ATCO Duty of Care

Presented by PLC

Summary

The paper proposes a number of broad principles air traffic control officers can apply that may be useful to ensure the requisite ‘duty of care’ has been met.

1. INTRODUCTION

1.1. Air traffic control (ATC) can be a rule-driven profession. Air traffic control officers (ATCOs) are taught early in their careers what rules to apply and when to apply them. ATC operation manuals are full of instructions such as ‘must’, ‘shall’, ‘ensure’, ‘apply’. Indeed, the task of separating aircraft by prescribed standards lends itself to the application of a rigid set of rules that are easily understood and applied.

1.2. This is not to say there aren’t other equally important components required to deliver a safe air traffic control service. Effective management, technical support, supervision, leadership and resourcing are but just a few examples. However for the ATCO, there is no denying that one of the most important functions is to apply and follow rules, standards and procedures (usually set out in an operations manual) and that to depart from these may result in the ATCO being held accountable.

1.3. However, despite the best efforts of ATC rule makers, it’s impossible to make rules to cover the countless scenarios that can present themselves to the ATCO. In these situations, ATCOs often deduct a principle from existing rules, and then adapt and apply it to the scenario at hand. When faced with these ‘novel’ situations where existing rules don’t apply, the concept ‘duty of care’ is often invoked by ATCOs to justify an action that is not strictly prescribed.

1.4. Despite ‘duty of care’ being a concept that may be well recognised (although perhaps by a different name in other jurisdictions) its meaning varies. ‘Duty of care’ is a legal term and although the concept is becoming more familiar, as evidenced by the phrase being widely recognised, its meaning and, importantly, its application varies widely from jurisdiction to jurisdiction (state to state). Even within jurisdictions, where duty of care as a legal concept is relatively settled, the understanding of the concept outside legal circles can be patchy at best.

1.5. Given the variety of legal meanings of duty of care and the well-meaning, although potentially misguided, attempts by ATCOs to understand and apply it, it’s concerning that in some instances it is being used to inform operational decisions.

1.6. This paper will examine the concept of duty of care in both the common law and civil law legal systems. Between them, these two legal systems comprise the majority of legal systems.
throughout the world. Taking the similarities between the two, the paper discusses the concept of duty of care with respect to ATC. The aim is to educate ATCOs as to what ‘duty of care’ is and to provide guidance that may add more certainty when invoking the concept of duty of care to inform operational decisions.

1.7. Finally, the paper will argue that despite the phrase duty of care being widely recognised and, in a number of jurisdictions, legally defined, ATCOs receive little or no training. The paper will recommend that ANSPs or regulators provide training to ATCOs to ensure they understand these concepts and how they’re applied in an ATC context in their particular jurisdiction.

2. **IFATCA POLICY**

2.1. International Federation of Air Traffic Controllers’ Association (IFATCA) has little policy on negligence and the duty of care - perhaps reflecting the complexity of the subject and the numerous jurisdictions it operates within. The only reference to ‘duty of care’ in the IFATCA Technical and Professional Manual (TPM) is in relation to terrain and obstacle clearance responsibilities (italics added):

   **International Civil Aviation Organisation (ICAO) provisions presently have problems:**
   
   • Currently most responsibility lies with pilots.
   
   • SID/STAR phraseology still unresolved.
   
   • Implied responsibility.
   
   • What about duty of care under surveillance - what happens when an aircraft leaves surveillance airspace.
   
   • Charting has shortcomings.
   
   • Questionable language regarding visual approaches.

   - IFATCA TPM Page 3 2 3 42

2.2. The reference to ‘duty of care’ in this context arguably demonstrates the misunderstanding of the phrase that this paper intends to address.

3. **ICAO References**

3.1. ICAO documentation has very limited references to ‘duty of care’ and none in the context of the liability of air traffic controllers.

4. **LEGAL SYSTEMS**

4.1. A fundamental question when dealing with the application of any legal concept is what jurisdiction (in this context, state or country) is a law to be applied. Obviously this is a critical issue when addressing the concept in the context of an international forum such as IFATCA. It’s an impossible task to define what the duty of care means to an ATC within every member association’s legal system. Even if it were possible, the integrity of the advice would still, in a lot
of cases, be subject to the whims of the judicial system should the question ever addressed in judicial proceedings.

4.2. Instead, what this paper proposes to do is to examine the concept of duty of care in the two major legal systems on which the majority member association’s legal systems are based: the civil law system and the common law system. It should be acknowledged that these are not the only legal systems. Other legal systems include those based on religious law and customary law. Increasingly, domestic legal systems are a combination of several legal systems.

Civil law legal system

4.3. The civil law system is the most widely applied legal system.\(^1\) It’s often referred to as ‘Roman law’ because its roots can be traced back to the Roman emperor Justinian who took what was, up until then, a loose collection of rules and laws, and arranged them into a collection of written laws, or *codes*. This gave certainty to judges, jurists and subjects as to what the law was and how it was to be applied. The ‘codification’ of the law is a basic principle of the civil law system.\(^2\)

4.4. In addition to the codification of laws, civil law judges take an active role in judicial proceedings, questioning parties and lawyers to determine the facts of the case. Once the judge has established the facts, they will apply the law to determine an outcome. Generally, juries do not play a part in proceedings. The active role of the judge, as opposed to lawyers or jurists, to inquire as to the facts of the dispute has led to the civil law legal system being described as an inquisitorial legal system.\(^3\)

4.5. Where there is no applicable law, or there are ‘gaps’ in the law, the judge is reluctant to create new legal principles to fill them. Although a judge may refer to previous decisions, or precedent, they are generally not bound to follow these decisions. Developing legal principles to apply to novel fact scenarios falls upon legal scholars outside the court. While in practice, similar facts lead to similar outcomes, the source of the law is not in the previous decisions made by a judge or court but instead it is in the letter and spirit of the law of written codes and the legal scholars that have analysed them.\(^4\)

4.6. The influence of the Roman Empire has ensured that most European countries have adopted a civil law system. The effect of colonisation also resulted in most of Asia, South America and Africa also having civil law legal systems or, at the very least, being influenced by it.\(^5\)

Common law legal system

4.7. The common law system has its roots in Great Britain after the time of the Norman Conquest (1066 AD). Previous to this, disputes were settled by subjects petitioning the aristocracy. The result was a ‘fragmented’ approach to the law that was often applied at the whim of those with power. In an effort to unify the law, a so-called ‘common law’ was conceived – a law common to the whole country.\(^6\)

4.8. To ensure consistency of application, and in the absence of written laws, courts applied the principle of precedent – that is, similar fact scenarios should result in similar outcomes. As the body of judicial decisions grew and became permanently recorded on paper, precedents


\(^{2}\) Ibid.

\(^{3}\) Ibid.

\(^{4}\) Ibid, p 25.

\(^{5}\) Ibid.

\(^{6}\) Ibid.
became easier to apply and offered predictability for future disputes.\textsuperscript{7} Eventually a system of courts with a defined hierarchy evolved with the ‘lower’ courts legally compelled to follow the decisions of ‘higher’ courts.

4.9. Where there is legislation, or in other words, the law has been codified, the courts must still apply this ‘statutory’ law before applying the ‘common’ law. This ensures that law as made by democratically elected representatives will take precedence over judge-made law. However, a major distinction between civil and common law systems is that where there are gaps in legislation a judge will look at previous decisions with similar but different facts and attempt to develop a new legal principle. They then apply this legal principle to the facts at hand to reach a decision. The source of the common law is therefore the judiciary – it is ‘judge made law’.\textsuperscript{8}

4.10. Another distinction between civil and common law systems is that the judge will take a more passive role during the proceedings letting the jurists or advocates for the parties present their legal arguments. They will generally not raise or decide issues that the parties don’t ask them to decide.\textsuperscript{9} This is known as an adversarial approach to advocacy, the parties and their advocates pit their arguments against one another with the judge being an ‘independent umpire’.

4.11. The common law is still an integral part of the British legal system. The influence of the British in their former colonies such as Canada, the US, Australia and New Zealand means these states also have common law judicial systems.

\textbf{Convergence of common and civil law systems}

4.12. While civil law systems are still fundamentally based on codified law and common law systems on case or ‘judge made’ law, with the onset of globalisation these distinctions are eroding.

4.13. Some European jurisdictions are starting to apply precedent and some common law countries are drafting codes, human rights charters for example, in the language of and style of a civil code.\textsuperscript{10} The European Union is an example of the convergence of common and civil law due in part to the developments in European Union and International Law.\textsuperscript{11} Judges in European Constitutional Courts now have the power to deliver decisions with precedential weight and administrative courts in civil law nations have gained greater persuasive weight over the years.\textsuperscript{12} However, it should be acknowledged that convergence is not uniform, even amongst European States, so caution should always be used when attempting to apply universal legal principles to multiple jurisdictions.

4.14. For reasons the paper will examine later, this has important implications for the principles of negligence and duty of care with respect to ATCOs.

\textsuperscript{7} Ibid.
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid.
\textsuperscript{12} Ibid.
5. THE LAW OF TORTS

5.1. The word 'tort' has generally come to mean 'wrong'. In English, tort has a purely legal meaning – it is a legal wrong performed by one party on another for which the law provides a remedy.\(^\text{13}\)

5.2. Tort law’s most important feature is that duties imposed on and between parties are fixed by the law.\(^\text{14}\) This can be contrasted with contract law where the duties imposed between parties are, generally speaking, fixed by the terms of the contract.\(^\text{15}\) Parties entering into a contract are more likely to be aware of the parties to which they owe a duty and the exact nature of that duty because, by definition, the parties themselves determine this in contract.\(^\text{16}\) However, in tort law, the parties may not be aware of the law and therefore less likely to know to whom they owe a duty and what that duty is.

5.3. How and what tortious duties arise between parties will vary between jurisdictions. For civil law countries where there is a tendency to codify law, these duties will be primarily defined in legislation. Even common law countries are moving towards codification of tortious duties however as detailed at [4.9], in common law countries there is still the opportunity for the courts to create 'judge law' that may create new duties between parties.

5.4. Another feature is that a tort is a wrong against a particular individual. This can be contrasted with a crime which is a wrong against the common good.\(^\text{17}\)

5.5. There are a number of established torts, or legal wrongs, including trespass to land, goods and person, defamation, slander and privacy. The tort of negligence is only one tort, albeit the one most commonly litigated over the last 80 years.\(^\text{18}\) This is because there are many more actions in negligence than there are in any other tort.\(^\text{19}\)

6. TORT OF NEGLIGENCE

6.1. The principles governing the tort of negligence in the common law are relatively settled. The four elements that must be proven for an action in negligence to be successful are:

1. A duty of care must be owed by one party to another;
2. The requisite standard of care must have been breached;
3. The breach of the standard of care must have caused damage; and
4. The damage caused must be allowable at law.

6.2. The general concept of duty of care existed in civil law jurisdictions long before the formal recognition of such a duty in common law jurisdictions. The civil law always recognised the general obligation not to act unreasonably in situations not governed by contracts.\(^\text{20}\)

6.3. This general duty was not formally recognised in common law jurisdictions until the famous *Donahue v. Stevenson*\(^\text{21}\) case in 1932 when the High Court of the United Kingdom found

\(^\text{14}\) Ibid, p 2.
\(^\text{15}\) Ibid.
\(^\text{17}\) Ibid14, p 2.
\(^\text{18}\) Harpwood, above n , p19; *Donahue vs Stevenson* [1932] AC 562.
\(^\text{19}\) Davies, above n 14, p 3.
a general duty of care similar to that of civil law in that ‘you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour’.  

6.4. Summarising, one person, the tortfeasor, must have neglected a duty of care which a reasonable person would have observed and that damage resulted from the neglect of that duty of care. Or in other words, in circumstances where personal injury is involved, in all systems there must be conduct that is intentional or careless, that cannot be justifiable and that causes harm to another party.

6.5. Because of the similarities of the general duty of care in both legal systems, and for the purposes of examining this duty of care in the context of the ATCO, it’s convenient to look at negligence with respect to the common law elements.

**Establishing a duty of care**

6.6. In common law legal systems, a duty of care is owed by one party to another if it’s reasonably foreseeable that not performing a duty with reasonable care could result in damage to another party. Over time a number of ‘relationships’ have been identified as giving rise to a duty of care between the parties such as a doctor-patient, driver-passenger and chef-patron. It should be noted that in the vast majority of negligence cases there is no dispute about the existence of a duty of care between parties – it is often self-evident.

6.7. Applying this test, it is obvious, and therefore reasonably foreseeable, that an ATCO that does not perform their duty to the requisite standard may cause damage to parties either in an aircraft or on the ground. In other words, the ATCO owes a duty of care to those who could suffer damage if that duty is not carried out to a reasonable standard.

6.8. Similarly, in civil law legal systems, the concept of duty of care also exists. If there is a breach of a rule of conduct imposed by legislation or regulation, or a failure to conform to a general standard of due care of diligence, liability can be established.

6.9. Reliance?

**The standard of care**

6.10. What standard of care one party owes another lies at the very heart of negligence and is what most people are referring to when they use the phrase ‘duty of care’. As demonstrated at [6.7], that a duty of care is owed by the ATCO to those affected by their actions is in no doubt – the answer is yes. The critical question is what standard of care is owed.

6.11. In both common law and European civil law jurisdictions the concept of an ‘objective’ standard care dominates. The requisite conduct is that of the fictitious reference person, the bon père de famille in France or the ‘reasonable person’ in common law jurisdictions. Germany also use this objective standard and where a party has not reached this standard they are said to have acted with Verschulden, or intention or negligence.

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22 Ibid, p 580.
25 Davies, above n 14, p 87.
26 Bartsch, above n 19, p 113.
28 Bartsch, above n 19.
6.12. This objective standard attempts to remove the peculiarities of individual behaviour from the standard of care. A party capable of inflicting damage on another must act in a way that reasonably prevents that damage regardless of any fallibilities they may have.

6.13. For the vast majority of fact scenarios, the standard of care is reasonably settled. The standard of care is either codified in legislation or, in common law jurisdictions, in the case law. From an ATC perspective, as much as possible, the requisite standard of care lies in the regulations, rules and standards prescribed by the State. It’s reasonable for the ATCO to assume that as long as they comply with these, they will have achieved the required standard of care.

6.14. However, what is the requisite standard of care when there are no rules or following the rules will lead to a negative safety outcome? In these cases, the standard or care will differ depending on the situation.

6.15. It is well established that experts, professionals and people with special skills are expected to exercise a higher standard of care than lay people. That standard should be of the same high standard as others at a similar level or experience within the same field. Put in the language of the reasonable person, an expert is required to exercise the same standard of care as a reasonably competent person trained in the particular trade or profession. However, they ‘need not possess the highest expert skill, just the ordinary skill of an ordinary competent man exercising a particular art’.

6.16. This has obvious implications for the standard of care owed by the ATCO. As this is the main issue the paper will address this element separately at [7].

**Breach of the standard of care**

6.17. Once the requisite standard of care is established, it is for the judge or court to decide if this standard has been met. If it has, there may be no cause in negligence.

**Damages**

6.18. Obvious damages that can result from a breach of a duty of care include a monetary loss or physical damage. There are other more controversial forms of damage that courts have debated including psychological or nervous shock. These issues are beyond the scope of this paper but still must be established in order for a party to bring a successful claim in negligence.

7. **ATCOs AND THE STANDARD OF CARE**

7.1. So far this WP has examined the tort of negligence and how it relates to the duty of care. We have established that in both civil and common law jurisdictions, the ATCO owes a duty of care to those that rely on them performing their duties to a requisite standard. Because an ATCO is an expert in their field, they must perform those duties to the same standard of care as a reasonably competent ATCO.

7.2. In an attempt to add certainty as to the standard of care owed by one to another, States, including those with common law legal systems, are increasingly codifying those requirements in

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29 Harwood, above n 16, p 23.
30 Ibid, p 143.
32 Davies, above n 14, p 190; Harwood, above n 16, p 37.
regulation, rules and standards and ATC is no exception. For this reason, ATC can be a very rule driven profession. It follows, therefore, that as long as the ATC adheres to those rules they will be meeting the requisite standard of care. Where they do not follow those rules, with or without intent, it’s reasonable to assume in most cases they will not have met the standard required of the ATCO and therefore they may be found negligent for any damage that may result.

7.3. However, ATCOs sometimes face situations where the rules don’t or only partially apply. In those situations, an ATCO might apply a ‘lesson’ from a previous experience or they might apply the principles that apply to more common situations to the novel situation at hand. However, if the party to which the ATCO owes the duty (i.e. the pilot and passengers on the aircraft the ATCO is controlling) were to suffer damage as a result of that ATCOs decision, a court will ultimately decide if they have met the requisite standard of care or if they were negligent.

7.4. As demonstrated at [6.11], both common and civil law countries apply a similar objective test to determine the standard of care. For someone with the specialist skills and knowledge of an ATCO, that standard is that of a reasonably competent ATCO or the standard expected to be achieved by other ATCOs.

7.5. In Australia, the courts have endorsed the following statements from Shawcross and Beaumont33 as the duty owed by ATCOs:34

‘to take reasonable care to give all such instructions and advice as may be necessary to promote the safety of aircraft within their area of responsibility’35

7.6. The question then becomes what and how much ‘instruction and advice’, or information, must the ATCO give to promote the safety of aircraft considering that in aviation practically every piece of information can potentially impact on aircraft safety.36 The paper will examine a number of court cases (in italics) divided into categories of instructions and advice in attempt to distil some broad principles that may provide a useful framework for ATCOs to assess what’s required to meet and maintain the requisite standard of care.

Provide instructions and/or information that is accurate and not misleading

7.7. When air traffic controllers provide information to pilots knowing that the information will be relied upon, they have a duty to ensure that it is accurate.37 In Universal Aviation Underwriters v United States,38 the court held a controller liable for not correctly describing an aircraft thus causing a pilot to follow the wrong aircraft resulting in a collision.

7.8. The concept of reliance can be important in establishing whether or not the requisite standard of care has been met by the ATCO. Courts are increasingly emphasising the importance of the concept of foreseeable and reasonable reliance as a crucial factor in determining whether negligence has occurred.39 In the context of the ATCO and the duty of care, the more reliant a pilot on an instruction or information, the higher the expectation that the ATCO will provide it.

33 Shawcross and Beaumont, above n , p 666.
36 Ibid. p 532.
If an ATCO provides information to a pilot and the pilot doesn’t act on the information the ATCO may not be found negligent. In Smerdon v United States\textsuperscript{40} the ATCO warned the pilot of adverse weather at the aerodrome. The pilot still attempted to land and crashed. The court found the ATCO was not negligent. The ATCO had met the required standard of care by proving the weather information to the pilot. It was for the pilot to act on that information.

**A duty to provide accurate, unambiguous and timely information**

Information must also be given in a timely manner. In Nichols v Simmonds and Royal Aero Club\textsuperscript{41} (Nichols), the ATCO issued a warning of an impending collision between two aircraft. The court found the warning was issued with insufficient time to avoid the collision and thus the controller was found not to have fulfilled his duty of care.\textsuperscript{42}

This can be particularly pertinent to the passing of timely weather information. The passing of weather information is generally governed by operations manuals. However, it can still be at the discretion of the ATCO to provide weather information they may have and that the pilot may reasonably not have.

For instance, in Bernard v United States\textsuperscript{43} the court found that the ATCO did not have access to information on turbulence, cloud tops and bases, lightning, etc. and therefore could not be held to be negligent in not providing that to an aircraft that subsequently crashed. Of course, the implication is that where this information has been made available to the ATCO, perhaps by pilot report, then it may be incumbent on the ATCO to pass this information to pilots that the ATCO may reasonably assume may not be aware of it.

**Duty to maintain a proper lookout**

Courts have found that it is not enough for the ATCO to just issue correct clearances. They have consistently found that, where they have the means, the ATCO is required to monitor aircraft to ensure they are complying with the clearance. In Hennesey v United States\textsuperscript{44} an ATCO was found to be negligent in not detecting that a heavy (as advised by the pilot to the ATCO), slow climbing aircraft had deviated from its clearance and had collided with a mountain. The court found a reasonably competent controller would have taken into consideration the fact there was terrain in the area and the aircraft was slow climbing and therefore should pay more attention than usual to ensure the aircraft was complying with its clearance.

Similarly, in Harris v United States\textsuperscript{45} an ATCO was found to be negligent for failing to notice that a light aircraft with a pilot unfamiliar with the aerodrome was falling below the normal approach profile and in the vicinity of unmarked power lines. The aircraft subsequently struck the power lines and crashed.

In an Australian decision,\textsuperscript{46} the court held that controllers were negligent in failing to recognise a developing scenario that ultimately led to a mid-air collision. The facts were that a pilot failed to fly a circuit as required resulting in his faster aircraft being positioned behind a slower aircraft in a circuit, ultimately leading to a collision between the two aircraft. The court held that the controllers in the tower had enough information to recognise a threat existed to the


\textsuperscript{41} Nichols v Simmonds and Royal Aero Club [1975] WAR 1, p 16-17.

\textsuperscript{42} Ibid, at 15.


\textsuperscript{45} 333 F. Supp. 870 (1971).

\textsuperscript{46} Skyways Pty Ltd (in liq) v Commonwealth (1984) 57 ALR 657.
safety of the aircraft but were negligent in not reaching that conclusion and thus not acting to make the pilots aware of the imminent threat despite the pilot error.  

7.16. In all of these decisions the ATCO had information at their disposal that arguably the pilot didn’t have. That is, the ATCO was in possession of information that could have prevented the accident if they had either acted upon it or advised the pilot of the information. Where an ATCO is not in possession of information, the standard of care is adjusted accordingly.

7.17. This principle was illustrated in Hamilton v United States.  Two VFR aircraft collided while trying to land on the same runway. The court found the ATCO had not acted negligently because despite clearing both aircraft for straight in approaches to the same runway, the ATCO had passed the required traffic and there was no reason to believe there was any danger. One of the pilots was found negligent.

Acting in accordance with standards and rules may not absolve the ATCO of negligence

7.18. The primary purpose of an air traffic control service is to prevent collisions between aircraft.  The level of air traffic service will vary depending on the class of airspace aircraft are operating in. However, in some jurisdictions merely providing an ATC service commiserate with the class of airspace may not meet the requisite duty of care. It’s not always enough for the controller to just apply the correct standards and rules.

7.19. In Nichols, the Supreme Court of WA found that although two pilots failed to keep a proper look out for each other in a circuit area, had the controller carried out his duty to keep a proper look out with the requisite care, he would have been aware that the two aircraft were in imminent danger of colliding with each other.  Had this threat been recognised the controller could have acted to prevent the collision. This was followed in Skyways Pty Ltd (in liq) and Another v Commonwealth of Australia  (Skyways).

7.20. In Furimizo v United States an ATCO correctly issued a wake turbulence warning to a light aircraft departing after a medium aircraft in accordance with the manual of operations. However, as the light aircraft had already commenced its take off roll before the caution was issued, the court found the ATCO should have issued a second warning.

Concurrent duty between ATCOs and pilots

7.21. There is a concurrent duty between the ATCO and the pilot to ensure the safe operation of the flight. Wallace J in Nichols reasoned that even where a duty to see and avoid was explicitly put on the pilots of a VFR aircraft, because the pilots also have to follow ATC instructions (in this instance, in class D airspace), there was a corresponding duty for the ATCO to warn of any dangers they are or should be aware of.

7.22. United States case law recognises the concurrent duties of pilots and controllers and that the weight of duty will vary according to the circumstances.  Pilots of aircraft operating under visual flight rules (VFR) in visual meteorological conditions (VMC) have been found to have

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50 Nichols v Simmonds and Royal Aero Club [1975] WAR 1, p 16-17.
51 57 ALR 657, p 686.
52 381 F. 2d 965 (9th Cir. 1967) cited in Bigwood, above n 38, p 433.
53 Allen, above n 33, p 289.
primary responsibility for avoiding mid-air collisions. This does still not absolve the controller of a duty to prevent collisions, as was found in Nichols and Skyways, but it does place a heavier burden on the pilot in command to show that the controller’s duty was not carried out with the requisite care because in such conditions the pilot is in a better position to identify the threat of a mid-air collision. Conversely, a controller owes a greater duty to pilots operating under instrument flight rules (IFR) conditions because more reliance is placed on the controller.

7.23. It is also the duty of the controller to inform the pilot of ‘all those facts that are material to the operation of his plane’. A controller may be in possession of ‘greater experience, superior observations facilities and localised information’.

7.24. This view was demonstrated in Spaulding v United States where the court found that

‘before the pilot is held legally responsible for his aircraft, he must know those facts which are material to the operation of his plane [and] an important source of this information are… air traffic controllers’.

7.25. Perhaps the most concise statement of the duty of the ATCO was enunciated in American Airlines, Inc. v United States where court said

‘the air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him [sic], but not apparent in the exercise of due care, to the pilot’.

7.26. This aligns with the cases at [7.13], [7.14], [7.15] and [7.17]. That is where the ATCO has, or should have, information that the pilot would reasonably not have, and the ATCO did not act on or pass on that information, and the failure to act led to damage, the ATCO may be held negligent.

7.27. Perhaps this can be summarised best by the concept of ‘reliance’. The High Court of Australia has repeatedly stated that the element of reliance is paramount in determining the existence of a duty of care. For example, if a pilot has all relevant operational information pertaining to their flight and is aware of the nature and extent of any danger, and if the ATCO failed to provide such information, the ATCO may not have failed in their duty of care.

7.28. On the other hand, if the pilot could not obtain the information from any other source, then the ATCO may fail in their duty of care if they possessed the information but did not pass it on to the pilot. Reliance is therefore a key factor that establishes the existence of the Duty of Care owed by ATCOs. As one commentator has suggested "It is difficult to envisage any public authority in which the element of reliance is more prevalent than it is with the control of air traffic".

54 Ibid.
55 Thibodeaux v United States 601 F. 2d 1193 (CA5, 1979) cited in ibid.
57 Spaulding v United States 455 F. 2d 222 (1972) at 226 cited in Bigwood, above n 38.
59 455 F. 2d 222 (1972) 226.
60 418 F. 2d 180 (1969).
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8. **‘DUTY OF CARE’ CONSIDERATIONS FOR ATCOs**

8.1. A common thread running through the decisions the paper has examined is that when judging whether or not an ATCO has reached the requisite standard of care, the court will look at the information that is available to the ATCO, the information the ATCO can reasonably assume the pilot will have, and then decide whether the ATCO has either acted reasonably on the information or, where appropriate, passed the information to the pilot to act on. This principle has been referred to as the ‘vantage point’ test.\(^6\) The court will decide who was in a better position to reasonably identify hazards or foresee harm, ATCO or pilot, before deciding whether the requisite standard of care was achieved.

8.2. The principle can be used to develop a number of questions that ATCOs may find useful when considering whether they have met the requisite standard of care.

1. Has the ATCO made reasonable efforts to **obtain and maintain information** to ensure the safety of aircraft in their area of responsibility?

2. Has the ATCO reasonably **acted on information** so as to ensure the safety of aircraft in their area of responsibility?

3. Has the ATCO passed to the pilot information that it’s reasonable to assume the pilot will **rely on** to ensure the safety of their aircraft?

8.3. It cannot be emphasised enough that these questions are only offered as a tool that may be useful for ATCOs to measure their actions against decisions made by some courts in selected jurisdictions. They do not and cannot be an accurate reflection of the law in all the member association states.

9. **‘DUTY OF CARE’ TRAINING FOR ATCOs**

9.1. Some regulators and ANSPs provide duty of care training to ATCOs. However, the majority of ATCOs receive none. It is crucial that for ATCOs to be given the greatest chance of acquitting their duty of care obligations, they must be educated as to how and when it is applied. This paper is not, and cannot, be a substitute for formal, jurisdiction specific duty of care training for ATCOs. That this paper has been written is due the absence of such training.

9.2. However, there is also the opportunity, and perhaps this working paper is the first small step, to influence the debate in a way that benefits our members. Arguably, it is the ATCO who is in the best position to determine what standard of care they can provide given the benefits, limitations and peculiarities of the ATC system they happen to be working within.

10. **PUBLIC POLICY CONSIDERATIONS**

10.1. As we saw at [4.9] in common law jurisdictions, judges have more latitude to make law where there are perceived gaps in regulation or legislation. Judges sometimes use ‘duty of care’ as a device for implementing policy considerations of various kinds.\(^5\)

10.2. One of these policy considerations is loss allocation or compensation. In aviation, small mistakes can lead to catastrophic outcomes often resulting in death or severe injury. This can mean that those affected, and their families, will have their lives severely impacted upon through

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\(^6\) Bigwood, above n 38, p 438.

\(^5\) Harpwood, above n 16, p 31.
no fault of their own. Furthermore, unless they can recover damages, there will be little available to mitigate the impact.

10.3. For this reason, air navigation services providers and airlines are held to be strictly liable where their employees are found liable for negligence because they are more likely to have the capacity to compensate victims than their employees. Normally ANSPs and airlines will be insured for damage their employees may cause through negligence. Because insurance companies spread their exposure through charging businesses, and businesses pass on those premiums to their customers, the effect is that victims end up being compensated by other customers within that industry, or indeed beyond that industry.

10.4. Of course, in order for victims to access compensation, they have to show their damage was caused by the negligence of the employee of the ANSP or airline. This is where judges in common law jurisdictions sometimes exercise their policy consideration and put a low threshold on the victims to prove negligence. Of course, this does not help the ATCO or pilot that may be found negligent in order to allow the court to compensate the innocent victim, but it is important to acknowledge that this can occur.

11. **CONCLUSIONS**

11.1. Duty of care is a term that many ATCOs are familiar with but I propose few fully appreciate. Although some regulators and ANSPs provide training for ATCOs, most don’t. At best, this may result in ATCOs not being fully aware of their responsibilities to operators, pilots and others. At worst, it could result in an ATCO not acting when they should or acting incorrectly in the mistaken belief they are acquitting their duty of care.

11.2. Through an examination of various court cases where the ATCO duty of care was considered, the paper attempts to extract a number of principles that ATCOs may consider in assessing whether or not they have performed at the requisite standard of care. At the same time, it’s readily acknowledged that this cannot and must not be considered as definitive advice. The most effective means to insure the ATCO can acquit their duty of care in a particular jurisdiction is to receive appropriate training from the regulator or ANSP.

11.3. The lack of a universal concept of duty of care does, however, present an opportunity. Through discussing and debating these concepts, IFATCA can develop a body of work to influence thinking in this area. The more developed and persuasive our arguments become, the more opportunity there is to influence to the benefit of our members. IFATCA has the opportunity to, at least to a small degree, set the agenda for the benefit of our members.

12. **DRAFT RECOMMENDATION**

12.1 It is recommended that this paper is accepted as information.
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