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Canada

GOVERNMENT'S LIABILITY FOR THE CONTROL OF AIR TRAFFIC AS WELL AS THE INSPECTION AND CERTIFICATION OF AIRCRAFT

BY

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A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of master of laws.

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FOREWORD

Please note that with respect to the American precedents, the law is stated as at July 1992.

As for the Canadian case law, the law is stated as at June 1992.

SOMMAIRE

Cette dissertation constitue principalement une étude des règles de droit public applicables aux poursuites contre le gouvernement américain pour sa responsabilité civile occasionnée par la négligence de ses employés dans le contrôle de la circulation aérienne et dans l'inspection des aéronefs. Cet ouvrage se consacre également à une étude comparative des règles de droit applicables au Canada dans ces secteurs d'activités.

Bien que le gouvernement américain ait renoncé à son immunité de poursuite en matière de responsabilité civile, il demeure des exceptions à cette immunité et certaines décisions de ses employés se voient par conséquent protégées. Notamment, la négligence dans l'accomplissement d'une tâche discrétionnaire ne peut engendrer la responsabilité du gouvernement si cette discrétion est basée sur des principes d'ordre politique, économique et social. De même, le gouvernement américain n'est pas responsable du dommage causé par la transmission d'une information erronée par un de ses employés. Cette thèse analyse conséquemment l'application de ces exceptions dans les secteurs du contrôle de la circulation aérienne et de la certification des aéronefs et tente d'identifier quels actes de ces employés se situent hors de la portée de ces exceptions.

Ce travail analyse également l'application des éléments constitutifs de la responsabilité civile du gouvernement fédéral dans ces secteurs et se concentre plus particulièrement sur l'existence d'un devoir de soin (duty of care) des contrôleurs et des employés effectuant l'inspection des aéronefs envers les passagers et membres de l'équipage.

Prenant en considération l'importante réglementation dans le domaine de l'aéronautique, le présent travail se veut de plus une étude de l'évolution de la jurisprudence afin d'identifier les devoirs de ces employés fédéraux dans ces activités et de déterminer dans quelles circonstances ils doivent répondre de leur responsabilité civile. Une majeure partie de ce travail se veut plus particulièrement une recherche juridique sur la responsabilité incombant aux contrôleurs par rapport à celle du personnel naviguant dans la réalisation d'une circulation aérienne efficace et tente d'identifier dans quelle mesure la responsabilité de ces deux groupes concernés a été modifiée. En effet, l'évolution de la technologie dans le domaine de l'aviation et l'augmentation du traffic aérien commercial ont amené les pilotes à dépendre de plus en plus du contrôleur aérien.

Cette analyse est complétée par une étude comparative de la jurisprudence canadienne sur toutes ces questions et principalement sur la responsabilité du gouvernement canadien pour la négligence de ses employés dans ces secteurs d'activités.

ABSTRACT

This thesis mainly studies the legal framework governing claims against the American government in the aviation field and circumscribes the specific instances in which negligent performance of air traffic control and negligent inspection of aircraft leading to certification give rise to the liability of the government. This analysis also compares the American legal principles applicable in these areas with the Canadian law.

More particularly, since the U.S. government is responsible for providing these services through the Federal Aviation Administration, the principles of public law and, therefore, the concept of sovereign immunity govern its civil liability. Even though the federal government has waived its sovereign immunity from civil liability, there remain, however, some exceptions such as the discretionary function exception, which provides that the performance or the failure to perform a discretionary function on the part of a federal employee cannot be actionable, and the misrepresentation exception, which precludes any claim against the U.S. government arising out of misrepresentation by a federal employee. In this respect, this thesis consequently analyses the evolution of the jurisprudence and the applicability of these exceptions to the decisions of the federal employees in performing the control of air traffic and the inspection of aircraft. More particularly, it tries to identify the instances in which their decisions do not fall under these exceptions.

Since the actionable duty of the controllers and the employees carrying the inspection of aircraft must be found in the State tort law principles in the U.S. and specifically the Good Samaritan doctrine, this thesis then analyses the question of whether the federal employee carrying out these activities owe a duty of care to the passengers and the crew members.

Taking into consideration the complex federal aviation regulations, it then focuses on the extent of the duty of the federal employee carrying out these activities and tries to identify the specific instances in which his negligent performance is accountable.

With regard to the controllers, it specifically tries to compare their duties with the duties of the pilots and to determine how the responsibility of each of these groups has been modified. Indeed, the advent of sophisticated aircraft and the increase of air traffic have forced the pilots to become more dependant on the controllers for instruction and the shared responsibility for accomplishing a safe flight has become more and more the basis for the determination of liability.

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1. INTRODUCTION

The tremendous increase in flying activity, both commercial and private, necessitated the development of a sophisticated and comprehensive air traffic control system over most of the American and Canadian airspace and pressured the respective governments to adopt a complex and complete set of safety regulations. Indeed, since the beginning of civil aviation, it has become evident that the enactment of laws and regulations mandating aviation safety is largely responsible for aviation's enjoyment in both of these North American countries of an enviable safety record, technological advancement and a freedom of use unparalleled anywhere in the world.

In spite of all the manpower and technology, and although statistics show that flying remains a relatively safe mode of transportation[1], disturbing incidents continue to arise. Most aviation accidents result from the interplay of a variety of factors which are, among others, technological limitations, weather and several human factors which do not only involve the crew members of the plane. The dynamic expansion of aviation as well as an increased number of high performance planes and traffic have increased the danger of flying and consequently placed a higher degree of responsibility on the shoulders of governments. Indeed, agents and employees of both the Canadian and the American governments are involved in almost every aspect of the aviation industry. These governments are responsible for, among other things, the inspection and certification of aircraft, the licensing of pilots and other aviation personnel, the gathering and dissemination of weather information, the allocation of airspace, and the control of air traffic. 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 since there is still no international

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[1] In 1989, the National Transportation Safety Board (NTSB) reported 24 accidents, including 8 with fatalities, of passenger flights from the major scheduled airlines. As a fraction of the number of accidents among scheduled airlines is small, about 109 per 100,000 departures in 1989. Air Safety Week, Jan.22. 1990,at 1, col. 1.

convention governing the liability of the government agencies performing these activities.

Efforts to recover money damages from the governments of the United States and Canada in the wake of airline disasters are nearly as old as the renunciation by both of these governments of their sovereign immunity, and the theories upon which recovery has been sought have changed surprisingly little over the years. From the outset, plaintiffs and their attorneys have urged to seek a deep pocket defendant and have identified the roles of the federal governments in the air traffic system, in the dissemination of weather information and in air safety regulations as the most fertile areas out of which might grow government liability.

This research will primarily focus on the liability of the U.S. government in performing air traffic control services and in assuring the airworthiness of commercial aircraft, i.e. how the airplane is designed, manufactured and maintained. Thus, this paper is not concerned with the regulatory functions of inspection and certification as they relate to the national aviation system (airports and airways) and the airline flight operations (flight crews, dispatchers and meteorological services). Our study will concentrate on the liability of the U.S. since there is a vast number of reported cases on these topics which allow for a more thorough and meaningful analysis. This dissertation will essentially be directed on the study of the civil liability of the government employee for the negligent performance of these activities when such negligence is the proximate cause of death, injury or property damage and the study of resultant commercial or economic loss is beyond the scope of this research.

In the first section, we will consequently study the legislation and legal principles providing the legal framework for the liability of the government in the United States for its air traffic control services and for the process of certification and inspection of aircraft. In this respect, our purpose is to study the relevant provisions of the federal legislation and regulations on these subjects as well as the **Federal Tort Claims Act** which provides the necessary consent by the federal government for some types of claims and sets the conditions under which the plaintiff may bring suit. In a comparative approach, we will also give an outline of the government regulation of air

traffic control and the airworthiness of aircraft in Canada as well as the general principles governing suits against the Canadian government and mainly provided by the **Crown Liability Act.**

We also intend to examine the manner in which the American courts have applied and developed the legal principles governing the liability of the government in carrying out these activities, with a view to defining the evolution of the duties imposed on the controllers and the employees providing the certification and inspection of aircraft. In the course of our examination we will also seek to compare the decisions of the courts in the United States with the few decisions of the courts in Canada on the same subjects.

More particularly, with the advent of sophisticated aircraft as well as advanced aviation technology and the increase of air traffic, the pilot has become more dependant upon the air traffic controller for instruction and assistance. How this accrued dependance has modified the respective responsibilities and duties of the pilots and the controllers is an interesting question that should be examined in detail.

Moreover, this technological evolution in air transport has also pressed these governments to further intrude in the design, manufacture and operation of aircraft in order to assure the safe transportation of the traveling public.

Whether in our days these federal governments, through their respective agency or department, can bear the same civil liability as the designer and manufacturer of aircraft and can be viewed as their partner, is another aspect that can raise the attention of plaintiffs seeking a deep pocket defendant.

2. THE CHICAGO CONVENTION

We believe it is imperative to examine the basic constitutional instrument and the cornerstone of legal regulation of international civil aviation[2], before studying the legal framework of air traffic control and aviation safety in the United States.

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[2] The Convention on International Civil Aviation established the International Civil Aviation Organization at Chicago (hereinafter referred to as ICAO) in 1944, (hereinafter referred to as the Chicago Convention).

It is well established that the **Chicago Convention** of 1944 does not affect the legislative sovereignty of each contracting party. However, each contracting party must consider the provisions of this Convention in the adoption of the legal framework for its civil aviation in order to assure that international civil aviation may be developed in a safe and orderly manner and that international air transport may be established on the basis of equality of opportunity and operated soundly and economically.

The American and the Canadian governments rapidly realized the importance of these objectives and adhered to the Chicago Convention. By doing so, they consequently accepted the responsibility that the provision of the air traffic control services as well as the issuance of certificates of airworthiness and certificates of competency and licenses should fall upon the state.

More particularly, article 12 pre-supposes the existence of national rules and regulations which should be in conformity, to the greatest extent possible, with those established from time to time under the **Chicago Convention** by the International Civil Aviation Organization (hereinafter referred to as ICAO) Council. In addition, through Articles 28 to 35 of the Chicago Convention, the delegates of the Chicago conference realized the necessity of the provision of air traffic services and air navigation facility as well as the fact that the safety requirements provided by the States must be equal to the minimum standards ordered by ICAO for the issuance of certificates of airworthiness, of competency and licenses in order to assure the safe transportation of passengers. Over the years, the ICAO Council has developed and adopted technical annexes to the Chicago Convention which deal more exhaustively with air traffic control and airworthiness.

Provisions on air traffic are contained in parts of Annex 2 (Rules of the Air) and in Annex 11 (Air Traffic Services). The most detailed document dealing with the technical aspects of air traffic control is Doc \ 4444 - The Procedures for Air Navigation Services - Rules of the Air and Air Traffic Services (PANS-RAC). There are also Regional Supplementary Procedures (SUPPS) that are meant for the regional application, as ICAO, through its Air Navigation Commission, divided the world in nine regions and for every region, it prepared supplementary procedures to be applied.

The objectives of air traffic control services are defined in chapter 2 of Annex II as follows[3]:

(1) prevent collisions between aircraft;

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

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

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

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

ICAO provisions on aviation safety and more particularly on the certification and inspection process are found in Annex 8 of the **Chicago Convention** which establishes the International Standards with respect to the "Airworthiness of Aircraft". Section 2.2 of part two of this Annex provides that:

> "A Contracting State shall not issue or render valid a Certificate of Airworthiness for which it intends to claim recognition pursuant to Article 33 of the Convention on International Civil Aviation, unless the aircraft complies with a comprehensive and detailed national airworthiness code established for that class of aircraft by the State of Registry or by any other Contracting State. This national code shall be such that compliance with it will ensure compliance with:
>
> a) the Standards of Part II; and
>
> b) where applicable, with the Standards of Part III or Part IV of this Annex.
>
> Where the design features of a particular aircraft render any of the Standards in Part III or Part IV inapplicable or inadequate, variations therefrom that are considered by the State of Registry to give at least an equivalent level of safety may be made."

Section 3.1 of this Annex provides that the Contracting State or its authorized representatives are responsible for issuing a Certificate of Airworthiness on the basis

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[3] Art 2.2

of satisfactory evidence that the aircraft complies with the appropriate airworthiness requirements. Moreover, it provides that the Certificate of Airworthiness must be issued in accordance with section 3.2 and that the evidence of compliance must be obtained in the manner prescribed in 3.1.1, 3.1.2 and 3.1.3.[4] The duties of the representatives of the Contracting State are thus to assure compliance with the appropriate airworthiness requirements in order to ensure aviation safety.

3. THE REGULATION OF CIVIL AVIATION IN THE UNITED STATES AND THE FAA.

The United States is party to the International Civil Aviation Convention and, as such, has elaborated a set of regulations and manuals governing air safety and air traffic control. These regulations are based upon the ICAO Annexes to the Chicago Convention con taining Standards and Recommended practices[5].

Two mid-air collisions[6] were the primary impetus behind the enactment of the **Federal Aviation Act**[7] of 1958 which created an independent federal agency, the Federal Aviation Administration (hereinafter referred to as FAA). All of the vast US airspace is subject to regulation by the FAA, which accomplishes in every way the duties undertaken by the U.S. government when it adhered to the **Chicago Convention**.

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[4] Section 3.1 of Annex 8, July 1988; Section 3.1.1 provides that there should be an approved design consisting of drawings, specifications, reports showing compliance with the airworthiness requirements. These records are maintained to establish the identification of the aircraft with the approved design.; Section 3.1.2 provides that the aircraft shall be inspected during the course of construction in accordance with a system of inspection approved by a State.; Section 3.1.3 finally provides that the aircraft shall be subjected to flights that are deemed necessary by the State.

[5] Annexes 2 (Rules of the Air) ,8 (Airworthiness of Aircraft), 10 (Aeronautical Services) and 11 (Air Traffic Services) of the Chicago Convention.

[6] On April 21, 1958, a United DC-7 collided with a military jet over Las Vegas and 58 people died. On May 20, 1958, a Capital Airways Viscount collided with a military jet over Brunswick, Maryland and 13 people died.

[7] 49 United States Code Service (Hereinafter referred to as U.S.C.S.) paragraphs 1301-1557 (1990).

The basic function of the FAA is to promote aviation by the implementation of plans and policies which ensure safety. The **Federal Aviation Act**, among other things, specifically authorizes and directs the FAA to develop plans and policies for the use of navigable air space and to prescribe air traffic rules and regulations governing the safe flight of aircraft for the protection of persons and property in the air as well as on the ground[8]. The result, created over a quarter of century, is a scheme of Federal Aviation Regulations (FARs)[9].

The FAA is also required by the Act[10] to prescribe minimum standards governing designs, materials, workmanship, construction and performance of aircraft and their components. Additionally, the FAA must regulate inspections, dictate maximum period of services of airmen, aircraft and air carriers, and generally provide for safety in air commerce. To fulfill these duties the FAA is empowered by Congress to issue airmen certificates as well as certificates for the design, production and airworthiness of aircraft, and operating certificates. Along with this power, the FAA is given the responsibility to suspend, modify and revoke such certificates, if a reinspection, reexamination or investigation by the FAA reveals that the safety of the public so requires[11].

It is consequently under the supervision of the FAA and its set of rules that the air traffic controllers employed and supervised by the FAA perform the critical function of directing the takeoff and landing of aircraft. In doing so, controllers rely primarily

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[8] 49 U.S.C.S par. 1348 (1990).

[9] Part 91 of Federal Aviation Regulations enacted under the Federal Aviation Act which deals with General Operating and Flight Rules; Part 93 which deals with Special Air Traffic Rules and Airport Traffic Patterns; Part 95: IFR Altitudes; Part 97: Standard Instrument Approach Procedures; Part 99: Security Control of Air Traffic.

[10] 49 U.S.C.S. par. 1421 a); see also Part 21 which deals with Certification Procedures for Products and Parts; Parts 23 to 39 which deal with Airworthiness Standards and Directives; and Part 43 which deals with Maintenance, Preventive Maintenance, Rebuilding and Alteration.

[11] Parts 21 and 183 of FAR's.

on the detailed regulations of the **Air Traffic Control Procedure Manual** (hereinafter referred to as ATCPM)[12].

Negligent acts on the part of air traffic controllers (hereinafter referred to as ATCs) can have severe consequences and have frequently led to claims against the FAA as we will see in depth below under the **Federal Tort Claims Act.**

It is under the FARs that FAA employees perform the certification and inspection of aircraft. As previously noted, the **Federal Aviation Act** authorizes the Administrator to issue the following types of certificates for aircraft: a type certificate, a production certificate and an airworthiness certificate[13], in order to determine compliance by a manufacturer with the minimum standards set forth, in parts 21, 23 and 183 of the Federal Aviation Regulations (FAR's)[14] which were adopted by the United States in accordance with Annex 8 of the **Chicago Convention.** Improper certification or inspection can also lead to fatal disasters in aviation and have frequently led to claims against the FAA under the **Federal Tort Claims Act** (hereinafter referred to as FTCA). In this case however, it has been more difficult to succeed against the government under the FTCA since, as we will see, the inspection and certification process has been found to fall under the discretionary function and the misrepresentation exceptions established under the FTCA, as well as not being within the scope of duty of the government.

4. THE REGULATION OF CIVIL AVIATION IN CANADA

The Federal Parliament of Canada has exclusive control and jurisdiction with respect to aerial navigation in Canada and has the power to enact legislation in this respect.[15]

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12 FAA Air Traffic Control Order 7110.65C (1982).

13 49 U.S.C.S par. 1423 A) B) C) (1990).

14 Title 14 of the Code of Federal Regulations (hereinafter referred to as C.F.R.).

15 Fernandes, Transportation law, Vol.2 (1991),Toronto: Carswell, at 9-2.

Although aviation was not anticipated in the **British North America Act of 1867**[16], the Privy Council of England In Re Regulation and Control of Aeronautics in Canada[17] has favored the central government's exercising its "almost sovereign power" so that uniformity of legislation might be secured in areas such as aeronautics. It found that those areas had "attained such dimensions as to affect the body politics of the Dominion."[18]. The Privy Council conceded the field of aeronautics as including safety and operation of aircraft and aerodromes, licensing of personal, economic supervision of commercial air operation, intra-provincial aviation, and the related area of private law of salvage.[19] Subsequent decisions, including decisions of the Canadian Supreme Court, confirmed this position.[20]

The Parliament has thus enacted the **Aeronautics Act**[21] where it grants the Governor in Council authority to regulate aviation in Canada. The regulations adopted

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16 1867, 30 & 31 Victoria c.3 (Can.).

17 1932, AC 54, 1932 1 D.L.R. 58.

18 Id. at 77.

19 E.M. Lane and D.B. Garrow, "Canadian Procedural Law in Aviation Litigation", (1980), 46 J. of Air Law and Comm., at 296.

20 Johannesson v. West St-Paul (Rural M.), 1952 1 S.C.R. 292; Schwella v. R., (1957) Ex. C.R. 226, 9 D.L.R. (2d) 137; Jogenson v. North Vancouver Magistrates, (1959), 28 W.W.R. 265, 124 C.C.C. 39 (B.C. C.A.); Butler Aviation of Can. Ltd. v. I.A.M., (1975) F.C. 590 (C.A.); Orangeville Airport Ltd. v. Caledon (Town), (1975), 11 O.R. (2d) 546 (C.A.); McGregor v. R., (1977) 2 F.C. 520 (T.D.); Assn des Gens de L'Air du Qué. Inc. v. Lang, (1977) 2 F.C. 371 (C.A.); Manitoba v. Air Canada, (1977) , 77 D.L.R. (3d) 68, aff'd (1980), 111 D.L.R. (3d) 513 (S.C.C.); Staron Flight (19720 Ltd v. Phillips, (1978) 1 W.W.R. 132, 82 D.L.R. (3d) 213 (B.C. C.A.); Haida Helicopters Ltd. v. Field Aviation Co., (1978) , 88 D.L.R. (3d) 539 (FED.T.D.); Pan American World Airways Inc. v. R., (1979) 2 F.C. 34 (T.D.), aff'd 129 D.L.R. (3d) 257 (S.C.C.); C.A.L.E.A. v. Wardair Can.Ltd. (1975) Ltd. (1979), 97 D.L.R. (3d) 38 (Fed. C.A.); Re Forest Industries Flying Tankers Ltd. and Kellough (1980), 108 D.L.R. (3d) 686 (B.C. C.A.); De Havilland Aircraft of Canada Ltd. v. Toronto (City), (1980), 27 O.R. (2d) 721 (Div. Ct.); R. v. De Havilland Aircraft of Canada Ltd., (1981), 129 D.L.R. (3d) 390, (Ont. Prov. Ct.); North Canada Air Ltd. v. Canada Labour Relations Board, (1981) 2 F.C. 399 and 407 (Fed. C.A.); Air Canada v. Joval (1982), 134 D.L.R. (3d) 410 (Qué. C.A.); British Columbia v. Van Gool (1985), 62 B.C.L.R.86 (B.C. S.C.); Airlinte Eireann Teoranta v. Canada (Minister of Transport) , (1987) 3 F.C. 384 (T.D.), aff'd (1990), 107 N.R. 129 (C.A.); Venchiarutti v. Longhurst, (1989), 69 O.R. (2d) 19 (H.C.).

21 R.S.C. 1985, c. A-2.

pursuant to this Act, which are published as the **Air Regulations** and the **Air Navigation Orders**, cover the ownership, maintenance and registration of aircraft, the control of airports, air traffic control, air routes, etc... The **Air Navigation Orders** (hereinafter referred to as ANO) are more detailed and technical than the **Air Regulations**. More particularly, they contain the **Rules of the Air** (ANO, Series V) which give detailed instructions for the pilot and the ATCs for the accomplishment of a safe flight.

Under the **Aeronautics Act** and the **Air Regulations**, the Minister of Transport has the power and responsibility of air traffic control within such portions of the airspace of Canada and at such airports as he may specify.[22] More particularly, he may make directions as he deems necessary respecting the provision of air traffic control service and the standards and procedures to be followed in the operation of any air traffic control service or any air traffic control unit.[23] It is under this authority that the **Air Traffic Control Manual of Operations** (hereinafter referred to as ATCMO) was enacted to circumscribe the functions and procedures to be followed by the air traffic controllers as in the U.S.[24] The objectives of air traffic control service, according to the ATCMO 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.

As in the U.S., aircraft are required to be certified as airworthy to be operated in the Canadian airspace according to the Act. The Minister is also responsible for the safety of aircraft through the certification process. A Canadian aircraft is required to meet the standards set by the federal government in regulations for its type, size and

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22 Aeronautics Act, R.S.C. 1985 c. A-2, ss. 4.2 and 4.9; Air Regulations, C.R.C. 1978 c.2 ss. 506,600-601.

23 s. 600, C.R.C. 1978 (am. SOR\80-390).

24 Tr. Can. (T.P. 703 e) and f) for the French version.

use. The standards of airworthiness are set out in an **Airworthiness Manual** and an **Engineering and Inspection Manual.**[25] It is specifically provided that no person shall fly an aircraft unless there is in force in respect of that aircraft a certificate of airworthiness duly issued by the Minister who shall indeed ensure that the aircraft conforms to the applicable standards of airworthiness.[26] The Minister may, if he has reasons to believe that an aircraft is unsafe for flying, suspend the certificate of airworthiness issued in respect of that aircraft.[27]

It should be noted that historically the Canadian Air Transport Administration (CATA) was responsible for administering, among others things, the registration, identification, inspection, certification and licensing of aircraft. In 1987, the **Aeronautics Act** was amended by S.C. 1987 c.34 and the CATA was abolished. The responsibilities of the CATA are now exercised by the Aviation Group of Transport Canada.

5. SUITS AGAINST THE U.S. GOVERNMENT

5.1 Federal Tort Claims Act in general

The traditional governmental immunity protects governments at all levels from legal actions including actions based on tort principles. At the level of State and national governments, this immunity is called the sovereign immunity. Under the doctrine of sovereign immunity, a sovereign government cannot be sued by one of its subjects unless it consents to the suit. The doctrine is based upon the English maxim "The King can do no wrong" and this notion that no suit may be prosecuted against the

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[25] Air Regulations, C.R.C. 1978 c.2. ss. 210-221, 820, 809; ANO, Series II, Order nos. 2 to 30. (Order no. 4 is related to the Certificate of Airworthiness, Order SOR\83-537).

[26] C.R.C. 1978, c.2, ss. 210-221 (am. SOR\82-725; SOR\82-984; SOR\84-933; SOR\86-300; SOR\86-478; SOR\88-194; SOR\90-593).

[27] s.212

sovereign absent its consent was well ingrained in English law.[28] Although the modern state gradually replaced the individual sovereign, this doctrine was carried over.[29]

An early elaboration of the notion of sovereign immunity as it pertained to this country is found in Osborn v. Bank of the United States[30]. In this case, it was held that the United States government could not be sued without its consent. However, no reason was given for the adoption of this principle. It was not before 1868 in the case of Gibbs v. United States[31] that the Court justified this doctrine.[32] It was found that the doctrine was necessary to avoid involving the government in "endless embarrassments and difficulties, and losses which would be subversive of the public interests"[33]. Later on, it was thought that there could be no legal rights against the authority that makes the laws on which the rights depend.[34] The reasoning of this judgment in fact became the modern justification of the doctrine of sovereign immunity. It consequently followed that no court had jurisdiction to entertain suits against the United States, that only Congress could waive the federal government's immunity and that any waivers should be strictly construed.[35]

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28 Prosser, D.B. Dobbs, R.E. Keeton and David G. Owen. Prosser and Keeton on Torts (5th ed. 1984), Minnesota: West Publishing Co., at 1032-1056.

29 Id. at 1033.

30 22 U.S. (9 Wheat) 338 (1824); see also B. Blakely, "Discretion and the FAA: An Overview of the Applicability of the Discretionary Function Exception of the Federal Tort Claims Act to FAA Activity" (1983) 49 J. of Air Law and Comm., 143.

31 75 U.S. (8 Wall) 269 (1868).

32 Blakely, supra note 30.

33 Gibbs, supra note 31, at 274.

34 Kawanakoa v. Polv Bank, 205 U.S. 349, 353.

35 S.S. Desrochers, "Misrepresentation exception in FTCA actions involving government inspection and certification", 49 J. of Air Law and Comm., (1983), at 650; see also Dalehite v. United States, 346 U.S. 15 (1953), 97 L Ed 1427, 73 S. Ct 956.

Following the establishment of this doctrine, the only way for a citizen to seek relief for injuries or damage caused by a government employee in the course of his duties was by way of private bill to the Congress[36]. The great number of petitions and the complexity of the recovery procedures became an increasing burden for the government over the years. These reasons together with the fact that the sovereign immunity created harsh results stimulated the Congress to adopt the **Federal Tort Claims Act** (FTCA).[37]

The FTCA which was enacted in 1946 after nearly thirty years of very cautious congressional consideration, provides for a broad waiver, with certain enumerated exceptions, of the federal government's sovereign immunity from liability in tort for the acts of its officers, employees and representatives. The FTCA has become the principal means of asserting tort liability against the United States and, as in other instances of negligence actions against the government, the FTCA has been applied and quoted in aviation tort cases in which the United States is either the sole defendant or one of the multiple defendants as we will see in depth below[38]. The waiver of immunity is contained in 28 United States Code Service (hereinafter referred to as U.S.C.S.) paragraph 1446(b)[39]. As it was carefully noted by Kreindler, "broken down into its

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[36] " Consent to liability on contract claims was given by the Tucker Act in 1887, but no such general consent to tort suit was given at that time. Instead, relief was granted only if the citizen could show that the government committed, not merely a tort, but a 'taking of property' compensable under the Constitution, or if he could bring himself within one of the narrow and particular statutes consenting to suit, or if he could manoeuver a private bill through the Congress.", Prosser, Dobbs, Keeton and Owen, supra note 28, at 1033.

[37] 28 U.S.C.S. par. 2674 (1990); Prosser,Dobbs, Keeton and Owen, supra note 28; see also Dalehite v. United States, 346 U.S. 15 (1953); 97 L. Ed. 1427, 735 S.Ct. 956.

[38] Lee S. Kreindler, Aviation Accident Law, New York: Mattew Bender Co., (1992), at 5-2.

[39] 28 U.S.C.S. (1990)- Judiciary and Judicial Procedure
This provision states: "The district Courts .... shall have exclusive jurisdiction of civil actions on claims against the United States for money damages ... 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

basic elements, the Act waives immunity for (1) negligence or wrongful acts, (2)committed by government employees, (3)while in the scope of employment, (4) if a private person would be liable under like circumstances, (5) according to the law of the place of the wrong".[40]

The broad purpose of the Act was described by the Supreme Court of the United States in Indian Towing Co. v. United States[41] as follows:

> "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 caprice and legislative burden of individual private law."[42]

As it was noted, numerous exceptions to the FTCA's broad statement of liability were also provided for situations in which immunity has been retained.[43] Neither the Act nor its legislative history clearly express the purposes underlying each exception.[44] As a result, determining the scope of coverage of the FTCA is largely a matter of judicial construction.

Beside the conditions provided under the jurisdictional provisions of the FTCA (28 U.S.C.S. paragraph 1346(b)), the limitations contained in section 2674[45], the discretionary function exception and the misrepresentation exception contained in section 2680 of the FTCA have formed part of the major defenses of the government

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the law of the place where the act or omission occurred."

40 Kriendler, supra note 38, at 5-4.

41 350 U.S. 61 (1955); 100 L.Ed. 48, 76 S. Ct. 122.

42 Id. at 68; 100 L. Ed. at 56.

43 The substantive limitations and exclusions are contained in 28 U.S.C.S par. 2674 and 2680 (1990), which list 13 exceptions to the waiver of tort immunity by the United States.

44 Desrochers, supra note 35, at 653.

45 Section 2674 provides: "The United States shall be liable, respecting the provisions of this title relating to the tort claims, in the same manner and the same extent as a private individual under like circumstances".

against claims alleging the liability of ATC agencies and the employees carrying the certification and inspection of aircraft.

These two last exceptions pertaining to ATC's liability and the liability of FAA employees for certification and inspection of aircraft are listed in section 2680 which excepts from the reach of paragraph 1346(B) of the Act the following claims:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of (...) misrepresentation ...

The discretionary function exception will be discussed in depth below since it has been the most debated and omnipresent exception in aviation lawsuits. We will also discuss the misrepresentation exception defense which has been raised by the government to claims of negligent licensing of aircraft.

However, before getting into the details of these exceptions, we believe it is imperative to study the other limitations and conditions to the general waiver of sovereign immunity which are relevant to aviation cases relating to ATC's liability and liability of FAA employees in the certification and inspection of aircraft process.

5.2 Requirement of Negligence or Wrongful Act

The FTCA requires that the plaintiff establishes the negligence or a wrongful act or omission of the government employee who was acting within the scope of his employment. In Dalehite v. United States[46] and in Laird v. Nelms,[47], the Supreme Court of the United States affirmed that under the FTCA, the exercise of discretion could not be abused without negligence or wrongful act. In Laird v. Nelms, it specifically decided that the United States could not be strictly liable without fault for

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[46] 346 U.S. 15 (1953),, at 32-34.

[47] 406 U.S. 797, 92 S. Ct. 1899, 32 L.Ed. 2d 499 (1972).

engaging in an ultra hazardous activity and that the " Act did not authorize the imposition of strict liability of any sort upon the government."[48]

In earlier decisions, the Courts had applied state absolute liability statutes applicable to owners of aircraft and had imposed absolute liability on the government.[49] The Nelms decision however sheds some doubts on the authority of these decisions.

The law of the state in which the alleged tortious conduct occurred determines the scope of the government's vicarious liability and consequently, what is a negligent or wrongful act. State law also determines what defences the United States may present. These assertions will be studied in more detail in sections 5.3 and 5.4 below.

The general principles of the law of tort should however be remembered. Generally, under negligence theory of state law, a plaintiff may obtain redress for a claimed wrong only if he can establish that the defendant had an obligation to the plaintiff, a duty of care, where the breach of that duty amounts to a violation of the plaintiff's legal rights.[50] Section 285 of the Restatement (second) of Torts provides that duties can arise when established by statute or administrative regulation, or may emerge from judicial decision. Once a duty is established, the standard of care is provided in the codification or emerges from judicial decision where it is generally governed by the "reasonably prudent person" standard. This external standard of conduct consequently involves factual subjective evaluations which can differ from one case to another. Since there can be an infinite variety of circumstances like those confronting air traffic controllers or FAA employees assuring the airworthiness of aircraft, we will consequently try to determine as much as possible the standard of care

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48 Id., 406 U.S. 797 at 801.

49 See, e.g., United States v. Praylou, 208 F2d 291 (4th. Cir. 1953), cert. denied, 347 U.S. 934, 98 L.Ed 1085 (1954); Long v. United States, 241 F.Supp. 286 (W.D.S.C. 1965); Parcell v. United States, 104 F. Supp. 110 (S.D.W.Va. 1951).

50 Restatement (Second) of Torts, American Law Institute Publishers, section 281 (1965).

of the ATCs and FAA employees providing the certification and inspection of aircraft in depth below.

For the time being, it may be relevant to note that in aviation tort litigation against the government, courts often rely on FAA-established regulations or procedures mandating minimal safety requirements or prescribing certain conduct as the standard of due care for government's employees conduct. The courts held many times that violation of federal regulations, in conjunction with state tort law principles, can constitute prima facie evidence of negligence.[51]

5.3 Government Liability Like That of a Private Person Under Like Circumstances

As it has already been mentioned, section 2674 of the FTCA limits and measures the liability of the United States for the negligent or wrongful acts of its employees "in the same manner and to the same extent as a private individual under like circumstances."

The purpose of this language has been interpreted as not creating new causes of action.[52] A prospective plaintiff must establish initially that the United States, if treated as a private person, would owe a duty of care to the plaintiff under the law of the state of the alleged act or omission.

The government has unsuccessfully tried to interpret the language of this section narrowly by arguing that under the language of section 2674, liability of the government existed only if private individuals engaged in the exact same activity as the

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[51] Kriendler, supra note 38, at 5-26; Gill v. United States, 429 F.2d 1072 (5th Cir. 1970), aff'd 449 F.2d (5th Cir. 1971); Hartz v. United States, 387 F.2d 870 (5th. Cir. 1969); Bowen v. Unites States, 570 F.2d 1311 (7th Cir. 1978).

[52] Kriendler, supra note 38 at 5-13; Feres v. United States, 340 U.S. 135 (1950) where the Supreme Court has held that the FTCA does not create new causes of action, but merely accepts liability under circumstances that would impose liability on private individuals under similar or analogous circumstances; This was also clearly expressed in King v. United States, 178 F.2d 320 (5th Cir. 1950) and subsequent cases: Schultetus v. United States, 277 F.2d 322 (5th Cir. 1960), at 325; Franklin v. United States, 342 F.2d 581 (7th Cir. 1965), at 584; American Airlines v. United States, 418 F.2d 180 (5th Cir. 1969), at 191; Spaulding v. United States, 455 F.2d 222 (9th Cir. 1972), at 226.

government. The government argued that section 2674 excluded from the scope of the FTCA liability negligence in the operation of uniquely governmental functions for which no private analogous activity exists.

In Indian Towing v. United States[53], the Supreme Court has clearly rejected this narrow construction of section 2674 and held that the government is liable so long as liability by private person would exist under local law "under like circumstances". Indeed, "like circumstances" does not require that for every governmental activity, an identical non governmental activity exists.

On the other hand, the Court relied on this language to apply the Good Samaritan doctrine which is a rule of state tort law. It held that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.[54]

The Good Samaritan doctrine stated in sections 323 and 324A of the Restatement (Second) of Torts,[55] is a rule of tort liability that 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. There is also liability on a person who negligently renders a service to another when it is clear that the person acting in reliance is in a more disadvantageous position than he was prior to the voluntary undertaking since the undertaking.[56] Under Section 324A[57], the doctrine imposes

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53 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), in this case, a claim for property damage was filed against the government. The damage resulted from the grounding of a vessel due to the failure of a light in the lighthouse, which was apparently caused by the negligence of the Coast Guard in operating the lighthouse. In order to escape from liability, the government argued that private persons do not operate lighthouses.

54 Id. at 64-65.

55 Restatement of the Law (Second) Torts, vol. 2, American Law Institute Publishers, 1965.

56 Restatement of Torts (Second) section 323 (1965) provides:
"One who undertakes, gratuitously, or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if: a) this failure to exercise such care increases the risk of such harm or; b) the harm is suffered because of the other's reliance upon the undertaking."

liability when a person renders a service which he should know is needed for the protection of a third person or his things, if negligent performance of the service results in physical harm. Therefore, when the risk of harm is increased, reliance upon the government is shown, or the government assumed an obligation owed to a third person to another, liability may be imposed on the government.[58]

Since the FTCA measures the liability of the U.S. "in the same manner and to the same extent as a private individual under like circumstances" it has been held that the FTCA does not create a cause of action[59]. The Good Samaritan doctrine rule has thus become the cause of action to which the plaintiffs refer within the purview of the **Federal Tort Claims Act** for negligence in air traffic control operations, in flight service station weather briefing services, in rescue missions for aircraft, in the FAA publication of navigation charts and other FAA functions such as the certification and inspection of aircraft.[60]

For example, in Clemente v. United States[61] it was found that where specific behavior of federal employees is required by federal statute, liability to the beneficiaries

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57 Restatement (Second) of Torts section 324A (1965). This section provides:
" One who undertakes, gratuitously, or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if: a) this failure to exercise reasonable care increases the risk of such harm or; b) he has undertaken to perform a duty owed by the other to the third person; or c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

58 C.F. Krause and J T. Cook, "The liability of the United States for negligent inspection", 48 J. of Air Law and Comm., (1983), at 735.

59 See also United States Scottish Insurance Co. v. United States 614 F.2d 188 (9th Cir. 1979); Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied 435 U.S. 1006 (1978).

60 Cecile Hatfield, "The Non Liability of the Government for the Certification of Aircraft", 17 The Forum, at 610; see also Kriendler, supra note 38, at 5-14 and 5-15.

61 567 F.2d 1140, (1st Cir. 1977), cert. denied. 435 U.S. 1006 (1978).

of that statute may not be founded on the FTCA if state law recognizes no comparable private liability.[62]

United States Scottish Ins. Co. v. United States[63] also provides an example of this reasoning. This case involved an aircraft certification process. The plaintiff alleged that the FAA had been negligent in inspecting two DeHavilland aircraft which had gasoline fueled heater installed and in issuing a supplemental type certificate for the aircraft. In this respect, the plaintiff relied on a violation of FARs as the basis for government liability. The Court of Appeals found that the plaintiffs could not base their claim on alleged breaches of federal law when there is no corresponding duty under state tort law since the FTCA imposes liability upon the United States only where private persons would be similarly liable.[64] The Ninth Circuit found as good samaritan activities the FARs which impose upon the FAA inspection and certification duties and stated that in order to hold private persons liable for the negligent execution of such good samaritan activities, applicable state law must provide the good samaritan theory.

Therefore, these cases which have required proof of actionable duty under state tort law principles, have argued that the federal regulations cannot presumptively establish a duty in a suit based on the FTCA but can only establish evidence of reasonable conduct.[65]

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62 Id. at 1149. This case involved a wrongful death action arising out of the crash of a chartered DC-7 aircraft on December 31st, 1972. The plaintiff asked the Court to find an actionable duty on the basis of an FAA regional directive concerning surveillance of an unairworthy aircraft being chartered for group transportation. The Court declined to find that the promulgation of the regional directive created a duty of care owing to plaintiff's decedents under the FTCA. The regional directive imposed a duty for FAA employees to perform their job in a certain way which as a duty "totally distinguishable from a duty owed by the government to the public on which liability could be based.", 567 F.2d. at 1145; see also Blessing v. United States 447 F. Supp. 1160 at 1186-1200 (ED. Pa. 1978).

63 614 F.2d. 188 (9th Cir. 1979).

64 28 U.S.C.S. section 1346 b) (1990).

65 George N. Tompkins, Jr. "The Liability of the United States for Negligent Certification of Aircraft", 17 The Forum, at 585.

Simply put, since there is no comparable private liability for inspection and certification activities for private persons, the duty must be found in the applicable state Good Samaritan doctrine. Therefore, the court must determine if the plaintiff's case satisfies the good samaritan requirements of the rule, provided that the state law in particular has recognized the Good Samaritan rule.

Recently, the 11th Circuit Court has also clearly applied this principle in Howell v. United States[66] which involved the alleged negligence of an FAA inspector. The Court stated that the FTCA was not intended to create new causes of action. Citing Indian Towing Co. v. United States[67], the Court reasoned that under the FTCA, whether the United States was liable for inspector's failure to act depended on whether a similarly situated employer would be liable for such an omission under the law of Georgia, the place where the omission occurred. It found that the plaintiffs did not establish any reliance by the passengers on the said inspection and accordingly held that the government was not liable under the Good Samaritan doctrine, which is the analysis utilized in Georgia cases to evaluate liability of private parties for negligent safety inspections.

As it will be demonstrated in depth below, while the Good Samaritan rule has been easily applied to find ATCs liable, courts have many time denied liability where "good samaritan" inspections were undertaken by the federal government especially because the reliance relationship between the passengers and the FAA inspectors is harder to determine.[68]

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[66] F.2d; 23 Av. Cas. (CCH) 17,681 (11th Cir. 1991). In this case, an FAA inspector was informed that the fuel of an airplane scheduled to be used for a "check ride" was contaminated. The FAA inspector canceled the check ride without taking further action. Two days later, the plane crashed. In the subsequent action brought under the FTCA, the plaintiffs contended that the FAA inspector should have taken action such as grounding the plane, issuing an official notice, or initiating an investigation into the cause of the contamination.

[67] 350 U.S. 55 (1955).

[68] Tompkins, supra note 65, at 581-585.

The government consequently relies very often on the absence of a legal duty defense to dismiss any claim based on the negligent certification of inspection of aircraft by an FAA employee.

5.4 What Law Applies

Under the FTCA, the federal courts are directed to follow the tort law of the state in which the tort occurred (28 USCS 1346 b)), including its choice of law rules. This rule differs from the traditional conflict of laws rule that the law of the place of the harmful impact governs tort liability. More particularly, the Supreme Court in Richard v. United States[69] has construed section 1346 b) as including its choice of law rules[70]. The Court's finding in Richard has recently been applied in Budden v. United States[71] where the Court stated that the whole law, including the choice of law rules of the state, governs the rights and liabilities of the parties. Since the crash of the helicopter ambulance occurred due to the negligence of the flight service station specialist employed in Omaha, Nebraska, the law of Nebraska applied.

A good example of the application of the approach elaborated in Richard, as applied in air traffic control cases, is found in Deal v. United States[72] where the crash

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69 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

70 Other aviation cases have construed and applied this provision: Donham v. United States (1976, CA8 Mo) 536 F.2d 765, aff'd 431 U.S. 666, 52 L.Ed.2d 665, 97 S. Ct. 2054, reh. den. 434 U.S. 882, 54 L.Ed.2d 168, 98 S.Ct. 250; Bibler v. Young (1974, CA6 Ohio) 492 F.2d 1351, 12 Av. Cas. (CCH) 18,322, cert. denied 419 U.S. 996, 42 L. Ed.2d 269, 95 S.Ct. 309; Spaulding v. United States (1972, CA9 Cal) 455 F.2d 222, 12 Av Cas (CCH) 17,240 , aff'd (CD Cal) 299 F.Supp 1116, 11 Av Cas (CCH) 17,228; Black v. United States, (1971, CA5 Tex) 441 F.2d 741, 11 Av Cas (CCH) 18,104, cert. denied 404 U.S. 913, 30 L.Ed.2d 186, 92 S.Ct. 233; Rudelson v. United States 1977, DC Cal) 431 F.Supp. 1101, 14 Av Cas (CCH) 17,991, supp. op. (DC Cal) 444 F.Supp. 1352, supp op (DC Cal) 444 F. Supp. 1354 and 1356; Hoffman v. United States (1977, ED Mich) 14 Av Cas (CCH) 17,646; Deal v. United States (1976, DC ARK) 413 F.Supp. 630, 13 Av Cas (CCH) 18,432, aff'd (CA8 Ark) 552 F.2d 255, 14 Av Cas (CCH) 17,766, cert. den 434 U.S. 890, 54 L.Ed.2d 175, 98 S.Ct. 264; In Re Paris Air Crash (1975, DC Cal) 399 F.Supp. 732, 14 Av Cas (CCH) 17,207; Robinson v. Unites States (1972, ND Tex) 13 Av Cas (CCH) 17,333, aff'd per curiam (CA5 Tex)475 F.2d 1403; Thinguldstad v. United States (1972, SD Ohio) 343 F.Supp. 551, 13 Av Cas (CCH) 17,105.

71 22 Av. Cas. (CCH) 18,344 (D.Neb. 1990).

72 413 F.Supp. 630 (WD Ark 1976); see also Eastern Air Lines Inc. v. Union Trust Co., 221 F.2d 62 (D.C. 1955).

of the plane occurred in Arkansas allegedly because of the negligence on the part of the controllers located in Memphis, Tennessee. The Court first referred to Tennessee conflicts law since it was the place where the negligent act occurred. However, under Tennessee law, the law which governs actions for wrongful death is the law of the place of the harmful impact. Since the accident took place in Arkansas, the Court then looked into the Arkansas comparative negligence statute to determine the rights of the parties.

The state law rules of wrongful death, res ipsa loquitur, proximate cause, contributory negligence and assumed risk consequently govern the question of federal liability[73] and the result of the suit may change according to which air traffic control tower was in charge of the flight or which inspector carried out the negligent inspection.[74] The procedural aspects of a suit under the FTCA are however governed by federal law.

Section 1346 b), however, cannot be helpful in solving a problem of the law to be applied in a multistate tort action such as when acts of negligence on the part of the United States occur in any combination of different states.

A multistate tort action was the basis of the issue in Kantlehner v. United States[75] where the alleged acts of negligence on the part of the United States could have occurred in any combination of nine different states. The Court applied the Restatement (second) of Conflicts "significant contact" rule to determine which state's

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[73] Prosser, Doobs, Keeton and Owen, supra note 28, at 1034; Kriendler, supra note 38, at 5-11.

[74] For example, in Eastern Air Lines Inc. v. Union Trust Co., supra note 72, the passengers of the Eastern airliner were killed in a crash of the plane in the District of Columbia. The cause of the crash was allegedly the failure of the control tower operators in Virginia to issue timely warning that another plane was also on final approach. The Court of Appeals reasoned that when the death occurs in a state other than the one where the wrongful act or omission occurred, the FTCA prescribes us to disregard the law of the place of injury and to apply the law of the state where the tort occurred. In this case, the death statute of the District of Columbia did not give any limitation on the recovery while the death statute of Virginia limited recovery at that time to 15,000$. The court applied the Virginia statute.

[75] 229 F.Supp. 122, (ED NY 1967).

law governed. The Court used the same approach in Beattie v. United States[76] where the acts of negligence occurred in both the District of Columbia and Antartica.[77]

The use of Restatement's significant contact test was however rejected in Bowen v. United States[78]. To determine which state's law would apply, the Court preferred to focus on the "place of the act or omission having the most significant causal effect" on the injury. The Court argued that Restatement's significant contacts approach considers a full panoply of factors whereas the FTCA focuses narrowly on wrongful acts or omissions and not all the factors involved in the "contacts approach".

Until the Supreme Court clearly closes the debate, the solution seems to be equivocal for the determination of which state's law would apply when acts of negligence on the part of the United States occur in a combination of different states.

While plaintiff's cause of action cannot exclusively be based on federal law, federal regulations and statutes mandating minimal safety requirements or prescribing certain conduct can be relevant in an FTCA suit in aviation litigation in establishing a standard of due care.[79] The certification process for aircraft and the regulation of air traffic being regulated by the FAA, the courts have many times concluded that violation of federal regulations in conjunction with state tort law principles such as the Good Samaritan doctrine, can constitute prima facie evidence of negligence.[80]

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76 756 F.2d 91 (DC Cir 1984).

77 For similar results see: Bonn v. Puerto Rico Int'l Airlines, inc., 518 F.2d 89 (1st Cir. 1975); Insurance co. of North am. v. United States, 527 F.Supp. 962 (E.D. Ark. 1981); Reminga v. United States, 448 F.Supp. 445 (N.D. Mich. 1978), aff'd, 631 F.2d 449 (6th Cir. 1980).

78 570 F.2d 1311 (7th Cir. 1978).

79 Kriendler, supra note 38, at 5-26.

80 Gill v. United States, 429 F.2d 1072 (5th Cir. 1970), aff'd following remand, 449 F.2d 765 (5th Cir. 1971); Hartz v. United States, 378 F.2d 870 (5th Cir. 1969); Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Thinguldstal v. United States, (1972 SD Ohio) 343 F.Supp. 551, 13 Av Cas (CCH) 17,105.

Complicating the matter, some states still follow a negligence per se approach when controllers are found to have violated provisions of the ATCPM.[81] Negligence per se is defined as meaning negligence as a matter of law and such a rule does not allow the defendant to show that his conduct under the circumstances was reasonable in spite of violating a statute or regulation.[82] This question will be examined in more detail in the section which deals with the standard of care applicable to ATCs and FAA employees carrying the certification and inspection of aircraft.

5.5 Government Employee and Scope of Employment

According to section 1346b) of the FTCA, the alleged tort-feasors must have been employees of the United States who were acting within the scope of their employment, such as to make the government liable under the doctrine of respondeat superior. While federal law determines who is a federal employee for purposes of the statute[83], the law of the state in which the alleged tortious conduct occurred determines the scope of the government's vicarious liability.[84]

Unfortunately, the Act does not provide helpful definitions for the terms "employee" and "scope of his office or employment".

Employee is defined as including:

> "Officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 316, 502, 503, 504 or 505 of title 32 and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States, whether with of without compensation".[85]

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81 Springer v. United States, 64 F.Supp.913 (DSC 1986).

82 Kevin N. Courtois, "Standards and Practices: The Judiciary's Role in Promoting Safety in the Air Traffic Control System", (1989) 55 J. of Air Law & Comm. at 1131.

83 LeFevre v. United States, 362 F.2d 352 (5th Cir. 1966).

84 Richard v. United States, 369 U.S.1, 11 (1962).

85 28 U.S.C.S section 2671.

"Federal Agency" is defined as follows:

> "The executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, incorporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States". [86]

There is nothing in the Act which would help define the expression "acting within the scope of his office or employment" except that "in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of Title 32, it means acting in line of duty".[87] These definitions consequently do not give any indications as to whether Congress intended to incorporate into the FTCA the common law interpretation of the expressions "employee" and "scope of employment".[88]

In 1955, the Supreme Court of the United States settled the question by concluding that state law principles of respondeat superior did govern the issue of scope of office or employment, although some earlier Federal Court decisions had applied federal standards to determine the question of scope of employment.[89]

As it has already been stated, it was however decided by the Supreme Court that federal law governs the determination of who is a federal employee and whether a particular office is a federal agency or an independent contractor.[90]

A distinction often difficult to draw, especially in cases of certification and inspection of aircraft, is between federal employees and independent contractors for

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86 Id.

87 Id.

88 Kriendler, supra note 38, at 5-16.

89 United States v. Sharpe, 189 F.2d. 239 (4th Cir. 1951); United States v. Lushbough, 200 F.2d. 717 (8th Cir. 1952).

90 Kriendler, supra note 38, at 5-17; Standard Oil Co. v. Johnson, 316 U.S. 481, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); United States v. Lacombe, 277 F.2d 143 (4th Cir. 1960); United v. Le Patourel, 571 F.2d 405 (8th Cir.).

whose tests the government is not liable.[91] In this respect, the Supreme Court in Logue v. United States[92], and in United States v. Orleans[93], adopted the "strict control" test which helps determine whether a tort-feasor is an employee of the United States or an independent contractor. The Court in Logue reasoned that "the critical factor in making this determination is the authority to control the detailed physical performance of the contractor."[94] In this case the question that needed to be answered was whether a county jail housing a federal employee was a federal agency and its employees federal employees or independent contractors. The Court found relevant the fact that the government had no authority to supervise the jail's employees and that the "day-to-day operations" of the jail were in the hands of the contractor. It accordingly concluded that the jail was not a federal agency and that the employees were not employees of the government.

In Orleans, the Court also applied this test to find that a community action agency was an independent contractor.[95]

The Court of Appeals has recently reaffirmed the requirement of "strict control" with respect to the government's liability in aviation cases in Charlima v. United States[96] and in Leone v. United States[97]. In Charlima, the airplane buyer brought a suit against the government under the FTCA for negligent airworthiness inspection. The Court of Appeals concluded that the designated airworthiness inspector was not an employee of the FAA since the FAA did not control his day-to-day activities. Citing Logue and Orleans, it stated that although the FAA had promulgated regulations

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91 28 U.S.C.S. section 2671; see also Kriendler, supra note 38, at 5-19.

92 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed. 2d 121 (1973).

93 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed. 2d 390 (1976).

94 Supra note 92, at 527-528.

95 Kriendler, supra note 38, at 5-20.

96 873 F.2d 1078 (1989).

97 910 F.2d 46 (1990).

regarding inspection process, it did not exercise day-to-day supervision and control over inspectors.[98] It added the following:

> "Moreover, according to the Director of the Office of Airworthiness for the FAA, the FAA has no customary contractual relationship with designated representatives, nor are they on the FAA payroll or otherwise compensated by the FAA. Instead, a designated representative is paid by the certificate applicant, which may elect to use her to inspect its aircraft at its own cost or choose instead to allow FAA personnel to inspect its aircraft in accordance with existing FAA practice."[99]

In Leone, the Second Circuit Court of Appeals reversed the district court for the Eastern District of New York, by holding that Aviation Medical Examiners (AMEs) are not employees of the federal government for purposes of the FTCA since the employees' day-to-day operations do not come under the direct supervision and control of the federal government. The Court reasoned that although the federal government issues guidelines for the performance of the AMEs' duties, the government does not maintain control over the AMEs' detailed physical performance of these duties. The Court found relevant the fact that AMEs schedule their own appointments, set their own fees, collect their fees directly from applicants, and provide their own instruments, tools and workplace.

In light of these decisions and criteria that have been elaborated by the courts, ATCs are undoubtedly federal employees under the FTCA and may engender the vicarious liability of the government. Indeed, the air traffic control personnel works under the jurisdiction of the FAA which has established an air traffic control network for the safe and efficient handling of instrument flight operations and which also prescribes standard procedures and policies to be followed in the control of air traffic.[100] Moreover, ATC's personnel is on the FAA payroll, it is closely supervised and controlled by the FAA and it works in the control towers operated by the FAA with instruments provided by the FAA.

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98 Supra note 96, at 1081.

99 Id.

100 For example ATCPM.

As for the inspectors of aircraft for the certification process, it has clearly been decided in Charlima that designated airworthiness representatives, private persons to whom the FAA has delegated the responsibility of certifying the airworthiness of aircraft, are not employees of the United States. Therefore, the government will be held vicariously liable in circumstances where the work of the employee will be daily supervised and controlled by the FAA, and where the employee will be listed on the payroll of the FAA such as the FAA personnel specifically trained and designated to perform the inspections.

5.6 Administrative Provisions in General and Jurisdiction

Beside the substantive limits, the FTCA also imposes a number of particular procedural limits. More particularly, there are three important limitations on the procedural side.

First, the FTCA confers on the federal district courts exclusive jurisdiction for actions filed under it and neither a claim against the United States nor a claim against any federal employee arising out of employment can be maintained in state courts.[101]

Second, FTCA actions are tried without a jury so that all claims of this sort are tried by the judge sitting as trier of facts.[102]

Third, within two years after the claim accrues, it must be filed in writing with the appropriate federal agency or department prior to filing a court action.[103] The federal agency is deemed responsible for the damages[104] and if the agency denies the claim, the action must be filed within six months. The purpose of this requirement is to facilitate the settlement of claims at the administrative level and ultimately, reduce the cost of processing claims at the judicial level. If the agency fails to act on the claim

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[101] 28 U.S.C.S. 2402 (1990); Prosser, Dobbs, Keeton and Owen, supra note 28, at 1035; Kriendler, supra note 38, at 5-6 and 5-7.

[102] 28 U.S.C.S. section 2402; Prosser, Dobbs, Keeton and Owen, supra note 28, at 1035.

[103] 28 U.S.C.S. section 2401, (1990).

[104] 28 U.S.C.S. par. 2401 b) and 2675.

within six months, the claimant has the right thereafter to treat this non-action as a denial of the claim and file suit.[105]

The Court of Appeals have jurisdiction of appeals from the final decisions of the district courts except where direct review may be obtained by the Supreme Court.[106]

On the other miscellaneous issues, the FTCA provides that the United States is not liable for interest prior to judgment or for punitive damages.[107] Moreover, the FTCA expressly excludes claims arising in a foreign country.[108] The expression "foreign country" was found to denote a "territory subject to the sovereingty of another nation".[109]

Finally, section 1402 contains the Venue Rule and provides that it lies "in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred".[110] It is important to note that improper venue will not defeat the court's jurisdiction over the case since the venue provision is not jurisdictional.[111]

Apart from these procedural limitations, the Act provides two major substantive limits: the discretionary function exception and the misrepresentation exception.

5.7 Discretionary Function Exception

One of the exceptions enumerated in the Act is that the federal government may not be held liable for the performance or the failure to perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or

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105 28 U.S.C.S. section 2675.

106 Id. section 1291.

107 Id. at 2674.

108 Id. par.2680 k).

109 United States v. Spelar, 338 U.S. 217, 70 S.Ct. 10, 94 L.Ed.3 (1949); see also Beattie v. United States 756 F.2d 91 (D.C. Cir. 1984), in which the court had to determine whether Antartica was a foreign country, thus making the FTCA inapplicable there.

110 Bechheit v. United States, 202 F.Supp. 811 (SD NY, 1962) where it was concluded that under the Act, the personal residence of the plaintiff-administrator governs.

111 Nowothy v. Turner, 203 F.Supp. 802 (MDNC 1962), Kriendler, supra note 38, at 5-6.

not the discretion involved be abused.[112] This exception has become the most litigated of the exceptions provided by the FTCA since there has been much confusion surrounding its scope and application, especially in cases where the liability of the FAA for negligent conduct has been at issue.[113]

Indeed, neither the Act nor its legislative history clearly express the policy reasons for excepting discretionary acts from the general waiver of tort immunity granted by the Act. However, the language of the Act seems to retain the idea that certain governmental activities are legislative or executive in nature and that any judicial control of those activities would disrupt the balanced separation of powers of the three branches of the government. Acts of a governmental nature should not subject the government to liability in order to avoid making the judiciary the final and supreme arbiter in government for all matters on which judgment might differ.[114] Although the recognition of this basis might help define the scope of the discretionary function exception, we must refer to the body of decisional law interpreting this exception in order to determine the contours of this exception and criteria applicable to various factual situations.

However, even if there is a significant body of decisional law, it is still impossible to define "with precision every contour of the discretionary function exception".[115]

The discretionary immunity is wide and is often said to include any governmental conduct that involves policy judgment. The most authoritative interpretation of this exception before the Supreme Court's decision in Berkovitz v. United States[116] in 1988, has been the Supreme Court's 1953 decision in Dalehite v.

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112 28 U.S.C.S. par. 2680 a) (1990).

113 B.Blakely, supra note 30, at 147.

114 Id. at 147-148, referring to House Report on the Act.

115 United States v. Varig Airlines, 467 U.S. 797, at 813.

116 486 U.S. 1988.

United States[117] which was reaffirmed and clarified in Varig Airlines[118] and its decision in Indian Towing v. United States[119].

In Dalehite, the government adopted a plan for the export of fertilizer to boost crops in friendly countries. The fertilizer was manufactured from explosive materials, and a large amount of it, on board ship in the harbor of Texas City, exploded, destructing the whole area. The government was allegedly negligent in controlling the manufacture, in handling and in shipping the fertilizer. The Court first noted that it seemed that the purpose of the exception was to avoid judicial review of claims questioning the "validity of legislation or discretionary administrative action"[120]. It then found that Congress's mind was to waive immunity for the "ordinary common law torts" of government employees, but not for "acts of a governmental nature or function"[121]. The Supreme Court concluded that there would be no liability because "where there is room for policy judgment and decision there is discretion."[122] In its analysis of the exception, the Court seemed to find that the policy judgment can equate to the planning level of the government and seemed to imply that operational level decisions that are based on routine would not be considered to be discretionary. More particularly, the Court stated the following:

> "[It] includes more than the initiation of programs and activities. It also includes determination made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were so, the protection of par.2680 (a) would fail at

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117 346 U.S. 15 (1953).

118 467 U.S. 797, (1984).

119 350 U.S. 61 (1955).

120 346 U.S. at 27; and statement of then Assistant Attorney General appearing before Congress, H. of Rep., 77th Cong., 2nd sess. on H.R. 5373 and H.R. 6463, at 29, quoted in Dalehite at 27.

121 Dalehite, supra note 117, at 28.

122 Id. at 36.

time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or non-action being directed by the superior, exercising, perhaps abusing, discretion."[123]

Less than three years after Dalehite, the Supreme Court decided Indian Towing. In that case, the plaintiff suffered economic losses when his tugboat and barge ran aground, resulting in the destruction of the cargo on board. The malfunction of the lighthouse, the failure of the government to properly maintain the lighthouse and the omission of the Coast Guard to issue a warning were found to be the cause of the grounding of the vessel. The government tried to avoid any analysis of the discretionary function exception by admitting that the lighthouse maintenance and warnings were at the "operational level". It argued instead that the operation of the lighthouse was a uniquely governmental function[124] and that under the FTCA the government could be found liable only in circumstances where a private individual could be so found. The Court rejected this argument and held that while the Coast Guard had no duty to undertake lighthouse service, once it exercised its discretion to do so it was under an obligation to use due care in its inspection. Indian Towing established a "good samaritan" basis of liability for the government and did not directly involve the discretionary function exception but has been "instrumental in aiding lower courts in their efforts to define its scope."[125]

The planning versus operational level distinction developed in Dalehite was later adopted by the courts as the essential criteria for distinguishing discretionary from non-discretionary governmental functions. The status of the author consequently became the main reference for determining whether he was exercising his functions at a

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123 Id. at 36.

124 Indian Towing, supra note 119, at 64.

125 B.Blakely, supra note 30, at 150-151; Smith v. United States, 375 F.2d 243, 246 (5th Cir. 1967), cert. denied, 389 U.S. 841 (1967).

planning level, where his conduct was immune, or at an operational level where the exclusion did not apply.[126]

For instance, for the negligence of a tower controller, the Court in Eastern Air Lines, Inc. v. Union Trust Co.[127] referred to the planning versus operational level distinction in order to conclude that the decisions of the controller were not within the purview of the discretionary function exception. The Court basically held that the decision of the ATCs were made at an operational level since they did not involve any consideration important to the practicability of the government's program of controlling air traffic at public airport.[128]

A more complete analysis of the discretionary function exception and of the planning versus operational activities test was subsequently completed by the Supreme Court of the United States in United States v. Varig Airlines[129]. More particularly, in Varig, the Court expanded upon Dalehite and rejected the planning versus operational level distinction as an effective test for analyzing the applicability of the discretionary function exception.

The Varig case involved the crash of a Boeing 707 near Paris caused by a lavatory fire. The FAA had certified the lavatory unit although it violated an air safety regulation requiring that waste receptacles be made of fire resistant materials and contain fire-containing devices. The respondent's claim was that the FAA was negligent in failing to inspect the aircraft design process before allowing certification.

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126 Among the cases applying the planning vs\ operational level distinction: United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); Medley v. United States, 17 Av. Cas. (CCH) 17,738 (N.D. Cal. 1982); Swanson v. United States, 229 F.Supp. 217 (N.D. Cal. 1964); Wenniger v. United States, 234 F.Supp. 499 (D. Del. 1964), aff'd 352 F.2d 523 (3rd Cir. 1955); United Airlines v. United States, 8 Av. Cas. (CCH) 17,108 (D. Del. 1962); In Re Air Crash Disaster Near Silver Plume, Colorado, 445 F.Supp. 384 (D. Kan. 1977); Vilandre v. United States, 19 Av. Cas. (CCH) 18,087 (D. Minn.1985); Schubert v. United States, 246 F.Supp. 170 (S.D. Tex. 1965).

127 221 F.2d 62 (D.C. 1955).

128 Id. at 78.

129 467 U.S. 797, 81 L.Ed. 2d 660, 104 S.Ct. 2755 (1984).

The government argued that this regulatory activity is designed to encourage compliance with minimum safety requirements and , as such, is the sort of conduct protected by the discretionary function exception.[130] In holding that the discretionary function exception did not bar a claim against the FAA, the Ninth Circuit compared the duties of FAA inspectors with those of the lighthouse keepers in Indian Towing. In its reasoning, the Supreme Court reaffirmed the views in Dalehite and enunciated several factors useful in determining the applicability of the exception in the following words:

> "First it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case... Thus, the basic inquiry... is whether the challenged acts of a Government employee- whatever his or her rank- are of the nature and quality that Congress intended to shield from tort liability. Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting as a regulator of the conduct of private individuals."[131]

Accordingly, the Court reasoned that the respondents' argument challenged two aspects of the certification procedure, i.e. the decision by the FAA to implement a spot-check for determining a manufacturer's compliance with FAA regulations and the application of the spot-check inspection to the particular aircraft in Varig and United Scottish.[132] It then emphasized that the discretionary function exception was plainly intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals and prevent "second guessing" of legislative and administrative decisions grounded in social, economic and political policy.[133] The Court went on to apply these principles and viewed the implementation of a "spot

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130 467 U.S. 797, at 815.

131 Id. at 813-14.

132 Two cases were actually before the court. In Varig (692 F.2d 1205 (9th Cir. 1982), claimants argued that the CAA had been negligent in inspecting the Boeing 707 and issuing a type certificate to the aircraft. In United Scottish, an air taxi caught in fire in mid-air and crashed. Claimants alleged that the FAA had been negligent in issuing a supplemental type certificate for the installation of a gasoline-burning heater on the aircraft. United Scottish's reference is 692 F.2d 1209 (9th Cir. 1982).

133 Kriendler, supra note 38, at 5-4.

checking" program to ensure manufacturers' compliance with safety standards as the best way to reach the goal of safe air transportation and resolve the problem of limited FAA personnel and resources.[134] Moreover, it added that the protection of regulatory activities was the main reason for the enactment of the discretionary function exception of the FTCA.[135] In conclusion, it was decided that the actions of the FAA employees under the spot-check program and especially the failure to check certain specific items in the course of certifying a particular aircraft were protected by the discretionary function exception.[136]

After this decision, "it became the government's position that Varig Airlines immunized it from liability for all regulatory activities, apart from negligence in such innocuous and ordinary day-to-day activities as driving a vehicle incident to government employment."[137]

This argument was clearly rejected by the Supreme Court in Berkovitz v. United States[138] which involved alleged acts of negligence in the government's licensing and approval of release of an oral polio vaccine. The Court emphasized that it is not all acts arising out of the regulatory programs of the federal agencies that are protected by the discretionary function exception, "but only such acts as are "discretionary" in nature."[139]

As it has cleverly and simply been explained by commentator Lee S.Kreindler in his leading work, Berkovitz gave "the best framework for determining the applicability of the exception:

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134 Varig, supra note 129, at 820.

135 Id. at 820.

136 Id. at 820.

137 Kriendler, supra note 38, at 5-51.

138 486 U.S. 531, 100 L.Ed. 2d 531, 108 S.Ct. 1945 (1988).

139 Berkovitz, 108 S.Ct. at 1960.

(1) It is the nature of the conduct that governs whether the exception applies in a given case.

(2) In examining the nature of the conduct the Court must consider first whether the action is a "matter of choice for the acting employee", since the exception only protects conduct involving an element of judgment or choice.

(3) If the conduct involves an element of judgment, the Court must then determine "whether that judgment is of the kind that the discretionary function exception was designed to shield."

(4) Congress only intended to "prevent judicial second-guessing of the legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." The exception "therefore protects only actions and decisions based on considerations of public policy."

(5) The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[140]

Since the federal agency responsible for issuing vaccine licenses had to comply with regulatory provisions, it was decided by the Supreme Court that the actions of the said agency were not barred by the discretionary function exception.

While it is easy to conclude under the criteria enunciated in Berkovitz that the day-to-day duties of air traffic controllers which consist of handling established policies do not fall under the discretionary function exception, it is not as easy to classify the duties or functions of the FAA employees carrying the certification and inspection of aircraft as we will see in depth below.

5.8 Misrepresentation Exception

Subsection 2680 h) of the FTCA precludes recovery of "any claim arising out of misrepresentation".[141]

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[140] Kriendler, supra note 38, at 5-51 and 5-52; Berkovitz, 108 S.Ct. at 1954.

[141] 28 U.S.C.S. 2680 h).

The misrepresentation exception is one of the limitations to the general waiver of sovereign immunity of the government provided by the FTCA which has been raised very often as a defense in FTCA actions.[142] Traditionally, the rationale behind the misrepresentation defense has been that finding the government liable for injuries suffered as a consequence of inaccurate information provided by government officials to private individuals would discourage the government from performing many important functions.[143]

This exception in the Act has been construed several times in aviation tort litigation. This defense has especially been raised in cases where the controllers have provided the pilots with inaccurate information and has effectively been asserted in a significant body of cases involving aircraft inspection/certification.

The application of the misrepresentation exception, especially to inspection and certification activities, has created two conflicting schools of interpretation with respect to government liability.

One of the leading cases dealing with the misrepresentation exception is United States V. Neustadt[144], where the United States were sued under the FTCA by the purchaser of a home, who claimed he had relied upon a negligent inspection and appraisal by the Federal Housing Administration and had been compelled to pay more for the property than it was worth. The Supreme Court reversed the Court of Appeals decision by finding that the plaintiff's claim was barred by the exception.

The Court looked very closely at the true cause of the complaint which it found was the inaccurate representation in the appraisal rather than the negligent action of the government, and construed the language in the Act to encompass negligent, as well as willful, misrepresentation by the government. In fact, the Court made it clear that

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142 Sarah Saldana Desrochers, supra note 35, at 652.

143 Ramirez v. United States, 567 F.2d 854, 856 (9th Cir. 1977).

144 366 U.S. 696 (1961).

section 2680 h) cannot be circumvented by stating that the basis of the claim lies in "negligence" rather than in "misrepresentation". [145]

Additionally, the Court held that the tort of negligent misrepresentation is to be construed according to its traditional definition. It has traditionally been interpreted to include the duty to use due care in obtaining and communicating information upon which another might reasonably be expected to rely. In a footnote, the Court noted that this negligent misrepresentation is more likely to arise in the course of business transactions. The Court in Neustadt finally drew a distinction between an incidental misrepresentation and those cases where the government fails to warn of a particular danger or hazard when there is such duty.[146] The Neustadt rationale is expressed as follows:

> "To say...that a claim arises out of "negligence", rather than "misrepresentation", when the loss suffered by the injured party is caused by the breach of "specific duty" owed by the Government to him, i.e. the duty to use due care in obtaining and communicating information upon which that party may reasonably expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definitions of the tort of negligent misrepresentation."[147]

Later decisions seized upon the occasion to apply the rationale offered by Neustadt. This decision unfortunately created a source of continuing controversy since these cases attempted to draw the slippery distinction raised in Neustadt between negligent action and negligent misrepresentation. [148]

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145 Cecil S. Hatfield, supra note 60, at 623.

146 Tompkins, supra note 65, at 594-595.

147 Neustadt, supra note 144, at 701-711.

148 Desrochers, supra note 35, at 654; some courts have even said that the misrepresentation exception will always apply in a commercial context. See Green v.. United States, 629 F. 2d 581, 584-85 (9th Cir. 1980); but cf. Vaughn v. United States, 259 F. Supp. 286 (N.D. Miss. 1966) where the Court refused to determine applicability merely along economic lines. See also Hatfield, supra note 60 at 623-624 (1982); Cross Bros, Meat Packers V. United States, 533 F. Supp. 1319, 1322 (E.D. Pa 1982); Park v. United States, 517 F. Supp. 970, 979 (D. Or. 1981); Summers v. United States, 480 F. Supp. 347 (D. Md. 1979); In re Air Crash Desaster near

Following that decision, it appears that plaintiffs in ATC cases avoided the bar of the misrepresentation exception more successfully when they were characterizing the government's activity as a "failure to warn" rather than a misrepresentation.

For instance, as for air traffic control cases, the failure of air traffic controllers to warn of bad weather was not a misrepresentation.[149] Moreover, the failure of the U.S. Air Force to warn pilots of dangers of collision due to failure to study commercial passenger traffic in the area of the Air Force base, as required by regulation, was not a misrepresentation.[150]

The rationale behind these decisions is that when there is a duty to warn, the pilot has the right to assert that there is no danger if there is no warning of danger. Hence, when there is danger and there is no warning, the gravamen of the complaint is the negligent performance of operational tasks, rather that misrepresentation. Indeed, the source of duty is easy to establish in such a case. Moreover, if this defense were upheld, it would bar suits against the government in any air traffic control case where the controller provided inaccurate information or failed to provide information available to him.

However, where a claim was filed against the government on the basis of FAA'S negligent action in having issued a certificate to an aircraft when, in retrospect, the aircraft had proven to be unairworthy, the misrepresentation defense was the most difficult one to overcome against the U.S. Government.

For example, in Marival Inc. v. Planes Inc. and Lloyd v. Cessna Aircraft Co., the courts barred a third party complaint based upon the misrepresentation exception.

Selver Plume, 445 F. Supp. 384 (D. Kan. 1977); Marival, Inc. v. Planes Inc., 306 F. Supp. 855, at 859 (N. D. Ga. 1969); Lloyd v. Cessna Aircraft Co. (E.D. Tenn. 1977) 429 F. Supp. at 197.

149 Ingham v. Eastern Airlines, Inc., 373 F. 2d. 227 (2nd cir. 1967), cert. denied, 389 U.S. 931 (1967).

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

The Court in Marival[151] was faced with a third party claim against the United States by the sellers of an airplane. The sellers alleged that the condition of the aircraft was misrepresented to the buyers following a certificate of airworthiness given by an FAA inspector. Because there was reliance upon an allegedly negligent misrepresentation in a commercial transaction, the Court, in a most expositive opinion, dismissed the third party indemnification complaint against the United States. It analyzed the frequent judicial misconception of the nature and scope of this exception in the FTCA. It reasoned that the negligence of the FAA airworthiness inspection was secondary "since it was the misrepresentation of the aircraft's condition by the buyer upon which the defendant sellers has relied in their communications with the buyer"[152] that created the damages. The Court accordingly distinguished between the direct versus incidental nature of the alleged negligent conduct of the government. Judge Edenfield lays it out at pp. 857-860, as follows:

> "The line between negligent conduct and negligent misrepresentation is often difficult to draw with precision. An element of misrepresentation runs through many forms of negligent conduct. Indeed, negligent misrepresentation involves underlying negligent action. But more is needed to come within the misrepresentation exception of paragraph 2680 h) than merely an element of misrepresentation." [153]

Lloyd v. Cessna Aircraft Co.[154] also barred a third party complaint in wrongful death and personal injury actions, based upon the misrepresentation exception. This decision contains a comprehensive analysis of almost all reported cases construing this exception. In LLoyd, the plaintiff alleged negligence on the part of the FAA in inspecting and testing an aircraft prior to the agency's issuance of a supplemental type certificate and an airworthiness certificate. The Court noted that the "misrepresentation

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151 306 F. Supp. 855 (N.D. Ga. 1969).

152 Tompkins, supra note 65 , at 595.

153 In this respect, see also Cross Brothers Meat Packers v. United States, 533 F. Supp. 1319 (E.D. Pa. 1982).

154 429 F. Supp. 181 (E.D. Tenn. 1977); see also Summers v. United States 480 F. Supp. 347 (P. Md. 1979); and Knudsen v. United States, 50 F. Supp. 90 (S. E. N. Y. 1980).

exception is just applicable to actions involving injury, wrongful death or property damages as it is to those involving only financial or commercial loss".[155] In its memorandum opinion, the district Court stated:

> "In several cases arising under the Federal Tort Claims Act,... the courts have held that negligent inspections and testing by government officials, which conduct results in incorrect information being reported and relied upon, in reality amount to a claim arising out of misrepresentation so as to be precluded by the [misrepresentation] exception to the [Federal Tort Claims Act]."

The Court continued:

> "Where the negligence of federal employees, whether by inspection, testing, diagnosis or otherwise, has resulted in the conveyance of erroneous information, thereby causing damages or other loss of the plaintiff, the courts have held that any action against the national Sovereign based on the Federal Tort Claims Act,... is barred by the misrepresentation exception."[156]

The misrepresentation exception has also been broadly construed as covering virtually all inspection-based claims in Summers v. United States and in Knudsen v. United States.[157]

In Summers, the plaintiff sued the United States alleging that the FAA had been negligent in issuing a type certificate for the aircraft's engine, in failing to issue an airworthiness directive requiring the replacement of allegedly faulty exhaust valves, and in failing to require certain testing and design corrections for the engine. The Court referred to the analysis in Marival and Llovd and stated that the claim arose from the reliance on the government's certification of the engine and that the alleged negligence

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155 Llovd v. Cessna Aircraft Co.,Id. at 187; Indeed, the line defining the boundaries of the exception was similarly drawn by some courts to preclude recovery only where economic, rather than personal, harm had been suffered. See, Green v. United States, 629 F. D. D. 581, 584-85 (9th Cir. 1980); Cross Brothers Meat Packers v. United States, 533 F. Supp. 1319, 1322 (E.D.Pa. 1982); Park v. United States, 517 F. Supp. 970, 979 (D. Or. 1981).

156 Llovd, Id. at 183 and 185.

157 50 F.Supp. 90 (S.D. N.Y. 1980).

of the inspection and testing of the engine was merely secondary. It consequently concluded that the misrepresentation exception barred plaintiffs' action.

In Knudsen, the Court also found that plaintiff's claim was barred by the misrepresentation exception. It reasoned that the FAA employee was responsible for a negligent misrepresentation in failing to discover and report operational defects in the airplane.

The opposite result was reached In re Air Crash Disaster near Silver Plume[158] where recovery was sought against the United States for injuries and deaths resulting from the crash of an aircraft. Plaintiff alleged that the FAA was negligent in inspecting and certifying an aircraft as airworthy when it was unfit to fly. The misrepresentation defense was raised by the government but the Court refused to apply this exception. The Court reasoned that the primary purpose of the **Federal Aviation Act of 1958** is the defendant's duty to promote safety and to prevent or reduce tragic aviation accidents through inspection and certification of planes[159] and that the passengers were the beneficiaries of such a duty. The Court stated:

> "The inspection of the aircraft, and the written record of such inspection, as stated in the certification, is to ensure detection and enforce remedying of defects in the aircraft inimical with its "condition for safe operation" (49 USCS par. 1423c)), not to calculate or insure the value of the inspected plane. The defendant's duty to promote safety through inspection and certification of planes is not incidental to the purpose of this Act but is the very reason for its enactment."[160]

Hence, the Court found that the misrepresentation exception will be applicable if any governmental duty under a statute or regulation is incidental or secondary to the primary statutory purpose or when an injury is proximately caused by a misrepresentation of facts based on either negligent or non-negligent conduct, rather than upon the conduct itself. The Court accordingly stated that the claim of the

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158 445 F. Supp. 384 (D. Kann. 1977).

159 Id. at 409.

160 Id. at 409.

plaintiffs arose from their reliance on the negligent inspection itself and not on the misrepresentation or in accuracy in providing information, and that the misrepresentation exception could not be used by the government to bar their recovery since the negligently performed inspection undertaken to protect the safety of air travellers was the proximate cause of the injuries of the passengers involved in the crash. In other words, the essence of the claim was the negligent FAA conduct rather than the misrepresentation.

Fireman's Fund Insurance Co. v. United States[161] is another case taking a similar approach as Silver Plume.

The decisions in Silver Plume and Fireman's Fund Insurance which concentrated on the essence of the claim gave rise to the adoption of an alternative approach to the misrepresentation exception by the Supreme Court in Block v. Neal.[162] The Neal decision is significant in the fact that the Court was drawn to construe in a strict manner one of the two most widely raised defenses to this broad liability created by the FTCA. Although this case doesn't involve aviation tort litigation, it however gives a boost to plaintiffs seeking recovery from government in airline certification cases.

Mrs. Neal brought suit against the Farmers Home Administration (FmHA) for the allegedly negligent inspection and supervision of the construction of a home by FmHA officials which was a prerequisite to receiving a Rural Housing Loan from FmHA.

The plaintiff Neal discovered a number of defects and sought compensation for these defects against the government, basing her complaint on the government's failure to use due care in the voluntary undertaking of inspecting and supervising the construction of her house rather than on any misrepresentation related to such undertaking.

The Supreme Court focused on the question of the applicability of the misrepresentation exception and affirmed the Sixth Circuit Court of Appeals' holding

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[161] 527 F. Supp. 328 (E.D. Mich. 1981).

[162] 103 S.Ct. 1089 (1983).

that the misrepresentation exception did not bar the particular action. The Court reviewed Neustadt opinion and noted that "Neustadt stood for the proposition that the misrepresentation exception protects the government from liability for pecuniary injuries which are "wholly attributable" to the plaintiff's reliance on negligent misrepresentation."[163] The Court accordingly reasoned that if the government wants to be protected by this exception, it must not only prove the communication of information but also reliance on such information by the aggrieved party. The Court clearly differentiated the facts in Neustadt from the facts in Neal. It specifically demonstrated that the duty breached in Neustadt was that of not using due care in communicating information to the buyer and argued that "the gravamen of the action was that the plaintiff was misled by a statement of FHA appraisal" while in Neal, the action was based on the plaintiff's allegation of negligent conduct by the government, i.e. on the breach of its duty to use due care to ensure that the builder complied with previously approved plans and to cure defects prior to completion of the construction.[164] Indeed, in Neal, the plaintiff did not base her complaint on the breach of exercising due care in the communication of information.

The Court has thus drawn a clear distinction between the negligent conduct of the government and the negligent misrepresentation, which is to be applied to the facts of each case concerning a suit against the government for negligent certification or inspection of aircraft by an FAA inspector.

This concludes our study of the limitation of the general waiver of government's immunity contained in the FTCA. Keeping in mind all these legal principles governing the government's liability, we now turn to a closer examination of the manner in which the U.S. courts have elaborated the basis for the liability of the government in carrying out the air traffic control and the certification and inspection of aircraft activities. However, before getting into the details of the government's liability in aviation tort litigation involving air traffic control and the certification and inspection of aircraft in

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[163] Blakeley, supra note 30, at 148-149.

[164] Neal, supra note 162, at 1094.

the U.S., and ultimately comparing the American jurisprudence with the few Canadian decisions, we believe the reader will appreciate to be provided with an overview of the legal principles surrounding claims against the government in Canada. This will indeed help the reader make a constructive comparison with the American system.

5.9 Comparison with Suits Against the Canadian Government

Canada, as many other English colonies, inherited British constitutional and legal traditions including the rule that no claim existed in tort against the Crown for negligent act or omission of one of its servants. This rule, as we have seen, is based on the English maxim that "The King can do no wrong" and was established in the last century by Tobin v. R.[165] and Feather v. R.[166].

Canada was slower than the United States and the United Kingdom in allowing the Crown to be sued for its liability. Initially, only a few claims were allowed against the government; these claims had to be based solely on contracts and with respect to public work only.[167] The Act was soon found to be insufficient and was criticized by the courts for its lack of logic and its unfairness.[168]

The **Crown Liability Act** (hereinafter referred to as CLA) was thus sanctioned by the Parliament in 1953.[169] This Act, as the FTCA, renders the government vicariously liable for the acts of its servants. Specifically, section 3 of the CLA states the following:

> "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

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165 (1864) 143 E.R. 1148.

166 (1865) 122 E.R. 1191.

167 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; S. Goldwater, "The Application of Provincial Law in Matters of Delictual and Quasi-Delictual Responsibility of the Crown", 12 Themis (1962), at 175.

168 H. Sasseville, "The Liability of Air Traffic Control Agencies", Thesis submitted to the Faculty of Graduate Studies, Institute of Air and Space Law, McGill University, March 1985, at 85-86.

169 An Act Respecting the Liability of the Crown for Torts and Civil Salvage, 1985 R.S.C. c. C-50.

b) in respect of a breach of a duty attaching to the ownership, occupation, possession or control of property. R.S.C. c. C-38, s.3"

As in the U.S., for the Crown's liability to be involved following the rule of respondeat superior, the servant has to be proven negligent. The Canadian air traffic controllers fall under the application of the CLA since they are recruited, trained and employed by the Department of Transport, which makes them civil servants or "servants of the Crown". The same can be said for the employees of Transport Canada carrying out the inspection and certification of aircraft.

Contrary to the FTCA, the second part of section 3 imposes a direct liability on the Crown for the property which it owns or controls.[170] This provision could become relevant to a situation which is likely to happen in a near future, that is the failure of computerized equipment of the air traffic control services causing an accident. Although there would be no negligence of the controller, the government could be found liable for a failure of such computerized equipment since the Canadian government occupies every control tower in Canada and owns all the equipment therein.

Although the CLA is silent on this matter, the applicable law determining the substantive extend of the delictual liability of the government is the provincial law of the place where the tort was committed provided it is not incompatible with the CLA.[171]

Public authorities are also judged according to the ordinary principles of negligence law of the province where the tort was committed. Indeed, section 10 of the CLA provides that no proceedings lie against the Crown in respect of any act or omission of a servant of the Crown "unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or the servant's personnel representative."

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[170] S. 3 (1) b).

[171] A.S. Abel, Laskin's Canadian Constitutional Law, 4th Ed., Toronto, 1973 at 796; S. Goldwater, supra note 167, at 180; Schwella v. The Queen, (1957) Ex. C.R. 226.

Although this provision seems to stipulate the contrary, it was decided by the Courts that it is not necessary to prove which one of the servants was personally involved in the negligent action.[172] The effect of this provision can be compared to section 2674 of the FTCA limiting the liability of the U.S. for the negligent or wrongful acts of its employees "in the same manner and to the same extent as a private individual under like circumstances." As section 2674 of the FTCA, the CLA refers the plaintiff to the traditional concepts of negligence law. Ordinary rules of negligence consequently apply to the ATCs and the inspectors of the government (of Transport Canada) carrying the certification and inspection of aircraft.

Hence, as far as the common law provinces are concerned, plaintiffs will have to prove a) the duty of care imposed by common law or statute law; b) the breach of that duty, and c) the damage caused as a result of the breach. The yardstick regarding the standard of care to be supplied is the conduct of the "reasonable and careful man" or "reasonable and prudent person" or "reasonable care under the circumstances" which is comparable to the American standard.[173]

As for the civil law of delictual or extra-contractual liability provided by section 1053 of the Civil Code of Lower Canada of the Province of Quebec, plaintiffs will have to prove: a) the fault of the defendant ; b) the damage; and c) that the fault was the direct cause of the damage. The fault is either determined by law, i.e. a breach of a duty, or by the conduct of the "bon père de famille dans des circonstances semblables."

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172 G.Pépin, Y.Ouellette, Principes de Contentieux Administratif, MTL, 1982, 2ième Ed., at 494, footnote 105 for a list of cases.

173 A.M. Linden, Canadian Negligence Law, 1988, 4th ed., at 115-116: "In 1850, Baron Andelson furnished the common law world with a definition of negligence that is still appropriate today: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that a person taking reasonable precautions would not have done."

i.e. a violation of a standard of conduct.[174] A fault is every wrongful act, whether of omission or of commission, which causes damage to another.[175] Although the civil law notion of fault has been considered to be wider in scope than the common law notion of tort of negligence, the basic elements of each system are almost identical and have the same effects on the duties of ATCs throughout Canada. All ATCs are indeed, in practice, subject to the same standards of care.

It should be noted that unlike the FTCA, the CLA does not mention that the negligence of the government employee must have taken place "while acting within the scope of his office or his employment". It is however the basic requirement of both common law and civil law that in order for the master to be held vicariously responsible for the acts of his servant, the latter must have acted or failed to act in the course of his employment.[176] Therefore, the negligence of the government employee will have to take place while he was acting within the scope of his office or employment in order to generate the liability of the Canadian government.

As for the jurisdiction for the claims against the Canadian government, the CLA originally gave the competence to the Exchequer Court. Former section 17 (1) of the 1970 and 1985 **Federal Court Act** also provided that actions against the Crown were brought by way of "statement of claim" before the Trial Division of the Federal Court, the former Exchequer Court, which had exclusive jurisdiction.[177] A suit against the Canadian government for negligent action of controllers or employees of Transport

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174 J.L. Beaudoin, La Responsabilité Civile Délictuelle, (1990) 3ième Ed., Cowansville: Les Editions Yvon Blais, at 54-55: Discussing the notion of fault this author states the following: "D'une façon générale, la plupart des définitions données par la doctrine se regroupent autour de deux idées maîtresses: le manquement à un devoir préexistant et la violation d'une norme de conduite."(at 54).

175 H.C. Goldenberg, The Law of Delicts, Montreal, 1935, at 10.

176 Sasseville, supra note 168, at 93.

177 Article 17 (1) of the 1970 Federal Court Act (R.S.C. (2nd. Supp.) c-10) and the 1985 Federal Court Act (R.S.C. 1985, c. F-7) 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 jurisdiction in all those cases."

Canada carrying the inspection and certification of aircraft consequently fell under section 17 (1) of the Act.

In addition to the exclusive jurisdiction of section 17 (1) for claims against the government in the first instance, the **Federal Court Act** gave and still gives the Trial Division concurrent jurisdiction with the Provincial Courts for certain other matters in section 23 which includes a claim for relief made under an Act of the Parliament of Canada in relation to aeronautics, except to the extent that jurisdiction had been otherwise specially assigned. It should be noted that unlike the state courts in the U.S., the Superior Court of a province has jurisdiction to interpret and apply federal statutes as well as provincial statutes and common law. The Superior Courts are referred to as "Provincial Courts" and are the Courts of Record existing in each province.[178]

This provision was found to be ambiguous and produced peculiar results especially in air transport where suits involving the alleged combined negligence of air carrier, aircraft and component manufacturers, airport authorities and crew members are likely to happen. Indeed, with regard to a joint action against the Crown and other defendants, it is understood that the Federal Court has to have jurisdiction over each one of the defendants and for the Federal Court to have jurisdiction, the action has to be based on existing federal law, i.e. the cause of action which the person seeks to assert in the Federal Court must itself be based in the jurisdiction of that Court and fall within and arise from valid and existing federal legislation.[179] This principle was reaffirmed by the Supreme Court of Canada in Quebec North Shore Paper Co. v. Canada Package Ltd.[180]

This consequently created situations where the suits had to be split and separate actions have to be taken; one against the Crown in the Federal Court and the other against the other defendants in the Superior Court of the Province.

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178 E.M. Lane and D.B. Garrow, supra note 19, at 300.

179 Lane and Garrow, supra note 19, at 301.

180 (1977) 71 D.L.R. (3d) 111.

It is in fact this kind of costly situation that was created in Pacific Western Airlines v. The Queen[181]. This action arose from the crash at landing of an airliner flying from Calgary to Canbrook. The airline sought to bring an action for recovery of its hull loss in the Federal Court Trial Division against the Crown, as employer of air traffic controllers, various aircraft and component manufacturers and the city of Cranbrook and its employees. All the defendants challenged the jurisdiction of the Federal Court. They were all successful except for the Crown. The Court refused to find as "existing federal laws" the **Aeronautics Act** and **Air Regulations**, the **Federal Court Act** and the **Bilateral Treaty** between Canada and the U.S.. As a result, the carrier was obliged to bring separate actions against all the defendants, excluding the Crown, in the Superior Court of the Province of British-Columbia.

Hence, before the **Federal Court Act** was amended in 1990, unfortunate situations arose where any plaintiff pursuing an aviation claim involving the Crown or its servants and employees as prospective defendants had to split the case and commence separate actions; one in the Federal Court, Trial Division, and the other in the Superior Court of the Province.

Fortunately, the **Federal Court Act** was amended to prevent this costly myriad of problems for plaintiffs by giving concurrent jurisdiction to the Provincial Court for suits against the government. Article 17 (1) now reads as follows:

> "Except as otherwise provided in this Act or any other Act of Parliament, the Trial Division has concurrent original jurisdiction in all cases where relief is claimed against the Crown."

In aviation tort litigation, it is now possible for a plaintiff seeking recovery against the Crown and other defendants, such as the manufactures or air carrier, to bring a joint action in the same convenient forum, i.e. in the competent Provincial Court.

Although the CLA is a general waiver of the sovereign immunity in Canada, there remains, however, an area of "political" decision making which has not been as vulnerable to a private law suit for damages and that has demanded special attention.

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[181] (1979) 2 F.C. 476.

Hence, in this particular area, there remains a government immunity to be sued. This immunity can be compared to the discretionary function exception contained in the FTCA in the U.S. Courts have indeed traditionally been unwilling to expose the political activities of a government to ordinary tort law scrutiny. It is still felt that those who engage in political decision-making ought not to have the quality of their decisions judged by their electorate, and not "second guessed" by the judiciary. Moreover, since policy formulation by the public bodies involves difficult decision making, the balancing of conflicting interests, the weighing of competing claims of efficiency and thrift or economy, courts are more naturally reluctant to get involved. These concerns have resulted in a case law which has the duty to draw a line between the activities of governments which will be subject to ordinary tort law principles and those which will be treated differently. On one side of the line are the decisions involving the exercise of statutory "discretion", "powers", "policy" or "planning". On the other side are governmental activities that involve statutory "duties", "administration" and "operations" that are subject to tort law scrutiny.[182]

Although the issue is a matter of degrees and cannot be black and white, the policy and operations dichotomy has been established as a useful test for the determination of the applicability of the immunity.[183] The policy phase has been interpreted as involving the making of choices, the weighing up of needs and priorities, the deciding of how to best use economic and human resources, while the operation phase has been viewed as involving the implementation of the decision that was taken, by following the standards and directives provided.[184]

As it was clearly explained by Mr. Justice Cory for the majority of the Supreme Court in Just v. British Columbia[185]:

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182 L.N. Klar, "The Supreme Court of Canada: Extending the Tort Liability of Public Authorities", Alberta Law Review, vol. XXVIII, no. 1, (1990), at 651.

183 City of Kamloops v. Nielsen, (1984), 5 W.W.R. 1, 29 CCLT 97 (S.C.C.).

184 Klar, supra note 182, at 651.

185 (1989), 64 D.L.R. (4th) 689, (1989) 2 S.C.R. 1228.

> "True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort. (...) What constitutes a policy decision may vary infinitely and may be made at different levels although usually at high level."

The application of this immunity, as we will see in the last section of this dissertation, has been debated in the case of alleged negligent inspection or certification of an aircraft in Canada. As for ATCs in Canada, there is no decision involving the application of this immunity for their decisions or actions. However, in light of the policy and operations dichotomy test, it can easily be determined that the decisions and actions of ATCs in their day-to-day work are made at an operational level and therefore, within the purview of the CLA.

6. LIABILITY FOR AIR TRAFFIC CONTROL

6.1 History of Air Traffic Control in the U.S.

At the beginning of aviation, makeshift runways were delineated by bonfires, lit in fashion similar to present day runway lights to help a pilot during takeoff or guide him to a landing site. Radio then became the primary tool facilitating the control of traffic and to ensure that planes stayed on their predetermined course.

Prior to 1940, the municipalities operated most of the airport air traffic control towers with the federal government issuing certificates to tower operators and suggesting standards.[186]

In 1936, the CAA (Civil Aeronautics Administration) was established and given the particular mandate "to designate and establish such civil airways as may be required in the public interest... (and also) 1) to acquire, establish and improve air navigation facilities wherever necessary; 2) to operate and maintain such facilities."[187] Over the

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[186] Seti K. Hamalian, "Liability of the United States Government in Cases of Air Traffic Controller Negligence", Annals of Air and Space Law, vol. XI, (1986), at 56.

[187] 49 U.S.C. Section 452 (1938); 52 Stat. 977, 985.

years, the CAA assumed gradually control over all en route traffic control facilities and almost all airport towers.

However, in 1958, Congress enacted the **Federal Aviation Act** which established an independent agency, as we all know the Federal Aviation Administration (FAA), to exercise a broader control over aviation since the air traffic system at that time was inefficient. Indeed, within three years, four mid-air collisions happened while the CAA was assuming control over most airport towers.

The FAA was thus established to:

> "Develop plans for and formulate policy with respect to the use of navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to ensure the safety of aircraft and the efficient utilization of such airspace."[188]

Before the advent of the jet aircraft around 1958, the duty of air traffic controllers was limited to providing some assistance or advice to the pilots who were primarily, if not solely, responsible for the operation of the plane. The duty of the air traffic controller was limited to "advise aircraft operating in restricted visibility conditions of ground based objects or other aircraft which the controller knew or reasonably should have known constituted a collision hazard."[189]

With the commercialization of the new high speed jet aircraft and the following increase in air traffic, the need for air traffic controllers' services became increasingly indispensable. These new planes which were flying much higher and at a greater speed particularly influenced air traffic control in three major aspects: the controlled airspace was expanded, additional air traffic control positions were established and radar became much more sophisticated.[190] Indeed, in the nineteen seventies, the wide-bodied aircraft like the Boeing 747 and the DC-10 appeared in the aviation industry and radar technology as well as the use of computerized equipment were introduced gradually.

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188 49 U.S.C. Section 1348 c) (1958).

189 S.J. Levy, " The Expanding Liability of the Government Air Traffic Controller", (1967-68) Forham Law Review, vol. XXXVI, at 402.

190 Stanford, F. Borins, "The Language of the Skies", Kingston and Montreal, (1983), p. 7.

The task of the air traffic controllers consequently became more and more demanding and stressful as they found themselves with the responsibility of making quick decisions that could affect hundreds of passengers. Moreover, compared to the early days of aviation, pilots were more and more depending on the directions and instructions given by ATCs.

6.2 Technical Background and Role of ATC

In the same way, air traffic rules gradually had to be defined in order to assure the protection of the aircraft and property as well as the safety of passengers.

As we have seen, the administrator of the FAA was authorized, through section 1348 c) of the **Federal Aviation Act**, to prescribe air traffic rules and regulations for the protection of aircraft, persons and property.[191] The policy underlying the establishment of air traffic controllers is thus the promotion of safety by providing an aid to air navigation, and the air traffic controllers accomplish this objective by ensuring the safe, orderly and rapid movement of aircraft through airspace. The administrator accordingly enacted Federal Aviation Regulations (FAR's) which deal, among other things, with the flight operations.[192]

Therefore, it is under the authority of the FAA that air traffic controllers perform the stressful function of directing the takeoff and landing of aircraft and providing instructions, information, advice and guidance to pilots flying the planes. Sections 91.105 and 91.115 of the Federal air regulations[193] provide two sets of rules under which a plane may be flown: Visual Flight Rules (VFR) and Instrument Flight Rules (IFR).

Under VFR conditions the pilot is supposed to "see and be seen" by other aircraft. The visibility must consequently be clear enough to enable pilots to survey the sky for other traffic.

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191 49 U.S.C.S. section 1348c) (1990).

192 Part 91 FAR's, 14 C.F.R. par. 91.1-.29 (1989).

193 14 C.F.R.

With the advent of high speed aircraft and the increase of air traffic over the years, especially with commercial airline schedules, a second set of rules was developed, the Instrument Flight Rules (IFR) which allow the planes to fly under practically all types of weather conditions and at any altitude. Hence, help and directives from the controllers through radars are mainly provided in IFR conditions. More particularly, Instruments Flight Rules (IFR) must be used when weather conditions preclude flying under Visual Flight Rules. These rules compel the pilot to navigate through the use of inboard instruments rather than visual reference and to maintain radio contact with the ATCs. As it will be seen, the duty of air traffic controllers is greater when the flight is operated under IFR conditions in controlled airspace.[194]

The detailed regulations that the air traffic controllers follow in the execution of their tasks are the **Air Traffic Control Procedure Manual**[195] (hereinafter referred to as ATCPM) and the **Local Operating Letters** (sometimes called local orders) which are FAA publications.

The ATCPM sets forth basic duties of air traffic control personnel with regard to aircraft separation, terminal operations, emergencies, radar usage, flight routings, and other fundamental concepts applicable on a nationwide basis. The local orders set forth controller's duties for specific facilities or special circumstances.

Air Traffic Control has also been divided in three functional categories with regard to flights operated under Instrument Flight Rules (IFR)[196]:

1.- Terminal air traffic control

2.- Enroute air traffic control, and

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194 Hamalian, supra note 186, at 58.

195 FAA ATC order 7110.65c (1982).

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

3.- Flight service specialists.[197]

Terminal Air Traffic Control

Three different controllers at most airports are given this designation: the ground controller, the local controller and the departure\arrival controller. The ground controller gives clearance for the plane movements on the ground while the local controller has charge of the plane from the time it is ready for takeoff until it is beyond the airport control zone and has consequently the responsibility of authorizing takeoffs.[198]

As for the departure\arrival controller, he assists the planes once they are outside the control zone and before the plane is handed off to the enroute traffic controller.

Enroute ATC

The Enroute air traffic controller monitors the plane while it is travelling towards its next destination, usually some time after the plane has left the control zone of the airport. The plane is handed off to various enroute traffic controllers as it passes over various parts of the country[199]. As the plane approaches its final destination, the above-mentioned procedures are carried out in the reverse order.[200]

Flight Service Specialists (FSS)

The duty to provide weather briefings by radio or telephone lies with the FSS. The FSS may also broadcast the weather briefings over special radio frequencies. "They also relay air traffic control clearances to aircraft arriving at or departing from airports that do not have control towers, and provide wind, altimeter and traffic information for these same airports."[201]

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197 Seti K.Hamalian, supra note 186, at 58.

198 Id. at 58.

199 Early, Garner, Ruegsegger and Schiff, "The Expanding Liability of Air Traffic Controller", 34 J. of Air Law & Comm., (1979), at 600.

200 Hamalian, supra note 186, at 59.

201 Id. at 59, referring to "Air Traffic Controllers and Flight Service Station Specialists": hearings on H.R. 1262, H.R. 1781, H.R. 3479, H.R. 3503, before the subcommittee on the Civil Service of the House Comm. on Post Office and Civil Service, House of Commons, 96th Cong., 1st sess.

Our examination of the nature and extent of liability of ATCs and their employer will focus primarily on the Terminal and Enroute Air Traffic Control. Moreover, the majority of cases involving ATC's liability have occurred during the attempted landing of aircraft since the landing situation places the pilot in need of more guidance by ATCs[202].

6.3 Federal Tort Claims Act

Actions against the government based on the negligent conduct of its employees in the provision of air traffic control services are subject to the provisions of the FTCA and must meet FTCA's requirements and limitations.

The government is vicariously liable for the acts and omissions of ATCs according to paragraph 2671 e) of the FTCA, as ATCs are government employees. The government employee must however have acted within the scope of his employment according to paragraph 1346 b) of the Act.

It is now well established that the government is not immune from liability for ATC's negligence under either the discretionary function or the misrepresentation exceptions to the Federal Tort Claims Act.

6.3.1 Discretionary Function Exception

Indeed, in the cases of Eastern Air Lines v. Union Trust Co.[203] and Ingham v. Eastern Airlines Inc.[204], the United States Government tried to shield itself from the liability behind the "discretionary function" exception in cases of air traffic control negligence but the courts rejected the argument.

In Eastern the ATC cleared two aircraft for landing on the same runway at approximately the same time resulting in a collision and the death of 55 people. The government claimed that the FTCA was inapplicable since it limited the liability of the

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(1979).

202 Early, Garner, Ruegsegger and Schiff, supra note 199, at 602.

203 221 F. 2d 62 (1955); revised in 350 U.S. 907.

204 373 F. 2d 227; 10 C.C.H. Avi. 17, 122; cert. denied 389 U.S. 931.

U.S. Government to that which a "private individual" would have "under like circumstances", and excludes claims arising from the performance of the discretionary function or duty. The government claimed that there was no comparable private liability to that relating to the operation of the control tower; that the tower operators performed governmental functions of a regulatory nature; and that no private individual had such power of regulation.

The Court considered the history of the development of control towers and found no reason why there could not be private control towers, as indeed, there were, operated by certain municipalities. In this respect, the Court affirmed the Circuit Court's decision based on the earlier holding in Indian Towing v. United States[205] which involved an interpretation of section 2674 of the FTCA.[206] In Indian Towing it was actually found that when the government undertakes to perform a public safety service and generates reliance of the part of the public, he engenders his liability comparable to a private person. Indian Towing 's decision, as we have stated earlier, established a "good samaritan" basis of liability for the government.

With regard to the discretionary function the Court held that although discretion was exercised when the FAA decided to operate the control tower, the tower personel had no discretion to operate it in a negligent matter.[207] It found that these decisions were "responsibly 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 tower operators, acted and failed to act, at an operational level" and added that "tower operators merely handle operational details which are outside the area of the discretionary functions and duties referred to in s. 2680 a)...".[208]

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[205] 350 U.S. 61 (1955).

[206] Section 2674 limits the U.S. Government's liability to that of a "private person under like circumstances".

[207] 221 F. 2d 62, at 77; see also Hamalian, supra note 186, at 61.

[208] Id. at 78.

Relying on the earlier decision of Dalehite v. U.S.[209] the Court also made a distinction between the acts or decisions made at an operational level with the ones made at a planning level and concluded that the tower operator had acted, or failed to act at an operational level[210] where there is no room for policy judgment and decision. The Court accordingly found the ATCs negligent in that they failed to issue a timely warning to the Eastern Airlines DC-4 that another aircraft was on final approach and in clearing both airplanes on the same runway at approximately the same time.

In Ingham, the discretionary function defense was practically eliminated for air traffic controllers liability cases. In this case, the air traffic controller failed to provide accurate weather information and this omission constituted the proximate cause of crash. More particularly, the Court held that:

> "When the Goverment decided to establish and operate an air traffic control system, that policy decision was the exercise of discretion "at the planning level", and as such could not serve at the basis of liability(...) but once having made that decision, the government's employees were required thereafter to act in a reasonable manner. The failure to do so rendered the government liable for the omission or commission."[211]

In other cases following these two decisions some Courts concluded that the activities of the air traffic controllers were not shielded by the discretionary function exception, since such activities were made at an operational level.[212]

We have seen in section 5.7 of this research that the Supreme Court of the United States in United States v. Varig Airlines[213] did not find determinative the planning\operational level distinction that was elaborated as a test to determine the

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209 346 U.S. 15 (1953).

210 Supra note 207, at 78.

211 373 F. 2d 227, at 238.

212 Sullivan v. United States 299 F.Supp. 621 (1968), aff'd 411 F. 2d 794 (1969); Colorado Insurance Group Inc. v. United States, 216 F.Supp. 787 (1963); Marr v. United States, 307 F.Supp. 930 (1969); see also Kriendler, supra note 38, at 5-71.

213 Supra note 129.

applicability of the discretionary function exception. Rather, the Court provided two tests that should help determine whether the acts of government's employees are protected by the discretionary function exception.[214] Firstly, the Court focused on the nature of the activity and whether it involved the exercise of policy-based discretion rather than on the level at which the activity occurred.[215] According to the Court, the "nature" of the activity could be established by determining whether the decision was of the "nature and quality" that Congress intended to shield from tort liability.[216] Hence, if the decision was grounded in "social, economic and political policy", the discretionary function exception would then shield the government from tort liability.[217]It thus dismissed the Indian Towing rationale as inapplicable. The Court secondly "indicated, in a very broad language, that the discretionary function exception plainly intended to encompass discretionary acts of the government when regulating the conduct of private individuals".[218] Yet, it is not surprising that these two standards given by the Court created confusion among litigants.

The government took the position that all the regulatory activities of regulatory agencies were covered by discretionary function exception while plaintiff's lawyers were of the opinion that the discretionary function did not apply to decisions of government employees that are not grounded in social, economic and political policy.[219]

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214 Thomas H. Rice, "Berkovits v. U.S.: Has a Phoenix Arisen from the Ashes of Varig?", (1989) 54 J. of Air Law & Comm. at 766.

215 Varig, supra note 129, at 813-814.

216 Id. at 813.

217 Id. at 814.

218 Rice, supra note 214, at 773.

219 Id. at 774.

However, as we have seen, the decision of the Supreme Court in Berkovitz[220] put an end to this confusion and clarified the scope of the discretionary function exception by specifically rejecting the government's argument of blanket immunity. More particularly, the Court stated that "in examining the nature of the challenge conduct, the Court must first consider whether the action is a matter of choice for the acting employee" and that "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow."[221] The Court further clarified its analysis by stating that just because judgment is involved, it does not necessarily follow that it falls under the discretionary function exception. It also clearly gave its message to the government by stressing that the "discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment."[222]

Accordingly, although the planning versus operational level test applied by earlier courts to determine the application of the discretionary function exception to the acts of ATCs does not seem to be a determining factor anymore, the new criteria based on the nature of the conduct will allow litigants to clearly establish which kind of decisions made by ATCs are barred by this exception.

We believe that, although involving an element of judgment, most of the day-to-day decisions of the ATCs in carrying their responsibilities are not protected by the discretionary function exception since the judgments or choices involved in those activities are not grounded in social, economic and political policy. Additionally, courses of action that are specifically mandated to ATCs by a federal statute, regulation or policy will not be covered by this exception according to the Supreme Court's reasoning in Berkovitz. Since most of the duties and responsibilities of the air traffic personnel are set out in the **Air Traffic Control Procedure Manual** (ATCPM), the

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220 Berkovitz, supra note 138.

221 Id. at 1959.

222 Id. at 1959-1960.

decisions made following these duties or mandated courses of action will not fall within the purview of the discretionary function exception.

6.3.2 Misrepresentation Exception

The government has also relied occasionally, but without any success, on the defence of "misrepresentation" in cases where the controllers have provided the pilots with inaccurate information. As we have seen in section 5.8, the basis of this defence is that the government will not be liable for the acts of its employees for inexact representation of a situation. Although this defence has been more successful in cases of negligent certification of aircraft, it has also been raised in certain cases of ATC's liability.

In Wenninger v. U.S.[223] the misrepresentation exception was held not to apply to the failure of the government to warn civilian pilots of the nearby activities of Air Force jet, although a failure to warn may be considered misrepresentation.

This exception was also closely examined by the Court in Ingham v. Eastern Airlines Limited[224] where an ATC told a pilot that visibility was one mile, when in fact it was only three-quarters of mile. The Court held that the misrepresentation defence did not apply although the air traffic controller's statement was literally a misrepresentation by stating the following:

> " The government's reading of the misrepresentation exception is too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form"[225]

and added that:

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223 234 F.Supp. 499, aff'd 352, F.2d 523 (3rd cir. 1965).

224 373 F.2d 227 (2nd Cir. 1967), cert. denied, 389 U.S. 391 (1967).

225 Ingham v. Eastern Air Lines, 373 F.2d 227 (2nd. Cir. 1967), cert. denied 389 U.S. 931 (1967), at 239.

" Where the gravemen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon section 2680(h) to absolve itself of liability."[226]

This choice to distinguish between cases in which harm resulted solely from reliance upon a misrepresentation rather than those in which the misrepresentation is merely incidental to negligent conduct was also taken earlier in United Airlines v. Wiener[227]. In this case, a mid-air collision has occurred between a commercial airline and a U.S. Air Force fighter jet. The government had failed to give notice to the airliner of the simulated instrument penetration procedure being practiced by the fighter in this flight area, even though government's employees had given a clearance under IFR through this area. The Court rejected the defence of misrepresentation as being "misplaced" since the real cause of action was the negligent action of the ATC who failed to warn the commercial airliner, rather than misrepresentation.

The recent decision in Neal[228], along with these cases clearly establish that the claim grounded on negligent action of ATCs give plaintiffs an opportunity to go to trial even though such facts may appear inextricably woven into a misrepresentation claim.

We believe this distinction is logical and appropriate since reading the misrepresentation exception too broad would exempt from tort liability any operational malfunctions by the ATC that could happen through communication with the pilot who relies on these communications.

6.4 Duty of Care

6.4.1 Elements of a Cause of Action

As it was explained earlier, the FTCA does not create a cause of action or a duty actionable in tort, it only applies to the government the state rules applicable to a private person and consequently, tort law principles. Plaintiffs who contend that an air traffic controller has caused an airplane to crash or that his conduct has contributed to

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226 Speiser and Krause, Aviation Tort Law, New York: The Lawyers Co-Operative Publishing Co., vol. 2, 1979, at 320-321.

227 ((1969) CA 9 Cal), 335 F. 2d 379; 9 CCH Av. 17,127, cert. dismd' in 379 U.S. 951.

228 Supra note 162.

a crash accordingly proceed against the government by addressing the standard elements of a negligent suit under applicable state law. Therefore, the plaintiff has the burden of establishing that the controller negligently breached a duty owed to the plaintiff, that the breach proximately caused the accident, and, if the state law so requires, that the plaintiff was free of contributory negligence.[229] Indeed, depending on local law, in death cases, defendant may have the burden of providing that plaintiff was contributory negligent in order to defeat the claim.

The elements of actionable negligence of a state generally include:

(1) a duty owed to the plaintiff;

(2) a breach of that duty;

(3) and damage proximately resulting from the breach.[230]

The principal issue in the analysis of claims based on negligence is inevitably the "duty" owed to the plaintiff. In aviation cases involving negligent conduct of ATCs, the question then becomes whether the air traffic controllers owe a duty to the pilot, the passengers and people on the ground.

6.4.2 Existence of a Duty of Care and Good Samaritan Doctrine

Since there is no comparable private liability for the activities of air traffic control, the duty of ATCs has been created by judicial decisions.[231] These decisions

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229 Richards v. United States, U.S. 1, at p.9 (1962).

230 See In re Air Crash at Dallas\ Fort Worth Airport, 720 F. Supp. 1258, 1278 (1989) stating the elements of a negligent action under Texas law.

231 Indeed, obligations can arise when established by statute or administrative regulations or may emerge from judicial decisions. In this respect, the Restatement of the Law (Second), Torts 2nd, vol. 2, Washington: The American Law Institute Publishers (1965) par. 285 (1965) provides the following:

> "The standard of conduct of a reasonable man may be
>
> a) established by a legislative enactment or administrative regulation which so provides;
>
> b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
>
> c) established by judicial decision, or

have clearly established that they do owe a duty of due care to pilots, crew members, passengers, third parties and objects on the ground.

Government liability for ATC's negligence was first established in the well known case of Eastern Air Lines v. Union Trust Co.[232]. This case involved an airliner which was struck from above and behind by a military aircraft while both planes were on the final landing approach to Washington National Airport. The negligence of the ATC clearing both aircraft on the same runway was found the cause of the accident. As we have seen, the Circuit Court of Appeal concluded that the "Government was not immune from liability under the discretionary function exception". In this respect, it implicitly referred to the Good Samaritan doctrine analysis which was later clearly adopted by the Supreme Court of the United States in Indian Towing[233]. The Court stated that once the FAA has exercised its discretion in its decision to establish and operate control towers, it has no discretion to perform his duty, i.e. operate the tower in a negligent manner.

Therefore, relying on the Good Samaritan tort rule, subsequent cases have held that ATCs owe a duty to pilots and that it extends to aircraft, passengers, crews and cargo, and even parachutists[234]. It is important to note that ATCs also have a duty to persons on the ground, so that those persons may also recover for government

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d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Once the duty is established, the standard of care is provided in the codification or emerges from judicial decision where it is generally governed by the reasonably "prudent person" standard. (Restatement (Second) of Torts, par.283 (1965)); see also Courtois, supra note 82, at 1125.

232 221 F.2d 62 (D.C. 1955); supra note 72.

233 350 U.S. 61 (1955); supra note 119.

234 Ingham v. Eastern Air Lines, Inc. 373 F.2d 227 (2nd Cir.), United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1964); Murray v. United States, 327 F.Supp. 835 (1971)., aff'd in 463 F.2d 208 (1972); Freeman v. United States, 509 F.2d 625 (1975); In Re Air Crash at New Orleans (Moisant Field), 544 F.2d 270, 273 (6th Cir. 1976); Delta Airlines Inc. v. United States, 561 F.2d 381 (1977) at 389.

negligence.[235] Specifically, the Indian Towing's application of local Good Samaritan rule to the government has become "the basis for concluding that analogous private liability exists for negligence in air traffic controller operations"[236]. The Court in Ingham[237] also relied on this rule to find an actionable duty against the ATC. This case involved the failure of a FAA approach controller to inform incoming aircraft that visibility had dropped for one mile to three-quarters of a mile. The plane crashed while attempting to land on Runway 4 which at the time, was engulfed in swirling ground fog. In finding the government liable, the Court in Ingham maintained that a duty arose because the government had voluntarily assumed the responsibility of providing control services when it was not required by statute to do so and pointed to the reliance by pilots and passengers on the government's services to justify a duty of care. More particularly, it stated the following:

> "It is now well established that when the government undertakes to perform services, which in the absence of specific legislation would not be required, it will nevertheless, be liable if these activities are performed negligently" (...) In light of this reliance, it is essential that the

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235 Himmler v. United States, 474 F.Supp. 914 (1979); Marino v. United States 84 F.Supp. 721 (E.B.N.Y. 1949): as early as 1949, the Court recognized that controllers do owe a duty of care. In this case, the duty was owed to a tractor operator who was severely burned after his tractor was struck by an army airplane taxiing on the airfield where he was working. He had been instructed to watch the tower constantly for signals where planes were moving on the taxiway. Before the accident, he had not received any. The Court held that the tower operator had a duty to exercise reasonable care and that it was "unnecessary to discuss whether these duties were primarily for the protection of pilots and planes, or of civilian workers and equipment".

236 Yates v. United States, 497 F.2d 878, 884 (10th C.I.R. 1974), cert. denied,435 U.S. 1006, 98 S. CT 1876, 56 L. Ed. 2d 388 (1978); Delta Airlines v. United States, 561 F. 2d. 381, 389 (1st Cir. 1977) where it was decided that the principle that once the government undertakes to provide services it must do so with due care applies to the federal air traffic control system. It was added that both pilots and passengers are entitled to rely on the services provided by the ATCs; Coatney v. Berskshire 500 F.2d 290 (8th Cir. 1974); In Re Korean Airlines Disaster of September 1, 1983, 646 F. Supp. 30 (D.D.C. 1986), citing Indian Towing; Dicken v. United States, 378 F. Supp. 845 (S.D. Tex.), aff'd, 545 F. 2d 866 (5th Cir. 1977) where it was held that once the government has assumed function or service, it is liable for its negligent performance. An ATC was negligent in failing to warn of wake turbulence; G. Springer v. United States, 641 F. Supp. 913 (D.S.C. 1986); Spaulding v. United States 455 F. 2d 222, 226 (9th Cir 1975); Gill v. United States, 429 F. 2d 1072, 1974 (5th Cir. 1970).

237 Ingham v. Eastern Airlines Inc., 373 F. 2d 227, at 236 (7) (2nd Cir.), cert. denied, 389 U.S. 931, 88 S.C.T. 295, 19 L. Ed. 2d 292 (1967).

government properly perform those services it has undertaken to provide albeit voluntarily and gratuitously ..."[238]

In short, these decisions seemed to recognize that federally imposed obligations, whether general or specific, are irrelevant under the FTCA, unless state law imposes a similar obligation upon private persons. Since the **Federal Aviation Act**[239] does not create a duty actionable in tort, courts have thus concluded that the duty must be found in the applicable state Good Samaritan doctrine and have found this rule as the basis of which courts predicate government liability for the negligence of air traffic control agencies.

In the air traffic control cases, federal air traffic controllers have been held to a wide range of duties to the travelling public, as it will be seen in more detail below, and the federal regulations and air traffic control manuals have been used to evaluate the controller's conduct or standard of care.[240] Indeed, the reliance, which is the essential condition for the application of the Good Samaritan doctrine, can easily be found in the relationship between ATCs, pilots and passengers. Moreover, as it has been noted by commentator G.N. Tompkins, referring to the reasoning of the Court in Clemente [241], in the air traffic control area, the United States has completely supplanted the duty of the airport owner to safely control arriving and departing air traffic. This concept of assumption of a private duty is important in that the Restatement (second) of Torts provides for liability when the actor assumes a duty to a third person.[242]

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238 Id. at 236.

239 49 U.S.C.S. pars. 1301-1557 (1990).

240 Tompkins, supra note 65, at 581.

241 Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

242 Tompkins, supra note 65, at 582.

For air traffic controllers, the application of the Good Samaritan rule and ultimately, the finding of the government's liability for the negligence of ATCs, can easily be predicated on these two premises.[243]

While the existence of a duty of care is now clearly admitted for air traffic controllers, the scope of that duty or the standard of care imposed on ATCs is harder to determine.

6.4.3 Extent of the Duty of Care

The duty of care for completing a safe flight does not only rest on the shoulders of the ATC but is concurrent with the airplane's pilot. In general, the respective responsibilities of the pilots and ATCs are concurrent but, there seems to be a trend towards a greater expansion of the controller's liability in the jurisprudence. In addition, there are certain instances when the ATC assumes a superior duty of care to the pilot. In this section, we consequently intend to study in more detail the evolution of the jurisprudence with respect to the scope of the duties of ATCs in comparison with the duties of the pilots.

6.4.3.1 Concurrent responsibility of the Pilot and ATC

Early cases alleging ATCs negligence generally held that the pilot in command of an aircraft was directly and primarily responsible for the safe operation of the aircraft. This principle was known as the pilot-in-command concept which is found in Annex 6 and Annex 2 of the **Chicago Convention.** Standards and recommended practices laid down in Annex 6 deal with the operational aspects of the flight operation and execution.[244] With regard to the responsibilities of the pilot in command, said Annex 6 provides the following:

"Duties of the pilot in command:

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[243] See supra section 5.3 of this dissertation, note 42-45.

[244] Operation of Aircraft- Annex 6, Part I, International Comm. Air Transport, Fourth Edition, July, 1983, par. 4.5.1

> The pilot in command shall be responsible for the operation and safety of the aeroplane and for the safety of all persons on board during flight time."

Chapter four of this Annex also provides a number of rules pertinent to the operational aspects of flight execution. For instance, there are rules regarding the preparation of the flight, in flight procedures, flight check systems, altitude and operating minima, etc...[245]

> Annex 2 of the **Chicago Convention** also read as follows:
>
> "The pilot in command of an aircraft shall have final authority as to the disposition of the aircraft while he is in command."[246]

And also:

> "The pilot in command of an aircraft shall whether manipulating the controls or not, be responsible for the operation of the aircraft in accordance with the rules of the air, except that he may depart from these rules in circumstances that render such departure absolutely necessary in the interest of safety."[247]

The pilot-in-command concept consequently recognizes that only the pilot in command of the aircraft in flight knows his limitations and his responsibilities.

In pursuance of section 37 of the **Chicago Convention**, the United States has adopted federal regulations which provide that the pilot has the primary responsibility for the actual safe operation of the aircraft and has the final authority as to its operation.[248]

For example, the pilot has the duty to study and know the provisions of the **Airmen's Information Manual** (AIM) and the **FAA Advisory Circulars** pertaining

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245 H.Geut, "The Law: The Pilot and the Air Traffic Controller-Division of Responsibilities", Air Law, vol. XIII, number 6, 1988, at 257.

246 Par. 2.4- Annex 2- Rules of the Air- July 1990.

247 Section 2.3.1 of Annex 2, July 1990.

248 14 C.F.R. 1-139.127 (1989) and more particularly, par. 61.83 c), 91.3 a), 91.5 a).

to his flying activities.[249] The pilot also has the responsibility of completing a preflight inspection of the aircraft, preflight planning, evaluation of the weather, and maintenance of flight currency equipments.

In early cases tried by the courts in the U.S., it was thus understood that ATCs had no duty to the aircraft, save the duty to adhere to the requirements of the **Air Traffic Control Procedure Manual.** More particularly, the Courts were initially reluctant to establish the duty of air traffic control to pilots beyond that of maintaining aircraft separation.[250] Indeed, relying on the pilot-in-command concept, the Court decisions in the nineteen sixties placed strong emphasis upon the primary responsibility of the pilot for the safe operation of the aircraft even during those times when the aircraft was within the airport control zone.[251]

Additionally, the clearance provided by ATCs was determined to be permissive, rather than obligatory, and did not relieve the pilot of the duty of exercising caution.[252] It was thus consistently held that the primary responsibility for the safe operation of the aircraft rested with the pilot.[253]

The harsh result in many of these cases led the courts to realize that the policy underlying the establishment of air traffic control i.e. the promotion of safety by

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249 14 C.F.R. section 61.105 (1989); Kriendler, supra note 38, at 5-73.

250 Early, Garner, Ruegfegger, and Schiff, supra note 199, at 602; Smerdon v. United States 135 F. Supp. 929 (D. Mas. 1955).

251 See H. Geut, supra note 245; Early, Garner, Ruegfegger and Schiff, supra note 199, at 602-603; United States v. Schultetus 272 F. 2d. 322 (15th Cir. 1960), cert. denied, 364 U.S. 828 (1960).

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

253 United States v. Miller, 303 F.2d 703 (9th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Stratmore v. United States, 206 F. Supp. 665 (D.N.J. 1962); Wenzel v. United States, 291 F. Supp. 978 (D.N.J. 1968), aff'd 419 F. 2d. 260 (3d Cir. 1969); See also note 17, A. Dilk, "Aviation Tort Litigation Against the United States- Judicial Inroads of the Pilot-In-Command Concept", (1987), 52 J. of Air Law & Comm., at 805.

providing an aid to air navigation, could not be advanced by placing full responsibility on the pilots.[254]

Indeed, the duties of air traffic control officers are laid down in the national law of the United States which adopted its own ATCPM and other regulations according to Annex 11 of the **Chicago Convention** which enunciates the objectives of the air traffic services as we have seen in section 2 of this thesis.[255]

Moreover, in the context of modern aviation and technology which was created with the advent of sophisticated aircraft instrumentation and the development of microchip electronics, it was realized that the pilot is most dependent upon ATCs for instructions and assistance especially during attempted landing of aircraft. The pilot's burden has accordingly lessened with the development of more sophisticated aircraft.[256]

Therefore, the theory of "reciprocal" duty was developed in Maryland ex. rel. Meyer v. United States.[257] In this case, a U.S. Air Force T-33 overtook and collided with a commercial airliner on final approach. The Court found the government liable for the negligence of the ATC. It specifically stated that there is a concurrent, reciprocal duty on behalf of the ATC even though the pilot is primarily responsible for the operation of the aircraft.[258]

Ingham v. Eastern Airlines[259] however remains one of the first significant cases dealing with the respective duties of pilots and controllers and perhaps the first

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254 Miller v. United States 303 F. 2d 703, at 711 (9th Cir. 1962); Maryland ex. rel. Muyer v. United States, 257 F. Supp. 468 (DDC 1966).

255 also applicable: ICAO doc. 4444 (RAC/501/n) and ICAO doc. 7030.

256 H. Geut, supra note 245, at 802-803.

257 257 F. Supp. 768 (D.D.C. 1966); see also Early, Garner, Ruegfegger and Shiff, supra note 199, at 603.

258 See also State of Maryland v. United States 257 F. Supp. 768 (D.C. 1966); Mattschei v. United States 600 F. 2d. 205 (9th Cir. 1979); Rudelson v. United States 602 F. 2d 1326 (9th Cir. 1979).

259 373 F.2d 227, (2nd Cir.), cert. denied, 389 U.S. 931.

case to assert that something more than robot-like obedience to operating procedures was required of ATCs. This decision is the early dilution of the pilot-in-command concept. In this case, the crew knew adverse weather conditions could divert the plane to Philadelphia[260] and that some planes were landing successfully and some were not. The Court ignored these facts and the regulatory pilot-in-command presumption, and rather concluded that the crew should have been told by the controller that weather conditions were becoming marginals.[261] Therefore, Ingham established a judicially created duty for air traffic controllers.

This attitude was quickly adopted and even reinforced in subsequent cases where the courts continued to place new duties on the controllers while at the same time reitering the traditional case law relating to the pilot-in-command concept, particularly in IFR conditions.[262] This attitude has been criticized by some authors who believe that the courts have wrongly reversed the roles of pilots and controllers, placing primary responsibility for aviation accidents on the controllers, and that the regulatory administrative system presently in force, the training of pilots and training of controllers cannot support this role reversal.[263] More particularly, at page 804 of his work, Dilk argues the following:

> "Neither the regulatory system nor the personal training and testing of pilots or controllers can support this fundamental role reversal. In accident cases involving aircraft flying under instrument flight rules (IFR), the courts often ignored the aircraft's required instrumentation and the controller's reasonable expectation that the pilot guides himself while flying in the "blind" with appropriate charts, approach plates, airport directory, etc. Courts forget that the pilot has been trained and tested to fly in instrument conditions, and that he possesses a minimum number of hours of flight experience in adverse weather. Furthermore, the pilot does not initiate the flight with the expectation that a controller will have to tell him the location, speed, altitude, rate of descent, etc., of

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260 Id. at 230.

261 Dilk, supra note 253, at 810-811.

262 Id. at 811.

263 Dilk, supra note 253, at 804.

> the aircraft. While pilots do not expect such instruction, some courts assume that they do. As a result, these courts too often impose liability on controllers in aviation accident cases, particularly when the accident involved passengers. Allocating fault to controllers places greater responsibility on them than the regulatory administrative system and their training intended."[264]

An example of a court decision affirming that the controller's responsibilities may be established by judicial decision in addition to arising by administrative regulation is found in United States v. Furumizo[265]. In this case the Court concluded that there was an "overriding duty" of safety that went beyond the dictates of the procedures manual and required that the ATC repeats a previous warning when it was apparent to him that the pilot was proceeding in disregard of the warning into objective danger.[266]

Neff v. United States[267] also condensed the debate created by plaintiffs' efforts to expand the governments' liability and the government's efforts to construe its scope. Neff arose out of the crash in July 1963 of a Mohawk Airlines plane on takeoff from Rochester, New York. The United States took the position that an ATC is merely a "traffic cop" implementing formal rules. Plaintiffs, on the other hand, argued that a flight in communication with an ATC is completely governed by the controller, leaving the crew no discretion and resting ultimate responsibility for any failure in the system on the controller. The Trial Court rather concluded that neither position was correct because:

> "Air system of traffic regulation is more sophisticated and better designed to protect the public and avoid human error than either of the categorical views suggested...there is a close working relationship contemplated...responsibility is mutual and coordinated at all times..."[268]

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264 Id. at 804.

265 381 F. 2d 1965 (9th Cir. 1967).

266 Id. at 968.

267 282 F. Supp. 910 (D.D.C. 1968).

268 Id. at 916.

The Fifth Circuit has recently reaffirmed the concurrent duties of air traffic controllers and pilots In Re Air crash at Dallas/Fort Worth Airport on August 2, 1985.[269] The Court observed that:

> "Although aircraft operational safety is the responsibility both of ground control personnel and of the air crew, the pilot-in-command of aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."[270]

This idea of cooperation and mutual reliance of course now forms a premise from which the majority of decisions analyze the pilot-controller liability, especially in cases where planes are flying under IFR conditions. The general trend is consequently to find a concurrent duty of care for accomplishing a safe flight on the part of the pilot and the ground support personnel.[271] "While the pilot-in-command remains the primary and final authority of the safe operation of the aircraft, both pilot and air traffic controller are concurrently responsible".[272] The balance between the duties of the pilot and the duties of the air traffic controller is however a fine one and we will try, in the following section, to identify in more detail the extent of the controller's responsibilities.

6.4.3.2 ATCPM and State Tort Principal of Duty of Care

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269. F. 2d, 23 Av. Cas. (CCH) 17,292, 17,296 (5th Cir. 1991).

270 91.3A (FAR); see also Rodriguez v. United States, 823 F. 2d, 735 (3rd Cir. 1987): ATC negligence in failing to warn of impending collision does not preclude concurrent pilot negligence for failure to see and avoid.

271 Mattschei v. United States, 600 F. 2d. 205, 208 (9th Cir. 1979); United States v. Miller 303 F. 2d. 703 (9th Cir. 1962); Daley v. United States 792 F. 2d. 681 (11th Cir. 1986); Bearden v. United States, 21 Av. cas. (CCH) 17,533 (N.D.Ala. 1988); First of America Bank v. United States, 639 F. Supp. 446 (W.D.Mich. 1986); Carney v. United States, 634 F. Supp. 648 (S.D.Miss.), Aff'd, 813 F.2d. 405 (5th Cir. 1987); Brooks v. United States, 19 Av. Cas. (CCH) 17,445 (5th Cir. 1985); Roland v. United States, 463 F. Supp. 852 (SD Ind.1978) and Dyer v. United States, 551 F. Supp. 1266 (W.D. Mich. 1982); but see however the following cases emphasizing the pilot-in-command concept: Redhead v. United States, 686 F.2d 178 (3d. Cir. 1982), cert. denied 459 U.S. 1203 (1983); Hamilton v. United States, 343 F. Supp. 426 (L.D.Cal. 1971), aff'd 497 F. 2d. 370 (9th Cir. 1974); and United States v. Miller 63 F. 2d. 703 (9th Cir. 1962).

272 W. Turley, Aviation Litigation, Colorado: Shepard's\ McGraw-Hill, (1986), at 98.

It has been clearly established by case law that the duties and responsibilities of the ATCs are set out in the ATCPM and by the general duty of care under the circumstances.[273] This most often takes the form of a duty to warn of and help avoid imminent dangers of which ATCs are or should be aware and of which a pilot is not aware.[274] The controllers have the duty to know and comply with the mandatory provisions relating to their operational responsibilities and they must "exercise their best judgment" when they confront situations not specifically covered by the ATCPM.[275]

In this respect, the courts resort to the common law theory of reliance (Good Samaritan doctrine) and the judicially created duty concept to find the ATC liable beyond the level of care defined in the ATCPM.

Ross v. United States[276] is the duty formulation and one of the most widely cited cases, along with Hartz v. United States[277] and Ingham, for the proposition that the ATCPM does not solely define the reasonable conduct of a controller. In Ross, the Court relied upon a judicially created duty concept to find the ATC liable. In this case, an employee of the government supplied the pilot with an incorrect minimum descent altitude (MDA). The Court found that the erroneous information contributed to the pilot's flying into a power line and crashing. There were no safety regulations which

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273 Rudelson v. United States, 602 F. 2d. 1326 (9th Cir. 1979); Spaulding v. United States, 455 F. 2d. 222, 226 (9th Cir. 1972); Carney v. United States, 634 F. Supp. 648 (S. D. Miss.), aff'd, 813 F. 2d. 405 (5th Cir. 1987); Bandy v. United States, 492 F. Supp. 13 (W.D. Tenn. 1978); Baker v. United States, 417 F. Supp. 471 (W.D. Wash. 1974); Ingham v. Eastern Airlines Inc. 373 F. 2d. 227 (2d. Cir. 1967); Gill v. United States, 429 F. 2d. 1072, 1075 (5th Cir. 1970); Hartz v. United States, 387 F. 2d. 870, 873 (5th Cir. 1968); Bearden v. United States, 21 Av. Cas. (CCH) 7,557 (M.D. Ala. 1988); Neff v. United States, 282 F. Supp. 910,920 (D.D.C. 1968) rev'd 402 F.2d 115; cert. denied 397 U.S. 1066; Jatkoe v. United States, 19 Av. Cas. (CCH) 17,833 (E.D.-Mich. 1985).

274 For example, Yates v. Unites States, 497 F. 2d. 878 (10th Cir. 1974); cert. denied 435 U.S. 1006.

275 The manual itself places first priority on the issuance of safety advisories and specifically states in the foreword that ATCs are to exercise their best judgment in situations not covered by the Manual.

276 640 F.2d 511 (5th Cir. 1981).

277 387 F. 2d. 870 (5th Cir. 1968).

required the ATC to provide a MDA even if one was specifically requested by the pilot.[278] The Court accordingly concluded that "the duty in this case arose not by virtue of a violated safety regulation, but because the controller voluntarily accepted the responsibility of providing a MDA."[279]

With the passing years, the division of responsibility between the controller and the pilot has become more solidified and can be simplified as follows:

- The pilot has a continuous duty to stay on the alert, be aware of the dangers he can detect with his own eyes[280] and ascertain the existence of hazardous conditions along his route by obtaining updated information.[281]
- Although the ATC must exercise reasonable care, the Court found that "under VFR conditions, the primary responsibility for the safe operation of the aircraft rests with the pilot, regardless of the traffic clearance".[282] Thus, the pilot-in-command concept seems to remain when the plane is flying under VFR conditions.
- Decisions that depend on conditions known in detail only by the pilot must be made by him.[283]

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278 Ross, supra note 276, at 519.

279 Id.; and Courtois, supra note 82, at 1140.

280 This duty is called the "See and avoid duty": Rodriguez v. United States, 823 F. 2d. 735 (3d Cir. 1987); Black v. United States, 441 F. 2d. 741, 743-744 (5th Cir.); Spaulding v. United States 455 F. 2d. 222, 227 (9th Cir. 1972); Bearden v. United States, 21 Av. Cas. (CCH) 17,534 (M.D. Ala. 1988); First of America Bank v. United States, 639 F. Supp. 446 (W.D.Mich. 1986; Thinguldstad v. United States, 343 F. Supp. 551 (S.D. Ohio 1972); Associated Aviation Underwriters v. United States 462 F. Supp. 674 (N.D. Tex. 1978).

281 Black v. United States, 441 F. 2d 751 (5th Cir.), Cert. denied, 404 U.S. 913 (1971); Burchett v. United States, 19 Av. Cas. (CCH) 18,440 (S.D. Ga. 1986); Mallen v. United States, 506 F. Supp. 728 (N.D. Ga. 979); Pierce v. United States, 16 Av. Cas. (CCH) 17,405 (M.D. Tenn. 1980), Vacated and remanded, 679 F. 2d 617 (6th Cir. 1982), Aff'd, 718 F. 2d 825 (6th 1983).

282 Schuler v. United States, 868 F. 2d 195 (6th Cir. 1989): but see earlier decisions where ATCs were found partly liable even in VFR conditions: Rudelson v. United States, 602 F. 2d 1326 (9th Cir. 1979); Foss v. United States, 623 F. 2d 104 (9th Cir. 1980).

283 Redhead v. United States, 686 F. 2d. 178 (3rd Cir. 1982), Cert. denied, 459 U.S. 1203 (1983).

- The pilot is still held primarily responsible for the operation of the aircraft, but the Court will find him liable only when he will have been informed of all the facts necessary for a safe flight.
- The air traffic controllers must give the information and warning required in the ATCPM[284] and the information and warnings they give out must be accurate and complete.[285]
- The duties imposed by the Manual vary according to the circumstances encountered and are arranged by priority. First priority must be given in keeping aircraft at a safe distance apart during takeoffs and landings in order to prevent collisions or wake turbulence.[286] This obligation is known as the duty of separation.[287] First priority must also be given to the issuance of safety advisories as required in the Manual. For instance, the controller must inform the pilot of proximate terrain, obstruction or other aircraft when he is aware that the aircraft is at a dangerous altitude.[288] Second priority is given to other services required by the Manual but which do not involve separation of aircraft. Third priority is given to "additional services to the extent possible" such as the dissemination of weather information, when time and traffic permits and upon pilot's request.[289]

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284 Spaulding v. United States, 455 F. 2d. 222 (9th Cir. 1972); Bearden v. United States, 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988); First of America Bank v. United States, 639 F. Supp. 446 (W.D. Mich. 1986); Jatkoe V. United States, 19 Av. Cas. (CCH) 17,838 (E.D. Mich. 1985).

285 Jatkoe v. United States, 19 Av. Cas. (CCH) 17,838 (ED. Mich. 1985); In Re Air Crash Desaster near Cerritos, Cal. August 31, 1986 - F. Supp.- 23 Av. Cas. (CCH) 12,448 (C.D. Cal. 1989).

286 Bearden v. United States, 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988).

287 Kriendler, supra note 38, at 5-76.

288 First of America Bank v. United States, 639 F. Supp. 446 (W.D. Mich. 1986).

289 Barbosa v. United States, 811 F. 2d. 1444, 1447 (11th Cir. 1987); Bearden v. United States, 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988); Burchett v. United States, 19 Av. Cas. (CCH) 18,440 (S.D. Ga. 1986). See also FAA Order 7110.65C Traffic Control 22 (1982).

- The controller must satisfy not only the government ATCPM requirements but also the accepted standard of due care, i.e. courts expect the controller to exercise his professional judgment and consider the needs of safety. The controller will not be permitted to evade responsibility where he could have acted to prevent the accident[290], i.e. his duty arises when he knows or should have known of the danger.

  The additional extent of a controller's duty to warn is one of the most disputed areas in mid-air collision litigation. The next section will thus be considered with the identification of the instances where ATCs have a superior duty of care.
- The duty of care of ATCs extends to all aircraft within a control zone, which for some ATCs include arriving and departing airport traffic, while for other ATCs it includes in-flight navigational routes.[291]

6.4.3.3 Superior duty of Air Traffic Controller

There are also certain moments where the ATCs assume a superior duty of care to the pilot. The superior duty is based on the state tort principle of duty care and is governed by the "reasonably prudent person" standard since the duty of the ATC is not only circumscribed by the limits of ATCPM and federal regulation as we have seen.[292]

The duty of safe operation of the airplanes remains with the pilot under both Visual Flight Rules (VFR) and during the operation of Instrument Flight Rules (IFR). However, many courts have established that a superior duty of care may be owed by the ATCs to pilots operating under IFR conditions.[293] The rationale of these decisions

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290 S. J. Levy, supra note 189, at 424; and see for example United States Aviation Underwriters Inc. v. United States,(1981 DC Colo) 16 Avi. Cas. (CCH) 18,288.

291 Turley, supra note 272, at 99; New York Airways v. United States, 283 F. 2d. 496 (2nd Cir. 1960); Tilley v. United States, 375 F. 2d. 678 (4th Cir. 1967); Franklin v. United States, 342 F. 2d. 581 (7th Cir.) Cert. denied 382 U.S. 844 (1965).

292 Kriendler, supra note 38, at 5-77.

293 Unites States v. Schultetus, 277 F. 2d, 322 (5th Cir.), Cert. denied, 364 U.S. 828 (1960); Dalev v. United States, 792 F. 2d. 1081 (11th Cir. 1986).For discussions on VFR and IFR see: Davis v. United States, 824 F. 2d. 549 (7th Cir. 1987); Dalev v. United States, 792 F. 2d. 1081, 1083

lies in the fact that under IFR conditions, the aircraft is under positive "control" by the ATC and negligence is thus more easily imposed than under VFR conditions where the pilot is in a far better position to look out for potential conflicting traffic than is a tower controller and where he is in physical control of the aircraft as well as the only person who can safely and effectively manoeuver that aircraft in order to avoid any traffic which he may encounter.

Even if the regulation does not prescribe an obligation to issue a warning, the ATC may have such a duty where he "has previously given such aircraft dangerous, inaccurate or misleading information, or...[because] he has actual knowledge of hazardous current...condition which the aircraft may encounter in flight and of which it may not yet be aware".[294] In addition, ATC's awareness of a danger reasonably apparent to him or reliance by the pilot on the ATC for a given service may create a common law duty to warn.[295]

Finally, in case of extreme danger or in an emergency situation, the controller has an "overriding duty" of safety. The degree of care required to constitute ordinary care will consequently increase according to the danger presented by the circumstances.[296]

For instance, an overriding duty of care was placed on the ATC in Daley v. United States[297] where an emergency resulted from an engine failure on a missed approach under IFR conditions. The ATCs were found negligent in failing to ascertain the plane's position, altitude or heading while the plane was in an emergency situation. In addition, the visibility was poor and the ATC knew the plane was in the vicinity of

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(11th Cir. 1986); Gadder v. United States, 616 F. Supp. 1163 (E.D. Mich. 1985); and section 6.4.3.3 of this dissertation.

294 Rowe v. United States, 272 F. Supp. 462, 472 (W.D. Pa. 1964).

295 Kriendler, supra note 38, at 5-78; Gill v. Unites States, 429 F. 2d. 1072, 1075 (5th Cir. 1970); Martin v. United States, 586 F. 2d. 1206 (8th Cir. 1978); Mallen v. United States, 506 F. Supp. 728, 736 (N.D. Ga. 1979).

296 Kriendler, supra note 38, at 5-78.

297 792 F. 2d. 1081 (11th Cir. 1986).

television towers. The plane crashed because it flew right into the television towers. It was thus found that the reasonable care on the controller's part in this emergency situation required a superior level of attention to the disabled aircraft.

The Court in Hensley v. United States[298] also involved a situation of extreme danger and recognized that ATCs may have a superior duty in extreme danger. It held that the ATC may be required to provide information not ordinarily required if there is extreme danger, the danger is reasonably apparent to the controllers, not apparent to the pilot, and the ATC is in a superior position to perceive that the pilot is in danger.

The circumstances under which ATCs have a duty to give warnings or information beyond the requirements of the ATCPM are clearly summarized by Lee K. Kreindler in his leading work and we allow ourselves to reproduce them:

(1) When the danger to the aircraft is immediate and extreme;[299]

(2) When the danger is apparent only to air traffic controller;[300]

(3) When the controller is better qualified than the pilot to evaluate the danger;[301]

(4) When the pilot declares an emergency or indicates distress;[302]

(5) When misinformation has been previously given;[303]

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298 728 F.Supp. 716, 22 Av. Cas. (CCH) 17,687 (S.D. Fla. 1989).

299 United States v. Furumuso, 381 F.2d 965 (9th Cir. 1967); Daley v. United States, 792 F.2d 1081 (11th Cir. 1986); Hensley v. United States, 22 Av. Cas. (CCH) 17,687 (S.D.Florida 1989).

300 United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964); Hensley v. United States, 22 Avi. Cas. (CCH) 17,687 (S.D. Flo. 1989).

301 Hartz v. Unites States, 387 F.2d 870 (5th Cir. 1968); Hochrein v. United States, 238 F.Supp. 317 (E.D. Pa. 1965).

302 Daley v. United States, 792 FROM .2d 1081 (11th Cir. 1986).

303 Rowe v. United States, 272 F.Supp. 462 (W.D. Pa. 1964).

(6) When the controller is aware of a danger reasonably apparent to him[304]; and

(7) When the pilots have placed reliance on the controllers for certain information.[305]

6.5 Proximate Cause

Most aviation accidents result from an interplay of factors, and judges, of course, must determine which of these factors was the proximate cause of the accident. Like any tort liability claim, and regardless of whether the ATC fails to comply with FAA procedures or is otherwise unreasonable in his conduct, no liability will attach unless the controller's action or omission legally caused the plaintiff's injury or damages.[306] This is the third out of the three important elements of actionable negligence as we have seen in section 6.4.1. There is no need to elaborate on this basic requirement of all systems of liability, but suffice it to say that like when finding on negligence, the federal court's ultimate determination of proximate cause is based on state tort law principles. Generally, the proximate cause consists of two elements: cause in fact and forseability or directness. General law of proximate cause also provides that there may be more than one proximate cause of event.

Citing Black v. United States[307], the Fifth Circuit In Re Air Crash At Dallas Forth\Worth Airport on August 2, 1985 restored the Louisiana definition of proximate cause and found it identical to the Texas definition as follows:

> "The proximate cause of an injury is the primary or moving cause, or that which, in a natural and continuous sequence, unbroken by an

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304 Gill v. United States, 429 F.2d 1072, 1075 (5th Cir. 1970); Martin v. United States, 586 F.2d 1206 (8th Cir. 1978); Mallen v. United States, 506 F.Supp. 728, 736 (N.D. Ga. 1979); Hensley v. United States, 22 Avi. Cas. (CCH) 17,687 (S.D.Flo. 1989); Re N-500 L Cases, (1981, DC Puerto Rico) 517 F.Supp. 825, 16 Avi, Cas. (CCH) 17,635, aff'd (CA1 Puerto Rico) 691 F.2d 15.

305 Id.

306 Associated Aviation Underwriters, 462 F.Supp. at 681; Restatement of Torts (Second), par. 430 (1965).

307 44 F.2d 741,745 (5th Cir. 1971), cert, denied, 404 U.S. 913 (92 S.Ct. 233), 30 L.Ed. 186, (1971).

> efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be reasonably interpreted or foreseen as a natural consequence of the wrongful act."[308]

In this decision, although the District Court had found that the ATCs and weather personnel had breached their duties to provide the accident aircraft with adequate weather information, it held, relying on the proximate cause principle, that their negligent acts were not the proximate cause of the crash because the pilot had possessed substantially all of the weather information potentially available from the government employees. In this connection, the Court of Appeals also recognized that the crew was aware of additional conditions unknown by the government sources.[309]

Consequently, although controllers may be found negligent, the court will dismiss a claim against the government if there was an intervening or superseding cause of crash such as pilot's failure to carry sufficient fuel on board and to timely notify ATCs of a fuel emergency or an aircraft malfunction.[310] Conversely, concurrent liability will occur only if the negligence of both is a proximate cause of the accident.[311] Indeed, as it was decided in Roland v. United States[312], even if the pilot and the ATC have a concurrent duty to accomplish a safe flight, their individual duties,

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308 F.2d , 23 Av.Cas. (CCH) 17,292 (5th Cir. 1991).

309 This case arose from the crash of an airplane during final approach. The flight crew attempted landing despite their knowledge of the presence of a thunderstorm between their aircraft and the runway on final approach. The airplane crashed when it encountered wind shear while passing through a thunderstorm cell. The widow of the pilot sued the U.S., alleging negligence on the part of FAA employees and the National Weather Service arising from their failure to relay weather information to the crew. 919 F.2d 1079 (5th. Cir. 1991); See also Pierce v. United States, 718 F.2d 825 (6th Cir.), reh'd denied, 722 F.2d 289 (1983) where the controller failed to warn the pilot of significant storms but the crash occurred well before the plane reached the storm so the controller's oversight was not the actual cause of the crash.

310 For ex. Wallace v. United States, 17 Av. Cas. (CCH) 18,066 (S.D. GA. 1982).

311 Tinker v. United States, 21 Av. Cas. (CCH) 18,221 (D.Kan. 1988); Roland v. United States, 463 F.Supp. 852 (S.D. Ind. 1978).

312 (1978 SD Ind) 463 F.Supp. 852, 15 Avi. Cas. (CCH) 17,515.

however, differ, and it cannot be said that because each is concurrently responsible for the flight, that the failure of one is the failure of both as to place liability upon both.

6.6 Contributory Negligence

Plaintiff's negligence in any matter may bar his claim and thus recovery depending on whether the jurisdiction has adopted a contributory negligence rule. If the jurisdiction has adopted the comparative negligence rule, the damages will be apportioned in accordance with the parties' degree of fault, i.e. in proportion to the fault contributed by plaintiff. To determine contributory negligence, courts examine if the plaintiff failed to meet the standard of care to which he is required to conform for his own protection and which must be a legally contributing cause, together with the defendant's fault, in bringing about his injury.[313] The burden of proof belongs to the defendant.[314]

Therefore, the contributory negligence principle is used as a defense for the government in spite of the controller's fault if the pilot was also at fault. It should be noted however that the negligence of the pilot cannot be attributable to his passengers and exculpate the controller of liability towards the passengers even if the negligence of the pilot also contributed to causing the accident.[315]

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313 Restatement (Second) of Torts, 2nd, section 463.

314 Prosser, Dobbs, Keeton and Owen, supra note 28, par.65.

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

Since there remain only a few states adhering to the contributory negligence principle[316], there are not many aviation cases[317] involving the contributory negligence of the pilot and we do not intend to further elaborate our study of this rule.

6.7 Standard of Care of Government ATCs - Jurisprudence

The extent of the controller's liability or his standard of care being dependent on the unique facts of each case, its determination is one of the most disputed areas in aviation litigation involving ATCs. Hence, we believe that a general review of the major types of cases involving ATCs negligence is imperative. Indeed, in addition to the general outline provided in the last section, it may help the reader who attempts to determine the specific instances in which the ATCs are generally found liable.

As it has already been explained, once the duty of care is established, the standard of care is provided by the codification or may emerge from judicial decisions. For ATCs, the primary source of rules setting their duties and responsibilities are of course set out in the ATCPM. Many courts have referred to this manual to determine the standard of care of ATCs. Since the manual cannot anticipate every situation that will confront an ATC, judicial decisions, as we have explained, have provided an additional extent of a controller's duty. Before reviewing the major types cases involving ATCs, we however believe it is important to draw the reader's attention to the issue of the legal effect of the violation of provisions of the FARs and ATCPM.

6.7.1 Violation of FARs - Negligence Per Se or Prima Facie Negligence

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316 In 1987, only Alabama, Delaware, Indiana, Maryland and New Mexico were still adhering to contributory negligence. See A.Dilk, "Aviation Tort Litigation Against the United States-Judicial Inroads to the pilot-in-command Concept", 52 J. of Air Law & Comm. (1987), at 806, note 20.

317 In Todd v. United States, 384 F.Supp. 1284 (M.D.Fla. 1975), the pilot widow was denied recovery under the law of Alabama in which contributory negligence is a complete defense 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. The Court found the controller negligent in giving the pilot cruise clearance at 4000 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.

Indeed, some courts found that a violation of the ATCPM amounts to negligence per se[318]and some found that it was merely prima facie evidence of negligence[319], depending on which common law principles the state adopted.[320] This is analogous to the tort principle which holds that violation of a statute or administrative regulation is either negligence per se or evidence of negligence. In the jurisdictions which adopted the prima facie negligence rule, the defendant may offer evidence to show that his conduct under the circumstances was reasonable in spite of violating a statute or regulation. Many states, however, have adopted the common law principle of negligence per se or negligence as a matter of law.[321] These jurisdictions view the ATCPM as having force of law even though the ATCPM is neither statute nor regulation.[322] The logic behind these decisions is that Congress has mandated the

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318 Eastern Air Lines v. Union Trust Co., 221 F.2d 62, 69 (D.C. Cir.), rev'd 350 U.S. 907 (1955), modified, 350 U.S. 962 (1956); Gatenby v. Arizona Aviation Corp., 407 F.2d 443, 446-447 (3rd Cir. 1968); Rudelson v. United States, 431 F. Supp. 1101 (CD Cal. 1977); Southern Pac. Co. v. Castro, 493 S.W.2d 491 (TEX. 1973) and Associated Aviation Underwriters v. United States, 462 F.Supp. 674, 680 (N.D. Tex. 1978) and Restatement (Second) of Torts par. 288 B) 1) (1965).

319 Courtois, supra note 82, at 1127; Roland v. United States, 463 F.Supp. 852 (S.D. Ind. 1978) where the Court concluded that regulation does not create an absolute standard of care.

320 Id. at 1128; see also Moody v. United States, 774 F.2d 150, 156 (6th Cir. 1985); Daley v. United States, 792 F.2d 1081 (11th Cir. 1986); Springer v. United States, 641 F.Supp. 913 (P.S.C. 1986); Drever v. United States, 349 F.Supp. 296 (N.T. Ohio), aff'd Sub. nom.; Freeman v. United States, 509 F.2d 626 (6th Cir. 1975).

321 Prosser, Dobbs, Keeton and Owen, Prosser and Keeton on Torts, par. 53, at 356 (1984), supra note 28:

> "Once the statute is determined to be applicable... and once its breach has been established, probably a majority of the courts hold that the issue of negligence is thereupon conclusively determined...", at 230.

322 Courtois, supra note 82, at 1129; In Re N-500L Cases, 691 F.2d at 28 where it was held that FAA regulations have the force and effect of law; United States v. Schultetus, 277 F.2d 322, 327 (5th Cir.): Government regulations have force of law, cert, denied, 364 U.S. 828 (1960); Ward v. Unites States, 462 F.Supp. 667,673 (N.D. Tex. 1979): Federal Aviation Regulations have force and effect of law; but contra: Baker v. United States, 417 F.Supp. at 485: The characterization of the procedural manuals as "regulations having the force of law is... unacceptable."

development of the air traffic control system.[323] The **Federal Aviation Act**[324] grants authority to the FAA to issue **Federal Aviation Regulations** (FARs)[325] and FARs require controller's compliance with the ATCPM to provide for a safe and efficient air traffic.[326] Therefore, ATCPM has the same effect of law and the same weight as statute or regulation.[327] However, U.S. Standard for Terminal Instrument Procedures which contain advisory criteria rather than binding FAA rules were found not to form the basis of the controller's standard of care in Ross v. United States.[328]

Springer v. United States is one example of a case applying a rule of negligence per se against the government when an ATC has violated provisions of the ATCPM. In this case, the airplane crashed after takeoff into wind shear conditions. The court concluded that it was the negligence of the ATC to fail to relay reports of strong winds to the pilots, as required by the ATCPM, that caused the crash. The violation of the ATCPM was found to be negligence as a matter of law.

On the other hand, Rodriguez v. United States[329] is an example of a case applying the prima facie evidence concept to the provisions of the ATCPM in suit against the government based on ATC's negligence.

It is argued that this approach "is better suited to the unpredictable nature of air traffic controller's task, which, on occasion, can make strict compliance with ATCPM

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323 49 U.S.C.S. pars. 1348 a), b)4) and 1303 c) (1976& supp. 1989).

324 49 U.S.C.S. pars. 1301-1557.

325 49 U.S.C.S. par. 1348 c).

326 14 C.F.R. par. 65.45 a) (1989).

327 Courtois, supra note 82, at 1130.

328 640 F.2d 511 (5th Cir. 1981).

329 823 F.2d 735.

provisions a virtual impossibility."[330] Indeed, high density of traffic[331] may prevent the ATC to abide by certain provisions of the ATCPM.

It should be noted, however, that the judges who abide by the negligence per se rule in a case against the government for ATCs' negligence do not recognize the requirements and limitations of the FTCA. They indeed do not recognize that a violation of the **Federal Aviation Act** or the **Federal Aviation Regulations** cannot serve as the basis for the government's liability and does not create a duty actionable in tort but establishes standards of care to be followed and should be relied on for the evaluation of reasonable conduct.

Applying the negligence per se rule, the courts are indeed bound to reach a particular result when the evidence shows that the procedures of the ATCPM either were or were not violated. Hence, the procedures of the ATCPM are viewed as creating causes of action although private persons are not subject to these federal duties.

We believe that the concept of prima facie evidence of negligence is better suited to the requirement that the employer's conduct must be of a nature comparable to private liability, i.e. that if a private person would be held liable under the law where the act or omission occurred.[332] The following statement of the Court in Clemente should indeed be remembered by the courts applying systematically the negligence per se approach in suits brought under the FTCA against the government in aviation cases:

> "Even where specific behavior of Federal Employee is required by Federal Statute, liability to the beneficiaries of that statute may not be founded on the FTCA if state law recognizes no private liability."

6.7.2 Airport Hazards and Ground Obstructions

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330 Courtois, supra note 82, at 1132.

331 Hamilton v. United States 497 F.2d 370 (9th Cir. 1974); Barbosa v. United States, 811 F.2d 1444 (11th Cir. 1987).

332 See Tompkins, supra note 65, at 579, discussing the scope of duty defense.

Even if the primary duty of an ATC is to supervise traffic in the sky, the government has been held liable for negligence in the failure to warn of known ground hazards at airports and near flight paths.

At most of the airports in the U.S. there are ground controllers whose responsibility is to ensure the safe utilization of available ground facilities such as runways, taxiways and terminal gates.

There are few reported cases on the ground controller's liability.[333] The liability of ATCs for ground collisions is, however, likely to be concurrent with that of the pilot since the latter must always maintain a proper lookout for other planes, i.e. duty to "see and avoid", as we have seen in section 6.4.3.1.

An old reported case on this matter is United States v. Douglas Aircraft Co. Inc. [334] where a collision occurred on the ground between a government owned aircraft (P-51) and a Douglas plane. The collision happened while the government's plane was waiting to be towed on the runway. The Douglas plane, returning from a test flight, landed on another runway, then turned onto the runway where the P-51 was waiting and collided with it. The government sued Douglas Aircraft for damages caused to the P-51. The Court found that the liability lied with the ATC who was "in the best position to take precautions for the removal of parked planes as hazards to traffic or to warn and advise the pilot of the parked plane's position."[335]

In Ozark Airlines v. Delta Airlines Inc.[336], the negligence of both the ATC and the pilot constituted the proximate cause of the collision. It was found that the ground controller failed to advise each aircraft of the other's position and intended route, and failed to utilize airport surface detection equipment designed to avoid collision between

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333 Hamalian, supra note 186, at 65.

334 169 F.2d 755 (9th Cir. 1948).

335 Id. at 758.

336 402 F.Supp. 687 (D.Ill. 1975).

taxiing aircraft not otherwise visible. The Delta crew was also held partially liable for the failure to maintain proper lookout for other planes.[337]

In Starr v. United States[338], the ATC was found negligent in failing to look out for a motorcyclist on a runway where an aircraft was given landing clearance, although the motorcyclist was found to be contributorily negligent.

In Air California v. United States[339] an ATC was held concurrently liable with the pilot for the Boeing 737 accident on the runway. The Boeing slid off at the end of the runway. The ATC was found liable although a NOTAM (notice to airmen) was issued, indicating that new asphalt on the runway was excessively slick. The Court held the ATC negligent for failing to enquire whether the pilot had received the NOTAM warning about the slick surface.

Finally, in Brooks v. United States[340], the United States District Court, applying Texas law of comparative negligence, apportioned 60 percent of fault to the ATCs who failed to warn the pilot of the construction at the end of the runway after landing, and 40 percent to the pilot for failing to notice the construction or to get updated information immediately after landing.

6.7.3 Take off, Landing and Navigational Assistance

The general rule originally adopted by the Courts was that the ultimate decision regarding takeoffs rested with the pilots and that the ATC clearance for takeoff was not an instruction to take off nor an implied representation that it was safe for the aircraft to takeoff at that particular time. The rule that the pilot was primary responsible for the operation of the aircraft was clearly applied by earlier decisions. This was affirmed by the decision in Neff v. United States[341] where the ATCs failed to warn the crew

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337 Id. at 695.

338 393 F.Supp. 1359 (N.D. Tex. 1975).

339 No. 81-362 (D.New., July 5, 1985).

340 (1985 CA5 Tex.) 19 Avi. Cas. (CCH) 17,445.

341 282 F. Supp. 910, Rev'd 420 F. 2d 115 (D.C. Cir. 1968), Cert. denied 397 U.S. 1066.

of a rapidly approaching thunderstorm. The plane crashed on takeoff since at that time the storm had reached the airfield. The Court of Appeals concluded that: "the wall of rain together with the warnings received and the other indicia of the impending storm, should have made it obvious to the crew that there was at least a substantial risk they would encounter severe turbulence and other dangerous weather phenomena before they reached a safe altitude. Their attempt to take off, in disregard of compelling signs of immediate danger, was contributory negligence..."[342]. The Court also found the ATCs partially liable for failing to report the storm.

The notion of primary responsibility of the pilot for takeoff was weakened with the decisions in Hartz v. United States[343] and in Stork v. United States[344]. In Stork, the Ninth Circuit concluded that the ATC had a duty to warn the crew members that a takeoff under poor weather conditions violated FAA regulations. Indeed, when clearance was given for takeoff, the visibility on the runway was "zero mile in fog". While criteria might vary from airport to airport, the recommended general visibility for takeoff is one-half mile for planes having more than two engines.[345] For VFR, ground visibility must generally be at least three miles[346]. In this case, the pilot processed nevertheless to take off but could not control the takeoff roll and the plane crashed. The Court concluded that the request for clearance for takeoff under such weather conditions was an indication "that something was amiss as a consequence of which the lives of passengers and crew were in grave danger and that warning was required." The Court accordingly found that the silence of the ATC in these extraordinary circumstances constituted a breach of duty on the part of ATC

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342 Id. at 121-122.

343 387 F. 2d 870 (5th Cir. 1968).

344 430 F. 2d 1104 (9th Cir. 1970).

345 14 C.F.R., section 91.116 (1989).

346 14 C.F.R. , section 91.105).

personnel.[347] The Court thus viewed that the clearance could be read to constitute a reliable official invitation to proceed. Consequently, even though the FAA regulation states that " the pilot-in-command of an aircraft is directly responsible for, and the final authority as to the operation of the aircraft", this case showed that ATCs may be found liable for clearing the takeoff.[348]

The trend toward the expansion of ATC's liability in takeoff cases was however reversed in Spaulding v. United States[349] where the Court seemed to conclude that the duty of ATCs to warn of hazards in takeoff applies only to those situations in which a violation of FAA regulation exists contemporaneously with ATC's ability to warn. The Court held that "the air traffic controller's duty to warn does not...relieve the pilot of his primary duty and responsibility."[350]

Moreover, the court in Federal Express Corp. v. Rhode Island Department of Transport, Airports Division[351] also focused its analysis on the concept of the primary duty of the pilot to "see and avoid". In this case, one of the Federal Express' jet aircraft mistakenly attempted to take off at about 2 A.M. on an unilluminated but inactive runway on which four aircraft had been parked. The ensuing collision resulted in the destruction of the jet and a suit by Federal Express against the United States, alleging negligence in defendant's provision of air traffic control services, but the court held that the controller on duty at the time was not negligent in failing to observe the jet visually and in failing to verify its location before giving taxi or takeoff clearance. It rather concluded that the negligence of the crew was the sole proximate cause of the collision and damage.

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347 Stork, at 1108.

348 Hamalian, supra note 186, at 68.

349 445 F. 2d 222 (9th Cir. 1972).

350 Id. at 226.

351 (1981, CA1 RI) 664 F.2d 830, 16 Avi. Cas. (CCH) 18,027.

Therefore, what can be drawn from these decisions is that compared to the earlier decisions where the ultimate decision for takeoff clearly rested with the pilot, ATCs may have a duty to warn departing aircraft of particular hazards. As we have seen, this has been found to encompass an obligation to warn that the takeoff under existing conditions violates FAA regulations, but it is also limited. Indeed, it only exists when the hazards or violation of the regulations are contemporaneous with ATCs' ability to warn, i.e. if the controllers are in a better position to prevent a takeoff which would present an imminent threat to life and property. In takeoff situations, it consequently appears that the pilot's duty to "see and avoid" imminent danger will generally prevail over the ATC's duty to warn. Moreover, "there is no duty to deny clearance because there is probability, such as in Spaulding, that the pilot will encounter adverse weather."[352]

As with other navigational assistance, over and beyond what is prescribed by the manuals, the ATC must finally exercise due care in giving out clearances which are as well designed to ensure the safety of aircraft flight.[353]

For instance, in Hennessey v. United States[354] the Trial Court ruled that the ATC was negligent in not detecting the course deviation of the plane right after takeoff, and that therefore, not warning the pilot sooner, was the proximate cause of the crash.[355] This decision is in line with the one in Hartz which will be studied in the section of wake turbulence.[356]

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352 Hamalian, supra note 186, at 69.

353 Kriendler, supra note 38, at 5-93; Fikegis v. Lickteig, 13 Avi. Cas. (CCH) 17,657 (D.Kan.1975) where the Court found the local traffic controller negligent in failing to coordinate their activities; Ozark Airlines v. Delta Airlines inc., 402 F.Supp. 687 (MD. 11 1975).

354 12 Avi. Cas. (CCH) 17,410 (D.Cal. 1971).

355 Id. at 17,419.

356 Speiser & Krause, supra note 226, at 388.

In Todd, v. United States[357] the Court stressed that the clearances issued must be reasonably designed to ensure the safety of aircraft flight. In that case, the ATC gave a cruise clearance at 4,000 feet without determining the plane's position and under highly adverse weather conditions over mountainous terrain. The airplane crashed into the mountain and the ATCs' negligence was found the proximate cause of the crash. Recovery was however barred by the contributory negligence of the pilot.

Other decisions have reiterated the requirement that the clearances and the navigational assistance given must be reasonably designed to ensure the safety of aircraft flight.[358]

Landing however requires an even closer cooperation of the controller and the crew. The pilot is most dependant on the controllers for instructions and assistance during this most critical stage of the flight. Therefore, the controller's duty to warn is more likely to be found the proximate cause of the crash and damages during this critical stage of flight. An important decision has been rendered in cases that arose from the crash of Eastern Airlines, Flight 66, while on final approach to Kennedy International Airport. One hundred and thirteen (113) passengers were killed onboard the Boeing 727. In Mc Cullough v. United States[359], the ATC was found negligent because he failed:

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357 384 F. Supp. 1284 (M.D. Fla. 1974), aff'd, 553 F. 2d 384, (5th Cir. 1977).

358 In re Air Disaster at New Orleans, 544 F. 2d 270 (6th Cir. 1976); Hennessey v. United States, 12 Av. Cas. (CCH) 17,410 (N.D. Cal. 1971) where a departure control's failure to timely observe and timely advise a heavily loaded departing cargo plane of its perilous left-of-course path was approximate cause of the crash. The advisory of the controller was "well, left-of-course". This advisory was found to be wholly inadequate under circumstances indicating that the plane, far left-of-course at the time, was heading for the high terrain of a ridge. Liability was imposed.; Todd v. United States, 284 F. Supp. 1284 (N.D. Fla. 1974), aff'd, 533 F. 2d 384 (5th Cir. 1977). Where it was found that due care requires an air traffic controller to issue clearances in accordance with FAA manuals. Over and beyond the requirements of the manuals, the clearances issued must be reasonably designed to insure the safety of the aircraft flight; Blount, Bros. Corp. v. Louisiana, 333 F. Supp. 327 (E.D. La. 1971); Wenzel v. United States 291 F. Supp. 978 (D.N.J. 1968), aff'd, 419 F. 2d 260, 11 Av. Cas. (CCH) 17,349 (3rd Cir. 1969); Texas Gulf Inc. v. Colt Elec. Co., 615 F. Supp. 648 (S.D.M.Y. 1984); Moloney v. United States, 354 F. Supp. 480, 12 Av. Cas. (CCH) 17,644 (S.D.N.Y. 1972).

359 538 F. Supp. 694, 16 Avi. Cas. (CCH) 18,385 (D.N.Y. 1982).

a) to relay to Eastern 66 a report of wind shear activity detected by the crew of a plane that had first landed;

b) to solicit pilot weather reports, and;

c) to inform the crew of Eastern 66 of thunderstorm activity on the final approach route.[360]

The Government argued that the crew did not affirmatively seek information as to weather conditions. The Court however found the ATC liable. It concluded that had the ATC given complete information, the crew would have been able to assess the seriousness of the situation. Even though relaying weather information is not the primary duty of ATCs and is to be done "to the extent possible", this case shows that some circumstances could require a higher degree of care by the ATCs.

Proving the ATC's negligence in landing cases is however not an easy task. For instance in Delta Airlines v. United States[361] and In Re Air Crash Disaster at New Orleans[362] the crash of the planes was held to have been caused by the negligence of the crew.

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360 Id.

361 561 F. 2d 381, 14 (CCH) Avi. 17,967 (1th Cir. 1977), cert. denied, 434 U.S. 1064, 98 S. Ct. 1238).

362 544 F. 2d 270, 14 (CCH) Av. 17, 393 (6th Cir. 1976); where the point in dispute was whether the controller gave the pilot a clearance to land with the statement "if you can see the runway or approach lights, affirmative you can land". The Court found it was a clearance for a low level approach and found the proximate cause of the crash was the pilot's negligence in attempting to land in very poor visibility". (at 278 of the case).

The navigational directions must also be correct and clear.[363] For instance in Owen v. United States[364] the aircraft collided with the side of a mountain following erroneous directions given by the ATC. Similarly, in Stewart v. United States[365] incorrect radar advisory distracted the attention of the pilot and was the cause of a mid-air collision.

Rerouting of an airplane must of course not be directed to a more dangerous flight path.[366]

One most not forget moreover that the negligence of ATCs in giving out navigational assistance must be the proximate cause of the damage.[367] The plaintiff must also prove that the ATCs were aware or should have been aware of the hazards of dangerous situations.

For example, the Court in Wyler v. Korean Airlines Co. [368] has recently held that even if the Air Force Trackers had discovered the Flight 007's course deviation, the plaintiff failed to establish that the FAA controllers had been advised of it. This case concerned a consolidated action brought when Korean Airlines Flight 007 was shot down by a Soviet aircraft. The Court of Appeals affirmed the summary judgment

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363 Kriendler, supra note 38, at 5-95; see also Ross v. United States, 16 Av. Cas. (CCH) 17,173 (5th Cir. 1981); Freeman v. United States 509 F. 2d 626, 13 Av. Cas. (CCH) 17,726 (6th Cir. 1975); Owen v. United States 713 F. 2d 1461 (9th Cir. 1983); In Re Korean Airlines Disaster of September 1, 1983, 646 F. Supp. 30 (D.D.C. 1986); Stewart v. United States 18 Av. Cas. (CCH) 18,047 (D. Odaho 1984); Calarie v. United States, 18 Av. Cas. (CCH) 18,393 (W.D.Ky 1984); Owen v. United States 15 Av. Cas. (CCH) 17,174 (S.D.N.Y. 1978); Haley v. United States 654 F. Supp. 481, 20 Av. Cas. (CCH) 18,118 (W.D.N.C. 1987); Zoppi v. United States 396 F. Supp. 416 (N.D. Ohio 1975); Kanner v. Ross School of Aviation, Inc. 18 Av. Cas. (CCH) 17,934 (N.D. Okla. 1984); Harris v. United States, 33 F. Supp. 870, 12 Av. Cas. (CCH) 17,282 (N.D.Tex. 1971); Ross V. United States, 365 F. Supp. 1138 (D.Vt. 1972).

364 713 F. 2d 1461 (9th Cir. 1983).

365 18 Av. Cas. (CCH) 18,047 (D. Idaho 1984).

366 Calarie v. United States, 18 Av. Cas. (CCH) 18,393 (W.D.Ky 1984).

367 Haley v. United States, 654 F. Supp. 481, 20 Av. Cas. (CCH) 18,118 (W.D.N.D. 1987); Zoppi v. United States, 396 F. Supp. 416 (N.D. Ohio 1975).

368 F.2d, 23 Av. Cas. (CCH) 17, 409 (D.C. Cir. 1991).

granted in favor of the United States on the claim that the government should have warned the crew that the flight was straying into Soviet airspace. The Court found the ATC had not breached any duty to passengers.

Arnould v. Eastern Air Lines, Inc.[369] also demonstrates that the ATC will not be found liable for his omission to warn the pilot if he could not reasonably have noticed the danger.

There is also a duty to use due care owed to the pilot and passengers when specific navigational assistance is requested or relied upon.[370]

Finally, it should be noted that ATCs will not be found liable if the pilot has not abided by all applicable FAR's. Controllers are not required to see and anticipate the unlawful, negligent or grossly negligent acts of pilots.[371]

6.7.4 Separation of Aircraft

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369 (1980, WD NC) 16 Avi. Cas. (CCH) 17,592, aff'd in part and rev'd and remanded in part (1982 CA4 NC) 681 F.2d 86; In this case the court found that the government's ATCs had no duty to monitor their screens for purposes of verifying the altitude of incoming flights at any point in the final approach, that the duty with respect to altitude deviations during final approach was limited to notifying incoming pilots of dangerous or potentially dangerous deviations of which the controllers had actual notice, that they had no knowledge of the dangerous low flight path prior to impact and this lack of knowledge of the danger was not due to any negligence on their part, and that no act on their part was a proximate cause of the crash.

370 Kriendler, supra note 38, at 5-95; Reidinger v. Trans World Airlines inc., 463 F.2d 1017, 12 Avi. Cas. (CCH) 17,432 (6th. Cir. 1972); Deal v. United States, 413 F.Supp. 630 (W.D. Ark. 1976), aff'd 552 F.2d 255 (8th. Cir.); cert. denied, 434 U.S. 890 , 98 S.Ct. 264, 54 L.Ed. 175 (1977); Deweese v. United States, 419 F.Supp. 147, 13 Avi. Cas. (CCH) 17,487 (D.Col. 1974), aff'd 576 F.2d 802, 14 Av. Cas. (CCH) 18,459 (10th Cir. 1978); Miller v. United States, 378 F.Supp. 1147, 13 Av. Cas. (CCH) 17,443 (E.D. Ky.1974), aff'd 522 F.2d 386, 13 Av. Cas. (CCH) 17,971, (6th Cir. 1975); Jatkoe v. United States, 19 Av. Cas. (CCH) 17,833 (E.D. Mich. 1985).

371 Berry v. United States, (1987, N.D. Ohio) 20 Avi. Cas. (CCH) 18,436, where the U.S. was not liable for the death of a pilot in a crash while attempting an IFR landing based on the failure of ATCs to warn the pilot that he was descending below the prescribed altitude for an IFR landing; United States Aviation Underwriters, Inc. v. United States, (1981, DC Colo.) 16 Avi. Cas. (CCH) 18,288.

The primary duty and most important responsibility of ATCs is to separate aircraft and prevent collisions.[372] The ATCPM provides that ATCs should separate aircraft in three situations: aircraft flying under IFR conditions; between all aircraft in Terminal Control Areas (TCA) and Terminal Radar Service Areas (TRSA); and between all aircraft on or over an airport runway area. In these two last situations, there is potential liability if the controller sees both aircraft and has not instructed the pilots to maintain separation.[373] All these situations compel the pilot to rely on the instructions of ATCs and the Manual's separation requirements and it follows that a collision in these situations is likely to result in the government's liability. More particularly, under IFR conditions, aircraft proceed along routes at altitudes requested by the pilot and authorized by ATCs, who determine the distance between aircraft by applying relevant provisions of the Manual. Collisions of aircraft within the boundaries of either a TRSA or a TCA can result in the government's liability because the controller's ability to provide separation is greatly enhanced by the availability of radar.[374] Moreover, in these situations, duties imposed by the FAA on ATCs are more stringent and provide sequency and separation on a full time basis for all IFR and

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372 Messick v. United States, 14 Av. Cas. (CCH) 17,290 (S.D.W.Va. 1976); Rudelson v. United States, 431 F.Supp. 1101 (C.D. Cal. 1977), aff'd, 602 F.2d 326 (9th Cir. 1979); Smerdon v. Unites States 135 F.Supp. 929 (D.Mass.1955).

373 Hatfield, "Problems of Representation of Air Traffic Controllers in Mid-air Litigation", 48 J.A.L.C., 1, at 4 (1982); W.J. Lack," Defendant's Discovery Plan in Mid-Air Crash Litigation", 47 J. of Air Law & Comm., (1981), at 74; Terminal Air Traffic Control Manual section 7110.65 c) and Supplemental Directives; see also Voce v. United States, 13 Av. Cas. (CCH) 17,189 (N.D. Cal. 1974) and Airmen's Information Manual, par. 400, July 1981.

374 A Terminal Control Area (TCA) consists of controlled airspace extending upward from the surface, or higher to specified altitudes within which all aircraft are subject to operating rules. (FAA Airmen's Information Manual 1-24 (1982)). TCAs are established at airports with high density of traffic because of the recognized need to maintain operational safety near busy airports. (14 C.F.R. 91.90) The major difference between a Terminal Radar Service Area (TRSA) and a TCA is that participation in the former is voluntary while participation in the latter is mandatory. (FAA's Airmen's Information Manual 1-32 (1982)); Hatfield, supra note 373, at 9.

participating VFR aircraft.[375] Hence, the reason for the increased likelyhood of controllers' liability is their greater involvement in this part of the flight.

The imposition of liability on ATCs under these situations provided by the ATCPM is not without limit and these situations do not systematically transfer the responsibility for collision avoidance from the pilot to the controller. To avoid liability, the pilot must have operated his aircraft within all prescribed procedures.[376] Although a special duty is owed to pilots by ATCs under IFR conditions, the pilots must indeed transmit the correct information to the ATCs and comply precisely with all the ATCs' instructions.[377] Conversely, pilots' duty is higher for flights under VFR conditions where the controller's duty to separate is minimal since the pilots must constantly look for other planes.[378] The controller's responsibility in VFR conditions will consequently occur very seldom in cases of mid-air collisions and is generally nominal. There is an abundant case law which confirms the view that the pilots have the primary responsibility for separation of aircraft under VFR conditions.[379] It has

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375 Hatfield, supra note 373, at 8-9; examples of cases in TCA or TRSA situations; Colorado Flying Academy v. United States, 506 F.Supp. 1221 (D.C. Colo.1981); Universal Aviation Underwriters v. United States, 496 F.Supp. 639 (D.C. Colo. 1980); Teicher v. United States, 15 Av. Cas. (CCH) 17,533 (C.D. Cal. 1978).

376 Sawyer v. United States, 297 F.Supp. 324 (E.D.N.Y. 1969) where the pilot was over seven miles outside the authorized holding position and had also failed to notify the ATC of some inoperative navigational equipment; Federal Express Corp. v. State of Rhode Island, 644 F.2d 830 (1st Cir. 1981) where the pilot taxied the aircraft on the wrong runway for takeoff.

377 White v. TWA, Inc., 320 F.Supp. 655 (S.D.N.Y. 1970) where two airline pilots had confirmed to the ATC their altitudes which would have provided a 100 foot separation. The ATC therefore had no way of knowing that one of the aircraft had departed from its assigned altitude which caused the collision.

378 14 C.F.R. section 91.105; Lack, supra note 373, at 773.

379 Hamilton v. United States, 497 F.2d 370 (9th Cir. 1974); Tilley v. United States, 375 F.2d 678 (4th Cir. 1967); Penny v. United States, 12 Av. Cas. (CCH) 17,919 (S.D. Ohio 1973); Coatney v. Berkshire, 500 F.2d 290 (8th Cir.) 1974); Thibodeaux v. United States, 14 Av. Cas. (CCH) 17,653 (E.D. Tex. 1976), aff'd (unreported, 5th Cir. 1978); Stanley v. United States, 239 F.Supp. 973 (N.D. Ohio 1965); United States v. Miller, 303 F.2d 703 (9th Cir. 1962); cert.denied 371 U.S. 955 (1963); United States v. Schultetus, 277 F.2d 322 (5th Cir. 1960), cert.denied, 364 U.S. 828 (1960); Rudelson v. United States, 602 F.2d 1326, 1329 (9th Cir. 1979); Fikejs v. Lickterg, 13 Avi. Cas. (CCH) 17,657 (D.Kan. 1875).

however been held that the duty to prevent a VFR mid-air collision rests with both pilot and ATC in Mattchei and Fikejs.[380] These decisions do not seem to have altered the well-established rule that pilots flying under VFR conditions have the primary responsibility for the safety of a flight of the aircraft and they must maintain aggressive lookout towards other aircraft to avoid collisions.[381]

With respect to the duty of separation of the controller, a review of the reported cases shows that no court has found a controller negligent for failing to take action beyond the scope of duties established in the FAA Manual unless the controller was aware or should have been aware that the aircraft was in a position of danger.[382]

More particularly, the courts have not hesitated to find the government liable when there was negligence in failing to detect an approaching aircraft,[383] or simply the failure to provide sufficient separation.[384]

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380 Mattschei v. United States, 600 F.2d 205, 208 (9th Cir. 1979); this decision involved a mid-air collision in VFR conditions between a Cessna and a Cherokee airplane while both were approaching Hayward California Airport for landing. The planes were in touch with different traffic controllers on separate radio channels. The Court found that the controllers were negligent in failing to warn the Cessna pilot that another plane was above and behind. The Court stressed that "the duty to exercise due care to avoid accidents is a concurrent one resting on both the control tower personnel and the pilot. (at 208); see also Fikejs v. Lickteig, 13 Avi. Cas. (CCH), 17, 657 (D.Kan. 1975).

381 Hamalian, supra note 186, at 72.

382 Hatfield, supra note 373, at 8; United Airlines v. Wiener, 335 F. 2d 379 (9th Cir.), cert. denied 379 U.S. 95.

383 Rudelson v. United States, 431 F. Supp. 1101, 14 Av. Cas. (CCH) 17,991 (C.D. Cal. 1977), aff'd, 602 F. 2d 1326, 15 Av. Cas. 17,723 (9th Cir. 1979); State of Marvland for the use of Mever v. United States, 257 F. Supp. 768 (T.D.C. 1966); but see Armstrong v. United States, 756 F. 2d 1407 (9th Cir. 1985) where the controllers were not negligent for failing to warn of airplane's presence because the airplane arrived early, below its assigned altitude, and without lights, placing it outside the purview of both the Air Traffic Control Manual and the controllers general duty to warn of a reasonably apparent danger; Drock v. United States, 14 Av. Cas. (CCH) 18,246 (E.D. Va. 1977).

384 Allen v. United States, 370 F. Supp. 992 (E.D. Mo. 1973); but see Voce v. United States, 13 Av. Cas. (CCH) 17,181 (N.D. Cal. 1974); In re Air Crash Disaster at Metro Airport, Detroit, 18 Av. Cas. (CCH) 17,915 (E.D. Mich. 1984); White v. Trans World Airlines, Inc., 320 F. Supp. 655 (S.D.N.Y. 1970).

The oldest reported case dealing with aircraft separation is Eastern Air Lines, Inc. v. Union Trust Co.[385]. This case involved a collision between a Bolivian Airliner and an Eastern Air Lines plane while both were on final landing approaches to the airport. The controller negligently authorized the two planes to land on the same runway, and at approximately the same time. After repeated attempts to warn the descending Bolivian airplane that it did not have the right-of-way, the controller instructed the Eastern crew to turn left. The mid-air collision occurred almost simultaneously with these instructions. The Court found the controller negligent in not separating both aircraft and in failing to warn either pilot of the other's approach and to keep both pilots advised of the location of the other plane.

Rudelson v. United States,[386] also involved a mid-air collision. The controller failed to scan the traffic pattern and the Court found that had he done so, he would have spotted the unannounced aircraft in sufficient time to warn it of impending danger and to alert the other incoming aircraft in the entry corridor. The Court concluded that the ATCs' duties are not limited by the duties established in the FAA Manuals and that in especially dangerous situations, controllers must take steps beyond those prescribed by the manuals if such steps are necessary to insure the safety of pilots and passengers.

In Allen v. United States,[387] it was found that the evidence showed that both aircraft were visible to the ATC for 50 seconds prior to mid-air landing collision. The Court concluded that the government violated its duties by placing a DC-9 and a Cessna 150 on a collision course and by failing to warn the flight crews of an impending danger when the controller saw or should have seen the collision course.

The most prominent external factor affecting the ATC's performance however is traffic-volume. Indeed, a situation that may be routine for an ATC under normal circumstances, can become extremely complex with the inclusion of just one or two

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385 221 F.2d 62 (D.C. 1955).

386 431 F. Supp. 1101, 14 Av. Cas. (CCH) 17,991 (C.D. Cal. 1977), aff'd, 602 F. 2d 1326, 15 Av. Cas. 17,723 (9th Cir. 1979).

387 370 F. Supp. 992 (E.D. Mo. 1973).

additional aircraft. Cases have taken this factor into account, i.e. heavy traffic, in their determination of the reasonable care that a prudent ATC must take in the circumstances. For instance in Hamilton v. United States,[388] controllers were faced with a crisis situation when two planes simultaneously approached the same runway. The controllers, relying on pilot's provided information, calculated that there was sufficient spacing for the planes to land in sequence and cleared both planes to land on runway 27 R.[389] When the planes suddenly appeared on the horizon in close proximity, the controllers hastily, but unsuccessfully, attempted to direct the pilot in emergency evasive maneuvers.[390] Although the controller failed to issue an ATCPM required warning, they were not found negligent because they had acted reasonably given the exigency of the situation.[391]

In conclusion, the United States is exposed to the greatest potential liability for mid-air collisions when such collisions are caused by the failure of FAA personnel to exercise due care in separation of aircraft under IFR conditions, and in TCA and TRSA situations. ATCs' fault may however be mitigated in instances where there is a high density of air traffic. The controller's duty to separate is minimal under VFR conditions since the pilot must keep a constant look-out for other planes. Under certain circumstances, the United States may also be liable for mid-air collisions of VFR aircraft, especially when the controller is in a better position than a pilot to evaluate a particular hazard. Pilots of aircraft however have concurrent responsibilities to avoid mid-air collisions and cannot rely exclusively on the ATCs to provide separation from other aircraft. The controller is indeed permitted to assume that pilots will exercise reasonable care, follow their duty to see and avoid, abide by all applicable FARs,

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388 497 F. 2d 370 (9th Cir. 1974).

389 Id. at 373-374.

390 Id. at 374.

391 Id. at 375-376.

follow instructions and take subsequent reasonable precautions following an ATC's warning.

6.7.5 Weather Information

Despite the fact that accurate and up-to-date weather information is essential to aviation safety and that failure by an ATC to provide this information can have catastrophic results, the trend does not seem to be towards increasing the liability of the ATC in the field of weather reporting.

As we have seen in section 6.4.3 of this thesis, the furnishing of weather information is specified in the ATCPM as an additional service, to be provided "to the extent possible", when time and traffic permits and upon pilot's request.[392] More particularly, as commentator Kreindler has clearly explained, they are to be provided to the extent possible, based on limitations of radar and higher priority duties.[393]

This trend towards the limitation of the ATC's is liability in weather reporting was demonstrated by recent decisions.

In Barbosa v. United States[394] the court held that ATCs were not negligent in failing to provide weather conditions. The Court concluded so by noting that the weather conditions were not requested by the crew and that the controllers were prevented from observing precipitation echoes since they were reasonably using weather suppression controls on the radar. The Court also held that the ATCPM did not impose mandatory duties with regard to weather information.

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392 Barbosa v. United States, 811 S. 2d 1444, 1447 (11th Cir. 1987); Bearden v. United States, 21 Av. Cas. (CCH) 17,533 (N.D. Ala. 1988); Burchett v United States, 19 Av. Cas. (CCH) 18,440 (S.D. Ga. 1986).

393 Pierce v. United States, 679 F.2d 617, 17 Av. Cas. (CCH) 17,111 (6th Cir. 1982); Aff'd 718 F. 2d 825 (6th Cir. 1988); Barbosa v. United States, 811 F.2d 1444 (11th Cir. 1987); Birchett v. United States, 19 Av. Cas. (CCH) 18,440 (S.D. Ja. 1986); Haley v. United States, 654 F. Supp. 481 (W.D.N.C. 1987); Associated Aviation Underwriters v. United States Associated Underwriters, 462 F. Supp. 674, 15 Av. Cas. (CCH) 17,495 (N.D. Tex. 1978).

394 811 F.2d 1444 (11th Cir. 1987).

In Moorhead v. Mitsubishi Aircraft International Inc.[395] the ATC was not found negligent in failing to relay icing forecast.

In Hensley v. United States,[396] the Court found that plaintiff had failed to establish that any weather information depicted on radar was within the scopes of responsible controllers which had to be relayed to aircraft. Moreover, the Court held that the controllers did not have a duty to inform the pilot of another flight's request for deviation due to weather. In Redhead v. United States[397], the Court held that the ATC did not have to learn what the weather conditions were in the precise area where the plane was descending and give weather conditions to the pilot since it was not an emergency situation; it was not a situation where the controller had failed to warn the pilot of a sudden change in weather either. Moreover, it contended that the controller was in no better position to inform the pilot about the weather than the pilot himself.

The reduced priority of weather services by ATCs is based in part on the fact that other weather information is available to pilots from the Flight Service Station.[398]

There are, however, instances when the controller has a duty to provide pertinent weather information. These occasions have clearly been summarized as follows: "...when specifically requested by the pilot,[399] when due care requires the ATC to provide the latest available weather information because of dangerous weather conditions that may not be known to the pilot,[400] and when misleading information

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395 828 F.2d 278 (5th Cir. 1987).

396 728 F. Supp. 716 (S.D. Fla. 1989).

397 (1982), CA3 Pa) 686 F.2d 178, 17 (CCH) Avi. Cas. 17, 261, cert. den. (US) 75 L Ed. 2d 435, 103 S ct. 1190)

398 Kriendler, supra note 38, at 5-88.

399 Springer v. United States, 641 F. Supp. 913 (D.S.C. 1986); Barbosa v. United States, 811 S.2d 1444 (11th Cir. 1987).

400 Ingham v. Eastern Air Lines, Inc., and United States, 373 F.2d 227 (2nd Cir. 1967), Cert. denied, 389 U.S. 931 (1968); Martin v. United States, 448 F. Supp. 855, 14 Av. Cas. (CCH) 18,285 (E.D.Ark. 1977), aff'd, 586 F.2d 1206, 15 Av. Cas. (CCH) 17,400 (8th Cir. 1978); Spark v. United States, 278 F. Supp. 869 (S.D. Cal. 1967); aff'd, 430 F.2d 1104 (9th Cir. 1970); Danz v. United States, 14 Av. Cas. (CCH) 17,547 (S.D. Fla. 1976); Thompson v. United States, 15

has previously been given."[401] There also definitely is a duty to ensure that any information given is accurate and not misleading.[402]

For instance, in Ingham the Court held the government liable for the controller's failure to disseminate available visibility information and to report a drop in visibility to an aircraft making a final landing approach under marginal visibility conditions. The Court held that the Manual required "the approach controller to report those subsequent changes which, under all these circumstances, the crew would have considered important both in determining whether to attempt landing and in preparing for the weather conditions most likely to be encountered near the runway."[403] Even though the minimum required visibility was a half mile, the Court held that report of current weather conditions and subsequent changes from one mile to three quarter of a mile visibility was necessary and should have been transmitted by approach facilities to all aircraft at the time of the first radio contact or as soon as possible thereafter.

A similar fact situation also gave rise to the liability of the government in Martin v. United States[404].

In Kullberg v. United States[405] the Court concluded that a duty exists if the ATC has actual knowledge of hazardous weather conditions of which the pilot may not be aware.

Av. Cas. (CCH) 18,294 (C.D. Ill. 1979); Kullberg v. United States, 271 F. Supp. 788 (W.D.Pa. 1964); Associated Aviation Underwriters v. United States (1978, ND Tex.) 462 F. Supp. 674, 15 Avi. Cas. (CCH) 17,495.

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

402 Gill v. United States, 429 F.2d 1072 (5th Cir. 1970), aff'd as to Remand, 449 F.2d 765 (5th Cir. 1971); Mallen v. United States, 16 Av. Cas. (CCH) 17,485 (N.D.Ga. 1979); Roland v. United States, 463 F. Supp. 852 (S.D. Ind. 1978); DeVere v. True Flite Inc., 268 F. Supp. 226 (E.D.N.C. 1967); INA Aviation Corp. v. United States (1979, ED NY) 468 F. Supp. 695, 15 (CCH) Avi. Cas. 17,609, aff'd without op. (CA2 NY) 610 F.2d 806.

403 Ingham v. Eastern Airlines, Inc. and United States, 373 F.2d 227 (2nd Cir. 1967), cert. denied, 389 U.S. 931 (1968).

404 448 F. Supp. 855, 14 Av. Cas. (CCH) 18,285 (D.Ark. 1977), aff'd 586 F.2d 1206, 15 Av. Cas. (CCH) 17,400 (8th Cir. 1978).

405 271 F. Supp. 788 (W.D. Pa. 1964).

In conclusion, it can be drawn from the major reported cases that there is no positive duty on the part of the ATC to obtain and relay weather information to pilots. There is a duty to provide weather information only in the specific circumstances such as knowledge by the ATC of hazardous weather condition of which the pilot may not yet be aware. In such instances, the duty arises only when it can be proven that the ATC had actual knowledge of the weather conditions or hazards and that the ATC was in a better position to inform the pilot about the weather. There is indeed no such duty of the ATC to provide weather information when the pilot is in a better position than the ATC to assess the weather conditions or hazards.

It is mainly the pilot's responsibility to obtain pertinent information through all available sources, both pre-flight and during flight. The primary duty of the pilot for the safe operation of the aircraft is thus clearly applied in the field of weather information. The pilot's duty of reasonable care will consequently be translated into carefully assessing and evaluating weather conditions by obtaining all information available to him and by avoiding danger.[406] His use of due care is "commensurate with the weather conditions apparent to him through his own perceptions".[407]

6.7.6 Wake Turbulence

Wake Turbulence is the phenomenon of whirling vortices trailing from the wing tips of large aircraft or rotation cones of turbulent air created by aircraft wings when moving and generating lift.[408] When encountering these wing tip vortices, smaller and lighter aircraft are particularly susceptible to violent changes in altitude, especially at very low altitude, such as during takeoff or landing. The intensity and danger of wake

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406 Bowen v. United States, 570 F.2d 1311 (7th Cir. 1978); Bearden v. United States, 21 Av. Cas. (CCH) 17,533 (N.D.Ala. 1988); Reidinger v. Trans World Airlines, Inc., 329 F. Supp. 487, 11 Av. Cas. (CCH) 18,276 (E.D.Ky. 1971); Karmev v. United States, 634 F. Supp. 648, 19 Av. Cas. (CCH) 18,581 (S.D.Miss. 1986), aff'd, 813 F.2d 405 (5th Cir. 1987) where the Court held that the primary responsibility rests with the pilot who, in this instance, was in a better position to determine weather conditions and therefore had the superior duty to avoid danger.; Kullberg v. United States, 271 F. Supp. 788 (W.D.Pa. 1964).

407 Kriendler, supra note 38, at 5-91.

408 Hamalian, supra note 186, at 78.

turbulence is commensurate with the aircraft's speed, weight, and angle of incline.[409] The ATCPM provides that when there is a danger of wake turbulence, cautionary instructions should be issued to pilots concerned. More particularly, section 411.7 states the following:

> "When controllers foresee the possibility that departing or arriving aircraft might encounter rotorcraft downwash, thrust steam turbulence or wing tip vortices from preceding aircraft, cautionary information to this effect should be issued to pilots concerned."[410]

It was not before the 1960's that courts dealing with ATCs' negligence in connection with advising of wake turbulence recognized that the phenomenon, unique to aircraft flight, is a hazard of which pilots are entitled to be warned of by ATCs. The lack of knowledge in the industry about wake turbulence was enough in earlier cases to absolve ATCs of negligence allegedly due to deficient warnings.[411]

Liability of ATCs in a case of wake turbulence was more particularly established by the Court of Appeals with the decision in United States v. Furumizo[412] where the government was found negligent when controllers, having given a warning, actually saw a Piper start to take off in apparent disregard of that warning, without waiting long enough for wake turbulence to dissipate, and yet did nothing to stop it. Even though the ATC had complied with the ATCPM, the Court concluded that compliance did not preclude a finding of a duty of care that went beyond the provisions of the Manual.

Wing-tip vortices dissipate over time and one of the functions of the ATC is consequently to follow the guidelines concerning appropriate aircraft departure separation time. Therefore, this trend towards expanding the ATC's liability that is

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409 Kriendler, supra note 38, at 5-82.

410 FAA ATCPM, Section 411.7.

411 Hamalian, supra note 186, at 78; Franklin v. United States, 342 F.2d 581 (7th Cir. 1965); Wasilko v. United States, 300 F. Supp. 573 (N.D. Ohio 1967), aff'd 412 F.2d 859 (6th Cir. 1969).

412 245 F. Supp. 981, 9 Avi. Cas. (CCH) 17,961 (D. Hawaii); aff'd 381 F.2d 865, 10 Avi. Cas. (CCH) 17,426 (9th Cir. 1967).

discernable in other areas was also evident in the wake turbulence situations. The decision in Furumizo was indeed quickly followed by Hartz v. United States[413] where the Fifth Circuit concluded that a controller had a duty to warn a Bonanza pilot of the possible danger from wing-tip vortex of a DC-7 that had just taken off. The Court did not find adequate the cautionary information of the ATC "watch the prop-wash". The Court also stated that this information was not in accordance with the ATCPM. The Court additionally indicated that the failure of the controller to properly caution the pilot imposed upon him an additional duty to delay takeoff clearance for such period as was necessary to permit the turbulence to dissipate.

These decisions pertaining to wake turbulence[414] have consequently established that ATCs are under a duty to consider wake turbulence when granting clearance, to issue proper warnings when turbulence may be a factor and to continue to re-issue warnings if it appears that the pilot has not fully appreciated the warning.

Many suits have been filed concerning wake turbulence, and although these cases have recognized the concept of responsibility of ATCs in this area, the dispute still often revolves around the concurrent responsibilities of the controller and pilot. Indeed, the pilot has concurrent responsibilities such as being familiar with the AIM's directives pertaining to wake turbulence.[415] These rules give instructions on how to depart behind a large aircraft and avoid the wing tip vortices. Pilot must also follow

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413 415 F.2d 259, 11 Av. Cas. (CCH) 17,168 (6th Cir. 1969).

414 Neal v. United States, 562 F.2d 338, 14 Av. Cas. (CCH) 18,207 (5th Cir. 1977); Dickens v. United States, 545 F.2d 886, 14 Av. Cas. (CCH) 17,635 (5th Cir. 1977); Miller v. United States, 587 F. 2d. 991, 15 Av. Cas. (CCH) 17,529; Felder v. United States, 543 F.2d 657, 14 Av. Cas. (CCH) 17,377 (9th Cir. 1976); Lightenburger v. United States, 460 F.2d 391 (9th Cir. 1972); cert. denied, 409 U.S. 983, 93 S.Ct. 323 (1972); Yates v. United States, 370 F. Supp. 1058, 12 Av. Cas. (CCH) 17,921 (D.N.M. 1973), aff'd 497 F.2d 878, 12 Av. Cas. (CCH) 18,416 (10th Cir. 1974); American National Bank of Jacksonville v. United States, 12 Av. Cas. (CCH) 12,273 (E.D.N.Y. 1971); Wasilko v. United States, 300 F. Supp. 573 (N.D. Ohio 1967), aff'd 412 F.2d 859 (6th Cir. 1969).

415 Sanbutch and Properties Inc. v. United States, 343 F. Supp. 611, 12 Av. Cas. (CCH) 17,690 (N.D. Cal. 1972); Klein v. United States, 13 Av. Cas. (CCH) 18,137 (D.Md. 1975).

the instructions of the ATC or be careful or reasonable following a warning of possible wake turbulence.[416]

The apportionment of liability will consequently depend on the facts of each case and on what was the proximate cause of the accident. Indeed, in aviation tort cases involving wake turbulence, it can sometimes become very difficult for the Court to determine whether the loss of control of the plane was caused by the wake turbulence of another plane or by pilot's error. To overcome this difficulty, some courts have held that when a period of time in excess of the normal dissipation time for wake turbulence has elapsed, the ATC cannot be held to have been negligent due to the lack of foreseeability of the dangerous event. It was established by these decisions that usually, a takeoff clearance for a light aircraft behind a heavy jet will require a delay of two minutes after the heavy jet begins the takeoff roll on the same runway.[417]

For instance, the government has avoided liability for crashes resulting from wake turbulence in cases where the period of elapsed time between the turbulence creating activity of the plane and the appearance of the other was twelve minutes.[418] In Miller v. United States[419], the government was absolved of liability. It was found by the Court that the ATC could not reasonably have known that the pilot was faced with an extreme danger or severe hazard when 2 minutes had elapsed between the

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416 Jenrette v. United States, 14 Av. Cas. (CCH) 17,798 (D. Cal. 1977) where the Court held that "a reasonable pilot, upon being informed that he was to follow a large jet on approach, would fly at an altitude above the descent path of the proceeding airplane and controllers have a right to assume that pilots will so fly." (at 17,802). In this case, the pilot was flying under VFR conditions when he encountered wake turbulence from a landing Boeing 737 and crashed. The pilot was warned that he was behind a large jet.; In Re N-500 L cases, 16 Av. Cas. (CCH) 17,635 (D.P.R. 1981), aff'd 17 Av. Cas. (CCH) 17,498 (1st Cir. 1982) where the pilot of a small aircraft was negligent when he failed to comply with the ATC's instructions and when he lost sight of the airliner.

417 Kriendler, supra note 38, at 5-82.

418 Hamalian, supra note 186, at 80; Lightenburger v. United States, 298 F. Supp. 813, 10 Av. Cas. (CCH) 18,316 (D. Cal. 1969), rev'd 460 F.2d 391, 12 Av. Cas. (CCH) 17,341 (9th Cir. 1972), cert. denied, 409 U.S. 983, 93 S.Ct. 323.

419 587 F.2d 991, 15 Av. Cas. (CCH) 17,529 (9th Cir. 1978).

departure of the plane that caused the wake turbulence and the one in which Miller was piloting.

In the same way, it was found that when there is no knowledge of the presence of the light aircraft or no basis for an opinion that there is danger of wake turbulence, there is no liability by the government.[420] Therefore, as in the case of separation of aircraft and of the dissemination of weather information, knowledge by the ATC of the hazardous situation must be proven.

6.8 Comparison with Canadian Decisions

There are very few cases in Canada involving suits against the government for the alleged negligence of ATCs. It is consequently very difficult to clearly determine what is the extent of the controller's duty and the standards to which they would be held.

The first case dealing with the possible liability of an ATC is Grossman v. The King[421]. In this case a pilot and his passengers sued the government for the damages they had suffered when the plane landed at the Saskatoon airport and ran into the side of an open-drainage ditch. The plaintiffs argued it was the duty of the ATC to provide adequate warning of the danger occasioned by the open ditch on the grass. The Court rejected the claim arguing that the Crown could not be liable for negligence in failing to give adequate warning to pilots using the airport when the obstruction is obvious to those using reasonable care. Conversely, it held that the Crown could be liable for negligence when the obstruction could not reasonably be detected and noticed by the crew members. In this case, the Court found that the pilot failed to take reasonable care in that he did not inform himself of the nature of the ground on which he proposed to land his plane and failed to take any steps to acquaint himself with the nature of the landing field.

In short, this case stands for two important points:

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[420] Kriendler, supra note 38, at 5-85; First of Am. Bank-Central v. United States, 639 F. Supp. 446, 20 Av. Cas. (CCH) 17,744 (W.D.Mich. 1986); Hersch v. United States, 719 F.2d 873 (6th Cir. 1983).

[421] 3 Avi. Cas. (CCH) 17,472 (Ex.C. of Canada, 1950).

- Air traffic control employees do owe a duty of care, at least consisting of warning of hidden obstructions on the ground, to pilot and passengers;
- If ATCs fail to discharge that duty, the Crown can be sued for negligence.

The next case involving the potential liability of ATCs is Sexton v. Boak[422]. This case involved the crash of a small aircraft (Aztec) as a result of wake turbulence created by a bigger aircraft (B 707). Before the accident, both pilots had been advised by controllers of each other's presence. The pilot of the Aztec however had not received clearance for landing. The small Aztec crashed, killing all four occupants. The widows of two of the passengers brought an action against the estate of the pilot and one of the ATCs. The estate took a recourse against the controller and one of his colleagues. It was submitted that the ATC had failed to warn of turbulence or to detect a separation distance that would have avoided the hazard.

In its reasoning, the Court reviewed some of the leading U.S. decisions involving wake turbulence, including Hartz v. United States[423], and stated that prior to landing clearance and while on VFR, the responsibility for adequate separation lies with the pilot and is not the concern of control tower operators. More particularly, it contended that:

> " In none of the great number of exhibits relative to airmanship and procedure at airports it is suggested that the tower should warn of turbulence or prescribe separation distances prior to landing clearance. (...) In my view, the control tower persons, having informed the aircraft of the intentions of each other, and put them in a position of safety with respect to one another, have no duty to concern themselves with the separation the pilot ought to maintain."[424]

The Court specifically distinguished Sexton from Hartz, explaining that Hartz involved an aircraft that was on the ground and that the controller was in a better position than the pilot to judge the movement of the aircraft. The Court also distinguished the case

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422 12 Avi. Cas. (CCH) 17,851 (British Columbia Supreme Court, 1972).

423 397 F.2d 870.

424 Hartz, Id. at 17,855.

at bar from Johnson v. United States[425] in that clearance was given in that particular case and that in the exercise of reasonable care, the ATC had a duty to take turbulence into consideration when giving clearance to land. Finally, distinguishing from Lightenburger v. United States[426], the Court held that under instrument flight rule systems, as were used in that case, the control personnel take on a much larger share of the total responsibility than under a VFR conditions case.

Hence, the Court in Sexton recognized the principle clearly established by the courts in the U.S. being that ATCs have a much larger share of responsibility under IFR conditions. It also admitted that if the ATC see a dangerous situation developing they "may" be under a duty to warn. Not going as far as the courts in the U.S. though, the judge in Sexton was clearly influenced by the American decisions.

Two years later, Churchill Falls Corp. v. The Queen[427] was decided by the Federal Court of Canada, Trial Division. This case involved the crash of an airplane into a sheer vertical rock face in an open pit mine at Wabush, killing all occupants onboard. The plane executed the only currently approved instrument approach pattern, but on the wrong beacon, as instructed by the ATC. More specifically, the controllers at the Moncton area control center were sued for alleged negligence in issuing a clearance according to a procedure that had been previously canceled by the Department of Transport. Advanced information with respect to the new procedure had been given to the controllers and pilots who had been instructed to destroy the old plates containing the procedure on the old beacon and replace them with the new ones. Having only the new plates, the pilots followed the new procedure but on the old beacon. They consequently missed the runway on landing and crashed.

Although ATCs were obviously negligent in not having instructed the pilots of the new beacon, the Court concluded that the crash had been caused solely by the negligence of the pilots, basing its argument on the fact that the pilot had the choice to

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425 183 F.Supp. 489, (1960), aff'd 295 F.2d 509.

426 (1969) 298 F.Supp. 813.

427 13 Avi. Cas. (CCH), 18,442.

accept or refuse the clearance given by the ATC. It indeed argued that once the pilot accepted the clearance of the ATC, the ATC's primary and sole concern was to separate the aircraft and not to monitor the aircraft's descent. Moreover, the Court indicated that upon and after acceptance of the clearance, the pilots were directly responsible for the operation and safety of the aeroplane and its passengers.[428] The Court therefore clearly applied the general rule adopted by U.S. Courts in earlier decisions that clearance from an ATC is permissive and that the pilot is primary responsible for the operation of the aircraft.

In addition, what is surprising is that in its discussion of the applicable standard of care, the Court clearly confirmed that "aviation safety requires the efforts of air traffic controllers and pilots. Their efforts complement each other."[429] Hence, the Court acknowledged the concurrent duties of the pilot and the controller, and yet, solely found the pilot liable in such a situation where the ATCs were negligent. It is not surprising that this decision has been criticized so much.[430] Involving IFR flying, this decision moreover comes into contradiction with the Sexton decision where it was held that ATCs have a greater degree of responsibility in IFR flying conditions. This clearance was not reasonably designed to ensure the safety of aircraft and should have been regarded as negligent and the proximate cause of the crash according to the principles elaborated by the prevailing U.S. case law.

It should also be noted that in its analysis of the existence of a duty of care owed to the passengers, the Court explicitly referred to the fact that the travelling public has no alternative but to rely on the controllers and pilots for the safety of flights. As we recall, the reliance criteria is also the key factor for the determination of a duty of care in the U.S., i.e. for the application of the Good Samaritan doctrine.

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428 Id. at 18,453.

429 Id. at 18,452.

430 John T. Keenan, "Case Law and Comments", 42 J. of Air Law & Comm., 28, (1976); Sasseville, supra note 168, at 111.

Churchill also stands for its evaluation of the effect of the regulations and manuals. The Court clearly stated that the **Canadian Air Regulations** and Manuals "are not a code governing civil liability in the event of an airplane accident, but (...) they represent a reasonable standard of care to be observed by air traffic control units and pilots in the carrying out of the activities they have undertaken."[431] Therefore, as in the U.S., the air regulations and the manuals are not the cause of action for a claim against the government for negligence in the air traffic control activities but they help determine the applicable standard of care.

The last decision in Canada involving the potential liability of ATCs is Trottier v. Canada[432], where a pilot brought an action against the Crown for damages suffered after the crash of his seaplane near Montreal. The plaintiff argued that the accident was attributable to the fault of the ATCs, employees of the defendant, who had failed in their duty to act and refused to provide the pilot with the assistance he had requested. The controllers were also blamed for contributing to this accident by their attitude as they had allegedly distracted the pilot instead of helping him to control the aircraft. The pilot had indeed contacted the Mirabel control tower for information on the route, although he was outside the airport's control zone. After asking if the situation was an emergency, which the pilot said it was not, the ATC attempted to put him in touch with the proper Terminal Radar Service Area in Montreal but without success.
The Court dismissed the pilot's claim, stating that the pilot was solely to blame for the collision. The Court found relevant the fact that he had taken off for a VFR flight in deteriorating weather conditions without checking the weather beforehand, that he had not submitted a flight plan, that he had contacted the incorrect control tower, and that he had failed to declare an emergency, which would have assured the assistance of the Mirabel tower control.

Since this decision involved a VFR flight, it seems to be in line with the reasoning of Sexton and the principles elaborated by the U.S. jurisprudence.

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[431] Churchill Falls Corp., supra note 421, at 18, 452.

[432] 9 F.T.R. 94 (T.D., Fed. Court of Canada, 1986).

A review of these cases demonstrates that the liability of ATCs in Canada has not been expanded as much as in the U.S.. In fact, all these decisions take into account the fact that the pilot has the final authority for the operation of the aircraft. Since the Canadian courts in aviation tort law are greatly influenced by the American jurisprudence pertaining to aviation tort litigation, one could expect that the ATCs' liability is likely to be expanded in Canada as well.

7. LIABILITY FOR INSPECTION AND CERTIFICATION OF AIRCRAFT

7.1 Technical Background

The certification process of modern transport jets is a complex one especially because of today's advanced technology in air transport and because improper certification and inspection can lead to fatal disaster. The certification of aircraft consequently represents one of the greatest intrusion of the U.S. Government into the design, manufacture and operation of aircraft.

In pursuance of the **Chicago Convention**, the U.S. Government, as we have seen, has implemented the **Federal Aviation Act of 1958** and a set of regulations prescribing minimum standards governing designs, materials, workmanship, construction and performance of aircraft and their components, and accordingly regulating the inspection to be carried by FAA employees. More particularly, the government's duty to intrude is found in Title 6 of the **Federal Aviation Act of 1958** which gives broad authority to the FAA to regulate the design, production and operation of aircraft as may be required in the interest of safety and empower the FAA to issue certificates for the development and production of aircraft, engines and propellers.[433] "Reduced to its basics, the government's role in assuring airworthiness has three essential elements: design to an objective set of minimum safety standards; manufacture the product so as

[433] Parts 21,23, and 25 are applicable to the design and production of aircraft. Parts 91,121, and 125 deal with the operation. Part 43 deals with maintenance.

to assure conformity with the design; maintain the product to continue this conformity and meet an appropriate level of safety."[434]

The certification process assuring the airworthiness of aircraft carried by the government is thus a multitiered process. First, a manufacturer must obtain approval of the type design of the aircraft by submitting blueprints and design drawings in order to obtain a type certificate.[435] This type certificate is issued by FAA engineers when the tests of the components are found successful and the flight testings of the prototype of the aircraft turn out to be satisfactory.[436]

Once the manufacturer obtains his type certificate approved by the FAA, he must obtain a production certificate, which will be issued when the FAA is satisfied that the production duplicates conform to or model with the prototype of the aircraft which has previously been tested and approved by the FAA. The manufacturer will then be allowed to begin manufacture of production models.[437] The production certificate also presents another important element in addition to the finding that the manufacturer has the capability of producing a product which conforms to its approved type design. It also represents that he has a quality control system which will ensure that each article in fact conforms to the type design and is in condition for safe operation.[438]

Upon final assembly and distribution of the aircraft, the last stage of the certification process involves the issuance of an airworthiness certificate[439] which is completed when the FAA is satisfied that the aircraft conforms to its type certificate and is in condition for safe operation.[440] Should the manufacturer wish to make a

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434 Jonathan, Howe. "Airworthiness: The Government's Role", 17 The Forum, at 645.

435 49 USCS par. 1423 a) (1990); 14 C.F.R. Part 21 , subpar. b) (1989).

436 Tompkins, supra note 65, at 570.

437 49 U.S.C.S par.1423 b) (1990); 14 C.F.R part 21 subpar. g) (1989).

438 Howe, supra note 434, at 652; subpar. g) generally of Part 21 of the FARs.

439 14 C.F.R Part 21, subpar. h) (1989).

440 49 U.S.C.S par. 1423 b) (1990).

major modification in the aircraft design so that it will no longer conform to the type certificate, he must obtain a supplemental type certificate.[441] The FAA or the person to whom it has delegated its certificating authority consequently makes the final determination that an applicant for a standard airworthiness certificate has sufficiently complied with regulatory minimum safety standards to receive a license.

Finally, after the new aircraft is introduced into airline operations, two mechanisms exist to assure the continued airworthiness of an airplane. One is the approved maintenance and inspection program and the other is the airworthiness directives.[442] Indeed, as a condition of their right to operate, air carriers must establish an appropriate maintenance and inspection system which will ensure that the aircraft continues to be in conformity with its type design. During the type certification process, the FAA has previously determined and approved this maintenance program and throughout the life of the aircraft, the "maintenance review board" (MRB), which is an informal gathering of senior FAA technical persons, continues to oversee this program. The FAA has the right to unilaterally amend these maintenance programs where safety so requires.

Airworthiness directives are rules that are issued whenever the FAA finds that an unsafe condition exists or is likely to occur in other products of the same type design.[443] They are considered as one of the most effective tools available to assure continued airworthiness of aircraft and automatically amend the approved type design of the aircraft. When airworthiness directives are issued by the FAA, no operation of the aircraft is allowed except in accordance with the terms of the directives.

While the FAA has a broad authority to dictate design and practically control the U.S. aircraft industry according to the **Federal Aviation Act**, it has not completely done so and the manufacturer still remains the major designer and producer of aircraft. Indeed, the FAA is not involved in each stage of the certification process and delegates

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441 14 C.F.R , Part 21, par. 111-119 (1989).

442 Howe, supra note 434, at 653.

443 Id. at 653.

much of its responsibility for certification to the manufacturer.[444] Moreover, because of the limiting factor of shortage of money and manpower experienced by the FAA, the certification process has resulted in a system of spot checks. As a consequence, only a very few aircraft are actually inspected for airworthiness.[445] In spite of this limited involvement of the government, many claimants trying to find a deep pocket defendant have attempted to view the FAA as a "partner" with the manufacturer in the design and the production of aircraft because of the FAA's extensive inspection and certification duties. In the following sections, we will consequently try to examine how the courts, over the years, have dealt with the negligence of the FAA in the certification and inspection process and through the mechanism of the FTCA.

Contrary to many cases where the liability of the government has been recognized for the negligent acts of ATCs through the claim process of the FTCA, the U.S. Government has generally not been found liable for negligent certification of aircraft. When confronted with claims alleging negligent certification or inspection, the United States has traditionally raised three defences:

(1) That it owes no duty of care to any individual;

(2) That under section 2674 of the FTCA, its function of certifying aircraft and issuing certificates is protected by the discretionary function exception which bars any liability;

(3) That any violation of the FARs with respect to the certification of aircraft is a misrepresentation, for which the United States has no liability under the misrepresentation exclusion of section 2680 h) of the FTCA.[446]

7.2 The Scope of Duty Defense and the Good Samaritan Doctrine

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[444] Tompkins, supra note 65, at 577; Indeed, section 314 of the Act, 49 U.S.C.S. section 1355, specifically authorizes delegation of powers and duties by the FAA to private persons to examine, inspect and test in connection with the issuance of certificates under Title VI of the Act. The Designated Representatives are usually employees of the aircraft manufacturers who work under FAA guidelines in the inspection of mechanical parts in the "type certification" of the design and modifications of aircraft, aircraft engines and propellers.

[445] Turley, supra note 272, at 94.

[446] Tompkins, supra note 65, at 578.

The FTCA is also obviously the principal means of asserting tort liability against the United States for negligent certification of aircraft. As it was studied in section 5.3 of this dissertation, liability of the government may not be founded on the FTCA if state law recognizes no comparable private liability.[447] Indeed, a violation of federal regulations cannot provide the basis for liability because there is no analogous "private person" liability for such activities.[448] Private persons are not subject to these federal duties. Thus, the Good Samaritan rule has become the only cause of action to which plaintiffs can refer within the purview of the FTCA for the negligence of FAA employees carrying the certification and inspection of aircraft.[449] In suing the government for the negligent inspection of aircraft, the plaintiff must therefore satisfy the good samaritan requirements of the rule if the law of the state in which the negligent act occurred has adopted this rule.

While this analysis of the basis for the liability of the government for alleged negligent certification and inspection appears to be the only logical reasoning applicable or the real issue to be addressed, some courts have rather given a generally sparse analysis to the question and have not made a thorough examination of the conditions for the application of the Good Samaritan rule.

For example, in Knudsen v. United States[450], the Court found that although one of the purpose of the Congress in establishing the Act was to promote air safety, the Act created no legal duty on the part of the FAA to provide any class of passengers with protective measures.

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447 See also Clemente v. United States, 567 F.2d 1140, (1st Cir. 1977); cert.denied 435 U.S. 1006 (1978); Howell v. United States, - F.2d- 23 Av. Cas. (CCH) 17,681 (11th Cir. 1991); and in Lee v. United States, unreported, civil No. 3358 (N.D. Tex. Oct. 1975), the Court expressly ruled that the Federal Aviation Act did not intend to create an actionable duty to individual passengers with respect to the responsibility of the FAA in the "licensing and inspection" of aircraft.

448 United Scottish Ins Co. v. United States, 641 F.2d 188 (9th Cir. 1979).

449 See supra, section 5.3, at p.15 of this dissertation.

450 500 F.Supp. 90 (S.D.N.Y. 1980); where the plaintiffs alleged that the United States negligently issued a type certificate and certificate of airworthiness for an aircraft whose propellers came into contact with plaintiff, causing plaintiff personal injuries.

On the other hand, some cases involving allegations of negligent inspection and certification have indicated that the liability of the government exists without getting into the analysis of the interplay between federal statutes and state law within the framework of the FTCA. Gibbs v. United States[451] is an example of that sparse analysis given to the question. In dismissing the scope of duty defense, the Court simply contended that "the Act established standards of care to be followed by the administrator of the FAA and his representatives in certificating air carriers to engage in air transportation"[452] and declared that there was a duty because "having decided to enter the broad field of regulation of flight and repair and modifications of aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted."[453]

Another example of a sparse analysis of the scope of duty issue is Silver Plume[454] where the Court found that the "Federal Aviation Act of 1958 and Regulations adopted pursuant thereto create and establish an actionable duty on the part of FAA personnel to persons in the zone of danger, that is, air passengers, carrier pilots and personnel to carry out operational activities undertaken pursuant to the Act and Regulations in a non negligent manner."[455]

These decisions have failed to address the precise nature of the FTCA's waiver of immunity, i.e. whether a private person would be liable under the same circumstances. They appear to disregard the specific language of the FTCA on the scope of liability of the U.S.. A lawyer examining the question of the government's liability in a suit alleging negligent certification or inspection must consequently be

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451 251 F.Supp.391 (E.D. Tenn. 1965), where plaintiff alleged that the FAA had negligently certified the airworthiness of an aircraft where certain modifications rendered the aircraft unairworthy. The United States denied that there had been a breach of the FAR's and also raised the scope of duty defense.

452 Id. at 399.

453 Id. at 400.

454 445 F.Supp. at 400.

455 Id. at 400.

careful in his study of the relevant case law. The case law chosen should indeed apply the Good Samaritan analysis with regard to a claim alleging negligent certification or inspection of aircraft by an FAA employee. As for the federal regulations, they may however provide relevant evidence of reasonable conduct.

In order to fall within the purview of the Good Samaritan theory, plaintiff must typically demonstrate that under factual situation of the case, the Good Samaritan requirements are satisfied.

The first condition that needs to be fulfilled under this theory is that there was an "undertaking" on the part of the U.S.. Indeed, the plaintiff must prove that the U.S. has engaged in an undertaking to render services to the injured party or to another for the protection of a third party. The proponents of the government's immunity from liability for negligent certification have argued that, by inspecting and certifying an aircraft to determine if the manufacturer has complied with the standards, the U.S. does not undertake to render a service directly to the passenger nor does it undertake a duty to ensure or guarantee the safety of the users of the aircraft.[456] Some commentators have, however, suggested that the Ninth Circuit decisions in United Scottish II and Varig Airlines v. United States hold that the U.S. Government can be liable under the Good Samaritan doctrine for negligent inspection of aircraft pursuant to a certification program since the inspection considered is an "undertaking" to render "service" as it will be seen in more detail below.[457]

In addition, even assuming an undertaking on the part of the government in inspection and certification cases, some courts have also denied liability of the government by noting that a good samaritan undertaking to inspect, even if negligent, gives rise to liability only if the inspection specifically engenders reliance or constitutes the undertaking of a duty directly owed by the employee, or worsens the position of the

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[456] C. Hatfield, supra note 60, at 610; Tompkins, supra note 65, at 579 and ss.

[457] Krause and Cook, supra note 58, at 747.

plaintiff.[458] Since it has been found that federal inspection of aircraft simply does not physically increase the risk of harm to users and operators of aircraft,[459] the courts have concentrated their analysis on the requisite reliance under section 324 A) c) of the Restatement of Torts.

For instance, the district court in Varig[460] has taken this approach. The court held that the government could not be held liable for an alleged negligent inspection and certification of a Boeing 707 aircraft that had crashed near Paris, France, in 1973, arguing that the government had not undertaken a good samaritan duty owed to the plaintiff under California law.[461] The court found that the government's inspection and certification of the aircraft were regulatory functions, unlike the activities of ATCs which are operational, and that in performing its regulatory function of issuing a certificate, the government did not undertake to ensure the safety of the aircraft.

In Clemente v. United States[462], the Court distinguished between a situation where the U.S. assumes a responsibility to provide services to individual members of the public via air traffic control, and governmental functions such as inspection and

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458 See section 5.3 and 6.4.2 supra; Restatement (Second) of Torts, section 323; Blessing v. United States, 447 F.Supp. 1160 (E.D. Pa. 1978), where the Court applied the Good Samaritan doctrine in a case dealing with negligent inspection. There, the injured employees sued the federal government under the FTCA, basing their cause of action on the allegedly negligent inspection of their private employer's premises by Occupational Safety and Health Administration (OSHA) inspectors. The district court found that the plaintiffs had failed to allege either the increased risk of harm, or the reliance required by the causation elements of the Good Samaritan doctrine. (at 1160-1161) Accepting the government's argument, the Court held that the plaintiffs could not base their claims on breaches of duty arising solely out of federal law if there was no corresponding duty under state tort law.

459 Hatfield, supra note 60, at 612.

460 Varig v. United States, Cir. No. 76-0187 (C.D. Cal. Jan. 26, 1981).

461 In this case, a fire had started in the waste paper container located in one of the aft lavatories on the plane. The civil air regulations that were in force at the time the plane was manufactured required that "all receptacles for used towels, papers and waste shall be of fire resistant material and shall incorporate covers or other provisions for containing possible fire." The plaintiff consequently alleged that the FAA inspector had negligently authorized and approved the use of the waste container on that particular aircraft, despite the obvious deficiencies which rendered it capable of containing possible fires.

462 614 F.2d 188 (9th Cir. 1979).

certification wherein a particular agency carries its regulatory responsibilities from which individual members of the public derive incidental benefits.[463] Particularly, the Court seemed to hold that the government's inspection activity was not a service to others but a function by which the government sought only to protect its own interests namely to assure that the manufacturer or the owner of the aircraft was performing or operating in the manner required by the FARs.

In United Scottish Ins.Co. v. United States[464], the Court characterized the inspection functions as "merely supplementing another's primary duty" and as not arising from a primary duty to provide service in question.

The position taken by the district court in Varig was however clearly rejected by the Court of Appeals. The Ninth Circuit reasserted that the U.S. Government would be liable under the Good Samaritan doctrine for negligently performing a service, such as an inspection, that increased the risk of injury to a person or caused the injured person to rely on the proper performance of the service. The Court accordingly and properly held that reliance of the traveling public on FAA inspections is general knowledge.[465]

Similarly, in United Scottish II[466], the Court stated that "the FAA's regulatory

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463 Hatfield, supra note 60, at 605; see also Roberson v. United States, 382 F.2d 714, 719-722, (9th Cir. 1967) which, however, is not an aviation case.

464 614 F.2d 188 (9th Cir. 1979); this case is usually referred to as United Scottish I .

465 692 F.2d 1207, at 1208.

466 692 F.2d 1211; in this case the government was sued for alleged negligent inspection and issuance of a supplemental type certificate for the installation of a heater in a DeHavilland Dove aircraft. Approximately three years prior to the crash, the plane had been modified with the installation of a gasoline-fueled cabin heater which had been installed in the nose of the aircraft in front of the passengers compartment and below the pilot's cockpit. Pursuant to the applicable law, the party installing the heater applied to the FAA for a supplemental type certificate (STC). During the flight the plane caught fire and crashed, killing all four occupants(at 189). The Court found that the government issued a STC based upon the negligently performed inspection and that the defect should have been detected by the FAA inspector. Judgment was entered against the government. The U.S. appealed the judgment but the Ninth Circuit reversed and remanded on a narrow basis. It held that there had been no showing during the trial and no determination by the trial court as to how a private person would be liable under like circumstances. The judgment on appeal is referred to as United Scottish I. The case was thus remanded for further

activities are performed for the public as a whole" and that "having chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's duty, once the inspections are undertaken."[467] The Court consequently felt that the aircraft's inspection pursuant to the certification process is performed not for the government's self interests but for the public as a whole.

These decisions clearly hold that under the Good Samaritan doctrine, there is an actionable duty against the government for negligent inspection and certification of aircraft pursuant to a certification program "because the inspection is a service and because the flying public reasonably relies on those inspections."[468]

Although the Supreme Court in Varig[469] did not address the issue of the Good Samaritan doctrine with regard to FAA inspections, its reasoning strongly suggests that the earlier precedent on the question remains undisputed.

The authority of these precedents has, however, been recently affected by the Court of Appeals in Howell v. United States[470]. This case involved an action under the FTCA in which survivors of passengers killed in an airplane crash alleged that the FAA was negligent in failing to take any action after one of its inspectors discovered that the airplane contained contaminated fuel. The action was dismissed because the complainants failed to establish that the FAA breached a duty owed to the deceased passengers under the "Good Samaritan" doctrine.[471]

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proceedings on that question and trial was re-opened. The trial court then again reentered judgment on behalf of plaintiffs against the U.S. The case was again appealed to the Ninth Circuit in United Scottish II.

467 692 F.2d at 1211.

468 Krause and Cook, supra note 58, at 747.

469 In the Supreme Court's case, the United Scottish case was combined with the Varig Airlines case since they involved almost identical facts and consequently the same questions of law.

470 F.2d - 23 Avi. Cas. (CCH) 17,681 (June 1991).

471 23 Avi.Cas. (CCH) at 17,681.

The Court clearly stated that whether the federal government was liable for the FAA inspector's failure to act depended on whether a similarly situated private employer would be liable for such an omission under Georgia Law, the place where the allegedly negligent act had occurred.[472] The Court accordingly applied the requirements of the Good Samaritan doctrine under the Georgia Law which is similar to section 323 and 324A) of the **Restatement.** More particularly, it reiterate that one who undertook to render services to another was subject to liability to a third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if: (1) his failure to exercise reasonable care increased the risk of such harm or, (2) he had undertaken to perform a duty owed by the other to the third person, or (3) the harm was suffered because of reliance of the other or the third person upon his undertaking.

The Court found that the FAA inspector's failure to ground the plane, issue a notice, or initiate an investigation did not increase the risk of harm under Georgia Law. It then focused its analysis on the "reliance" requirement and found that the complainants did not show any. In this respect, the Court argued that nothing showed that the passengers knew of the unplanned FAA inspection two days before their flight and could not and did not rely on it. The Court based this conclusion on the following rationale:

> "We believe this means that Georgia law, at a minimum, requires knowledge that the allegedly negligent inspection occurred before reliance can be found and "good samaritan" liability can attach. Here, nothing shows the passengers knew of the unplanned "inspection" two days before their flight; and thus they could not and did not rely on it. This conclusion under state law- that plaintiffs, if unable to point to specific acts or omissions in their decedents' precautions made in reliance on the inspection- is not changed by the alleged duty's basis in the federal statute."

This decision consequently seems to be in contradiction with the Ninth Circuit decisions in United Scottish II and Varig where the Court concluded that the

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[472] Id. at 17,683.

relationship between FAA inspectors and pilots, as well as FAA inspectors and owners and passengers is "imbued with reliance".

Until the Supreme Court of the United States clearly addresses the issue of the liability of the FAA inspectors through the Good Samaritan analysis doctrine as established in the **Restatement of Torts** for the negligent inspection of aircraft, it will remain equivocal whether the discharge by the U.S. Government of aircraft inspection and certification functions constitutes an actionable duty, i.e. whether the FAA inspectors have a good samaritan duty.

We believe that the broader approach accepted by the Ninth Circuit in United Scottish II and Varig is more reasonable and realistic in the actual context of civil aviation. Firstly, one should not forget that the **Federal Aviation Act** and the FAA created pursuant to it are primarily concerned with promoting air safety. The government's function of inspecting aircraft consequently constitutes an undertaking to render services to others and it cannot be argued that through certification and inspection of aircraft, the sole purpose of the government is to assure its own interests. The Court in Howell ignored the fact that the motivation of the government in establishing a certification and inspection process was the risk of injuries of the flying public and its desire to eliminate aircraft accidents.

Secondly, the reliance requirement of sections 323 and 324 A) of the **Restatement** should be broadly construed since the flying public is generally known to rely on FAA inspections. More particularly, as it was mentioned by the Ninth Circuit in Varig, there is a general knowledge that regulations designated to ensure optimum safety exist and that the United States inspects each aircraft for compliance.[473] The public knows that it is the government who performs the certification and inspection of aircraft activities and as such, necessarily relies on the proper performance of such functions.

The Court's requirement in Howell that there be knowledge of the occurrence of a specific fact of inspection and reliance upon it is exorbitant. If specific proof of

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[473] 692 F.2d at 1208.

reliance by passengers and crew on a specific inspection was required, it would be unlikely that the plaintiffs could discharge such a burden. The government would therefore, under any circumstances, be absolved of liability for negligent inspections of aircraft by its employees.

7.3 The Discretionary Function Exception

In claims involving the negligent inspection or certification of aircraft by an FAA employee, the U.S. government has argued that the inspection and certification activities involve judgmental discretion and that they accordingly fall under the discretionary function exception to the general waiver of immunity contained in the FTCA. This argument also represented the position adopted by the courts before the judicial interpretation of this exception was finally clarified by the Supreme Court in Berkovitz.

As we have seen, before Berkovitz, the most authoritative decision interpreting the discretionary function exception and the most definitive word on FAA liability for negligent inspection and certification of aircraft was Varig Airlines.[474] This case involved two consolidated appeals out of the Ninth Circuit[475]. In both of the underlying cases, damages were incurred as a result of fires which broke out in mid-flight. In one case, the plaintiff alleged negligence in issuing a type certificate because the lavatory trash receptacle where the fire broke out did not satisfy fire containment standards. In the other, it was alleged that the FAA inspector was negligent in issuing a supplemental type certificate because a cabin heater did not meet applicable airworthiness standards. As it was explained in more detail in section 5.7 of this thesis, relying on the Good Samaritan rule, the Ninth Circuit imposed a duty on the government to perform the inspection and certification in a non negligent manner in both cases. The Court also rejected the discretionary function exception. The Supreme Court reversed, holding that the FAA's inspection and certification process constituted

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474 United States v. S.A. Empresa de Viaccao Aera Roi Grandense, 104 S.Ct. 2755 (1984).

475 United Scottish Insurance Co. v. United States, 692 F.2d 1205 (9th Cir.1982) and Varig Airlines v. United States, 692 F.2d 1205 (9th Cir. 1982).

a discretionary function. In doing so, the Court focused heavily on the fact that the plaintiff's argument challenged two aspects of the certification procedure; one which was to implement a spot-check for reviewing an aircraft manufacture's compliance with FAA regulations and the second which was the application of the spot-check inspection to the particular aircraft. The Court found that this spot-checking allowed the use of discretion in determining the extent of actual inspection and concluded that the alleged negligence of FAA inspector was due solely to the calculated risk inherent in spot-checking which had been adopted by the FAA in the accomplishment of its goal of safe air transportation.[476] The Court explained that this kind of decision is precisely the sort of policy decision which the discretionary function exception was designed to protect. The Court provided two tests for the determination of what would be protected discretionary conduct and of what would result in governmental liability. Unfortunately, these tests seemed to be somewhat contradictory.[477]

Indeed, the Court first indicated that the exception was intended to cover discretionary acts of the government when regulating the conduct of private individuals.[478] The government consequently took the position that Varig gave blanket immunity for all regulatory activities of regulatory agencies.

The Supreme Court however implied that the type of decisions that was made could demonstrate or show the nature of the conduct that Congress intended to shield. It indeed stated that the discretionary function exception would apply to a particular decision if that decision was grounded in "social, economic, and political policy".[479] As we have seen, following Varig, plaintiff's lawyers consequently argued that if the decisions of the government employees were not grounded in social, economic and political policy, the discretionary function did not apply.

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[476] Rice, supra note 214, at 768.

[477] Rice, supra note 214, at 772.

[478] Varig, 467 U.S. 797, at 813-814; and Rice, supra note 214, at 773.

[479] Varig, at 814; Rice, supra note 214, at 773.

This resulted in contradictory decisions throughout the United States. More particularly, "in the four years following the decision, Varig was cited in 207 cases in the lower federal courts"[480] and this conflict arose especially in cases involving polio vaccines regulated by the Food and Drug Administration.

An example of an aviation case citing Varig is Waymire v. United States[481] where the court held that the issuance of an airworthiness certificate is a discretionary function. Another example of a case involving negligent certification is Leone v. United States[482]. Although this case involved the alleged negligence of an aviation medical examiner in examining the pilot obtaining his FAA certification, it represents a good example of the narrow interpretation given to the Varig's decision in an aviation litigation. In this case the plaintiffs' descendants died in an aircraft crash when the pilot apparently suffered a heart attack and lost control of the craft. Apparently, the physician failed to adequately question the pilot about his clinical evidence of angina. This resulted in the certification of a pilot in violation of federal regulations specifying that no applicant with an established medical history of myocardial infarction, angina pectoris, or coronary heart disease could receive a satisfactory medical certificate. Citing Varig, the government contended that the Supreme Court had made it clear that the discretionary function exception extended to all activities undertaken pursuant to regulatory authority. The Court determined, however, that the Supreme Court's decision could not be construed so broadly as to bring all regulatory activities under the discretionary function exception.[483] The Court distinguished the Supreme Court's decision by noting it involved federal regulation empowering government employees to make policy judgments when conducting airline inspection compliance reviews and that such power was discretionary. It emphasized that Leone rather involved the

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480 Rice, supra note 214, at 774.

481 629 F.Supp. 1396 (D.Kan. 1986).

482 690 F.Supp. 1182 (E.D. N.Y. 1988); 910 F.2d 46 (1990).

483 Leone, Id. at 1187.

government alleged failure to apply clearly, articulated, undeviating medical examination. Therefore, it concluded that the discretionary function exception does not apply in such a situation.

Baker v. United States[484] is also another example of a court's decision trying to narrow the scope of Varig. This case involved the issue of whether a regulatory agency could be held liable for the distribution of a polio vaccine. The plaintiff contracted polio after his nephew was inoculated with an oral poliovirus vaccine and brought an action against the U.S. government under the FTCA alleging that the agency negligently failed to require the mandatory testing prior to issuing a license allowing the laboratory to manufacture and distribute the vaccine. The Ninth Circuit focused its inquiry on whether Congress intended to shield from tort liability the government's failure to follow its own regulations.[485] In this respect it noted that neither Varig nor Dalehite, had addressed the precise issue of "whether a governmental agency, when regulating the conduct of private individuals, may be subject to tort liability for the alleged negligence of an agency employee in failing to follow a specific mandatory regulation."[486] The Court concluded that the agency's failure to follow its own regulatory commands would not extend the exception too far.[487]

A conflict between the circuits really arose when the Third Circuit in Berkovitz v. United States[488] refused to follow the reasoning of Baker. In this case, the Court was again faced with an individual who had contracted polio as a result of taking a live polio vaccine. Berkovitz's complaint also alleged violations of federal regulations by

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[484] 817 F.2d 560 (9th Cir. 1987), cert. denied, 108 S.Ct. 2845 (1988).

[485] Id. at 563.

[486] Id. at 564.

[487] The Court stated:

> "The discretionary function exception shelters actions taken on the basis of erroneous facts, the failure to exercise available discretion in any way, the failure to perform supervisorial tasks, and the failure to enforce effectively regulatory orders. It would not extend this exception greatly to include within it the facts of this case."

[488] 822 F.2d 1322 (3rd Cir. 1987), rev'd, 108 S.Ct. 1954 (1988).

the agency. In a unanimous opinion, the Court held that the discretionary function exception precludes liability only when governmental conduct involves the permissible exercise of policy judgment.[489]It especially held that the discretionary function exception did not apply when a federal statute, regulation, or policy specifically prescribes the course of action which the government employee is supposed to follow. It thus confirmed the approach adopted by the courts in Leone.

Although this case did not involve negligent certification of an aircraft by an FAA employee, it suggested, however, that the U.S. government may now have a greater exposure to liability in the certification of airmen, aircraft, and airports, as well as in other areas involving detailed regulations. The Supreme Court indeed made it clear that Varig was never meant to immunize governmental conduct to the extent that the government asserted in Varig. According to the Supreme Court, Varig is however good law[490] and decisions of FAA inspectors involving an element of judgment based on consideration of public policy will fall within the purview of the discretionary function exception.

Since Berkovitz, the government has recently been exposed to liability in the certification of aircraft in Taylor v. United States[491] where the plaintiff, whose descendant was killed in an airplane crash, brought an action against the U.S. alleging that the FAA inspectors had failed to carry out certain mandated duties relating to maintenance and execution of weight and balance procedures which contributed to the crash. Citing Berkovitz, the Court contended that many of the inspectors' functions and duties which are spelled out in the regulations in the Airworthiness Inspector's

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489 See also section 5.7 of this dissertation.

490 Rice, supra note 214, at 788.

491 F.Supp., 23 Av. Cas. (CCH) 17,348 (E.D. Ark. 1991).

Handbook order no. 8300.9 are of distinctly mandatory character. Therefore, the plaintiff's claim was not barred by the discretionary function exception.[492]

Following Berkovitz and Taylor, it is now well settled and established that the discretionary function exception will not apply when the course of action of an FAA inspector is prescribed by federal statute, regulations or by a governmental policy.

Since there is a number of governmental policies that have been written with mandatory directives when the government thought it was immune from tort liability for the certification process, the government is now clearly exposed to a greater risk that his conduct will be the basis of liability.[493]

In a case involving negligent certification or inspection of aircraft, the inquiry will therefore be focused on the mandatory character of the FAA inspector's course of action. It will thus be important for the plaintiff to examine closely any federal regulation of any governmental directive that could be relevant to the particular facts surrounding the certification action involved.

We finally wish to note that following Berkovitz, cases involving facts similar to the situation in United Scottish are likely to result in the government's liability.

As we have seen, in United Scottish the FAA issued a supplemental type certificate for a modification to the heater system. An FAA Order Type Certification Manual required that the FAA inspector examine and approve the complete installation before issuing this certificate. The inspection was, however, found to be improper and incomplete since the overall quality of the design and fabrication of the heater system was inconsistent with FAA regulations. Since the course of action of the FAA inspectors was prescribed and circumscribed by FAA regulations and orders, the

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[492] See also Foster v. United States, F.2d , 23 Av. Cas. (CCH) 17,259 (9th Cir. 1991), where the Court also applied the two-step test enunciated in Berkovitz in a case where the pilot had allegedly been negligently issued a special issuance class II medical certificate. The Court however, found that the federal air surgeon's actions in authorizing the certificate were clearly discretionary since they were policy-oriented decisions, tied to the FAA's public safety policies, which required consideration of social and economic policies.

[493] Rice, supra note 214, at 790.

discretionary function exception should not have been be found to bar the government's liability in this particular situation.

7.4 The Misrepresentation Exception

Since section 5.8 of this dissertation has dealt in detail with this particular exception and has particularly studied cases relating to negligent certification and inspection undertaken by the FAA, we do not intend to further elaborate on this exception. However, we wish to note that when a claim is filed against the government on the basis of FAA's negligence in issuing a certificate to an aircraft, and when in retrospect, the aircraft proved to be unairworthy and that this unairworthiness contributed to the crash, it appears that, following the decisions In Re Air Crash Disaster at Silver Plume and Fireman's Fund Insurance and the Supreme Court's decision in Block v. Neal, the misrepresentation exception defense does not bar recovery anymore.

Indeed, the claim for damages in such a situation arises from the passenger's reliance on the negligent inspection undertaken to protect the safety of air travellers and not on a misrepresentation inaccuracy in providing information.

For situations as in Neustadt, Lloyd and Marival, where the pecuniary injuries are "wholly attributable" to the plaintiff's reliance on FAA's negligent misrepresentation respecting the aircraft's condition, i.e. on the giving out of misleading information, the misrepresentation exception will apply and bar recovery against the government. As it was pointed by the Court in Marival, an "examination of the leading cases of negligent misrepresentation indicates that in each the cause of action arose directly from reliance on communication of certain erroneous facts arrived at through negligent means."[494] Therefore, the misrepresentation exception is likely to bar claims of manufacturer, owner or buyer of aircraft relying on the erroneous information relayed by the FAA which may occur because of their negligent inspection of the aircraft. For cases involving typical passengers claim, it is unlikely that a passenger will be able to

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[494] Marival v. United States, 306 F.Supp. at 858.

establish the type of direct reliance on specific representation made by the government employees evidenced by the airworthiness certificate.

The distinction made in Neal is thus important and was unfortunately not understood by the earlier courts who systematically applied the misrepresentation exception defense in cases involving negligent certification and inspection of aircraft such as the courts in Summers and Knudsen.

7.5 Conclusion

The application of the discretionary function and the misrepresentation exceptions has therefore thoroughly been studied and determined by the courts with respect to negligent inspection of aircraft. What can generally be drawn from the case law pertaining to negligent inspection and certification of aircraft is that it is likely that these exceptions will not bar a claim for the government's negligent inspection of aircraft if the federal employee did not apply and follow explicit airworthiness regulations or directives. However, it still remains uncertain whether FAA employees carrying the inspection and certification of aircraft owe a duty of care to the passengers since their reliance upon such inspection of aircraft has not clearly been recognized by the U.S. courts.

7.6 Comparison with Inspection and Certification cases in Canada

In Canada, the Federal Court of Appeal has recently rendered an important decision with regard to the government's liability for the negligent action of Transport Canada in Swanson et al. v. The Queen in right of Canada[495]. In this case, a small commercial airline, Wapiti Aviation Ltd., operated with safety irregularities including violations of **Air Navigation Orders** (ANO) issued under the **Aeronautics Act**[496]. Complaints were made to Transport Canada from 1982 and reports were made by inspectors in April and August 1984, listing many serious deficiencies. Transport Canada issued warnings but, despite these repeated safety irregularities, it took no more severe action, though it had power to do so under the Act. Indeed, the Act empowers

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[495] May 22, 1991, 80 D.L.R. 4th 741.

[496] R.S.C. 1985, c. A-2.

Transport Canada to restrict methods or flying, to cancel approval of certain routes, or to suspend licenses. In october 1984, a Piper Chief aircraft crashed into a hill in Alberta, killing six passengers. Mr. Swanson and Mr. Peever were among the passengers who died in the crash. Their widows and families sued the federal Crown for damages under section 3 of the **Crown Liability Act**[497], alleging that the negligence of its employees contributed to their loss.

Section 3 of the **Crown Liability Act** provides that the Crown is liable for a tort committed by a servant of the Crown. Section 8, however, provides that "nothing in s.3... makes the Crown liable in respect of anything done or committed in the exercise of any power or authority, that, if those sections had not been passed, would have been exercisable by virtue of ... any power or authority conferred on the Crown by any statute...". Moreover, as we have seen in section 5.9, there still exists in Canada an immunity for certain type of governmental activities which cannot be attacked by means of a negligence action as long as they are done in good faith. This immunity can be compared to the discretionary function exception of the FTCA in the U.S..

As in the U.S., courts in Canada are indeed reluctant to second-guess decisions that are made in the political sphere because of their respect for the separation of powers theory and because they recognize that there is an "awkward vantage point from which to access public policy decisions with multilateral implications."[498] The scope of that immunity has, however, been disputed in Canada, as in the U.S., and the Federal Court of Appeal has consequently attempted to circumscribe the scope of this immunity in Swanson.

Before studying the Court's determination of whether the impugned conduct of the officials of Transport Canada was subject to negligence law or whether it was outside its ambit, we believe a general review of the Canadian legislation with respect to air transportation, and especially certification and inspection of aircraft, is imperative in order to understand the extent of this decision.

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497 R.S.C. 1985, c. C-50.

498 Feldthusen, Economic Negligence, 2nd ed. Toronto: Carswell, 1989, at 284.

The **Aeronautics Act**[499], as amended, declares that it is, among other things, "the duty of the Minister ... to supervise all matters connected with aeronautics."[500] The Minister of Transport is granted wide powers to pass regulations. In this respect, the Canadian Transport Commission was established and its function, among others, is the issuance of licenses to operate commercial air service.[501] Notwithstanding the issuance of a license, however, "no air carrier shall operate a commercial air service unless he holds a valid and subsisting certificate issued to him by the Minister certifying that the holder is adequately equipped and able to conduct a safe operation."[502] There is consequently a two step procedure for airlines: the acquisition of a license to establish a commercial air service, which is obtained from C.T.C., and then receiving an operating certificate, which is secured from the Aviation Regulation Branch of Transport Canada.

Air Navigation Orders (ANO) and policy directives were thus promulgated pursuant to this regulatory power. These ANO set out the standards of safety which the branch and its inspectors must enforce. If there is non-compliance, they have many powers, including the authority to suspend permission to fly single pilot IFR, to fly night VFR, to revoke the appointment of management personnel, to cancel approval of certain routes, destinations and departure times, and, if necessary, the tough measure of operating license suspension. Moreover, they can refer the matter to the Department of Justice or the RCMP for further investigation and possible prosecution.

In this case there were many violations of the ANOs by Wapiti and several complaints were made by its pilots to Transport Canada. The trial judge held in favor of the plaintiffs, finding that there was a duty owed to them by the Crown, that this duty was breached and that this caused loss to the plaintiffs.

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499 R.S.C. 1985, c. A-2.

500 Section 4 a).

501 Section 21 (1).

502 Section 21 (8).

The Crown appealed, contending that there was no duty owed by the Administration, that there was no negligence and if there was, that there was no proof that this conduct caused the crash.

The Federal Court of Appeal found the government liable. It first contended that Transport Canada owed a duty of care to airline passengers. Examining the scope of the immunity involved in this case, the Court studied the difference between those governmental acts that would immune from tort liability and those acts that would not. It particularly stated that:

> "No liability in tort can be imposed for governmental acts which are done pursuant to "legislative", "judicial", "quasi-judicial", "planning", "discretionary" or "policy functions"."[503]

On the other hand it contended that:

> "Liability may be imposed for governmental acts which are classified as "administrative", "operational", "routine", "housekeeping", "implementation, or "business powers"."[504]

In this respect, the Court referred to the Canadian Supreme Court as well as the House of Lords's decisions which have held that there could be no liability for "policy decisions" made in good faith, but that there could be for "operational" decisions.[505]

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503 Swanson, supra note 495, at 747.

504 Id. at 747-748.

505 Anns v. Merton, 1977, 2 ALL.E.R. 492; Murphy v. Brentwood, District Council (1990) 2 ALL. E.R. 908 (H.L.); Kamloops (City) v. Nielson, (1984), 10 D.L.R. (4th) 641, 1984 2 S.C.R. 2, (1984) S.W.W.R. 1; and Just v. British Columbia, (1989), 64 D.L.R. (4th) 689, (1989) 2 S.C.R. 1228, (1990) 1 W.W.R. 385; the Supreme Court in Just has indeed tried to distinguish between these two types of government activities in the following words:

> "However the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every governmental decision designated as one of policy.(...) True policy decisions should not be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claim in tort. (...) The duty of care apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary

More particularly, Mr. Justice Linden referred to the "policy decision" criteria based on social, political or economic factors which has been established by the Supreme Court of Canada in the following words:

> "Thus, tort immunity should be sparingly granted to Crown agencies; only their "true policy decisions", generally made at higher levels, involving "social, political and economic factors", are exempt."[506]

He also referred to another way of looking at this question by referring to the U.S. Supreme Court's decision in Dalehite. He indeed seemed to refer to the planning versus operational distinction that was initiated in Dalehite and thus the status of the author who made the decision. More particularly, he stated the following:

> "Another way of looking at this is to say that a government must be entitled to govern free of restraints of tort law, but that when it is merely supplying services to citizens it should be subject to ordinary negligence principles. (...) Such an immunity, therefore, is necessary, but it must be limited only to those functions of government that are considered to be "governing" and not available to those tasks of government that might be styled "servicing".

He accordingly concluded that the official making the enforcement decisions was not a high elected official like the Minister and that his work involved not policy, planning or governing, but only administering operations or servicing.[507] The Court finally concluded that:

> "These people were essentially inspectors of airlines, aircraft and pilots, who did not make policy, but rather implemented it, although they certainly had to exercise some discretion and judgment during the course of their work, much like other professional people. (...) These officials were not involved in any decisions involving "social, political or economic factors". Indeed, it was another emanation of the Department of Transport altogether, the Canadian Transport Commission, a quasi-judicial body whose function it was to take into account such grounds, which granted the initial license to Wapiti and other airlines, whereas this

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> infinitely and may be made at different levels although usually at a high level."

[506] Id. at 748.

[507] Id. at 750-751.

> branch concerned itself with operating certificates that focused mainly on the matter of safety. (...) Their tasks was to enforce the regulations and the ANOs as far as safety was concerned to the best of their ability with the resources at their disposal. This function was clearly operational. Hence, a civil duty of care was owed to the plaintiffs to exercise reasonable care in the circumstances."[508]

As for section 8 of the Crown Liability Act, the Federal Court held that it must be construed to apply only to non-negligent conduct; otherwise its effect would be to make section 3 virtually useless. The Federal Court of Appeal consequently did not interfere with the apportionment of liability among the defendants determined by the lower court. It found that the negligence of Transport Canada was one of the causes of action in that it allowed an environment to continue that encouraged unsafe flying practices.

Following this decision, the Canadian government is, contrary to the American government, clearly exposed to a greater risk that its conduct in the certification and inspection of aircraft will be the basis of liability. Indeed, the Canadian Federal Court recognized that the inspectors of aircraft do owe a civil duty of care to the passengers, as it was recognized by the Ninth Circuit in United Scottish II and Varig, but contrary to what was decided by the Court of Appeals of Georgia in Howell.

In their determination of whether the course of action of the inspector is immune from tort liability, the Canadian courts consider the same criteria as the ones considered by the courts in the U.S., except that it seems that the Canadian courts rely, in addition, to the planning versus operational distinction that was found not to be determinant by the Supreme Court of the U.S. in Varig.

8. CONCLUSION

With regard to the scope of duty of the air traffic controller, it is clear that he owes a duty of care to the passengers, crew members and people on the ground. The reliance relationship between the controller and the passengers and the controller and

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[508] Id. at 750-751.

the crew members has indeed clearly been recognized by the courts. Moreover, in the area of air traffic control, the U.S. has assumed a duty to third persons by completely supplanting the duty of the airport owner to safely control arriving and departing air traffic.

A cause of action can easily be ascertained against the government for negligent control of air traffic since the liability of the government in such a case is not shielded by the discretionary function exception as the functions of its ATCs are generally not grounded in social, economic and political policies. In addition, neither does the misrepresentation exception bar a claim against the government in cases where the controllers provide the pilot with inaccurate information as the misrepresentation during the accomplishment of their operational task is merely incidental to such a negligent conduct.

It may be concluded that there is an interrelation between the duties of the pilot and the controller, and both are responsible for the safe operation of the flight. As the cases indicated, the courts over the last few decades have generally tended to expand the duties of air traffic controllers and have diluted and weakened the notion that "the pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft". The best example of this attempt to expand ATCs' liability is that they are subjected to a standard of due care above and beyond that prescribed in the Manual.

Whether this trend towards the expansion of ATCs' liability is well founded in law could itself be the object of a dissertation. It should be noted, however, that to some, this expansion of the responsibilities of the ATCs does not seem proper since the FARs clearly recognize that the primary responsibility and final authority as to the operation of the aircraft lies with the pilot in command. The rectification of this alleged misplaced role reversal of the pilots and the ATCs belongs to the courts and until a revealing case law determines otherwise, the increase of the affirmative duties of ATCs remains. While this approach may cause some uncertainty on the controller's part concerning the extent of his responsibility, it more accurately reflects the relative role of the government's participation in aviation operations.

Hence, depending on the particular circumstances of a case, a greater duty of care may be required of either the pilot or the controller. The determination of liability consequently lies in the facts of each case which are the ultimate determining factors. However, when a controller is found to have been negligent and more particularly when one of the aircraft is flying under IFR conditions, the finding is generally based on the determination that either the provisions of the ATCPM were not followed or a controller failed to exercise due care when confronted with a situation where he knew or should have known, that the aircraft was in a position of danger.

In collision cases, the decisions that we have studied more particularly demonstrate that the key to establishing negligence on behalf of air traffic control personnel lies in showing the following elements: (1) the aircraft were properly within a Terminal Control Area, a Terminal Radar Service Area or on an IFR plan; (2) the flight conditions were such that the pilots were reasonably unable to see and avoid each other; and (3) by the exercise of reasonable diligence the air traffic controller could have recognized the impending danger and alerted the pilots in sufficient time to prevent collision.[509]

As for the liability of the U.S. government for negligent inspection or certification of aircraft, we have seen that the courts over the last few decades have generally absolved the government from liability by relying on either the scope of duty defense, the discretionary function exception or the misrepresentation exception.

However, following the decision of the Court of Appeals in United Scottish II and Varig, and the Supreme Court's decision in Varig and Berkovitz, it can be contended that a cause of action can be asserted against the U.S. under the FTCA for negligent inspection leading to certification. Whether the FAA inspectors of aircraft have a good samaritan duty to the crew and passengers is however a question that needs to be clarified. However, taking into consideration the primary purpose of the **Federal Aviation Act** and the underlying reasons behind the establishment of the FAA, i.e. the

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509 W.J. Lack, "Defendant's Discovery Plan in Mid-Air Crash Litigation", (1981), 47 J. of Air Law & Comm., at 776.

promotion of air safety and the fact that the flying public is generally known to rely on FAA inspections, it could indeed be argued that a cause of action can be asserted against the U.S. for negligent inspection of aircraft. Moreover, the negligent application of explicit airworthiness regulations to a specific set of facts, not involving any discretion by the operational employees designated by the U.S. to effectuate the policy, may now be within the scope of judicial inquiry. "The availability of judicial review will depend upon the nature of the judgment and the ability of the courts to evaluate its reasonableness by recourse to discernable objective standards of law."[510]

Therefore, neither of these three defenses traditionally asserted by the government should bar a claim against the government for negligent inspection if the following occur: (1) the plaintiff alleges that the cause of the crash was a defect in the plane that was a violation of publicly disseminated and objectively measurable government standards or regulations; (2) the plaintiff alleges that the injured parties reasonably relied upon the FAA to inspect the aircraft in question, pursuant to the administrator's obligation under the **Federal Aviation Act**; (3) the plaintiff alleges that the defect in the plane was contrary to the objectively determinable regulation or standard, and was the cause of the injury; and (4) the plaintiff alleges that the failure to detect the defect resulted from negligent performance of an actual inspection of the airplane by an FAA employee in the course of his duties.[511] With respect to this last requirement, it should not be forgotten that inspections of the aircraft are often carried by designated representatives of the FAA who are not employees of the FAA but, very often, employees of the manufacturers. In such a case, the government would be absolved of any liability.

Since the case law allowing a cause of action against the U.S. government for negligent inspection of aircraft is quite recent, the extent of the duties and responsibilities of the FAA employees remains to be determined by the scrutiny of the courts in the future. In this respect, Canada seems ahead of the U.S. with its recent

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[510] Tompkins, supra note 65, at 594.

[511] W.J. Lack, supra note 509, at 776.

decision in Swanson where the government was found liable for its negligent certification, i.e. for the negligent inaction of its inspectors, and this Canadian decision could be referred to by the American courts as an example of the scope of the duties of the inspectors.

As in the control of air traffic, it seems appropriate that the government should be accountable for the failure of its representatives to properly enforce the statutory provisions, regulations and certification criteria which have been established for the express purpose of promoting safety. Acknowledging this liability is even more appropriate in a context of great reliance placed upon the U.S. for the proper and safe regulation of the entire transport industry by all users.

It will be interesting to see how the courts will deal with negligent certification cases in the future and whether they will recognize that the FAA employees do owe a duty of care to the passengers and crew members in their inspection of aircraft functions. Assuming such a duty is recognized, it will also be interesting to notice if a trend towards the expansion of the liability of the government for negligent inspection leading to certification will occur as it has been the case in the area of air traffic control. With regard to negligent inspection of aircraft, it is surprising to note that contrary to the American precedents, the Canadian jurisprudence is unequivocal and admits that the government's inspectors do owe a duty of care to the flying public. Therefore, it will specifically be interesting to see if the American courts will follow the Canadian example.

Conversely, it will be interesting to see if Canada will continue to be influenced by the American case law and if the expansion of the ATCs' liability will occur in Canada as in the United States or if the pilot-in-command concept will remain important.

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