UFOs AND COMMERCIAL AIR TRAFFIC

Part 3 Project

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IN the first part of this article I described a hypothetical case in which an unknown craft had been observed by radar operators to close with an American Airlines' 727 jet, which was later discovered wrecked. Mary Doe, surviving wife and heir of passenger John Doe, filed a complaint in the United States District Court in San Diego, naming American Airlines, the United States Government and the Pacific Fidelity Insurance Company as co-defendants. In the second part, the U.S. Government's position, in that the Air Force investigatory Project Blue Book was involved, was discussed.

FAA liability

What about the liability of the Federal Aviation Agency? Might a court of law construe their actions in allowing Flight 211 to depart as scheduled as a breach of a duty owed the plaintiff?; if so, their negligence is apparent. Clearly there are no official regulations requiring a controller to refuse take-off permission to a pilot where UFOs have been reported recently over an area included in his flight plan. There are, however, certain obligations which arise by Federal regulation and what might be called the "reasonable man" standard. Certain sections of the Federal Aviation Act of 1958 place a *duty* upon controllers to warn pilots not to take off when there are prevailing adverse conditions.[30] This regulation, among others, was emphasised by U.S. District Court Judge Kunzel in the recent (1967) case of *Stork v. U.S.*, decided here in San Diego. In that litigation, twenty-eight consolidated cases were brought against the United States for deaths and injuries sustained in a 1961 Ohio airplane crash which wiped out the entire football squad of California State Polytechnic College. In concluding that the controllers were guilty of negligence in a high degree, Judge Kunzel made the following observation: "The controllers owed a duty of care to the passengers . . ."[31]

Another 1967 case in point is *Ingram v. Eastern Air Lines, Inc. v. United States*. The Court, in commenting upon this duty owed to passengers by controllers, makes a public policy argument which seems entirely applicable to the case under discussion, and relevant to both FAA *and* Air Force liability:

"Our conclusion . . . is in tune with the heavy degree of reliance which passengers place upon the government for insuring the safety of their flights. While air travel in this jet age has become commonplace, we know too well that there is always lurking the possibility of tragic accidents capable of snuffing out the lives of hundreds in a mere matter of seconds. Much of the success in preventing such disasters can be given to the federal government's assumption of the supervision of commercial flying; . . . public confidence in air travel has been fostered in large measure by knowledge that our government, recognising the high stakes involved, is *constantly overseeing the carrier's operations in order to promote safety*"[32] (italics mine).

Liability was imposed on the FAA in this case because the controllers involved breached their duty to the passengers.

Responsible agents defined

Writing in a recent issue of the *Journal of Air Law and Commerce*, P. B. Larsen advocates a "proof of fault system" for persons alleging negligence on the part of the Air Traffic Control.[33] The system would not, however, work a hardship on injured plaintiffs since it would not operate to limit the liability of the ATC. Basically, the suggested system would further define the responsible agents of the ATC, thus giving the plaintiff a spectrum of possibilities upon which to base his difficult court procedure. It is important to note that the wider definitions proposed, though not presently set out in an official FAA regulation, nevertheless exist to varying extents in the present services offered by the ATC. The article lists eight such "definitions", and at least three of these are germane to this discussion of FAA liability. The first of these is the "Air Traffic Advisory Service". It provides reliable information about *collision danger*. The "Alerting Service" is the division which would sound the alert *whenever an emergency situation arose*, and the third category, "Airport Facilities", involves *dangerous conditions* which may interfere with the orderly flow of traffic. The emphasis provided to key words in each of the above divisions is my own; the relevancy of each to the case under discussion seems apparent, making further explanation unnecessary.

A final consideration in deciding whether liability could reasonably be imposed against the FAA, is the official federal regulation which defines the primary objective of the Air Traffic Control Service. Such a provision is in essence the standard that is required of every controller at all times. The foreword to this regulation states that "controllers on duty are expected to use their best judgment." The basic objective of ATC, as stated, is:—

"*to promote the safe*, orderly, and expeditious *movement of air traffic. This shall include:* (1) Aiding pilots in *preventing collisions* between aircraft and *between aircraft and obstructions on the movement area;* and (3) assisting the person in command of an aircraft by providing such advice and information as may be useful for the safe and efficient conduct of the flight"[34] (italics mine).

It is not clear whether a series of reports of UFOs approaching airliners on a near-collision course during a relatively short period and over a specific area would constitute a danger sufficient to require that FAA controllers take some affirmative action. This situation would most probably arise where a local ATC facility fails to follow the recognised procedures of contacting the nearest military air base.

Once the Air Force does receive proper notification of a sighting by ATC, there is a definite shift of responsibility; should an airline company inquire as to the possible threat represented by a series of concentrated sightings, as I have suggested, the Air Force has the burden of advising that airline one way or another. If no reply is forthcoming, or the reply is a mere echo of the "no threat to our national security" policy that has remained steadfast for the past twenty-one years, the liability would in all certainty fall more heavily upon the Air Force than the FAA—although both are in essence the same defendant. If the situation developed that Project Blue Book officials, because of the small amount of time before the scheduled departure of other flights over the area (and the impossibility of an immediate and satisfactory investigation), delegated the authority for the decision to the local ATC chief controller, any action taken by that individual would be closely scrutinised by the courts in the light of the federal regulations and recent cases previously mentioned. It is always possible that a total cancellation of flights may be unnecessary; re-routing all flights around the area of the sightings until an investigation can be undertaken would seem a logical alternative.

In seeking to prove that the Air Force or FAA officials were in fact negligent, the plaintiff must show that these individuals failed to use ordinary care; such care is generally characterised as that which a "reasonably prudent man" would use under the same or similar circumstances, not the beliefs or standards of the individual at fault at the time he acted or did not act. In determining the standard of care, it must be shown that there was a breach of a duty owed to the person injured.

Duty owed by Air Force

As a general principle, all persons have a duty to use ordinary skill and care to avoid dangers which might cause injury to the person or property of another. If the Project Blue Book investigators acted as reasonable men in their position would have acted after learning of the nature of the sightings which occurred in this case, they clearly should not be liable. It is significant to note in this regard that the U.S. Government, as pointed out previously, has a responsibility to the travelling public for establishing and maintaining air traffic safety measures; the reliance placed thereon, as brought out in the opinion in the *Ingram* case, is of some importance in allocating liability. The duty owed by the Air Force thus seems somewhat greater than that owed by an ordinary person; the skill and care utilised might be examined more strictly. It should be pointed out that custom generally does not determine the standard of care, and thus past procedures or policies would not necessarily offer a defence to ATC or Project Blue Book employees.

The burden of proof is naturally with the plaintiff, and she must show the negligence of the defendants by a preponderance of the evidence, i.e. that it is "more probable than not" they were negligent. It is not entirely clear whether the U.S. Government should be charged with "simple" or "gross" negligence; it seems unlikely, however, that their acts would be construed as amounting to criminal negligence, i.e. a total disregard for the rights of others.

Assuming that the airline company heard of the previous sightings and made timely inquiry, they would seem to be free from any active negligence, and the subsequent action or non-action by FAA or Air Force officials might be considered as intervening and superseding in the chain of causation. If the airline had knowledge of the sightings but makes no inquiry, or fails to brief its pilot or crew as to the location and characteristics of the reported objects, it may be subjecting itself to a lesser degree of negligence and face some liability. The factual possibilities which could occur in such a situation are innumerable—but none of those suggested here should be considered as too remote.

Position of insurance company

I included an insurance company as a co-defendant in my hypothetical case only for the purpose of briefly discussing the typical airline trip insurance policy, and whether a beneficiary named in such a policy could recover where it appeared that a UFO had been the direct or indirect cause of the crash. An examination of this type of a policy reveals that regardless of the company issuing it, all have a number of features in common; they are non-renewable, covering a one-way flight aboard a scheduled air carrier, and generally contain indemnification provisions for specific types of personal injuries suffered. Virtually all of the policies, including the one included in the Appendix of this paper, have a standard exclusionary clause which reads as follows: "This insurance shall not cover death, dismemberment, loss of sight or other loss caused by . . . war or any act of war."[35]

Where causation was clearly attributable to a UFO, an insurance company might argue that such a "deliberate" act constituted an "act of war" within the meaning of its policy's exclusionary clause. Although many UFOs seem to demonstrate a low form of intelligence in their flight characteristics and seemingly inquisitive manoeuvres, there has never been any evidence of hostile actions in the thousands of reliable sightings reported to date—and no nation or territory on earth has been exempt from their visitations. Even if there were such cases, and the apparent hostile nature of the objects could be proven in a court of law, it is doubtful whether the acts would be construed as "acts of war" since the prime requisite would seem to be the involvement of a recognised power or government—and most importantly, sapient beings, preferably *homo sapiens*.

One case which arose out of an insurance policy "act of war" exclusion involved the sinking of the British liner "Lusitania" by a German submarine.[36] "War" has been defined to be that state in which a nation prosecutes its right by force. As used in an insurance policy with the kind of exclusion mentioned here, such phrase means "death or injury as a consequence of war or rebellion carried on by authority of some *de facto* government."[37] Recent cases have limited the scope of such clauses, even holding that the death of a U.S. Navy seaman resulting from the Japanese attack on Pearl Harbour did not occur in time of "war".[38] In every reported case, the requisite for recovery has been the involvement of at least two nations, or as the *Welts* case

says, "*de facto* governments." In short, if a UFO directly or indirectly caused an airliner to crash, it could no more be considered an act of war than if a flock of birds had collided with the plane and brought about the same result.

Conclusion

Throughout this discussion, I have endeavoured to emphasise one important point, i.e. that this hypothetical series of events, including the resulting litigation, could take place in the foreseeable future. The well-documented instances of UFO-airliner "near-misses," the Air Force's continuing policies reflecting an attitude bordering on unconcern, and the FAA's lack of definite procedural guidelines in such a situation are only a few of the factors previously mentioned. If a case developed which was identical, or nearly so, to the situation which I have outlined here, it is my belief that the United States Government would indeed face some degree of liability.

Congressional pressure following the wave of "saucer" sightings in 1966 led to the establishment of the Air Force-sponsored "independent" UFO Study at the University of Colorado. Such an investigation by a team of qualified scientists seemed a significant step toward a greater understanding of the UFO phenomenon. However, it is the firm belief of this writer that our Department of the Air Force and Federal Aviation Agency should act now to institute a new and realistic evaluation of their present policies on UFO investigatory procedures. The age of the massive supersonic transports is forthcoming, and as the number of jetliners in the skies at any given moment is increasing, so are the number of UFO sightings. The time for some affirmative and preventive measures is now.

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NOTES

30 *Federal Aviation Act of* 1958, sec. 307 (a), 601 (b), 49 U.S.C.A. sec. 1348 (a), 1421 (b).
31 *Stork v. United States*, 278 F. Supp. 869, 881 (1967).
32 *Ingram v. Eastern Air Lines, Inc. v. United States*, 373 F.2d 227, 235-236, (2nd Cir. 1967).
33 "Air Traffic Control: A Recommendation for a Proof of Fault System Without a Limitation on Liability." P. B. Larsen. *Journal of Air Law and Commerce*, Vol. 32, Winter 1966, pp. 3-23.
34 *ANC/PCAT* (Procedures for controlling air traffic) *Manual*, sec. 1.0300 (1), (3). (see Appendix for copy of regulation).
35 Policy provision of Fedelity and Casualty Company of New York; *Scheduled Air Carrier (Airline) Trip Insurance*. (see Appendix for copy.)
36 *Vanderbilt v. Travelers' Ins. Co.*, 184 N.Y.S. 54, 55, 112 Misc. 248.
37 *Welts v. Connecticut Mut. Life Ins. Co.*, 48 N.Y. 34, 40, 8 Am. Rep. 518.
38 *West v. Palmetto State Life Ins. Co.*, 25 S.E. 2d 475, 477, 202 S.C. 422, 145 A.L.R. 1461.

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