

**CHAPTER NINE  
GOVERNMENT LIABILITY**

Government Liability .....	1
California .....	1
Federal .....	2
Feres Doctrine .....	3
Cases: <u>Beech v. USA</u> .....	4
<u>Bethman v. City of Ukiah</u> .....	12

**California**

Under the California Tort Claims Act, state and local public entities may be held liable for injuries caused by the acts or omissions of their employees acting within the scope of their employment. State and local public entities are also liable for injuries caused by a dangerous condition on public property. Furthermore, an employee of a public entity may be held liable for acts or omissions that cause injury, providing the acts or omissions are within the scope of the employee's employment. A public employee may also be held liable for injuries resulting from a dangerous condition of public property. However, before a prospective plaintiff may file suit for money or damages under the Tort Claims Act, the plaintiff must submit a timely written claim to the appropriate public entity within the strict time limits (within six months of the event giving rise to the claim) set by the Act. This notification in turn allows the public entity an opportunity to determine the claim's timeliness and sufficiency, to provide notice to claimant of the untimeliness or insufficiency of a claim, and to require the claimant to justify any delay in filing a claim or to supply any information missing from the claim.

Since adoption of the California Tort Claims Act in 1963, liability of all state and local public entities for torts exists only to the extent declared by statute. The immunities of public entities and public employees are also statutorily prescribed in the "California Tort Claims Act". These rules do not affect the right to obtain relief other than money or damages from a public entity or public employee, or the liability of public entities in actions based on contract. Under the CTCA, a public entity is liable for any injury proximately caused by an act or omission of one of its employees committed within the scope of his or her employment if that act or omission would have given rise to a cause of action against that employee or his or her personal representative as if he was a private person.

A major exception to the immunities provided in the Tort Claims Act is the rule that public entities are not immune from constitutionally based claims or from claims arising under federal statutes.

Public employees and public entities are immune from liability for injuries resulting from:

- (1) Adoption or failure to adopt, or failure to enforce, any enactment or law;
- (2) Action or inaction regarding licensing;

- (3) Negligent inspection of, or failure to inspect, private property;
- (4) Misrepresentation, whether negligent or intentional.

A public employee is not liable for an injury resulting from his or her act or omission where the act or omission was the result of the exercise of the discretion vested in him or her. There is no liability even if the employee abused his or her discretion. In determining what constitutes a discretionary act, courts distinguish between basic policy decisions, which are considered discretionary, and the implementation of those decisions, considered ministerial. The distinction between discretionary and ministerial is sometimes phrased in terms of the difference between "planning" and "operational" levels. In order to qualify for the immunity afforded discretionary acts, the defendant must establish that the basic policy decision involved a conscious balancing of the risks and advantages. The defendant must establish that the injury resulted from his or her exercise of that discretion, and not from the employee's negligence in performing the function after having made the discretionary decision.

### **Federal**

Under the doctrine of sovereign immunity, the United States government is immune from suit unless express statutory consent is conferred. However, there are a number of federal statutory waivers of immunity. For example, the Federal Tort Claims Act ("FTCA") states that the United States is liable generally 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 or her office or employment."

There are several express statutory exceptions to the general rule of liability provided by the Federal Tort Claims Act, including those relating to claims compensable under other statutes, and immunities provided for claims based on certain kinds of acts. For example, the federal government is immune from liability for injuries arising from:

- (1) Discretionary acts or omissions;
- (2) Acts of employees exercising due care in executing statutes or regulations;
- (3) Negligent misrepresentation;
- (4) Most intentional torts;
- (5) Loss, miscarriage or negligent transmission of letters or postal matters;
- (6) Combatant activities of certain military forces;
- (7) Floods;
- (8) Certain actions by customs officers; and
- (9) Claims arising in foreign countries.

The United States is not liable for punitive damages or prejudgment interest. In addition, recovery of attorney fees from the United States is strictly limited.

"Employees of the government" are defined in the law as including officers or employees of "any federal agency," members of the military or naval forces, 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 or without compensation." (28 U.S.C., §2671.)

In Maryland v. United States (1965), a collision between a commercial airline plane and an Air National Guard plane, caused by the negligence of the Maryland National Guard pilot, gave rise to a great many actions. The theory of the plaintiffs was that the pilot was also employed by the Guard in a civilian capacity as Aircraft Maintenance Chief under the federal "caretaker" statute (authorizing funds to employ persons to take care of National Guard equipment). The Supreme Court held that in both his capacities, the pilot was an employee of the State, not the United States; hence, there was no liability under the Act.

A federal air traffic controller must: (1) Exercise ordinary care at work, and give pilots all information and warnings specified in manuals (McDaniel v United States (1982, ND Cal) 553 F Supp 910 involving a wrongful death suit under FTCA applying California law); (2) Warn of other air traffic; (3) Warn of wake turbulence; (4) Give weather information accurately. The federal government, which employs air traffic controllers, can be liable for their negligent acts. In one FTCA suit, FAA employees found negligent where pilot could not see radio tower (Rudelson v United States). The United States was found to be 20 percent at fault because of negligence of air traffic controllers; vicarious liability based on doctrine of respondeat superior. However, an airport with an operating control tower is not liable for the acts of air traffic controllers employed by the Federal Aviation Administration.

One of the most important government immunities is that attached to discretionary decisions. A public employee is not liable for an injury resulting from an act or omission which was the result of the exercise of vested discretion. Such protected decisions include the certification of aircraft for commercial use (United States v S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) (1984)) and the design of an approach to a runway (West v Federal Aviation Admin. (1987)). Not all decisions are protected. For example, in United Air Lines, Inc. v Wiener (1964) flight training conducted in vicinity of commercial airway was not immune, since it also results from a violation of Federal Air Regs.

A public entity acts for public purposes when it acquires, builds, or operates an airport. However, a public entity is not immune from liability for personal injuries caused by its operation of an airport. (Andrews v County of Orange (1982)). Nevertheless, a city that has leased land for airport purposes is not liable for the tenant's annoying activities, not rising to the level of nuisance, that affect neighboring land. Under the state Tort Claims Act, public property is not dangerous if safe when used with due care, and if a risk of harm is created only when foreseeable users fail to exercise due care.

### **Feres Doctrine**

The United States is immune from claims for injury to military personnel acting incident to their military service. This doctrine precludes federal liability for aviation deaths of military personnel incident to service.

In Feres v. United States (1950), three servicemen, in separate incidents while on active duty, were injured due to the negligence of other military personnel. The Government was held not to be liable where the injuries "arise out of or are in the course of activity incident to service."

The court emphasized the following considerations:

(1) The basic purpose of the Act is to provide a remedy for those who had been without one. Servicemen do not fit within this category since they are protected by a comprehensive system of relief, similar to workers' compensation statutes, which has provided adequate compensation for injuries.

(2) The provision in the Act making the Government liable "in the same manner and to the same extent as a private individual under like circumstances" is an acceptance of liability under circumstances creating private liability, not the creation of new causes of action. There is no statute allowing a serviceman to recover for the negligence of his superior officers or the Government. Nor is there liability "under like circumstances," for no private person may create a private army.

(3) Since the Act incorporates "the law of the place where the act or omission occurred", it would be irrational to base governmental liability to servicemen on "geographic considerations over which they have no control and to laws which fluctuate in existence and value." If Congress had anticipated that the Act would be applied in this situation, it would have provided some means of adjusting recovery thereunder with recovery under existing compensation and pension programs. It did not do so.

(4) The Brooks decision, holding the Government liable to a serviceman injured by a government vehicle while on leave, is distinguishable in that the relationship of a serviceman who is free to go where he desires is not analogous to that of one injured while performing duties under orders.

In United States v. Johnson (1987), the plaintiff, a Coast Guard helicopter pilot on a rescue mission, was killed when his helicopter struck a mountain. His widow's wrongful death suit was based on the theory of negligence of FAA flight controllers who had assumed radar control over the flight. Held, the Feres doctrine was a bar to recovery. Although all of the Supreme Court decisions applying the doctrine had involved allegations of negligence on the part of the military, nonmilitary status of the alleged tortfeasor is not relevant; Feres bars a suit on service-related injuries even though it results from negligence of federal civilian employees.

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**BEECH AIRCRAFT CORP. v. U.S.**  
**51 F.3d 834 (9th Cir. 1995)**

PER CURIAM.

Beech Aircraft Corporation ("Beech") and other Plaintiffs<sup>1</sup> (collectively "Plaintiffs") appeal the district court's judgment in favor of the Defendant in Plaintiffs' action under the Federal Tort Claims Act, 28 U.S.C. 2671, et seq. ("FTCA"), seeking indemnity from the United States for monies they

paid in settlement for alleged air traffic controller negligence, arising from injuries and damages sustained when a Beech Aircraft crashed into Sun Valley Mall in Concord, California. Plaintiffs also appeal the trial court's decision to exclude certain evidence and testimony.

## I.

On December 23, 1985, shortly after 8:30 p.m., a twin-engine Beechcraft Baron airplane ("Baron") crashed into the Sun Valley Mall in Concord, California. The Baron was piloted by James Graham. At the time of the accident, Graham had just completed a flight from San Luis Obispo to Concord and was attempting to land the Baron at Concord's Buchanan Field. Graham ran a local "fixed base operation" at Buchanan Field. The litigation that is the subject of this appeal arises out of the accident and the alleged negligence of the air traffic controllers in handling the attempted landing.

On approach to the Concord area, the Baron on first received air traffic control services from the Oakland Air Route Traffic Control Center and Travis Air Force Base Approach Control ("Travis"). Airplanes intending to land at Buchanan Field obtain clearance for approach to Buchanan Field from Travis, but obtain clearance for landing from the local controller in the Concord Tower at Buchanan Field. Concord Tower is not equipped with radar, and the controllers in the tower cannot track an airplane unless it is visible to the eye.<sup>2</sup>

Buchanan Field has two runways, labelled 19R and 1L, and there are different landings that a pilot may make on each runway depending upon weather conditions. Pilots may either obtain clearance to fly straight in to runway 19R or obtain clearance to circle to land on runway 1L.

On the straight-in landing, the pilot uses instruments to guide him until he can make visual contact with the runway, at which time he shifts to visual flying. If the pilot, in making his descent, does not see the runway when he has descended to an altitude of 340 feet above mean sea level (320 feet above ground), he must cease his descent and fly at that altitude until he can see the necessary visual cues to guide him to the runway and can descend further. When the pilot reaches a certain point over the threshold of the runway (the "Missed Approach Point" or "MAP"), if he has not seen the necessary cues, the pilot has missed the opportunity to execute a straight-in landing, and he must execute the published missed approach procedure. That procedure involves an immediate climbing left turn to 2,500 feet above mean sea level to set up to re-attempt the same approach or begin another approach.

The other type of landing performed at Buchanan field requires the pilot to circle the airport and land on runway 1L. In order to execute this landing, the pilot flies towards the threshold of runway 19R as if to make a straight-in landing and then, at or before the beginning of runway 19R, makes an aggressive left turn to the east. This landing requires one mile horizontal visibility and requires vertical visibility up to a minimum of 580 feet above mean sea level. Additionally, the pilot must be able to keep the runway in sight during the circling maneuver.

Plaintiffs contend that the controllers at Concord Tower had, for some time, condoned an illegal practice and permitted pilots to execute a third type of landing. According to Plaintiffs, pilots landing at Buchanan field who miss the approach for a straight-in landing on 19R often attempt to convert such a landing into an illegal circle-to-land landing instead of executing missed approach procedure. Plaintiffs allege that a pilot attempting this illegal procedure would contact Concord Tower and explain that he had missed the opportunity to land on 19R and request clearance to circle to runway 1L. Plaintiffs argue that the controllers had made it a standard practice to grant such clearance even if the visibility minimums were insufficient for a circle-to-land landing.

On the night of the accident, when the Baron neared Buchanan Field, Travis cleared the aircraft for approach to runway 19R. Graham then contacted Concord Tower, and the controllers cleared him for a straight-in landing on 19R. The weather conditions at that time were such that visibility was up to 400 feet above mean sea level. The dispute in the lawsuit centers over what type of landing Graham attempted and who caused him to make such an attempt. Principal issues in the proceeding below were whether the controllers, in fact, habitually allowed the aforementioned illegal landing to go on, whether Graham knew of it, and whether Graham was attempting to execute it on the night of the accident.

While it is undisputed that the Baron flew over the missed approach point for runway 19R, the parties disagree over what happened next. Normally, communications between the tower and the Baron would have been recorded and there might have been irrefutable evidence as to Graham's intentions. On the night of the accident, however, the tower's recording equipment malfunctioned, and the transmissions were not recorded clearly. All of the transmissions from the tower to the Baron were preserved, but the equipment did not pick up Graham's transmissions to the tower.<sup>3</sup> The controller responsible for communicating with the Baron, Michael Snyder, testified he heard Graham's responses to his transmissions loud and clear.

After Graham flew over the missed approach point for runway 19R, Snyder testified that he heard Graham declare a missed approach. Within 24 hours of the accident, both Snyder and ground controller Ron Attard filled out reports reflecting that Graham had declared a missed approach. Regardless of Graham's transmissions to the tower, it is undisputed that Snyder radioed Graham to "contact Travis departure." Such a transmission is consistent with a declaration of a missed approach.

The parties dispute what happened next, but the trial judge found that the Baron flew overhead within view of the tower and continued straight ahead to a point almost two miles south of the tower, then entered into a right descending spiral and crashed into the Sun Valley Mall. The trial judge also found that after passing the tower, the Baron accelerated and retracted its landing gear, actions which are inconsistent with the illegal circle-to-land approach.

The ground victims injured by this accident and mall store owners who sustained property damage filed suit in California state court against Graham, Beech, the maker of the airplane engines, the company which owned and maintained the Baron, the city of Concord and Taubman.<sup>4</sup> The case went to trial, but before it could be submitted to a jury, Beech, Taubman and the estate of the pilot settled. The maintenance company was found not liable. The United States was not a party to this litigation.

Subsequently, the PSC Plaintiffs brought suit against the United States for alleged air traffic controller negligence. Beech and other state court defendants brought consolidated actions seeking indemnity from the United States for the money they had paid in settlement.

In preparation for trial, Beech hired two experts to testify as to the contents of the faulty tape of the Baron-to-tower transmissions, one who worked to enhance the tape and one who allegedly deciphered the low-level voice transmissions made by Graham. Prior to trial, the trial judge decided to exclude the testimony of these experts and held that no witness would be allowed to testify as to the contents of the tape. In addition, during closing arguments, the PSC Plaintiffs attempted to admit some worksheets produced by the FBI in its investigation of the accident and examination of the tapes. The trial judge refused to admit the worksheets.

After hearing all of the evidence at the two week bench trial, the trial judge concluded that "Plaintiffs

failed to show either that the Tower's behavior was negligent or that said negligence, if any was a legal or proximate cause of the crash." (D.Ct.Op. of Aug. 6, 1993 at 1) Plaintiffs challenge the trial court's finding that the air traffic controllers were not negligent as well as the court's placement of the burden of proof on the plaintiffs and the court's application of the standard of proof. In addition, Beech appeals the exclusion of the expert testimony, and the PSC Plaintiffs appeal the exclusion of the FBI worksheets.<sup>5</sup>

## II.

### A. Air Traffic Controller Negligence

After the two week trial, the court determined that the plaintiffs failed to prove the controllers were negligent and that their negligence was the proximate cause of the accident. Plaintiffs contend that there was overwhelming evidence of air traffic controller negligence and that the district court's judgment for the Defendant in the face of this evidence was clearly erroneous.

The findings of the district court may not be set aside unless they are clearly erroneous such that the reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been made. Fed. R.Civ.P. 52(a); *Dollar Rent A Car of Washington, Inc. v. Travelers Indem, Co.*, 774 F.2d 1371 (9th Cir. 1985); *Smith v. James Irvine Foundation*, 402 F.2d 772, 774 (9th Cir. 1968), cert. denied, 394 U.S. 1000, 89 S.Ct. 1595 (1969). An appellate court must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting lay or expert oral testimony. *Gibbs v. Pierce County Law Enforcement Support*, 785 F.2d 1396, 1402 (9th Cir. 1986). The deference due the district court is also given to inferences drawn by the court. *United States v. Schuster*, 734 F.2d 424, 426 (9th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S.Ct. 959, 83 L.Ed.2d 965 (1985).

Plaintiffs allege that the air traffic controllers were negligent in two ways: they habitually allowed pilots to perform the illegal circle-to-land, thereby conditioning Graham to attempt it on the night of the accident, and their conduct on the night of the accident was negligent.

In airplane tort cases, general negligence law applies; however "the standard of due care is concurrent, resting upon both the airplane pilot and ground aviation personnel. Both are responsible for the safe conduct of the aircraft." *Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972). In a Federal Tort Claims Act suit, the "whole law" (including choice of law rules) of the jurisdiction where the alleged act or omission occurred governs the rights and liabilities of the parties. *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1961). In this case, because the crash and the alleged negligence of the controllers occurred in California, California law controls. Under California law, tort plaintiffs cannot recover if there is only a mere possibility that defendant's actions caused the wrong. *Simmons v. West Covina Medical Clinic*, 212 Cal. App.3d 696, 260 Cal.Rptr. 772, 775 (1989); *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal.App.3d 396, 209 Cal.Rptr. 456, 460 (1985).

There can be many, even an infinite number of possible circumstances which can produce an injury. But a "possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. . . ."

*Simmons*, 260 Cal.Rptr. at 775 (quoting *Jones*, 209 Cal.Rptr. at 456).

From the memorandum of the district court, it is clear that the trial judge found that Graham was not attempting the circle to land approach on the night of the accident. While the court thought it

plausible that Graham was attempting this illicit procedure as allegedly conditioned to do so by the controllers, the judge determined that Plaintiffs did "not provide[] sufficient evidence that this theory is more plausible than any number of alternate theories presented by the Defendant, all of which suggest no negligence on the part of air traffic controllers." (D.Ct.Op. of Aug. 6, 1993 at 5, 1993 WL 3162232).

In support of its conclusion that Graham was not attempting the illegal approach, the district court observed that pilots are trained to follow the missed approach procedure upon missing an approach. The evidence was undisputed that Snyder instructed Graham to "contact Travis departure." This transmission implicitly instructed Graham to fly the missed approach procedure and raised the inference that Graham declared a missed approach. Additionally, Snyder testified that Graham declared a missed approach and did not request new clearance to land. It was undisputed that pilots attempting the illegal landing always requested new clearance before attempting it. Moreover, there was testimony that the flight path, location, configuration, position and altitude of the Baron just after missing the approach to 19R were inconsistent with a circle-to-land approach and were not inconsistent with a Beech Baron aircraft generally executing the missed approach procedure.

Plaintiffs challenge the determination of the district court that Graham was not attempting to perform the circle-to-land landing on the night of the accident. However, such a determination must stand unless review of the record leaves this court with the definite and firm conviction that a mistake has been made. *United States v. United States Gypsum*, 333 U.S. 364, 393-95, 68 S.Ct. 525, 542, 92 L.Ed. 746, reh'g denied, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948).

While there may be some evidence that the Baron performed the circle-to-land, and there may be some doubt as to whether the Baron was attempting to execute the missed approach procedure, there was clearly evidence that the Baron's maneuvers on the night of the accident were inconsistent with the alleged illegal practice. The trial judge was obviously in a better position than we to evaluate this evidence, and we find no justification to disturb the finding of the trial court. Thus, in accord with the evidence before it, the trial court, despite Plaintiffs' contention, was not bound to determine whether an illegal landing was common practice at Buchanan Field; indeed, evidence of such a practice would be irrelevant to this litigation.<sup>6</sup>

We must now consider whether the controllers' actions were negligent in some other regard on the night of the accident. Plaintiffs argue that once the Baron missed the approach point for the straight-in landing, it was or should have been obvious to the controllers that Graham was not executing the missed approach procedure. When the Baron flew over the tower, urge Plaintiffs, the controllers should have contacted the Baron to demand clarification of the Baron's intentions, and yet, after the transmission, "Contact Travis departure," there was no communication from the tower to the Baron. Plaintiffs maintain that the failure of the controllers to contact the Baron and to demand that Graham execute the missed approach procedure was a breach of their duty and, thus, negligent. We do not agree.

Under California law, negligence is either the omission of a person (aircraft tower controller) to do something which an ordinarily prudent person (tower controller) would have done under given circumstances, or the doing of something which an ordinarily prudent person (tower controller) would not have done under such circumstances.

*Sanbutch Properties, Inc. v. United States*, 343 F.Supp. 611, 613 (N.D.Cal. 1972). "The Air Traffic Controller (ATC) must perform certain functions necessary to the maintenance of a high degree of aviation safety, yet the pilot is burdened with the ultimate responsibility for the prudent handling of

his aircraft." *Richardson v. United States*, 372 F.Supp. 921, 925 (N.D.Cal. 1974). Once an air traffic controller has given clearance to land, it is incumbent upon the pilot to assume responsibility for the proper and safe landing of the craft. *Sanbutch*, 343 F.Supp. at 616. While the duty in an airplane tort case is a concurrent one, resting on both the control tower personnel and the pilots, "under VFR conditions, ultimate responsibility for the safe operations of an aircraft rests with the pilot." *Hamilton v. United States*, 497 F.2d 370, 374 (9th Cir. 1974) (holding where the pilot is flying under VFR conditions, it is the pilot's obligation to see and avoid other traffic, even if he is flying with a traffic clearance). Moreover, "controllers are not required to foresee or anticipate the unlawful, negligent or grossly negligent acts of pilots." *In re Air Crash at Dallas/Ft. Worth Airport*, 720 F.Supp. 1258, 1290 (N.D.Tex. 1989), *aff'd*, 919 F.2d 1079 (5th Cir.), *cert. denied*, 502 U.S. 899, 112 S.Ct. 276, 116 L.Ed.2d 228 (1991). Under these principles of California tort law, we conclude that it was not clearly erroneous for the trial court to find that the controllers did not breach their duty.

The record contains undisputed evidence that the Baron missed the approach point for a straight-in landing on runway 19R and that at some point thereafter, Snyder told Graham to "contact Travis departure." This transmission could indicate that Snyder believed Graham missed the landing and expected him to execute the missed approach procedure. In addition, the controllers at Concord Tower do not have radar, and there was testimony at trial that without radar the controller could reasonably have thought that Graham was attempting to execute the missed approach procedure. In fact, Plaintiffs' own pilot expert testified that upon hearing the tower transmit "contact Travis departure," it would not be reasonable or prudent for Graham to do anything other than the published missed approach procedure. Moreover, the controllers knew Graham and knew that he was an experienced local pilot who was familiar with the area, the airport, and the published missed approach procedure. There is no duty to warn a pilot of a condition of which he would ordinarily know or of which he should be aware based on his training, experience and personal observations. *Neff v. United States*, 420 F.2d 115 (D.C.Cir.), *cert. denied*, 397 U.S. 1066, 90 S.Ct. 1500, 25 L.Ed.2d 687 (1969).

We do not suggest that an air traffic controller is not required to take any action to attempt to prevent a crash; however, once Snyder transmitted "contact Travis departure" there was less than one minute before the Baron crashed into the mall, and the Baron would only have been visible to the controllers, operating without radar, for a portion of this period. The evidence in the record supports a reasonable assumption on the part of the controllers that Baron would contact Travis departure and continue to fly in a safe manner. Accordingly, we hold that the district court properly found that the air traffic controllers were not negligent.<sup>7</sup>

## **B. Preponderance of the Evidence**

Plaintiffs have also raised the argument that the trial court misapplied the principle of preponderance of the evidence. Throughout its opinion, the district court used language consistent with the preponderance of the evidence standard. Thus, Plaintiffs cannot and do not argue that the court applied the incorrect legal formulation for the standard. Plaintiffs' argument on this issue is nothing more than a reiteration of their prior contention that the evidence did not support the trial court's conclusions. Having addressed this aspect *supra*, we find no reason to elaborate on our stated determination. Regardless of the form of Plaintiffs' argument, we are satisfied that the trial court's conclusions were reached from the evidence before it.

## **C. Burden of Proof**

The district court clearly, and in our view properly, placed the burden of proving both negligence and causation on the Plaintiffs. Plaintiffs challenge this placement and urge that the burden should have been placed on the United States. This argument was first raised by Plaintiffs in a post trial motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Defendant argues that because this issue was not raised prior to judgment, Plaintiffs are precluded from asserting this theory on appeal. Plaintiffs respond that because the trial court addressed and rejected the contention in the Rule 59(e) motion, this Court may now rule on the issue.

Usually errors not raised in the trial court will not be considered on appeal. *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976); *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); *Michael-Regan Co. v. Lindell*, 527 F.2d 653 (9th Cir. 1975). This Court has held that it "need not consider a claim of error not raised below if the error might have been avoided had the issue been timely raised." *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp.*, 711 F.2d 902, 905 (1983).

That Plaintiffs raised the issue in a post-judgment motion does not save this issue for appeal for the Plaintiffs. In *Seamon v. Vaughan*, 921 F.2d 1217, 1220 (11th Cir. 1991), the Eleventh Circuit declined to entertain an argument on appeal because the party failed to present it to the district court prior to final judgment, even though the party made the argument in their motion to alter or amend the judgment pursuant to Rule 59(e). See *Krock v. Electric Motor & Repair Company*, 327 F.2d 213 (1st Cir.) ("Since these were matters that could have been asserted prior to the motion for a new trial, an attempt to claim them in that motion was without effect so far as an appeal was concerned."), cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964).

The time for Plaintiffs to object to the allocation of burden of proof was at or prior to trial, when the judge could have remedied the situation if necessary. To raise it only after judgment deprives Defendant of the opportunity to meet a burden they thought was on the Plaintiffs, and leaves open the possibility of a lengthy and expensive retrial. Cf. *Monsma v. Central Mutual Ins. Co.*, 392 F.2d 49, 52 (9th Cir. 1968) (holding that rule that no party may assign as error the giving of an instruction unless he objects before the jury retires is designed to bring errors to light while there is still time to correct them without entailing costs, delay and expenditure of judicial resources occasioned by retrial).

Because Plaintiffs could have raised this issue at or before trial and because they have not presented any valid reason for not having done so, we decline to consider Plaintiffs' burden shifting argument.

## **D. Exclusion of Expert Testimony**

The appellate court reviews a district court's decision to admit or exclude expert testimony for an abuse of discretion. *United States v. Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993). "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." *Id.*

Due to a malfunction in the recording equipment at Concord Tower, the transmissions from the Baron to the tower were not properly recorded, and only communications from the tower to Graham were preserved. Plaintiffs retained two expert witnesses to decipher the tapes. They hired Frank McDermott, an electronic sound enhancement expert with an air traffic controller background, to create and analyze "enhanced" tapes of the faulty transmissions. They also hired Dr. Roger Shuy, an

expert in the field of linguistics, to analyze the tapes and decipher what Graham said to the tower using phonetic analysis.

The government challenged the admissibility of the enhanced tapes and any accompanying testimony. The trial court, after listening to the enhanced tapes, stated that it was skeptical of McDermott's methods and held that what the trier of fact can or cannot hear is not a proper subject for expert testimony. Consequently, the court excluded McDermott's enhanced tapes and held that no witness would be able to testify as to the content of any communications by Graham on the night of the accident.<sup>8</sup> Plaintiffs challenge this ruling on appeal.

Under Rule 702 of the Federal Rules of Evidence:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

However, even if testimony may assist the trier of fact, "the trial court has broad discretion to admit or exclude it." *United States v. Aguon*, 851 F.2d 1158, 1171 (9th Cir. 1988). This Circuit has outlined four criteria to determine the helpfulness of expert testimony: "1) qualified expert; 2) proper subject; 3) conformity to a generally accepted explanatory theory; and 4) probative value compared to prejudicial effect." *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973).<sup>9</sup>

We are of the opinion that the trial court properly excluded the testimony because it did not concern a proper subject for expert testimony. Plaintiffs offered Drs. Shuy and McDermott to testify as to what could be heard in a tape recorded conversation, yet hearing is within the ability and experience of the trier of fact. It is our opinion that the trial judge, who sat without a jury, was in the best position to determine whether anything on the tapes could be heard which might need clarification by experts. Accordingly, we conclude that the trial judge did not abuse her discretion in excluding testimony concerning the contents of the faulty tapes.<sup>10</sup>

#### E. Exclusion of FBI Worksheets

"The district court has broad discretion in admitting or excluding evidence. Its rulings are reviewed only for an abuse of discretion." *United States v. Dunn*, 946 F.2d 615 (9th Cir. 1991) (citing *United States v. Kearney*, 560 F.2d 1358, 1369 (9th Cir.), cert. denied, 434 U.S. 971, 98 S.Ct. 522, 54 L.Ed.2d 460 (1977)), cert. denied, 502 U.S. 950, 112 S.Ct. 401, 116 L.Ed.2d 350 (1991).

During closing arguments, Plaintiffs attempted to offer into evidence the handwritten worksheets of Federal Bureau of Investigation ("FBI") Agent Bruce Koenig. Plaintiffs had not listed these worksheets as an exhibit, nor had they identified Koenig as a trial witness. The trial court found the worksheets inadmissible for lack of foundation.

Plaintiffs offered the worksheets at the last minute, without the benefit of authenticating testimony and without giving the government the opportunity to elicit testimony to place the worksheets in context. There was no foundation laid at trial for the eleventh hour admission of the worksheets, and we hold that it was within the discretion of the trial court to exclude them. See *McGonigle v. Combs*, 968 F.2d 810 (9th Cir.) (holding not abuse of discretion for trial court to rule that plaintiffs could not introduce evidence on issue they had failed to identify in list they were required to file as part of pretrial proceeding), cert. dismissed, \_\_\_ U.S. \_\_\_, 113 S.Ct. 399, 121 L.Ed.2d 325 (1992).

### III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

#### Footnotes

[Footnote 1] The other parties who have appealed are the personal injury plaintiffs ("PSC Plaintiffs") and the Taubman Company ("Taubman").

[Footnote 2] Thus, Concord Tower is a "visual flight rules" ("VFR") tower.

[Footnote 3] Only some low level inaudible voice transmissions from Graham to the tower were recorded.

[Footnote 4] The Taubman Company is the developer of the Sun Valley Mall.

Footnote 5] While different plaintiffs appeal on different issues in some instances, in this opinion, plaintiffs all shall hereinafter be referred to collectively as "Plaintiffs."

[Footnote 6] Both in their briefs and in oral argument, Plaintiffs made much of the perceived failure of the trial court to address evidence of the illegal landing practice; however, having determined that Graham was not attempting the illegal landing on the night of the accident, the court was not required to consider evidence that the illegal landing took place on other occasions.

[Footnote 7] Even if the district court erred in determining that the controllers were not negligent, the judgment of the district court should stand because there is ample support in the record for the finding of the trial court that any alleged negligence was not the proximate cause of the crash. There is no evidence that a transmission from the controllers to the Baron asking for clarification of its intentions or demanding it to execute the missed approach procedure would have averted the crash.

[Footnote 8] While this ruling did not specifically reference Dr. Shuy, it effectively excluded his testimony.

[Footnote 9] Although Amaral was decided prior to the enactment of the Federal Rules of Evidence, this Court has continued to apply the four Amaral factors. See e.g., *United States v. Miller*, 874 F.2d 1255, 1266 (9th Cir.), reh'g denied, 884 F.2d 1149 (1989).

[Footnote 10] The Seventh Circuit has faced a similar situation and reached a similar result. *United States v. Devine*, 787 F.2d 1086 (7th Cir. 1986), cert. denied, 479 U.S. 848, 107 S.Ct. 170, 93 L.Ed.2d 107 (1986). In *Devine*, Dr. Shuy offered testimony concerning difficult to hear sections of a tape recorded conversation. *Id.* at 1087-88. Dr. Shuy planned to testify based on auditory and phonetic indicia, i.e. listening skills, and not based on his expertise in understanding the context and dynamics of conversations. The district court excluded Shuy's testimony, concluding that it would "not have given the jury significant help in understanding the evidence or determining a fact in issue, and understanding what is said in a tape recorded conversation is not outside the average person's understanding." *Id.* at 1088. The Seventh Circuit agreed with the reasoning of the district court and affirmed the exclusion of Dr. Shuy's testimony. *Id.*

## I. Introduction

This case arises from the crash of a small aircraft piloted by Fred Bethman on May 1, 1984, when he allegedly attempted an instrument landing<sup>1</sup> at the Ukiah Municipal Airport (Airport) in the County of Mendocino. Bethman and two passengers were killed when the aircraft crashed into mountainous terrain approximately four miles south of the Airport. His heirs, plaintiffs and appellants Teri Bethman, Kim Bethman, and Cindy Bethman (plaintiffs), filed the instant wrongful death action against the City of Ukiah (City) as the alleged owner of the Airport, and the County of Mendocino, based on an alleged dangerous condition of public property.<sup>2</sup>

This appeal concerns the preemption by the Federal Aviation Act of 1958, as amended (Act) (49 U.S.C. § 1301 et seq.),<sup>3</sup> of an action for damages based on state tort law against a city in its capacity as owner of an airport. We conclude that where a claim of a dangerous condition of property is based on airport navigation facilities which, as a matter of law, are regulated, approved, and controlled pursuant to the Act and its comprehensive corresponding federal regulations, such claim is preempted by the Act. We therefore affirm the judgment of dismissal.

## II. The Complaint and the Demurrer

At the time of the crash, defendants owned, maintained, and controlled the Airport. The Airport created a dangerous condition by its instrument approach landing system, in that distance measuring equipment is located on a mountain approximately five miles south of the Airport as well as at the Airport, requiring pilots using an instrument approach landing to switch from one frequency to the other; the need to change frequencies creates confusion for pilots; and because of the confusing instrument approach landing system, the Airport should have had but failed to have a control tower or personnel located at the Airport to communicate with aircraft attempting to make an instrument approach landing, or a middle marker or directional beam located on the runway to signify to incoming aircraft that the aircraft has passed over the airport or runway. Defendants created the dangerous condition by negligently designing, constructing, and maintaining public property known as the Ukiah Airport, but failed to take any action to correct it. The dangerous condition proximately caused the crash of the aircraft in wooded mountainous terrain south of the Airport during an attempt to land at the Airport.

Defendant City demurred (challenged the legal sufficiency of the complaint) on the grounds that the complaint failed to state any cause of action and was uncertain. As to the first ground, the City contended, among other things, that the Act granted the Department of Transportation, including the Federal Aviation Administration (FAA), exclusive authority to establish, improve, operate, and maintain air navigation facilities such as those at the Airport; that the City had no control over the air navigation facilities at the Airport, which precluded the City from operating or improving them; and that the causes of action alleged therefore were preempted by the Act.<sup>4</sup>

Attached to the moving papers in support of the demurrer was a copy of portions of the official National Transportation Safety Board (NTSB) report on the crash.<sup>5</sup> The report states that the Airport is not certificated by the FAA, but that a Ukiah flight service station staffed by FAA personnel operates navigation facilities at the Airport. The report indicates that the instrument landing system at the Airport consists of a "localizer" radio frequency, and that other navigation aids utilized are high frequency navigation facilities and distance measuring equipment. The report contains statements of the FAA air traffic control specialists working at the Ukiah flight service station at the time of the crash. The FAA personnel reported radio contact from Bethman's aircraft south of the very high frequency omnirange (VOR) station<sup>6</sup> and also received an "IFR inbound notification" of the aircraft from the Oakland Center shortly before losing contact with the aircraft. The report states that the type of instrument landing for which Bethman was cleared was a nonprecision or "localizer only" approach. It further states that when the aircraft's navigation receivers were removed and examined, it was determined that the number 1 navigation receiver was set on the Ukiah localizer frequency, while the number 2 navigation receiver was set on the Ukiah

VOR frequency. The distance measuring equipment was set to select the number 2 navigation receiver.

Evidently, Bethman failed to switch his distance measuring equipment from the number 2 navigation receiver (set on the VOR frequency) to the number 1 navigation receiver (set on the Ukiah localizer frequency) as he approached the Airport, resulting in the confusion as to his aircraft's location, as alleged in the complaint.

As to the Airport's navigation facilities, the report noted no deficiencies in such facilities: "Aids to Navigation [¶] ... A flight inspection of the Ukiah, California, LOC/DME Runway 15 approach and associated facilities was conducted on May 1, 1984, at approximately 1630 by the FAA. The facility operation was found to be satisfactory and no discrepancies were noted." The trial court sustained the demurrer without leave to amend on the ground that the entire field of aircraft navigation systems has been preempted by the federal government, and therefore the complaint failed to state a cause of action.

### III. Overview

Plaintiffs' claim that the City is liable for a dangerous condition created by inadequate airport navigation facilities is based upon an erroneous premise concerning the City's authority to design, install, regulate, or control the Airport's navigation facilities.

The operation of public airports involves the interplay of federal, state, and local municipal regulation and control.<sup>7</sup> Pursuant to the powers conferred by the Government Code, a municipality such as the City has the authority to acquire property for use as an airport and to erect and maintain hangars, flying fields, and places for takeoffs, landings, and storage of aircraft, in addition to air navigation facilities. Government Code section 50474 specifies a municipality's powers with respect to the operation and maintenance of a public airport, which include the exaction of fees and tolls for their payment, the regulation of the embarkation or debarkation of passengers or property to and from landing places, the lease of space, the regulation of airport facilities and means of transportation within the airport, and the cooperation with the federal government.

Courts have held that a municipality such as the City acts in a proprietary capacity in owning and operating an airport. (See: Greater Westchester Homeowners Assn. v. City of Los Angeles (1979); Air Transport Association of America v. Crotti) For example, in Greater Westchester, our Supreme Court stated that the city, as an airport proprietor, retained responsibility for land use planning designed to minimize the effects of noise, and held the city liable for injuries resulting from airport noise constituting a nuisance. (see also Gray v. America West Airlines, Inc. (1989) [complaint sought damages against airport owner based on premises liability for a dangerous condition of property arising from plaintiff's injury when she tripped over an unattended box on the concourse area of an airport].)

A city, however, in its capacity as airport proprietor, may not regulate those aspects of airport operation or aircraft navigation which are preempted by the Act. (City of Burbank v. Lockheed Air Terminal (1973))<sup>8</sup> We therefore examine the role of the federal government under the Act in the establishment and operation of airport navigation facilities.

### IV. The Act and Pertinent Federal Regulations

The Act constitutes a comprehensive scheme of federal control of civil aviation within the jurisdiction of the United States, conferring on the Secretary of Transportation (Secretary)<sup>9</sup> extensive authority to regulate the use of the nation's navigable airspace. Such authority, exercised principally by the FAA, extends to regulation of air navigation facilities; air traffic rules and regulations; and rates, routes, and services of air carriers.

#### A. Section 1348.

Section 1348 defines the powers and duties of the Secretary regarding airspace control and navigation facilities. Section 1348(a) directs the Secretary to formulate plans and policies governing the use of navigable airspace and to establish such terms, conditions, and limitations as are necessary

to insure the safety of aircraft and the efficient utilization of such airspace.

Sections 1348(b) and (c) vest the Secretary with the authority to control air navigation facilities and establish air traffic rules which are pertinent to the attempted instrument landing alleged in the instant case. Section 1348(b) provides in part: "The Secretary of Transportation is authorized, within the limits of available appropriations made by Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic. ..." Section 1348(c) further authorizes the Secretary to prescribe air traffic rules and regulations governing the flight of aircraft, including rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

#### B. 14 Code of Federal Regulations.

Section 1348 confers extensive power upon the Secretary to prescribe standards and regulations concerning numerous aspects of aviation navigation, including the installation of air control towers, radio navigation systems, and other navigation aids. Pursuant to this authority, the Secretary has promulgated comprehensive rules and guidelines, published in 14 Code of Federal Regulations, section 1.1 et seq. (1989) (FAA regulations), governing air navigation and IFR approach landings. Pertinent parts of FAA regulations which apply to the attempted IFR approach landing alleged here are found in 14 Code of Federal Regulations, sections 91.1 et seq., 97.1 et seq., and 171.1 et seq. Section 91.115 et seq. of 14 Code of Federal Regulations contains instrument flight rules, and section 91.116 sets forth requirements for takeoffs and landings under IFR. Section 97.1 et seq. governs standard instrument approach procedures for aircraft landings under IFR, incorporating sections of the Federal Register and criteria contained in the United States Standard for Terminal Instrument Approach Procedures.

Section 171.1 et seq. of 14 Code of Federal Regulations sets forth a maze of regulations governing the approval and operation of airport facilities applying instrument flight rules and air traffic control procedures related to those facilities, including VOR facilities, instrument landing system facilities, and distance measuring equipment. They establish the requirements which must be met before the FAA will approve such facilities, including installation requirements, maintenance and operation requirements, and the requirement of periodic filing of reports with the FAA.

The FAA regulations have the force and effect of law binding upon pilots, FAA personnel, and the operators of airports, and are subject to only limited review in the federal courts. Federal courts have applied the standards, duties, and requirements established by the regulations in determining questions of liability under the Federal Tort Claims Act in actions arising from airplane crashes. For example, in the Ross case (Ross v. United States, supra, 640 F.2d at p. 517.), an airplane crashed after colliding with electric power lines on a landing field while the pilot was attempting an IFR approach landing. The pilot's heirs brought an action against the United States, claiming negligence on the part of an FAA air traffic controller.

The parties agreed at trial that the height of the power lines was in accordance with FAA regulations on obstacle clearance. The plaintiffs nevertheless contended that the government failed to provide a sufficient buffer zone of obstacle clearance at the landing field, relying on FAA manual criteria recommending a greater clearance than the FAA regulations. The court rejected this contention, stating that the FAA regulations, unlike the advisory criteria, had the force of law in determining negligence, and found no negligence as a matter of law on the part of the government in the maintenance of the power lines. The court also held that the pilot's flying below certain altitude levels in making the IFR approach in contravention of FAA regulations, while necessarily aware of the necessity for maintaining prescribed approach altitudes, established his contributory

negligence. (The court ultimately found negligence on the part of the FAA air controller on another ground.)

Further, at least one federal court has found that it could not interfere with the FAA's exercise of its discretionary authority in formulating rules and procedures for safety of aircraft takeoffs and landings. (West v. F.A.A. (9th Cir. 1987)) In West, FAA employees designed and approved a special instrument approach and departure procedure for an airport lying in a deep valley surrounded by mountains. An aircraft following the FAA departure procedure struck the slope of a mountain while attempting to depart from the airport. In an action against the government for FAA negligence, the district court found that the probable cause of the accident was insufficient ground lighting, and concluded the FAA employees had negligently failed to conduct night flight tests to determine whether there was a problem with lighting.

On the second appeal, the Ninth Circuit held that the FAA exercised a discretionary function in designing and approving a departure procedure, and that its actions were therefore immune from liability under the discretionary function exception of the Federal Tort Claims Act.

#### V. Federal Preemption of Plaintiffs' Action

##### A. Federal preemption generally.

Sections 1305 and 1506 constitute the Act's sole explicit statements concerning preemption. Section 1305(a)(1) provides:

"Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation."

Section 1305(b)(1) provides:

"Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights."

Section 1506 declares that its provisions are not intended to abridge remedies that were existing at common law or by statute, but that they are in addition to such remedies.<sup>11</sup>

These statutory provisions codify in large part existing case law on preemption. (6) "Under the doctrine of preemption, federal law prevails over state law if Congress has expressed an intent to occupy a given field in which federal law is supreme. But even if there is no such intent, state law is preempted if it conflicts with federal law so that it is impossible to comply with both, or if the state regulations stand as an obstacle to the accomplishment of the full purposes that Congress sought to achieve." (Elsworth v. Beech Aircraft Corp. (1984))

In City of Burbank v. Lockheed Air Terminal, supra, 411 U.S. 624, Burbank enacted an ordinance placing a limited curfew on jet flights from the Hollywood-Burbank Airport for noise abatement purposes. The appellees sought an injunction against the enforcement of the ordinance. On appeal from the Ninth Circuit's upholding the injunction on federal preemption grounds, the Supreme Court affirmed, holding the ordinance was preempted by the Act. The court reviewed the district court's findings that such curfews would increase congestion and cause a loss of efficiency in the use of navigable airspace, and that the FAA has consistently opposed curfews unless managed by it. The court further noted that the 1972 amendment of the Act created a comprehensive scheme of federal control of the aircraft noise control problem. The court concluded: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." The court further noted that "the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act

requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). ... The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."

Since Burbank, judicial decisions addressing the issue of preemption have distinguished between state or municipal action which effectively regulates the use of navigable airspace, aircraft traffic, or air flight safety, on the one hand, and state or municipal regulation of the location and environmental impacts of airports, the safety of ground maintenance facilities, and the manufacture of aircraft, on the other hand. As to the former, courts have invalidated such action on the ground of federal preemption. (See, e.g., San Diego Unified Port Dist. v. Superior Court (1977); United States v. City of New Haven (2d Cir. 1974))

As to the latter, courts have found no exclusive control by the FAA under the Act and thus no preemption. (See Elsworth v. Beech Aircraft Corp.; Greater Westchester Homeowners Assn. v. City of Los Angeles.; United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.; Air Transport Association of America v. Crotti, [California noise abatement provisions "which in no wise intrude upon or affect flight operations and air space management in commerce ..." not preempted].)<sup>12</sup>

For example, in United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd., the issue was whether under a California Labor Code provision, a state agency had jurisdiction to issue a citation for an unsafe working condition at an airport ground maintenance facility, or whether the FAA had exclusive jurisdiction to do so. The court found the Act did not preempt the agency's jurisdiction, concluding that while the Act contemplated some FAA regulation of ground employee practices, and the FAA had the authority to issue regulations relating to the health and safety of ground maintenance personnel, the FAA was primarily concerned with safety in flight, and in fact the FAA expressly disclaimed broad authority to regulate all aspects of the occupational safety of airline maintenance personnel.

In Elsworth v. Beech Aircraft Corp., the court held that a products liability action against an aircraft manufacturer for defective design was not federally preempted even though the aircraft had been certified by the FAA as complying with safety regulations. The court stated that, given the real possibility of error in certification, allowing the jury to determine whether the manufacturer did in fact comply with the FAA safety regulations did not interfere with the accomplishment of any federal objectives. The court further indicated in dicta that because the issuance of a FAA-type certificate certified nothing more than compliance with FAA minimum safety requirements for aircraft, compliance was insufficient to absolve the defendant's duty as a manufacturer.

#### B. Preemption of plaintiffs' claims.

By the complaint, plaintiffs essentially claim that the City had a duty to determine whether the Airport's navigation facilities or lack thereof created a dangerous condition of property under California law and to take steps to remedy the condition, regardless of the Airport's compliance with applicable FAA regulations.<sup>13</sup>

We conclude, as did the trial court, that such claim is inconsistent with the Act. Sections 1348(b) and (c) vest with the Secretary extensive authority to regulate and control the Airport's navigation facilities, and the corresponding FAA regulations provide the specific and detailed rules and requirements which implement such authority. Because such authority pertains directly to the use of navigable airspace and air flight safety, it lies exclusively with the Secretary and the FAA. The determination of the need for additional navigation aids at the Airport, e.g., air control towers, runway markers, or directional beams, as alleged in the complaint, falls squarely within such exclusive authority. Accordingly, the City had neither any degree of control over nor any authority to implement changes in the navigation facilities, which fact directly undercuts the premise of plaintiffs' claim against the City.

Stated another way, plaintiffs essentially request this court to hold that navigation facilities which were adequate under FAA standards were inadequate and to impose upon municipalities the duty to establish additional standards and requirements. Such a holding would be inconsistent with the FAA's exclusive authority to make these determinations. As stated in City of Burbank v. Lockheed Air Terminal, the FAA has imposed a variety of regulations relating to takeoff and landing procedures which implement a "uniform and exclusive system" with a "delicate balance between safety and efficiency ...." A ruling of this court that additional procedures and facilities were necessary, and that the City had an obligation to implement them, would interfere with that uniform system, and thus stand as an obstacle to the accomplishment of the purpose of the Act.

The issues and circumstances here are unlike those before the court in United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd., or Elsworth v. Beech Aircraft Corp.. Unlike the case in United Air Lines, the navigation facilities which are the subject of the complaint here regulate and pertain to flight safety, which the United Air Lines court recognized as one of the primary purposes of the Act.

In Elsworth, the aircraft manufacturer, not the FAA, manufactured the aircraft and was in control of the safety of its design. The FAA solely issued a type certificate specifying whether the aircraft met certain safety regulations. Here, the FAA, not the City, had ultimate control over the installation and operation of the Airport's navigation facilities and the authority to determine the safety requirements for those facilities.

Thus, although the Act, by virtue of section 1506, does not preclude state tort law remedies for injuries arising from a field completely occupied by the FAA, the maintenance of the instant action would frustrate the objectives of federal law. Plaintiffs' claims against the City are therefore preempted by the Act.

## VI. Disposition

The judgment is affirmed.

White, P. J., and Merrill, J., concurred.

FOOTNOTE 1. An "instrument landing" refers to the following. The flight of general aviation aircraft may be conducted under either one of two different sets of flight rules — visual flight rules (VFR) or instrument flight rules (IFR). Under IFR, it is presumed that pilots are unable to see either other aircraft or the ground and are guided by air traffic controllers. Control of the aircraft is maintained by reference to various instruments on board, and navigation is accomplished through various electronic navigation aids, which receive and interpret data broad-cast from ground stations. (Redhead v. United States (3d Cir. 1982) 686 F.2d 178, 180, fn. 1.)

An "instrument" or "instrument approach" landing refers to an IFR landing. Most instrument approach landing systems consist of one or more radio frequencies or signals which are picked up by the receivers in aircraft which enable the pilot to calculate a safe approach to the runway.

FOOTNOTE 2. Plaintiffs' action, filed in the federal court, was dismissed as to the United States and certain other defendants.

FOOTNOTE 3. All further statutory references are to title 49 of the United States Code unless otherwise indicated.

FOOTNOTE 4. A complaint may be read as including matters judicially noticed, and thereby made subject to attack on demurrer on the basis of such matters. (Code Civ. Proc., § 430.30, subd. (a); 5 Witkin, Cal. Procedure, Pleading, supra, § 896, p. 337.) In the City's reply brief to plaintiffs' opposition to the demurrer, the City explained that it owns the land on which the Airport is constructed, but that the FAA operates the local flight service station at the Airport, and the FAA employs navigation maintenance engineers and others to operate and maintain the navigation facilities. Plaintiffs state in their opposition papers that the City granted the federal government

easements for the purpose of construction and operation of navigation facilities at the Airport. We take judicial notice of these facts, which neither party disputes. (Evid. Code, § 452, subd. (h).)

FOOTNOTE 5. We take judicial notice of the NTSB report pursuant to Evidence Code section 452, subdivision (h). Although section 1441(e) prohibits the admission into evidence of the NTSB's opinions or conclusions in such report as to possible causes of an accident or negligence, the admission of factual material or a statement of the factual circumstances surrounding or leading to the accident in such report is permissible. (See *Murphy v. Colorado Aviation, Inc.* (1978) 41 Colo.App. 237 [588 P.2d 877, 881-882].)

FOOTNOTE 6. 14 Code of Federal Regulations, section 1.1 (1989).

FOOTNOTE 7. The California State Aeronautics Act (SAA) (Pub. Util. Code, § 21001 et seq.) embodies state law governing aviation, enacted for the stated purpose of, inter alia, effecting uniformity of aeronautics laws and regulations consistent with federal laws and regulations, and providing for cooperation with federal authorities in the development of a state-wide system of airports and a national system of aviation. (Pub. Util. Code, § 21002.) The SAA explicitly recognizes, however, the preemptive effect of federal aviation law, with the exception of economic regulations: "This state recognizes the authority of the federal government to regulate the operation of aircraft and to control the use of the airways, and nothing in this act shall be construed to give the department the power to so regulate and control safety factors in the operation of aircraft or to control use of the airways. ..." (Pub. Util. Code, § 21240.)

FOOTNOTE 8. "Cities may exercise their police power to regulate local airport operation and some aspects of aircraft operations. Aviation rules and regulations designed to protect the public safety, health and welfare have been upheld as valid exercises of the municipal police power. However, local regulations must be reasonable and must not conflict with existing state or federal regulations. Furthermore, cities may not regulate those aspects of aircraft operation which have been preempted by the federal government nor may such regulations unduly burden interstate commerce." (*Airports and the Law*, supra, at pp. 5-6, fns. omitted.)

FOOTNOTE 9. All functions, powers, and duties of the former Federal Aviation Agency and the administrator thereof were transferred to the Secretary, pursuant to Public Law No. 89-670 (Oct. 15, 1966) 80 Statutes at Large 931, with the establishment of the FAA within the Department of Transportation. (§ 1655(c)(1).)

FOOTNOTE 10. In addition, 14 Code of Federal Regulations, section 139.1 et seq., contains extensive regulations governing FAA certification and operation of airports which serve air carriers having a seating capacity of 30 or more. Such regulations include requirements for the marking and lighting systems, runway and taxi identification, and maintenance of traffic and wind direction indicators.

The NTSB report indicated that the Airport has no FAA certification.

FOOTNOTE 11. The Act itself does not provide any private right of action. (*In re Mexico City Aircrash of October 31, 1979*, supra, 708 F.2d at p. 408.)

FOOTNOTE 12. One commentator notes the distinction made by the courts between the regulation of air navigation and flight safety, and regulation of environmental concerns: "Significant local authority over air safety ended with the passage of the 1958 Act. ... [¶] The courts have generally construed the Federal Aviation Act of 1958 as allowing only federal regulation of safety in air navigation. ... [¶] It is apparent that, in the field of safety control, Congress and the courts have excluded the states from any appreciable regulatory role, i.e., the area has been preempted. ... [¶] [However, due to the] increase in the adverse environmental factors, particularly noise, created around airports ... , [¶] ... [t]he exercise of [their] police powers is a strong interest of the states and federal legislation will not be deemed to have precluded their use unless there is a clear congressional intent to do so pursuant to a legitimate congressional concern." (Comment (1973) 39 J. of Air Law and Commerce 521, 533-534, italics added, fn. omitted.)

FOOTNOTE 13. Significantly, plaintiffs do not allege that the Airport's navigation facilities failed to satisfy or violated any pertinent FAA regulations or requirements. As stated ante, the NTSB report noted the Airport's navigation facilities were satisfactory. We therefore do not determine here the question whether plaintiffs in future cases could state a cause of action against the City for negligence under California law based upon the City's violation of FAA regulations and requirements, or any corresponding SAA regulations or requirements, in maintaining the Airport.