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Aviation Law: Assessing Duties of Pilots, Controllers After Collision Over the Hudson

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The deadly midair collision over the Hudson River earlier this month raises serious questions regarding the responsibilities of pilots and air traffic controllers and the rules for aircraft traversing the busy airspace around Manhattan.

The collision took place in the Hudson River Visual Flight Rules (VFR) corridor, a narrow airway over the river limited by a ceiling of 1,100 feet. Pilots flying small planes and sightseeing helicopters use the corridor to operate underneath the huge domes of restricted airspace set aside for aircraft using the region's three major airports. Pilots flying through the corridor need not check in with air traffic control and ordinarily do not receive traffic advisories or other assistance from government controllers. Rather, pilots are responsible to announce their position and altitude on a common radio frequency and use diligence to "see and avoid" other aircraft. Southbound planes head down the New Jersey side of the river, while northbound planes skirt the Manhattan shore.

The corridor route is popular because it offers amazing views and provides a helpful short-cut under restricted airspace, avoiding the need to obtain air traffic control clearance. Any licensed pilot can legally fly the corridor, and no special training or experience is required.

On a sunny Saturday morning with over 10 miles visibility, a helicopter operated by Liberty Helicopters planned a 12-minute sightseeing flight through the Hudson corridor. After take-off from the West 30th Street Heliport, the helicopter crossed the river and turned to head south along the New Jersey side of the Hudson. According to the government investigators, the helicopter made a radio report of its position alongside Stevens Point in Hoboken and climbed to an altitude of 1,100 feet.

About three minutes prior to the collision, a private plane took off from Teterboro Airport, about five miles west of the George Washington Bridge, headed for Ocean City, N.J. The plane's pilot apparently asked for "flight following" under which air traffic control provides traffic advisories on a "workload permitting" basis and can issue a clearance to pass through restricted airspace. The pilot requested an altitude of 3,500 feet for his flight, and the Teterboro tower controller instructed the pilot to fly at or lower than 1,100 feet for the time being and to turn to intercept the Hudson River. Fifty-four seconds before the collision, the Teterboro controller radioed the plane and told the pilot to contact the Newark tower controller on a separate frequency for further assistance.

Either during or immediately after that transmission, 47 seconds before the collision, the helicopter appeared for the first time on the air traffic control radar screen at both the Teterboro and Newark towers. The helicopter was then at 400 feet above the Hudson and climbing. While the Teterboro controller (who investigators found was multitasking on a completely unrelated phone call) took no action, the Newark tower controller noticed a potential conflict between the private plane and traffic in the Hudson corridor and called the Teterboro controller, asking him to instruct the private plane to turn away from the river to the southwest to avoid the conflict.

The Teterboro tower controller then tried to reach the plane but was unsuccessful (probably because the pilot had switched or was in the process of switching over to the Newark tower frequency as previously instructed). The plane never made contact with the Newark tower controller before the collision. Nor does it appear that the plane ever announced its position on the common radio frequency for the Hudson corridor.

Twenty seconds before the collision, the air traffic control radar system computer detected a conflict between the paths of the helicopter and the plane and set off an aural alarm and visual "conflict alert" for both the Teterboro and Newark tower controllers. The controllers made no attempt to issue a warning of the collision danger.

The collision occurred at 1,100 feet as the helicopter completed its climb. Given the visibility available from the two aircraft and their flight paths, the view of both pilots may have been limited before the collision. The helicopter pilot was gaining altitude and almost certainly did not see the plane approaching from behind and above, and the private plane, a low wing Piper, probably had restricted visibility of the climbing helicopter.

Despite the extremely high number of flights through the corridor route, the last midair collision in the vicinity occurred 26 years ago in 1983, when a float plane and police helicopter collided over Brooklyn on the air corridor which heads up the East River. Government investigators found the pilots of both aircraft at fault for that collision because of their failure to keep a visual lookout.¹ The East River corridor itself was closed to unauthorized fixed wing aircraft after the 2006 crash of Yankee pitcher Cory Lidle, who flew into an East Side apartment building while attempting to complete a 180° turn over the river.

Pilots' Duty

Pilots have a duty to see and avoid. "See and avoid" is a fundamental rule of flying. The rule provides that "vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft."² A pilot may not "operate an aircraft so close to another aircraft as to create a collision hazard."³ The pilot is the "final authority" over the operation of the aircraft,⁴ and during visual flight has a continuing duty to exercise vigilance to "see and avoid" and may never assume that air traffic control will timely issue collision warnings.⁵ The pilot "is obligated to observe and avoid other traffic, even if he is flying with a traffic clearance."⁶ The controller's job is "to assist the pilot in the performance of the duties imposed, not relieve him of those duties."⁷

Courts have held that pilots following their duty to see and avoid must move their heads and maneuver their aircraft to compensate for any blind spots inherent in their aircraft's design.⁸

In the Hudson River-VFR corridor, pilots are supposed to tune their radios to the common radio frequency, issue accurate position reports, listen to the position reports of other planes and be on the lookout. An important question regarding the collision over the Hudson is whether the pilot of the private plane had tuned in to the corridor frequency. If so, the pilot would have heard the helicopter's position report shortly before the collision and would have been required to identify his location and intentions as well.

The federal air regulations also establish a series of right-of-way rules, including that an "aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear."⁹

A pilot involved in a midair collision on a clear day is not negligent per se, and there are circumstances where courts have ruled that such a pilot is not negligent or that his or her negligence was not a cause of the collision.¹⁰

Modern technology has provided new tools to assist pilots to see and avoid. Many aircraft are now equipped with Traffic Collision Avoidance Systems which can warn pilots of approaching traffic. Apparently, neither aircraft involved in the Hudson collision was equipped with such a system.

Controllers' Duty

Air traffic controllers have a duty to separate aircraft under their control. Under typical conditions, air traffic control is not in radio contact with the pilots operating visual flights through the Hudson corridor and controllers would have no duty to issue safety advisories. On this occasion, however, the pilot of the private plane requested flight following, sought permission from air traffic control to fly at a higher altitude, and was instructed by the Teterboro controller to enter the Hudson corridor.

The first priority of an air traffic controller is to separate aircraft and prevent collisions. The controller is obligated to issue clear instructions that do not place aircraft in conflict with each other.¹¹

Controllers are instructed to "[i]ssue a safety alert to an aircraft if you are aware the aircraft is in a position/altitude which, in your judgment, places it in unsafe proximity to...other aircraft."¹² As one court has described it, "[w]hen a plane is in contact with ATC, the FAA tells the pilot that the controller's primary duty is to separate the plane from other aircraft."¹³ The duty of the controller can extend to other aircraft on a collision course with planes under their control.¹⁴

Negligence on the part of pilots in causing a midair collision does not relieve an air traffic controller of his or her responsibility to issue appropriate warnings.¹⁵ Aviation safety mandates that both pilots and controllers share concurrent duties to avoid midair collisions.¹⁶

One court rejected government arguments that pilots operating in visual conditions under the see and avoid rule must "as a matter of law" be held more negligent than an air traffic controller. Rather, the appointment of fault is an issue of fact, as "it would be impossible to set out a rule of law holding either pilot or controller more responsible for a given occurrence save in those situations where there is no duty imposed on one or the other."¹⁷

Viability of the Corridor

Following the collision, there were numerous calls for various changes in the rules for the Hudson corridor or the complete closing of the corridor to air traffic. The government is immune from liability for its design or development of the Hudson flight corridor, as such policy making falls within the "discretionary function" exception of the Federal Tort Claims Act.¹⁸

The continuing government investigation will undoubtedly lead to recommendations concerning whether the corridor flight rules need revision. One suggestion has been to limit helicopter flights to below 600 feet.

There is no question, however, about the key existing safety requirements for flight through the corridor that all pilots monitor and file position reports on the same radio frequency and follow the see and avoid rule. It is possible that the private plane pilot assumed that he was cleared to fly along the Hudson by air traffic control and never tuned into the corridor frequency.

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Endnotes:

1. http://ntsb.gov/ntsb/brief.asp?ev_id=20001214X43900&key=1.

2. 14 C.F.R. §91.113 (b).

3. 14 C.F.R. §91.111.

4. 14 C.F.R. §91.3.

5. Aeronautical Information Manual §5-5-8.

6. *United States v. Miller*, 303 F.2d 703, 710 (9th Cir. 1962).

7. *Id.* at 711.

8. *Budelson v. United States*, 602 F.2d 1326, 1330 (9th Cir. 1979); *Miller*, 303 F.2d at 709.

9. 14 C.F.R. §91.113 (f).

10. *Rodriguez v. United States*, 823 F.2d 735, 744-45 (3d Cir. 1987).
11. *Rodriguez*, 823 F.2d at 740-41.
12. FAA Order 7110.65R, §2-6 (Air Traffic Control Manual).
13. *Frutin v. Dryvit Systems*, 760 F.Supp. 234 (D. Mass. 1991).
14. *In re Greenwood Air Crash*, 924 F.Supp. 1518, 1537 (S.D. Ind. 1995).
15. *Rodriguez*, 823 F.2d at 746; *In re Greenwood Air Crash*, 924 F.Supp. 1518 (S.D. Ind. 1995).
16. *Miller*, 303 F.2d at 711 (the "optimum of safety is sought to be achieved by imposing concurrent duties on the pilots and tower personnel").
17. *Rodriguez*, 823 F.2d at 745-46.
18. 28 U.S.C. §2680(a); *Collins v. United States*, 564 F.3d 833 (7th Cir. 2009) (government could not be held liable for failure to install radar system to prevent collisions).