in charge of ATC services in your State?

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(1) All succeeding questions relate to the liability contemplated in this question.

* ICAO Doc. LC/SC/LATC No.1

3.2 If the answer to question 3.1 is in the affirmative, may the claims be brought:

(a) without any restriction, i.e., on the same basis as if the claim were against a private person?

(b) with restrictions, and, if so, what restrictions?

4. Is liability based on

- contract?
- delict (tort)?

5. What are the defences available to the ATC agency?

6. Is there any limit to the amount of compensation that may be recovered?

7. Is there is such a limit, what is its amount?

8. If there is such a limit, are there any circumstances in which it may be exceeded?

9. Is there any security (e.g. insurance, security bond, bank deposit) required in respect of the liability of an ATC agency?

10. If so, what is the nature and amount of such security?

11. Are there any periods of limitation applicable to claims brought against ATC agencies?

12. Are there any restrictions in respect of the Courts in which suit may be brought against a Government authority operating an ATC agency?

13. In the case of a suit against a private individual or a private corporation brought in a particular court: is it always possible to join a government authority operating an ATC agency as a co-defendant in that court and vice-versa?

III. Other Comments

Have you any comments to furnish concerning other items related to the liability of air traffic control agencies and not dealt with above?

IV. Judicial Decisions

If actual cases have been decided by the Courts involving liability of an air traffic control agency in your State, kindly indicate in very brief form the basic facts, the legal principles applied and the decision given.

SYNOPSIS OF REPLIES TO 1963 QUESTIONNAIRE

(27 States)	Body which provides ATC			Legal Regime		Basis		System		
	Gov't	Private	Int. Org.	State Immunity	State Liability	Contract	Tort or Delict	Fault	Objective	Limits
Argentina	x				x					
Australia	x				x		x	x		
Belgium	x	x	x		x		x	x		
Brazil	x				x		x			
Canada	x	x			x		x	x		
Denmark	x				x		x	x		
Fed.Rep.Germany	x		x		x		x	x		
France	x		x		x		x	x		
India	x				x		x	x		
Italy	x				x		x	x		
Jamaica	x				x		x	x		
Japan	x				x		x	x		
Kenya			x		x		x	x		
Mexico	x	x			x		x	x		
Netherlands	x	x			x		x	x		
New-Zealand	x					x	x	x		
Philippines	x			x						
Poland	x				x		x	x		
S. Africa	x				x		x	x		
Spain	x				x				x	
Sweden	x			x						
Switzerland	x				x		x	x		
Tanganyika-Zanzibar			x		x		x	x		
Trinidad & Tob.	x			x[2]		x				
Un. Kingdon	x	x			x	x	x			
U. States	x				x		x	x		

(1) Private bodies were in small number and for private aerodromes only except for Mexico.

(2) Immunity in tort; suits allowed in contract.

APPENDIX B

THE 1964 QUESTIONNAIRE*

Question I:

What is the opinion of your government with regard to the question of establishing international rules on the liability of air traffic control agencies for damage caused by their activities?

Question II:

A. (1) Should such rules relate to the air traffic control services only?

(2) (a) Should the rules relate also to flight information services?

(b) Should the rules relate also to alerting services?

(c) Should the rules relate also to any other services?

B. Should criteria other than the kind of service, as contemplated in Question II A. above, be adopted for the purpose of application of such international rules and, if so, what criteria?

Question III:

A. Basis of liability if services are provided by a Government agency:

(a) only upon proof of fault
(b) presumed fault
(c) absolute liability

B. Should the basis of liability differ if the services are provided by a private person or an organization which is not a Government agency?

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* Circulated by letter LE 4/13-64/180, dated 16 November 1964.

Question IV:

(1) Should there be a limitation on the liability of air traffic control agency?

(2) Should there be different limits of liability (with respect to a Government agency) depending on the basis of liability?

(3) Will your answers be different if the agency is not a governmental one?

Question V:

If, at present, an agency performing air traffic control services in your country cannot be sued, could you indicate:

(a) whether measures could be taken (including any necessary changes in your laws) so that such agency could be sued?

(b) if so, should the liability of such agency be made subject to any special conditions?

SYNOPSIS OF REPLIES TO 1964 QUESTIONNAIRE[1]

(40)	Question I					Question IIA				Q. IIIA			Q.IV(1)		Q. V		
	In favour	No objection	No opinion	Support study	Opposed	ATC only	+ Flight info	+ Alerting services	All ATCA	Proof of fault	Presumed	Absolute	Limits	No limits	ATC can be sued now	considering changes	with conditions
Algeria	x						x	x	x	x			x				
Argentina				x			x	x	x	x	x		x		x		
Australia	x						x	x		x							
Austria	x						x	x		x				x	x		
Belgium	x					x				x			x		x		
Brazil	x						x	x		x			x		x		
Burma					x												
Canada					x	x			x	x				x	x		
Chile	x												x				
China		x				x				x			x		x		
Colombia	x						x	x	x	x			x		x		
Czechoslovakia	x						x			x			x		x		
F.R. Germany	x						x	x	x	x		x		x	x		
France			x														
Greece			x						x	x			x				
India	x					x				x			x				
Iraq		x					x	x		x			x			x	x
Ireland				x		x		x		x			x			x	
Japan	x					x				x				x	x		
Jordan					x												
Kenya[2]	x					x				x			x		x		
Korea					x		x	x		x			x			x	x
Laos	x																
Luxemburg	x						x	x	x	x			x				
Malagasy Rep.			x						x								
Mexico	x					x				x			x			x	
Netherlands					x				x	x			x				
Nigeria	x						x	x		x			x		x		
Philippines		x				x				x			x			x	x
Poland	x						x	x		x			x		x		

S. Africa	x					x				x	x		x		x				
Spain	x						x	x	x			x	x		x				
Sweden				x						x			x		x				
Switzerland	x						x	x	x	x	x	x		x	x				
Tanzania	x					x				x			x		x				
Tunisia	x									x			x		x				
Trinidad & T.	x					x				x			x		x		x		
U.A.R.	x					x				x			x		x				
Uganda	x					x				x			x		x				
U.K.				x			x	x	x	x			x		x				
U.S.	x						x	x	x	x				x	x				

(1) For a more detailed analysis, see ICAO Doc. 8787-LC/156-2, Appendix A.

(2) The answers of Kenya are also given on behalf of Tanzania and Uganda.

APPENDIX C

THE 1980 QUESTIONNAIRE*

1. What are the bodies governing in your country air traffic control services?

- Government? Central, local or municipal?
- Private corporation (certified by the Government and operating on behalf of the Government, or operating privately)?
- An international agency?
- Any other agency?

2. Has your country adopted a specific legislation regarding the liability of air traffic control agencies?

3. If the answer to Question 2 is in the affirmative, give a summary of the scope of the legislation:

a) To whom does the liability attach? The Government itself, the ATC agencies, the employees?
b) Is the liability based on fault or on contract?
c) What are the defences available (contributory negligence, force majeure, fault of the third party, waiver of liability, etc.?
d) Is the liability limited or unlimited?
e) Is there any security required in respect of the liability of ATC agencies? In the affirmative, specify (insurance, security bond, bank deposit, etc.)?
f) If such a security is not required, is the practice to take out insurance coverage?
g) May claims be brought before any court of your country or before a special jurisdiction?

4. If the answer to Question 2 is in the negative, indicate what are the general principles of law applied in cases involving the liability of air traffic control agencies.

5. Does your country use computerized air traffic control services?

6. In the affirmative, is the air traffic control agency liable for damage resulting from the failure of the computerized equipment?

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* ICAO Doc. LC/25-WP/875.

7. Does the specific legislation, if any, or the principles of law apply also with respect to the liability of air traffic control agencies involving international elements (foreign aircraft, foreign victims or claimants, etc.)?

8. Are there any restrictions imposed in your country to claims brought before a court by foreign claimants (public or private corporations or indiciduals)?

9. What are the specific legal problems encountered by your country in respect of the liability of air traffic control agencies involving "international elements"?

10. Does your country find a sufficient "international element" which would justify the elaboration of an international instrument?

11. If the answer to Question 9 is in the affirmative, are the problems of liability of air traffic control agencies in the practical experience of your country of sufficient magnitude to justify an urgent international solution?

12. Does your country see a need for an international convention dealing with the liability of air traffic control agencies or should this subject better be dealt with by domestic legislation?

13. If a convention on the liability of air traffic control agencies were to be elaborated, should such an instrument include also problems arising out of aerial collisions?

14. If a convention on the liability of air traffic control agencies were to be elaborated, have you any observations to present in respect of:

a) the scope of a convention (kinds of services, kinds of damages, geographical scope or location of aircraft, kinds of aircraft and posture of aircraft; on the ground or in flight);
b) system of liability;
c) limitation of liability;
d) defences;
e) parties liable and security;
f) parties entitled to bring actions;
g) problems relating to direct and recourse actions;
h) period for notification of claims and limitation of actions;
i) jurisdiction;

15. Has your country any comments or views to express on specific legal problems involving international elements with respect to the liability of air traffic control agencies which are not covered by any of the foregoing question?

SYNOPSIS OF REPLIES TO 1980 QUESTIONNAIRE

(37)	Question 1			Q. 4			Q.5	Q. 12		Q.13	Q. 14(b)			Q.14(c)	
	Government	Private	Int'l Agency	State Immunity	State Liability	Employee's Liability	Computerized ATC	Convention	Domestic Legislation	ATC + Aerial Collisions	Fault	Presumed	Absolute	Limits	No Limits
Argentina	x	x[1]			x			x			x	x		x	
Australia	x				x		x[2]	x		x	x				x
Austria	x				x		x			x					
Barbados	x					x	x[3]	x			x			x	
Belgium	x				x		x	x							
Canada	x				x		x		x						
Chile	x				x			x		x		x			
Cuba	x				x			x			x				
Cyprus	x				x			x		x	x			x	
Czechoslovakia	x						x	x		x		x		x	
Denmark	x				x		x		x	x					
Egypt	x					x	x[2]	x		x	x			x	
F.R. Germany	x				x	x	x		x						
Finland	x				x	x	x								
France	x				x	x	x			x	x				
Greece	x									x					
Hungary	x								x	x					
Indonesia	x				x	x			x	x					
Iraq	x							x		x					
Ireland	x				x	x	x[3]		x						
Italy	x				x	x			x		x				
Japan	x				x				x	x					
Kenya	x				x			x		x					
Morocco	x				x	x	x	x		x					
Norway	x				x		x		x				x	x	
Netherlands	x				x		x		x						
Portugal	x					x		x		x	x			x	
Singapore	x						x		x	x	x				x
Spain	x				x		x		x		x			x	
Sweden	x				x		x		x	x					
Switzerland	x				x		x								
Tanzania	x				x			x		x					
Thailand	x								x	x					

Tunisia	x						x		x	x						
U.Kingdom	x				x		x	x		x						
U.States	x	x[1]			x		x		x							
U.S.S.R.								x		x	x				x	

(1) limited number

(2) Australia: computerized equipment will be installed by 1984
Egypt: idem

(3) Computerized equipment is used to a limited extent

APPENDIX D

LIABILITY OF AIR TRAFFIC CONTROL AGENCIES*

(ARGENTINE REPUBLIC)

PRELIMINARY DRAFT INTERNATIONAL CONVENTION ON THE LIABILITY OF AIR TRAFFIC CONTROL AGENCIES

THE SIGNATORY GOVERNMENTS

WHEREAS:

The majority of Member States of the International Civil Aviation Organization have expressed their view that international rules should be agreed upon to establish uniform liability of air traffic control agencies;

The unification of rules on this question must be related to the principles included in other international law conventions, which have deserved the adherence of a large number of countries;

The development of international airports and the increase in the number of aeroplanes operating from them, many of which are wide-body jets and some of which are SST aircraft, is such that the activity of air traffic control agencies is of greater importance than at other periods in the development of aviation;

It is essential that a large number of countries support the unification of rules concerning the activity referred to in the foregoing paragraph.

HAVE agreed as follows:

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* ICAO Doc. LC/25-WP/875-39

CHAPTER I

BASIC CONCEPT AND APPLICATION

Basic concept

Article 1

1) For the purposes of this Convention, an "air traffic control agency" shall be understood to be an agency specially set up by States or authorized by them to provide services for the protection and regulation of flights;

Services included

2) Services for the protection and regulation of flights shall include those relating to air traffic control, area control, approach control, aerodrome control, air traffic advisory service, aeronautical information and alerting services, including collaboration in aircraft search, assistance and rescue;

Other services included

3) If the services provided by the agencies referred to in subparagraph 1) include the provision of meteorological services, airport facilities, aeronautical charts and other air navigation supporting services and facilities, these services shall be considered to be included in the description given in the preceding subparagraph.

Objectives

Article 2

1) The Air Traffic Control Agencies (ATCA) referred to in this Convention shall have the purpose of:

a) Avoiding collisions between aircraft;

b) Avoiding collisions between aircraft and obstacles in the manoeuvering area;

c) Regulating and appropriately accelerating the movement of aircraft;

d) Giving information useful for flight safety and efficiency;

e) Notifying the appropriate agencies regarding aircraft requiring assistance and provision of the said services to the extent possible;

Laws applicable. Requests for service.

2) The ATCA shall provide their service in accordance with the relevant laws and regulations laid down by each country, in accordance with the Chicago Convention of 1944 and the Annexes thereto and as requested by aircraft commanders or other air traffic agencies or other authorities or technical bodies in the cases referred to in the preceding subparagraph.

Scope of the Convention

Article 3

1) The present Convention shall apply to damages resulting in the following circumstances:

a) When an aircraft performs an international flight and is within the territory of a Contracting State other than the country of its flag and under the control of an ATCA of that other State or of another Contracting State;

b) When an aircraft performs an international flight and is within the territory of a Contracting State other than the country of its flag, but under control of an ATCA of its own country, and has caused damage in the Contracting State;

c) When an aircraft makes an international flight and is within the territory of a Non-Contracting State, under the control of an ATCA of a Contracting State other than that of its flag;

d) When an aircraft makes a flight between two points of the country of its flag but under the control of an ATCA of another Contracting State.

Unlawful user

2) Likewise, the Convention shall apply when the aircraft referred to in the preceding subparagraph is in flight, on the ground, moving or at a standstill, provided it is under the control of an ATCA or even when it is being controlled by an unlawful user.

Damage included

Article 4

1) The present Convention shall apply to damage caused to aircraft; to persons, cargo, baggage and mail carried by them; to persons and objects on the surface.

Damage excluded

2) It shall, however, in no case apply to damage caused by delay in the transport, or to damage caused by abnormal noise or sonic boom, or to damage caused by the transmission of messages which have produced interference with other electronic or telegraphic facilities or any other facilities, on the surface.

Aircraft to which the Convention applies

Article 5

This Convention shall apply equally to the following aircraft, even when they are on experimental or test flights:

a) Military, customs, police and other States aircraft exercising public functions, without prejudice to the reservation authorized in Article 42, subparagraph 3;

b) Commercial, civil, tourist and sports aircraft, even when operated by States or by joint air transport agencies or by international consortia as provided for in Article 77 of the Chicago Convention;

c) Aircraft operated by international public law bodies.

ATCA included

Article 6

1) The ATCA included in this Convention shall be subject to the same liability, whether they belong to the State or to local governmental authorities and are operated by military or civil authorities, or to private individuals, whether natural or legal persons, or to mixed associations comprising governmental authorities and private persons.

International or multinational ATCA

2) The same liability shall also apply, with the scope laid down in the preceding subparagraph, to ATCA operated by agencies formed by various countries or by agencies authorized by various countries.

ATCA operated by ICAO

3) If the ATCA is operated by ICAO as provided for in Article 71 of the Chicago Convention, the State where the services are provided shall assume liability for the damage provided for in the present Convention.

CHAPTER II

SYSTEM OF LIABILITY

Culpable liability of ATCA

Article 7

1) The ATCA shall be liable for fault on the part of their officers, employees and agents, for damage to aircraft, persons, objects and postal cargo carried by aircraft and for damage to third parties and to objects on the surface, within the system established in the present Convention;

ATCA, exemption from liability

2) Nevertheless, the ATCA shall not be liable if the damage occurred fortuitously or as a result of force majeure, through the action of a third party, through fault of the victim or inaccurate information from another agency, which the ATCA only transmitted, and provided that the ATCA proves that it took every possible measure to avoid the damage or that it was impossible to take such measures;

ACTA, contributory liability

3) If the damage results from contributory fault on the part of the victim and employees of the ATCA or of the victim, the employees of the ATCA and the operator (or operators) of the aircraft involved in the damage, or of employees of the ATCA and of the operator or operators referred to, the liability shall be shared in proportion to the gravity of the fault of each, in accordance with conventional or judicial decision and assessment.

State ATCA, no immunity

4) No exemption may be based on the immunity of an ATCA because it belongs to a State.

Fault, scope of the concept

5) The expression "fault", used in the present Convention, shall include error, negligence, lack of skill and criminal intent.

Fault, presumption through failure

Article 8

1) If the victims or the operator or operators prove that the damage resulted from failure of the electronic equipment and/or automatic communications machinery, there shall be presumption of fault against the ATCA, which will be obliged to show that its officers, employees and agents took all regulatory and possible steps to avoid the failure.

Fault, presumption through failure to present documents

2) There shall also be a presumption of fault against the ATCA when, for reasons of national defence or other reasons, the Agency fails to present the files or registers containing records of messages exchanged between its officers, employees and agents, and the aircraft commanders, other ATCA and other Agencies with which they were exchanged.

Aircraft commander, compliance with orders from the ATCA

Article 9

Without prejudice to the responsibility of the aircraft commander as flight chief or director throughout the operation, aircraft commanders must comply with orders received from ATCA in accordance with the purposes specified in Article 2, which they may disregard only in the event of danger, immediately reporting this circumstance to the air traffic service units.

Liability, for damage to persons and objects

Article 10

1) If a claim is made against the ATCA for damage affecting a passenger or the passenger's baggage or damage to the cargo, the person suffering the damage may claim compensation for the damage suffered to the extent of the amount indicated in the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention);

Liability of a non-contractual carrier

2) The provisions of the preceding subparagraph shall also apply if the carrier who performed the carriage was not the contractual carrier, in accordance with the provisions of the relevant International Convention;

Liability for damage to postal cargo

3) If a claim is made against the ATCA for damage to postal cargo, the injured party may claim compensation for the damage suffered, up to the respective amount indicated in the International Convention of the Universal Postal Union.

Liability for damage on surface

Article 11

If a claim is made against the ATCA for damage to persons or goods on the surface, the injured party may claim compensation for the damage suffered up to the amount or amounts indicated in the International Convention on Liability of the Operator in respect of persons and objects on the surface, without prejudice to the provisions of Article 19.

Liability for damage resulting from collision

Article 12

1) If a claim is made against the ATCA for damage to the aircraft, persons and goods as a result of collision between two or more aircraft, the injured party may claim compensation for the damage suffered up to the amount or amounts indicated in the International Convention on liability of the operator in the event of collision;

Prorata in cases of collision

2) If the amount of compensation fixed in accordance with the preceding subparagraph, exceeds the limit of liability of the ATCA, the procedure followed shall be as indicated in Article 19.

Burden of proof lies with the injured party

Article 13

1) The claimant shall be required to present and produce evidence of fault on the part of the ATCA and of the relationship between the said Agency and the damage suffered, except in the cases provided for in Article 8.

Applicable procedural law

2) The rendering of the judgment and production of proof are governed by the law of the country where the proceedings were brought or where they were continued in the event of a change of jurisdiction.

Documents, retention of

3) The files and documents containing records of messages exchanged between parties, relating to the protection and regulation of the flight, must be retained for a period of three years. But for this to be done, the injured party or his beneficiaries must request it of the ATCA in writing within a period of six months from the date of occurence of the damage, otherwise the entitlement will expire.

Aircraft accident, conclusions of investigation as proof

4) The conclusions of an aircraft accident investigation, reached by the competent authority of one of the Contracting States, by virtue of the provisions of Article 26 of the Chicago Convention, shall be taken into account as proof, without prejudice to the provisions of subparagraph 2 of the present Article.

CHAPTER III

LIMITATION OF LIABILITY

Compensation, limitation of

Article 14

1) The liability of ATCA, established in the present Convention, shall be limited to the amount laid down for liability of the aircraft operator in the Conventions specified in Articles 10, 11 and 12, as the case may be.

Shared liability; Judicial action

2) If the liability is to be shared between the ATCA and the operator, the victim may claim from each of them to the extent of the limit laid down in the preceding sub-paragraph, but in no case may he claim an amount greater than the sum corresponding to the damage suffered and duly substantiated together with court costs and interest, from the date the action was brought.

Compensation, increased limits

Article 15

No clause of the present Convention shall be interpreted as preventing a State from increasing the limits of liability of its ATCA, beyond the amount laid down in the preceding Article including authorization of full compensation for the damage caused.

Criminal intent, willful omission. Reckless action

Article 16

1) Liability of ATCA shall extend to full compensation of the damage to the victim, if the officials, employees and/or agents of the Agency, acting within their functions and within the sphere of their duties, performed the criminal actions or omissions with intent to cause the damage, or performed the reckless action which caused the damage without taking into account their consequences.

Compensation, claim

2) ATCA may claim from their officials, employees or agents having caused the damage, the amounts they shall have paid in compensation for the damage, and take out insurance covering such risk.

Full compensation for damage to aircraft

Article 17

Likewise, compensation for damage to aircraft, if not included in the Conventions referred to in Articles 10, 11 and 12, shall cover full compensation for losses incurred by the operator in this connexion.

Currency

Article 18

1) Compensation for damage referred to in this Convention shall be calculated in the currency laid down in the Conventions referred to in Articles 10, 11 and 12.

Currency conversion

2) The amount resulting therefrom shall be converted into the currency of the country where the judgment was rendered or in a currency agreed upon by the parties in the event of this not being specified in the judgment, on the date of effective payment.

Prorata for third parties on the surface

Article 19

If damage was caused to third parties on the surface and if the amount of compensation fixed exceeds the limit of liability, as provided for in Article 11, the following rule shall be observed:

a) If the compensation relates solely to death of, or injury to, persons or solely to damage to property, it shall be reduced in proportion to the respective amounts of the compensation;

b) If the compensation relates both to death or injury and to damage to property, half of the amount to be distributed shall be allotted to cover compensation for death and injury, and if the said amount is insufficient, it shall

be distributed proportionally among those to whom it was awarded in the case. The remainder of the total amount to be distributed shall be prorated between the compensation for damage to property and the part of the remaining compensation that is not covered.

CHAPTER IV

JURISDICTION AND APPLICABLE LAW

Judicial action of the injured party

Article 20

1) Any person who has suffered damage as provided for in this Convention, whether to his person or his property or his beneficiaries, is entitled to bring judicial action to obtain compensation for the damage incurred.

Judicial action for damage to postal cargo

2) In the case of damage to postal cargo, the action shall comply with the procedures for the carriage of mail, as laid down in the Convention of the Universal Postal Union.

Judicial action v. ATCA or v. operator

Article 21

1) The injured party may bring the action directly against the ATCA he considers liable or against the operator in accordance with the provisions of the Conventions referred to in Article 10, 11 and 12.

Judicial action of the operator

Recourse by the operator

2) An operator who has incurred damage through death or injury to his personnel or damage to his aircraft or other property, may bring action directly against the ATCA he considers responsible, and may also bring a recourse action against the ATCA for payment made to other persons as stated in the preceding subparagraph.

Judicial action to obtain full compensation

Article 22

If the injured party or his beneficiaries has brought an action against the operator and has not received compensation for the damage incurred within the limit of the latter's liability, they may bring a further action against the ATCA they consider responsible, within the same limits, submitting proof of the amount of damage incurred.

Competence

Article 23

1) Actions brought by the injured party in accordance with the provisions of the present Convention shall be brought before the courts of the country in which the ATCA whose activity was a prima facie cause of the damage has its offices, even when the aircraft was flying in another country at the time of the accident.

Competence in cases brought against a multinational ATCA

2) If the ATCA is a multinational agency, the judicial proceedings shall be brought in the country where it has its main office according to its statutes but likewise the claimant may bring the case before the judicial authorities of the territory of the Member State of that agency, where the damage occurred.

Competence in cases brought against an ATCA and an operator

3) If the claimant brings the case against the ATCA and operator jointly, he must follow the procedures outlined in the preceding subparagraphs.

Overriding jurisdiction

4) If some of the claimants bring the case against the ATCA and others against the operator in different jurisdictions, the case brought against the ATCA shall decide the overriding jurisdiction with regard to the other cases.

Priority

Article 24

The Conventions and laws shall be applied in accordance with the following priorities:

a) the present Convention;

b) such aeronautical convention as the parties may invoke in accordance with the provisions of Articles 10, 11 and 12;

c) the internal law of the country where the ATCA against which the claim is brought has its offices.

Judicial action against defunct ATCA or ATCA that have merged with other ATCA

Article 25

1) If the ATCA responsible is a natural person, in the event of that person's death, the actions for damages may be brought against his beneficiaries; if it is a private legal person and has merged with other agencies or has become another agency, the action may be brought against the new, suceeding body.

Judicial action against an international or multinational ATCA that is defunct

2) If the ACTA responsible is a private international or multinational body and has been dissolved, the suit for damages may be brought against those States which authorized it to operate, without distinction.

CHAPTER V

PRESCRIPTION

Prescription concerning direct action by the injured party

Article 26

1) Direct action for compensation for the victim or his beneficiaries or for the operator shall be prescribed after a limit of two years from the date when the event which gave rise to the damage occurred.

Prescription for compensation claim

2) A recourse action claiming compensation by the operator against the ATCA for payment made to the victim or his beneficiaries, shall be prescribed after a limit of two years from the date of offective payment, whether it be the consequence of the definitive award or of agreement between the parties.

Prescription for action for balance of compensation

3) Action by the victim or his beneficiaries against the ATCA they consider responsible, for the balance of the original claim against the operator which has not been met, shall be prescribed on expiry of one year dating from the date on which insolvency of the operator with regard to the credit was established.

Suspension or temporary cessation of prescription. Law applicable

4) The reasons for suspension or temporary cessation of prescription shall be those determined by the law of the court which hears the case.

CHAPTER VI

GUARANTEES

Guarantees, procedures

Article 27

Payment of compensation under the provisions of the present Convention shall be guaranteed by the ATCA with their property and shall follow any one of the procedures stated below:

a) Through a subsidiary guarantee of a Contracting State;

b) Through endorsement by a bank of recognized solvency or of another institution authorized by one or more Contracting States;

c) Through insurance with an insurance company authorized by the Contracting State and suitable for the type of insurance involved.

Guarantees, exception for State ATCA

Article 28

If the operator of the ATCA is a State body and provided the services directly, if shall be exempt from the provisions of the preceding Article. But if this is not the case, the State shall take the necessary steps to ensure that the guarantees provided for in this Chapter are genuine and effective.

Guarantees, multinational ATCA

Article 30

The Contracting Parties undertake to apply as a minimum requirement for the safety of international aeronautical activities, the "Standards and Recommended Practices" for the protection of air transport contained in the Annexes to the Convention on International Civil Aviation.

Clauses, invalidity

Article 31

All clauses prior to the occurrence of the damage provided for in the present Convention, which are contrary to the rules of the present Convention, shall be invalid. Likewise, any clause tending to exempt an ATCA from liability or to set for such liability a limit less than that set in the present Convention shall be invalid and of no effect.

Days

Article 32

1) For the periods mentioned in the present Convention defined in days, it should be understood that these are calendar days and not working days and they start on the calendar day following the event under consideration.

Months and years

2) Periods in months or years shall end on the same day as when they started, after expiry of the number of months or years laid down in the present Convention.

Liability of the ATCA, beginning and end

Article 33

The liability of the ATCA shall begin when it takes or ought to take the aircraft under its protection or control and ends when it transfers them to another ATCA in respect of the same aircraft.

Claim for compensation, entitlement of the ATCA

Article 34

1) None of the rules of the present Convention shall prejudice the fact as to whether or not the ATCA responsible shall be entitled to claim compensation against any other natural or legal person, in respect of payments to the injured party, even if he was an unlawful user, for any of the damage provided for herein.

Unlawful user, concept

2) For the purpose of this Convention, the term "unlawful user" refers to whoever has the aircraft in his possession without authorization from the owner or from whoever has the exclusive right to use it if he has conferred this right on another person.

ICAO, intervention

Article 35

If any disagreement arises between two or more Contracting States on the interpretation or application of the present Convention, which cannot be settled by direct negotiation, the procedure to be followed shall be that established in Articles 84 to 88 of the 1944 Chicago Convention, without prejudice to the provisions of Article 42, subparagraph 3 of the present Convention.

Court of Arbitration

Article 36

1) The injured party or parties, the operators and the ATCA may submit a difference on which no agreement has been reached to a Court of Arbitration.

Arbitration, agreements, formalities

2) The arbitration agreement must be recorded in a public document before a notary or court clerk of the jurisdiction indicated in Article 23 and shall establish the rules of the Court of Arbitration. These rules may not be contrary to the specific legislation of the country where the arbitration procedure is to take place.

Evidence to be used

3) The Court of Arbitration may use all forms of evidence accepted in the specific legislation indicated, which shall govern any solution not provided for in the rule, including the fees of the arbitrators.

Fees. Arbitration award, enforcement

4) The final decision on a difference may be submitted also to a natural or legal person, either national, international or interline, but the enforcement of the award shall, where necessary be performed in the country indicated in Article 23 of the present Convention.

CHAPTER VIII

DIPLOMATIC CLAUSES

Languages

Article 37

1) The present Convention shall be drawn up in English, French, Spanish and Russian and the four versions shall be equally authentic. In the event of divergency between any of the versions, the procedure laid down in the 1944 Chicago Convention, Article 84 shall be followed.

Deposit of the original document

2) The original document shall be deposited at the Ministry of External Relations of the State whose Government shall transmit a certified copy thereof in the appropriate language to each of the Member States of the International Civil Aviation Organization.

Copies of the Convention

3) Likewise the Government shall transmit a certified copy of the original document to the United Nations and to the International Civil Aviation Organization.

Ratification

Article 38

1) The present Convention shall be ratified by those States which wish to apply it. The instruments of ratification shall be registered with the International Civil Aviation Organization as laid down in Article 83 of the 1944 Chicago Convention. ICAO shall communicate the register to each Member State, both to those which have not yet ratified the Convention and to those States which are signatories thereof.

Entry into force

2) The present Convention shall enter into force ninety days following the date of the deposit of the instrument of ratification by twenty States. Subsequently it shall enter into force between the other States which ratify it and those which have already ratified it, ninety days following the date of deposit of each instrument of ratification.

ICAO, communication of entry into force

3) The International Civil Aviation Organization shall inform each Member State of the entry into force of the present Convention.

Denunciation

Article 39

1) Any Contracting State may denounce the present Convention, by notification to the Council of the International Civil Aviation Organization, which shall immediately inform the Government of each Contracting State thereof.

Effect of the denunciation

2) The denunciation shall take effect six months following the date on which the Council of ICAO is notified and shall operate only as regards the State effecting the denunciation.

Communication of denunciation

3) On expiry of the period indicated in the preceding sub-paragraph, the Council of ICAO shall inform the General Secretariat of the United Nations of the denunciation.

Convention, geographical scope

Article 40

1) The present Convention shall apply to all territories for whose external and aeronautical relations a Contracting Party is responsible, with the exception of those territories for which a declaration has been made in accordance with the following paragraph.

Convention, territories excepted

2) At the time of the deposit of its instrument of ratification or adherence, any State may declare that acceptance of the present Convention does not include one or more of the territories for whose external and aeronautical relations it is responsible.

Convention, territories subsequently included

3) Any State may subsequently, by means of a communication addressed to the Council of ICAO, extend the application of this Convention to any of the territories with respect to which it has made a declaration in accordance with the provisions of the preceding paragraph. Such amendment shall take effect on the ninetieth day from the date of receipt of the communication from the said Government.

Denunciation of the Convention, with respect to territories

4) Any Contracting State may denounce the present Convention in accordance with the denunciation clauses, separately with respect to any of the territories indicated in the present Article.

Convention, signature

Article 41

1) Until such date as the present Convention enters into force, the original document shall remain open to signature by any State which took part in the Conference at which its text was approved.

Convention, adherence

2) After its entry into force, the present Convention shall remain open to adherence by any non-signatory State and to subsequent ratification by that State.

Reservations, exclusion

Article 42

1) No reservation may be made with respect to the present Convention.

Reservation, with respect to the International Court of Justice

2) Nevertheless, at the time of signature or ratification of the Convention, any State doing so may declare that it will not submit any controversy in which it may be involved

to the Permanent International Court of Justice. However, any Contracting State which has expressed the reservation indicated in this subparagraph may withdraw it at any time, notifying the International Civil Aviation Organization of such withdrawal.

Reservations, with respect to State aircraft

3) Likewise, Contracting States reserve the right to exclude from the scope of the Convention, the liability of its Air Traffic Control Agencies for damage caused by:

A) all or specific classes of State aircraft of other Contracting States.

B) the State aircraft of the Contracting State itself.

Terms, interpretation

Article 43

The terms "agreement", and "convention" used in the foregoing Articles have one and the same meaning and scope and refer to the complete text formed by the Articles referred to.

In witness whereof the undersigned plenipotentiaries, being duly authorized, have signed the present Convention on behalf of their respective Governments on the date shown with their signatures.

- END -

APPENDIX E

LIMITATION OF LEGAL LIABILITY OF THE CONTROLLER

(IFATCA'S DRAFT CONVENTION)*

Article 1: Aviation Technical Personnel

1. The present Convention is applicable for the purposes of civil liability in the case of aircraft accident to Air Traffic Controllers, Air Traffic Control Assistants and analogue technical grades, including all telecommunications grades of Fixed or Mobile Aeronautical Services, all grades employed in Meteorology, and all grades employed in the provision of ground to ground Services and all grades employed in operational planning, including all trainee personnel in such grades, provided that such personnel are qualified at least to the minimum standards laid down by International Civil Aviation Organization where such Standards are required.

2. The present Convention is not applicable to personnel not qualified under Section 1 of this Article, nor to military personnel who, for acts carried out whilst on duty, are excluded from civil liability by Municipal Law, except when military personnel are employed to carry out the duties of the personnel described in Section 1 of this Article.

3. Notwithstanding exemption from civil liability of military personnel as laid down in Section 2 of this Article, when in conditions other than declared war, the State claims force majeure and replaces civilian personnel by military personnel, the personal liability of such military personnel shall be that of the civilian personnel replaced.

Article 2: Aviation Authorities

1. This present Convention is applicable for limitation of civil liability in the case of aircraft accident, for the purpose of determining ex gratia payments and employer's vicarious liability (Common Law countries), Commettant liability (Civil Law countries), Liability of the Economic Unit (Socialist Countries of E. Europe), to all agencies

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* IFATCA '76, WP-31, as amended at IFATCA '77, WP-59.

employing personnel as defined in Article 1 of this Convention, including Governments, Airline Companies, Aviation Industry, Flying Clubs and International Organizations with or without International Personality.

2. This present Convention is applicable for Civil Liability to Military Authorities employing civilian and/or military personnel whether or not such personnel are exempt from Civil Liability.

Article 3: Aircraft Accident

1. For the purposes of this present Convention, an aircraft accident shall be considered to be any incident involving any aircraft including operational air traffic which results in death or injury to any person, or damage to any structure, ship or goods whatsoever from the time at which any person boards an aircraft with the intention of flight, until such time as he has disembarked.

2. Except in the case of operational air traffic, this present Convention defines also an aircraft accident, any incident involving damage to the aircraft itself, its cargo or mail.

3. For the purposes of this present Convention, on airports used for general air traffic, aircraft accident shall also cover taxiing aircraft and vehicles on the manoeuvering area as defined under the Annexes to the Chicago Convention 1944, when such aircraft or vehicles are authorised to proceed by Air Traffic Control and are either in radio contact or are subject to air traffic control signals.

Article 4: Application to Aircraft

This present Convention is applicable to all forms of air transport and shall include operational air traffic if such traffic is involved in any accident as defined in Article 3 of this Convention with general air traffic or a third party.

Article 5: Application to Third Parties

1. This present Convention shall apply to any person suffering death, his next of kin, or to any person suffering injury or to any person or company suffering loss or damage to any property whatsoever, wheresoever the death, injury, loss or

damage shall occur as a direct result of an aircraft accident. The onus of proof of direct result shall be upon the third party.

2. This present Convention shall afford to third parties the same Statutory Payment in the event of any aircraft accident as that afforded under the conditions of the Warsaw Convention and subsequent protocols. This Statutory sum shall be payable by Aviation Authorities in addition to the sum payable by Airline Companies. Subsequent to any legal proceedings the Civil Courts shall adjust such Statutory payments among the Aviation Authorities, the Airlines and their insurers where possible without the requirement of participation by the third party.

Article 6: Reference to other Conventions and Protocols

1. When this present Convention makes reference to other Conventions and Protocols, such reference shall be limited to the laid down requirements of this present Convention and shall not be interpreted as recognition of the aforesaid other Conventions or Protocols by non-contracting States to such other Conventions or Protocols.

2. This present Convention shall apply as definition of crew, passengers, cargo and mail any definition laid down in the Warsaw Convention (12th October, 1929) as amended by the Hague Protocol (28th December, 1955) and the Guatemala Protocol (8th March, 1971) and any subsequent protocols to the Warsaw Convention, but excluding the Montreal Protocol (1975).

Article 7: Extinction of Civil Liability

1. Other than Statutory Liability, no civil liability shall exist for an Aviation Authority nor for Aviation Technical Personnel if a claim has not been registered with appropriate legal Authority before midnight on the three hundred and sixty-fifth day after the aircraft accident, exclusive of the day of the aircraft accident.

2. The extinction of civil liability as defined in Section 1 of this Article shall apply also in cases involving a possible case of criminal negligence.

3. Civil liability shall be automatically extinguished for Aviation Technical Personnel and for Aviation Authorities, save the Statutory Liability of the latter, in proven cases of intervention by any third party known or unknown, who is guilty of air piracy attack or threat of attack on aircraft, attack or threat of attack on Aviation Technical Personnel or attack or threat of attack on ground installations used for the purposes of aircraft navigation, communications or safety.

4. Civil liability shall be automatically extinguished in the event of attack by military aircraft of any State save that civil liability shall never be extinguished for the military authorities of the State whose attacking aircraft have been even an indirect cause of an aircraft accident.

5. There shall be no extinction of civil liability for any guilty party as defined in Section 3 of this Article and a claim for civil damages shall lie before the Courts of any Contracting State. Exemplary (punitive) damages shall always be awarded under this Section and failure to pay such exemplary damages shall be punishable by imprisonment.

In such cases extradition shall be granted between Contracting States.

6. Claims for civil damages shall be extinguished for Aviation Authorities and Aviation Technical Personnel in all cases involving baggage, cargo or mail if a claim has not been registered either with the legal authority of the States before midnight on the three hundred and sixty-fifth day after the aircraft accident or with the air transporter under the provisions of Article 26 of the Warsaw Convention as amended by the Hague, Guatemala and subsequent protocols.

Article 8: Cases to which this Present Convention is Applicable

1. This present Convention is applicable to all cases of liability under the Civil Law of Negligence or non-feasance.

2. Notwithstanding Section 1 of this Article, nothing in this present Convention shall be interpreted as increasing the civil liability of Aviation Technical Personnel under such systems of Municipal Law where a lower limit of civil liability was in force in the Contracting State prior to ratification of this present Convention by such Contracting State.

Article 9: Criminal Negligence

Nothing in this present Convention shall preclude recourses to criminal proceedings in the case of Aviation Technical Personnel if a judge of the State's courts shall rule that there is a prima facie case to answer. In all proceedings for criminal negligence against Aviation Technical Personnel, in order to have a verdict of "Guilty", mens rea must be proved beyond reasonable doubt.

Article 10: Place of Civil Proceedings

1. Irrespective of the place at which an aircraft accident occurs or of the subsequent enquiry, any proceedings for civil liability involving aviation technical personnel or Aviation Authorities to which this present Convention is applicable shall be heard before the Civil Courts of the State of the Aviation Technical Personnel or the Aviation Authority concerned.

2. In the instance of a case of civil liability involving Aviation Technical Personnel employed by an International Organization to which international personality has been accorded either by treaty or by decision of the International Court of Justice, proceedings for civil liability shall be heard before the Civil courts of the State in which the siege social of the International Organization is situated and the conditions of Section 2 of Article 8 of this present Convention invoked if applicable, except that if the siege social of the International Organization is situated in a non-contracting State, the conditions of Section 1 of this Article shall apply.

3. Notwithstanding Section 2 of this Article, when Aviation Technical Personnel are employed by an International Organization to which international personality has not been accorded by treaty or by decision of the International Court of Justice, proceedings in cases of civil liability shall be heard before the civil courts of the State in which such personnel are employed.

Article 11: Aircraft Accident Enquiries

1. In the event of an aircraft accident, the Contracting State in whose area of jurisdiction for the purposes of provision of Aviation ground services, the accident occurs, shall cause to be set up an official enquiry.

2. When any civil aircraft or any aviation technical personnel is involved, the enquiry shall be civilian in nature and an airline pilot and/or member of the same profession of the technical personnel involved and of at least the same rank shall have the right to be nominated as member(s) of the enquiry board.

3. Should the aforesaid enquiry reveal that there may be a prima facie case to be answered for civil liability in addition to any statutory liability, the chairman of the board of enquiry, if other than a Coroner, prior to publication of any findings, shall refer the findings to a judge of the civil courts and should such judge decide that there is a prima facie case of civil liability to be answered in any Contracting State he shall rule whether, in the interest of all parties concerned, taking into account also the public interest to allow general publication of the findings prior to the civil liability hearing. This Article shall be applicable to military enquiries, except where an aircraft accident involved only military personnel and no third parties.

4. To avoid possible judgment of the case before the enquiry, the enquiry may not accept as evidence information on any disciplinary action taken prior to the said enquiry by an aviation authority or an Administrative Authority.

Article 12: Limitation of Liability for Aviation Authorities

1. Apart from Statutory awards under this present Convention, damages awarded against an aviation authority shall not exceed the damages payable by Airlines as laid down under the Warsaw Convention as amended by the Hague, Guatemala and any subsequent protocols, except that these limits shall apply to domestic as well as international flights.

2. Damages awarded for death or injury shall be limited even in the case of third parties to the limits for passengers as defined in Article 22 of the Warsaw Convention as amended by the Hague, the Guatemala and any subsequent protocols.

3. Damages awarded for loss or damage to property of third parties shall not exceed damages awarded for death or injury.

4. Damages awarded for loss or damage to cargo or mail being transported in aircraft shall not exceed the limits for Air transporters as laid down under Article 22 of the Warsaw Convention (Section 2) as amended by the Hague, Guatemala and any subsequent protocols.

5. Damages awarded for death or injury in the case of third parties shall be payable only if the third party was killed or injured at or near the scene of an aircraft accident as a direct result of such accident and, in the case of death, the death occurred within two calendar years from the date of the accident inclusive and can be proved by the next of kin to have been a direct result of the aircraft accident. In this case only shall the conditions of Article 7, section 1 of this present Convention be waived so that a further claim may be registered within three hundred and sixty-five days of the date of birth.

6. Damages for loss or damage to registered baggage and hand baggage shall be limited to the amounts laid down under Article 26 of the Warsaw Convention as amended by the Hague, Guatemala and subsequent protocols.

7. Subsequent protocols to the Warsaw Convention as used in the present Convention, in order to be considered for this present Article must have come into force not later than the day before the aircraft accident. The date of the aircraft accident shall be the date in the State where the accident occurred and if over the high seas the date in the State of the last known air traffic control authority to have given a service to the flight(s).

Article 13: Defences by Aviation Authorities

1. No defence shall exist for an aviation authority in any case of negligence or non-feasance proved against any employee of the Authority except an Act of God.

2. In the case of an employee proved to have acted ultra vires damages may be reduced only if in the view of the court such reduction would not incur undue hardship to the plaintiff.

3. "Volenti non fit injuria" may be a defence if the plaintiff is the aircraft captain or owner, provided that the volition of such plaintiff were not a direct result of abiding by the rules of the air of the State where the aircraft accident occurs when such rules are in conflict with the rules of the air of the State of the defendant aviation authority.

4. Where an aircraft accident occurs, inside the jurisdiction of a State but other than the State of the defendant aviation authority, but when service was given by employees of such aviation authority, the authority shall have the right to call expert technical witnesses from the other State, whether a Contracting State or not, and if from a Contracting State, this latter State shall facilitate the attendance of such witnesses.

Article 14: Limitation of Liability for Aviation Technical Personnel

1. In the event of an aircraft accident damages in civil liability awarded against aviation technical personnel shall in no case exceed a total equal to the annual salary of the official concerned after all direct taxation due by the official has been paid. For the purposes of this Article, annual salary shall include only that salary which he could be expected to receive for his work for the aviation authorities in his grade at the time of the aircraft accident.

2. The stage of training and the experience of the official shall be considered with a view to assessing reduced damages.

3. The actions of a trainee shall be taken into account when assessing damages against an instructor or supervisory staff.

4. Reduced damages may not be assessed if the official is proved to have acted ultra vires.

5. If another official or an assistant to an official is a joint tort-feasor, his actions shall be taken into account when assessing damages against an official.

6. Costs shall not be awarded against aviation technical personnel unless criminal negligence has previously been proved.

7. No term of imprisonment nor fine may be imposed on aviation technical personnel for civil negligence or non-feasance, nor may any official be imprisoned pending a case for criminal negligence unless a judge rules that there is a grave risk of the accused absconding.

8. The Court may not hear as evidence information in disciplinary action taken against the technical personnel before the Court's proceedings.

Article 15: Defences by Aviation Technical Personnel

(aimed at reduction of damages)

1. Aviation technical personnel may claim joint tort feasance with the aircraft captain or owner or with other aviation technical personnel or with an aviation authority.

2. "Violenti non fit injuria" may be a defence if the aircraft captain or owner is the plaintiff provided that the volition of such plaintiff were not a direct result of abiding

by the rules of the air of the State where the aircraft accident occurred when such rules are in conflict with the rules of the air of the State of the defendant technical aviation personnel.

3. Written superior orders may be claimed as a defence.

4. Act of God may be claimed as a defence.

5. In the case of an accident occurring inside the jurisdiction of a State other than that which the personnel is employed but while service was being given, the aviation technical personnel shall have the right to call expert technical witnesses from the other State, whether a Contracting State or not, at the expense of the Aviation Authority. The Court shall rule whether such expenses may be awarded as costs and against whom. If the witnesses are called from a Contracting State this latter State shall facilitate the attendance of such witnesses.

Article 16: The Aviation Authority and Aviation Technical Personnel as Joint Tortfeasors

1. When the aviation authority and an employee are joint tortfeasors and damages are awarded against the aviation authority, the latter shall under no circumstances have the right to subsequent proceedings against the employee to recover damages, except when it has been proved that the employee acted ultra vires and the limitations of the present Convention shall apply also to such proceedings.

2. When damages are awarded against aviation technical personnel whose involvement under Municipal law is solely to permit the plaintiff the right to proceed against the aviation authority, the aviation technical personnel shall have the right to proceed against the aviation authorities and any expenses incurred.

3. Aviation technical personnel shall have the right to proceed against the aviation authority to recover damages awarded against such personnel when in following written superior orders the aviation technical personnel is adjudged to have caused an aircraft accident.

Article 17: Conflict of Laws

1. If there is a conflict of law, the law of the State in whose airspace the aircraft accident occurred shall be applicable.

2. If such place is in the dispute, the Law of the State of the defendant technical personnel shall be applied.

3. If the accident occurs outside the territorial jurisdiction of any State, the court will take into account any international law which affects the incident, except that in Common law systems precedent shall be accepted. If no international law exists the law of the State of the defendant technical personnel shall be applied except that Article 10 Sections 2 and 3 of this present Convention shall be applied to technical personnel employed by International Organizations.

Article 18: Languages of the Convention

1. This present Convention shall be lodged in English by Contracting States with the International Civil Aviation Organization which shall cause the Convention to be translated into French, Russian and Spanish.

2. En the event of dispute, the English language version of this present convention shall be considered to be the authentic text.

Article 19: Protocol to the Convention

1. This present Convention is open to signature by all States and all international Aviation Authorities endowed with international personality which employ aviation technical personnel. The President or Chief Executive of such International Aviation Authority shall sign on behalf of the Organization and no instrument of ratification shall be required on behalf of such international Authority. The Convention remains open for signature until it comes into force under sections 5 or 6 of this present Article.

2. Contracting States shall ratify this present Convention according to their systems of Constitutional Law.

3. This present Convention shall be lodged with the International Civil Aviation Organization.

4. Instruments of ratification shall be lodged with the International Civil Aviation Organization.

5. When at least ten of the following States: Argentina, Austria, Bahamas, Belgium, Brazil, Canada, Channel Islands, Costa Rica, Cyprus, Denmark, Egypt, Fidji, Finland, France, Federal Republic of Germany, Ghana, Greece, Guyana, Hong Kong, Hungary, Iceland, Iran, Ireland, Israel, Italy, Luxemburg, Malta, Mexico, Morocco, Netherlands, Antilles, New Zealand, Nigeria, Norway, Portugal, Rhodesia, Senegal, Sierra Leone, South Africa, Sri Lanka, Sudan, Surinam, Sweden, Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay and Yugoslavia have lodged instruments of ratifications, the present Convention shall come into force on the ninetieth day after lodging of the tenth such instrument of ratification. Signature of this present Convention by an International Organization having international personality and being an aviation authority providing aviation technical Services including the International Civil Aviation Organization, European Organization "Eurocontrol" for the Safety of Air Navigation and Cenamer shall be construed as a presentation of an instrument of ratification under this present Section.

6. When less than ten of the States or International Organizations mentioned in Section 5 of this present Article have ratified, this present Convention shall nevertheless come into force on the ninetieth day after the lodging of the nineteenth instrument of ratification including signatures by International Organizations under the conditions of Section 5 of this present Article.

7. The Convention shall come into force for any other signatory State on the ninetieth day after the lodging of that State's instrument of ratification after the coming into foce of this present Convention. For the purpose of this Section the Convention shall come into force for an International Organization which signs the Convention after the coming into force of the Convention upon signature of the Convention.

8. This present Convention as soon as it comes into force shall be registered with the United Nations Organization by the Secretary-General of the International Civil Aviation Organization.

9. This present Convention shall remain open after coming into force for the adherence of all non-signatory States. Adherence will be carried out by lodging an instrument of adherence with the International Civil Aviation Organization and will result in the coming into force of this present Convention for such States on the ninetieth day following the lodging of the instrument of adherence. For International Organizations the Convention shall come into force on signature.

10. Unless notification is otherwise made at the time of signature or adherence to this present Convention, a Contracting State adheres to this present Convention on behalf of Colonies, protectorates, mandated territories, any other territory under its sovereignty and all suzerain territories.

11. Signature of any subsequent protocols to this present Convention shall be deemed adherence to this present Convention and shall be published as such under the conditions of Section 19 of this present Article.

12. Any Contracting party may denounce this present Convention and any Contracting State may denounce either totally or on behalf of Colonies, protectorates, mandated territories, any other territory under its sovereignty and suzerain territories by means of a notification of denunciation lodged with the International Civil Aviation Organization, provided that denunciation cannot be made for part of a Flight Information Region as defined by the Chicago Convention, 1944 and annexes thereto, and provided also that this present Convention shall remain inforce as if the denunciation had not been made in the matter of damages or if limitation of civil liability applicable under this present Convention resulting from any aircraft accident occurring before the taking effect on the one hundred and eightieth day after receipt of the notification of denunciation by the International Civil Aviation Organization.

13. Any Contracting State which has either not adhered to or has denounced this present Convention on behalf of Colonies, protectorates, mandated territories, other territories under its sovereignty or suzerain territories may extend the adherence to this present Convention to include all or part of such territories by lodging an instrument of extension of adherence with the International Cviil Aviation Organization. Adherence to a subsequent protocol to this present Convention without reservation shall be interpreted as including such territories.

14. When all or part of the territory of a Contracting State is ceded to a non-Contracting State this present Convention shall cease to apply to such ceded territory from the date of cession unless the treaty of cession includes a condition of adherence for the ceded territory and such adherence is lodged with the International Civil Aviation Organization by the signatories of the Treaty of Cession.

15. When part of the territory of a Contracting State becomes an Independant State responsible for its own external affairs, this present Convention shall cease to apply to such territory from the date fo independence unless such territory shall announce its intention to adhere to this present Convention on becoming an independent State.

16. When all or part of the territory of a non-Contracting State or of a Contracting State is ceded to a Contracting State this present Convention shall apply to such territory unless a notification of non-adherence is lodged by the Contracting State with the International Civil Aviation Organization and provided that the conditions of Article 7 or Article 12, Section 5 of this present Convention have not expired, a case may lie if the ceding State is also a Contracting State. Further, if a Contracting State delegates airspace to a non-Contracting State or non-Signatory International Organization, this Convention shall be applicable in such delegated airspace.

17. The Contracting States and International Organizations recognise that in all cases of dispute under this present Convention, final arbitration shall rest with the International Court of Justice.

18. The Contracting States shall cause the limitations of this present Convention to be published by the Airlines registered in these States.

19. The Secretary General of the International Civil Aviation OrganizaTion shall notify all signatory or adhering States and International Organizations as well as all member-States of the International Civil Aviation Organization and all member-States of the United Nations Organization of:

i. The date of lodging of every instrument of ratification or adherence during the thirty days following the date of lodging such instruments.

ii. The date of receipt of every denunciation or declaration of extension of adherence or notification of cession of territory including provisos concerning this present Convention contained in such bilateral treaties during the thirty days following the date of lodging such denunciations, declarations or notifications.

iii. The date on which the Convention comes into force thirty days prior to its coming into force and the dates on which it shall come into force for such States as ratify or adhere to this present Convention after the initial date of its coming into force, thirty days prior to its coming into force for such ratifying or adhering States.

iv. The date of signature of the Convention by an International Organization.

20. The words "Contracting State" shall signify International Signatory Organization except as follows: Article 7, Section 5; Article 11, Section 3; Article 19, Section 2, 10, 12, 13, 14, 15, 16 and 18.

Article 20: Signature

1. No reservations shall be admitted to this present Convention.

2. This present Convention shall be lodged with the International Civil Aviation Organization where in accordance with Article 19 it will remain open for signature. The Secretary General of the International Civil Aviation Organization shall send certified conforming copies and translations in accordance with Article 18 to all signatory States and International Organizations as well as to the Member-States of the International Civil Aviation Organization and of the United Nations Organization.

3. In good faith of which the undersigned plenipotentiaries, duty authorised have duly signed this present Convention.

Signed in.....the.....day of the month

of.....of the year.....

in English, recognised as the authentic text.