

The Pilot-Controller Relationship—Assessing Comparative Responsibility in General Aviation Crashes

Though they may never meet in person, a pilot on an instrument flight rules (IFR) flight plan and an air traffic controller who guides the aircraft have an important—if brief—relationship.

This discussion addresses how the pilot and controller are judged after a crash in instrument meteorological conditions (IMC) when pilot-controller communication is a factor in causing the event.

A controller—especially one seated at a modern, full-color STARS console—sees a big picture: weather, traffic, terrain. In the comfort of a climate-controlled room, a radar controller serves as a surrogate set of eyes and ears to enhance the safety of the flights within the air space “owned” by that controller.

A pilot in IMC, on the other hand, lives in a hostile environment. Limited in vision by clouds and precipitation, perhaps under the physical stress of turbulence and noise, and charged with managing the moving aircraft and the passengers within, the pilot flying a small general aviation aircraft in IMC can be strained physically, emotionally, and mentally. The pilot needs—and is entitled to—the benefit of all available resources, including the ATC system.

When an aircraft crashes as a result of a controller withholding or misstating critical weather information, the assessment of the viability of a tort claim requires an understanding of the respective responsibilities of pilot and controller under the ATC system’s regulatory structure.

1. *The Air Traffic Controller’s Responsibility*

The controller’s duties and responsibilities are governed by Federal Aviation Administration (FAA) Order 7110.65 (the “Order”).¹

Paragraph 2-1-1 of the Order states:

The primary purpose of the ATC [Air Traffic Control] system is to prevent a collision between aircraft operating in the system and to organize and expedite the flow of traffic, and to provide support for National Security and Homeland Defense. In addition to its primary function, the ATC system has the capability to provide (with certain limitations) additional services.

¹ An electronic version of the Order can be obtained on the web at <http://www.faa.gov/atpubs>. The Order is frequently updated, and as of the date of submission of this paper, Order JO 7110.65W is current.

The “additional services” include, among other things, weather and chaff information as well as weather assistance. Importantly, the Order states that controllers *shall* provide such services to the extent permitted by circumstances, and provision of such additional services is *not optional*.²

An air traffic controller working in a radar facility is required to “become familiar with pertinent weather information when coming on duty, and stay aware of current weather information needed to perform ATC duties.”³

There are a number of tools available to controllers to allow them to “stay aware of current weather information” as required by Paragraph 2-6-1, including monitoring the weather displayed at their terminals and the mandatory soliciting of pilot reports from aircraft in the controller’s airspace.

In prioritizing tasks, the controller is required to “give first priority to separating aircraft and issuing safety alerts as required in this order.”⁴

The Order constitutes guidelines that are evidence of the standard of care, but it has been held that “an air traffic controller’s duties are supplemented by the general duty of care owed under the circumstances.”⁵

As discussed below, a crash associated with the failure of a controller to provide the mandatory “additional services” to an aircraft encountering dangerously bad weather often leads to a dispute as to the proper apportionment of responsibility between the controller and the pilot.

2. Pilot’s Responsibility

(a) Operational authority. The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.⁶ However, being “directly responsible” does not mean the pilot is *solely* responsible for the safety of the flight. The pilot has a right and a duty to respect the role of the air traffic controller in the system and to depend upon that controller to provide timely, accurate information affecting the safety of flight, especially when the controller’s work load is light to moderate.

The Aeronautical Information Manual (AIM) contains a section that describes “Pilot/Controller Roles and Responsibilities.”⁷ There, pilots are told that “[i]n order to maintain a safe and efficient air traffic system, it is necessary that *each party* fulfill their

² Order Paragraph 2-1-1; Pilot-Controller Glossary, Aeronautical Information Manual.

³ Order, Paragraph 2-6-1

⁴ Order, Paragraph 2-1-2

⁵ *Abrisch v. United States*, 359 F.3d 1214, 1226 (M.D. Fla. 2004), citing *Daley v. United States*, 792 F.2d 1081, 1085 (11th Cir. 1986); *Worthington v. United States*, 807 F. Supp.1545, 1566 (S.D. Ga. 1992), *rev’d on other grounds*, 21 F.3d 399 (11th Cir. 1994).

⁶ 14 C.F.R. §91.3(a)

⁷ AIM Section 5

responsibilities to the fullest” (emphasis added).⁸ Though the pilot in command is directly responsible for safe operation of the aircraft, the air traffic controller shoulders a significant part of that load, as the AIM states:

The responsibilities of the pilot and the controller intentionally overlap in many areas providing a degree of redundancy. Should one or the other fail in any manner this overlapping responsibility is expected to compensate, in many cases, for failures that may affect safety.⁹

(b) Use of resources

Some federal courts have looked at the pilot-controller relationship carefully enough to recognize that pilots must rely on the services provided by air traffic controllers.¹⁰

Pilots are taught that to make informed decisions during flight operations, they should be aware of resources both inside *and outside* the cockpit.¹¹ This includes air traffic control. In fact, the FAA requires flight instructors to teach student pilots about the importance of “CRM”—*crew resource management*, a concept that grew out of airlines’ studies of human factors-related accidents.¹² As the FAA itself states, “The focus of CRM is on the effective use of all available resources: human resources, hardware, and information.”¹³

Having been trained to expect air traffic controllers to provide the “non-optional” safety alerts that are readily available to ATC, pilots who are unknowingly vectored into—or permitted to continue into the teeth of—dangerous weather are often unfairly judged; the all-to-common phrase “pilot error” becomes a convenient catchall for a *system* failure, in which the pilot’s role is only a part.

3. Comparing fault in ATC cases

(a) Forum and choice-of-law. Because the air traffic control function falls within the authority of the FAA, a claim that a crash was caused by a breach of a duty by an air traffic control facility is governed by the Federal Tort Claims Act (FTCA),¹⁴ and federal district courts have original jurisdiction over the claims; however, the United States government’s liability is determined according to the law of the state in which the act or omission occurred.¹⁵

⁸ AIM Paragraph 5-5-1(d)

⁹ AIM 5-5-1(c)

¹⁰ *Redhead v. Untied States*, 686 F.2d 178, 182 (3rd Cir. 1982).

¹¹ Aviation Instructor’s Handbook, FAA Advisory Circular FAA-H-8083-9(1999).

¹² “CRM” was originally coined to refer to “cockpit resource management.” Though the initials stayed the same, CRM has evolved from “cockpit” management to “crew” management, in recognition of the importance of information and resources *outside* the cockpit, e.g. air traffic control.

¹³ Aviation Instructor’s Handbook, Chapter 9, FAA Advisory Circular FAA-H-8083-9 (1999)

¹⁴ 28 U.S.C. §1346(b)(1), §2671, *et seq.*

¹⁵ *Richards v. United States*, 369 U.S. 1, 11 (1962)

One might question where the “act or omission” occurs in a case in which a pilot flying over one state is in radio contact with a controller in another state. The question is further complicated by the Supreme Court’s determination that under the FTCA the “whole law” of the state in which the act or omission occurred applies, including its choice-of-law rules.¹⁶

Application of the “whole law” rule can create a situation in which the state whose law applies may choose to apply another state’s law instead of its own under its choice-of-law principles. In some cases, it may also dictate applying choice-of-law principles to discrete issues within the same claim, which could result in liability issues being decided under the laws of one state and damages issues under another.¹⁷

The outcome of the choice-of-law analysis may well determine the outcomes of the case as a whole, in light of the differences among the states’ comparative responsibility schemes. Because ATC negligence cases almost invariably involve apportionment of responsibility among multiple parties (and in some states, non-parties as well), whether the state whose substantive law is to be applied has a “pure comparative” scheme or a “modified comparative” scheme—which may bar recovery when a claimant’s own percentage of “fault” exceeds a legislated threshold—is a question of supreme importance.

(b) The fact finder. There is no right to a jury trial in suits brought against the United States under the FTCA because they are not “suits at common law” within the meaning of the 7th Amendment of the United States Constitution.¹⁸ The practical effect of this in ATC negligence cases is that the federal district judge who decides which state’s comparative responsibility law to apply under choice-of-law principles is the same person who allocates the percentage of fault that caused the crash...and then renders a judgment applying the “chosen” law to the “found” facts. Thus, unlike in jury cases, all decisions of fact and law will be decided by an individual who has a complete understanding of the ultimate consequences of those decisions.

4. *Conclusion*

The law places a high level of responsibility on the pilot in command of an aircraft; however, the public also relies on air traffic controllers employed and trained by the federal government to do their part to make the skies—and the ground beneath our air space—safe.

When available information is not shared with pilots by controllers, in violation of FAA-mandated standards and general principles of negligence law, preventable crashes should not be automatically assigned to the “pilot error” waste bin. A proper application of state law comparative negligence principles under the FTCA requires a more thorough and thoughtful evaluation of the pilot-controller relationship.

¹⁶ *Id.* at 9.

¹⁷ See *Donaldson v. United States*, 634 F. Supp. 735 (S.D. Fla. 1986)

¹⁸ 28 U.S.C. §2402, see *Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994)

The Author:

Mark Pierce, with the firm of Pierce Sauer PLLC in Austin, Texas, is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. He is an FAA-certified instrument flight instructor (CFI-I), with commercial pilot certification in single-engine and multi-engine airplanes. His aviation law practice includes commercial litigation among buyers and sellers of turbine-powered aircraft as well as tort litigation arising out of airplane and helicopter crashes.

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