

## Vicarious Liability for Aircraft Owners Under Certain State Laws

Donald B. Hilliker

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Donald B. Hilliker, *Vicarious Liability for Aircraft Owners Under Certain State Laws*, 60 Marq. L. Rev. 1031 (1977).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol60/iss4/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# VICARIOUS LIABILITY FOR AIRCRAFT OWNERS UNDER STATE LAWS

DONALD B. HILLIKER\*

In recent years, the so-called general aviation industry has grown rapidly as more companies have recognized the efficiencies that can be realized with the use of corporate aircraft to ferry executives and others. At another level, the number of recreational and student pilots is quite large. In 1975 there were over 700,000 licensed pilots and close to 180,000 student pilots in the United States.<sup>1</sup> These people fly some 180,000 planes.<sup>2</sup> Naturally, there must be a concern about the allocation of losses in accidents involving these planes.<sup>3</sup> Few individual pilots carry adequate insurance to cover the possibly catastrophic losses should they become involved in a serious accident. In fact, few owners have coverage adequate to meet possible losses in the hundreds of millions of dollars should a small plane cause a heavily-loaded commercial jet to crash.

While there should be attention given to those persons who may be responsible to pay losses, the primary focus should be on the availability of a remedy for those harmed in an accident

---

\* B.S. 1966, Loyola University of Chicago; J.D. 1969, Northwestern University School of Law; member, Illinois Bar.

1. According to the latest available statistics, there are about 730,000 pilots in the country including about 178,000 student pilots. U.S. Dep't of Transportation, Federal Aviation Admin., FAA Statistical Handbook of Aviation, Calendar Year 1975, Table 7.1 at 87 (1976) [hereinafter cited as Handbook].

2. There are about 168,000 small aircraft registered in the United States. The small single-engine, under five-passenger plane is the predominate type with almost 150,000 of these registered with the FAA. According to an FAA survey, the vast bulk of these small aircraft are used for personal use. Besides the large number of small planes, there has been a striking increase in the number of hours these planes are in the air. The FAA estimates that 34 million hours were flown by small planes in 1975—up from 27 million in 1972. Most (over 70%) were flown by single-engine planes. Handbook, *supra* note 1, Table 8.1 at 102; Table 8.2 at 103; and Table 8.8 at 106.

3. Commercial aviation recorded three fatal crashes in 1975 with 124 deaths. In contrast, general aviation recorded 675 fatal crashes with 1345 deaths. Handbook, *supra* note 1, Table 10.2 at 123 with Table 10.10 at 125. During the five year period 1971 through 1975, just under 7,000 were killed in small planes. Handbook, *supra* note 1, Table 10.10 at 125. Interestingly, the greatest concentration of private pilots, small aircraft and airports is in the Midwest. Illinois has more aircraft and pilots than any state except California, Texas and Florida. Illinois has the most airports in the country, 831 of a total of 13,000, and most are small with runways under 3,000 feet, *supra* note 1, Table 3.2 at 18.

and for the descendants of persons killed in crashes. The owner of the aircraft would seem a most logical person to bear these losses and it is common for an owner to carry insurance for his craft, whether an airplane or automobile. One particularly valuable tool under certain state statutes for reaching the aircraft owner—the imposition on him of vicarious liability for the negligence of the pilot of his plane—has come under question in recent years. As will be discussed, this remedy should be available and the case law supporting it is virtually unanimous. To understand this issue a review of the leading federal and state cases and the legislative evolution against the background of the common law is necessary.

At common law, a bailor of an instrumentality was not liable for the negligence of the bailee in most circumstances.<sup>4</sup> Generally, it was believed that after an individual gives up control, it would not be appropriate to hold him responsible for the negligence of the bailee since he has no control over the bailee's actions.<sup>5</sup> A number of exceptions were carved out of this general rule in cases where courts found a degree of bailor control over the acts of the bailee and believed that financial responsibility for the acts of the bailee should rest with the bailor.<sup>6</sup> For the most part, though, courts have been reluctant

---

4. See, e.g., *Stanberry v. Gem City*, 90 Idaho 222, 409 P.2d 430, 432 (1965); *City of Rockford v. Nolan*, 316 Ill. 60, 146 N.E. 564, 567 (1925); *Moreno v. Beckwith*, 77 Ill. App. 2d 443, 222 N.E.2d 918, 921 (1967); *McQueen v. Ingalls Shipbuilding Corp.*, 229 Miss. 656, 91 So. 2d 740, 742 (1957); *Mimick v. Beatrice Foods Co.*, 167 Neb. 470, 93 N.W.2d 627, 631 (1958). See generally BATY, VICARIOUS LIABILITY (1916); 8 AM. JUR. 2d *Bailments* §§ 258-59 (1963).

5. Prosser observes that in England in the sixteenth century, "it was considered that the master should not be liable for his servant's torts unless he had commanded the particular act." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69 (4th ed., 1971), at 458 [hereinafter cited as PROSSER]. Prosser sets out a good general discussion of the whole subject of vicarious liability and the various fictions developed by the courts to impose liability under varying circumstances. Of particular interest for this discussion see Prosser's observations relating to the development of vicarious liability for car owners as an analogous situation is developing for small aircraft. He states:

The alarming increase in traffic accidents, together with the frequent financial irresponsibility of the individual driving the car, has led to a search for some basis for imposing liability upon the owner of the vehicle, even though he is free from negligence himself. Bluntly put, it is felt that, since automobiles are expensive, the owner is more likely to be able to pay any damages . . . and that the owner is the obvious person to carry the necessary insurance to cover the risk, and so to distribute any losses among motorists as a class.

PROSSER, § 73 at 481.

6. Vicarious liability first developed in the master-servant area where the master

to expand vicarious responsibility for the acts of a bailee in the absence of legislation which would indicate that the general rule should not apply.<sup>7</sup>

In 1938, the Civil Aeronautics Act was adopted,<sup>8</sup> and shortly thereafter several states enacted statutes modeled on the federal act.<sup>9</sup> This definition, or one substantially similar, is found in these acts:

“Operation of aircraft” or “operate aircraft” means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.<sup>10</sup>

When the federal act was adopted in 1938, there was little or no legislative history to help explain the meaning of the sec-

was held accountable for the acts of his servant and expanded into situations involving joint enterprises in which each member of the joint effort would also be considered to be doing the bidding of the other. Though various rationales were offered by the courts for imposing vicarious liability, ultimately the ability of the master to control his servant and the recognition of a need to have a source for recovery against the person best able to pay and receiving the economic benefit from the acts of the person who caused the injury were probably determinative. See PROSSER, *supra* note 5, § 69 at 458-59.

7. It appears that the inability generally of a bailor to control the acts of a bailee makes the courts unwilling to impose liability. Exceptions, such as the family purpose doctrine and ultrahazardous activities, involve an element (or at least a presumption) of control by the bailor over the bailee. Deviation from the general rule has been by way of legislation in some cases where no control can be found. See PROSSER, *supra* note 5 § 73.

8. Ch. 601, §§ 7 *et seq.*, 52 Stat. 973 (1938), *repealed* by Federal Aviation Act, Pub. L. No. 85-726, § 1401, 72 Stat. 806 (1958). The pertinent definition was incorporated into the 1958 Act in full, 49 U.S.C. § 1301(26) (1958), and presently appears in its renumbered form at 49 U.S.C. § 1301(26) (1970). For a discussion of the 1938 Act, see H.R. REP. NO. 2360, 85th Cong., 2nd Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3741.

9. ALA. CODE tit. 4 § 20(25) (1960); CONN. GEN. STAT. § 15-34(20) (1975); DEL. CODE tit. 2, § 501 (1975); ILL. REV. STAT. ch. 15½, §§ 22.11, 22.42a-22.42o (1963); IND. CODE ANN. § 8-21-3-1(h) (Burns 1973); IOWA CODE ANN. § 328.1(14) (West 1949); KY. REV. STAT. ANN. § 183.011(16) (Baldwin 1971); ME. REV. STAT. tit. 6, § 3(24) (1964); MASS. GEN. LAWS ANN. ch. 90, § 35(j), 49B-49R (West 1975); MICH. COMP. LAWS § 259.22 (1967); MINN. STAT. ANN. § 360.013(10) (West 1965); MISS. CODE ANN. § 61-1-3(j) (1973); MONT. REV. CODES ANN. § 1-1-0(10), *as amended*, § 1-102(11) (Supp. 1975); NEB. REV. STAT. § 3-101 (1974); N.H. REV. STAT. ANN. § 422:3 (1968); N.Y. GEN. BUS. LAW § 251(2) (McKinney 1968) (statute directly imposes vicarious liability); N.C. GEN. STAT. § 63-1(16) (1975); VT. STAT. ANN. tit. 5, § 2(20) (1972).

10. 49 U.S.C. § 1301(28) (1970).

tion. It is doubtful, too, whether any state legislatures left a record of their thinking when adopting similar legislation.<sup>11</sup>

However, in 1948, the federal act was amended to provide specifically that certain persons whose interest in an aircraft was essentially only that of a security interest should not be liable for damages to certain persons or property caused by the aircraft, unless the security interest holder actually controlled the plane at the time of the damage.<sup>12</sup> Most interesting, however, was the House Report which accompanied the amendment when proposed. That report quoted the definitional section of the federal act and observed in pertinent part:

Provisions of present Federal . . . law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft (on leases of over thirty days), liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.<sup>13</sup>

This report, it was argued by some, indicated that Congress had intended to impose liability on owners through the definitional language in section 1301(26) of the 1938 Act because the legislators in 1948 conceded that the existing federal law could be so construed and were enacting legislation to limit the possibility of such a construction. Reasoning from the definitional language and other provisions requiring persons to operate aircraft safely,<sup>14</sup> plaintiffs sought successfully in state and federal courts to impose vicarious liability on owners of aircraft for injuries resulting from the negligence of the pilot.<sup>15</sup>

In recent years, however, confusion has developed over the federal courts' increasing reticence to imply a cause of action under the federal act and the application of the reasoning of

---

11. There is no legislative history provided for any of the state statutes referred to in note 9 *supra*, with the exception of the unique New York provision.

12. Ch. 482, Pub. L. No. 80-656, 62 Stat. 470 (1948), *repealed and reenacted by* Federal Aviation Act, Pub. L. No. 85-726, §§ 504, 1401, 72 Stat. 774, 806 (1958), 49 U.S.C. § 1404 (1970).

13. H.R. REP. No. 2091, 80th Cong. 2nd Sess., *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1836.

14. *See, e.g.*, 49 U.S.C. § 1430(a)(5) (1970); 14 C.F.R. § 91.9 (1976); IND. CODE ANN. §§ 8-21-1-1, 8-21-1-2 and 8-21-4-8 (Burns 1973). *See also* notes 61 and 62 *infra*.

15. *See* cases in text accompanying notes 16-20, 37-55 *infra*.

those cases to state law.<sup>16</sup> It is submitted that the decisions under the federal act should not be read to affect the application of the state enactments. To place this issue in perspective, a review of the treatment of the various enactments by the federal and state courts is necessary.

#### CASES UNDER THE FEDERAL ACT

Cases under the federal act have reached varying conclusions about the impact of section 1301(26). In some cases, the courts have concluded that the federal act does impose vicarious liability on owners and lessors. In *Hoebee v. Howe*,<sup>17</sup> the New Hampshire Supreme Court concluded that the plaintiff, who alleged a claim under the federal act and a virtually identical state law, stated a cause of action. Though the court there did seem to be looking primarily to the state law, it did hold that "the Trial Court correctly charged that causal violation of the state or federal statutes . . . by the pilot of the plane would . . . render the [owner] . . . liable."<sup>18</sup>

In *Sosa v. Young Flying Service*,<sup>19</sup> a Texas federal district court found that an action against the owner could be implied from the federal act alone and sustained the action. Texas had no law similar to the federal act and the plaintiffs, invoking diversity jurisdiction, sued under the Texas wrongful death statute for the negligence of a student pilot in a crash which killed him and his three passengers. Balanced against these cases were decisions finding no implication of a remedy for various reasons.<sup>20</sup>

In the late 1960's, a series of federal decisions concluded

---

16. See, e.g., *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389 (5th Cir. 1970); *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681 (D. Colo. 1969); *Sosa v. Young Flying Serv.*, 277 F. Supp. 554 (S.D. Tex. 1967).

17. 98 N.H. 168, 97 A.2d 223 (1953).

18. *Id.* at \_\_\_\_\_, 97 A.2d at 226.

19. 277 F. Supp. 554, 557 (S.D. Tex. 1967). Note that the district judge certified his decision for interlocutory appeal under 28 U.S.C. § 1292 (1965), but no appeal apparently was taken.

20. *Yelinek v. Worley*, 284 F. Supp. 679 (E.D. Va. 1968) (dismissed action under federal act for personal injuries against owner for negligence of pilot); *Moungey v. Brandt*, 250 F. Supp. 445 (W.D. Wis. 1966). In *Moungey* the action for personal injuries against the owner for the pilot's negligence was dismissed because the court found no persuasive reasons to indicate that the federal program relating to air regulation would be assisted by a federal remedy. The court also observed that no inadequacies in available state remedies had been brought to its attention. *Id.* at 451. See also *Moody v. McDaniel*, 190 F. Supp. 24 (N.D. Miss. 1960).

that no private remedy could be imposed upon an owner under the federal act. In the first of these, *Rosdail v. Western Aviation, Inc.*,<sup>21</sup> injured passengers and representatives of deceased passengers sued the owner and the lessor of a plane which crashed allegedly because of pilot error. Plaintiffs' counsel sought a remedy under the federal act to avoid the necessity of arguing which state law would apply to the case. The importance of the question is evident from the court's remark that: "There is a pending question before this Court whether Iowa law, which imputes a bailee's negligence to his bailor with respect to aircraft injuries, or Colorado law which does not, is to be applied to the facts of this case."<sup>22</sup> The court rejected plaintiffs' claim for a number of reasons. First, the court could find no compelling national interest in establishing a federal remedy and no particular need for uniformity of remedy.<sup>23</sup> It concluded, too, that there were adequate state forums in which injured parties could seek relief.<sup>24</sup> In the absence of compelling reasons to imply a remedy, the court was unwilling to take a step that would require the development of a federal common law of torts.<sup>25</sup> Rejected, too, was plaintiffs' argument that House Report No. 2091<sup>26</sup> required the implication of a remedy under section 1301(26). The court stated that:

The report . . . neither condones nor repudiates a construing of § 1301(26) to impute liability to owners and lessors. It only recognizes that this section as well as other more specifically worded statutes may be so construed. We cannot accept the interpretation of the report which plaintiffs urge upon us. It is not clear that Congress by this exemption intended that owners and lessors should incur civil liability contrary to common law.<sup>27</sup>

Ultimately, the court seemed most concerned with the implications of creating a federal common law of torts to deal with the implied civil remedy.

In a variation of the approach in *Rosdail*, the plaintiffs in

---

21. 297 F. Supp. 681 (D. Colo. 1969).

22. *Id.* at 682.

23. *Id.* at 683.

24. *Id.*

25. *Id.*

26. H.R. REP. No. 2091, 80th Cong. 2nd Sess., reprinted in [1948] U.S. CODE CONG. & AD. NEWS 1836.

27. 297 F. Supp. at 685.

*Rogers v. Ray Gardner Flying Service, Inc.*,<sup>28</sup> argued that by enacting section 1301(26), Congress intended to pre-empt under its commerce clause powers, Oklahoma law that the bailor of a plane is not liable for the bailee's negligence.<sup>29</sup> Here the defendant was a sublessee under a long-term lease who rented the plane to the deceased pilot under an oral agreement. The plaintiffs argued that public policy supported what they saw as the clearly intended conclusion by Congress to pre-empt state law and place liability with those in a position to control the use of aircraft and more likely to be financially responsible.<sup>30</sup> To support this argument, the plaintiffs looked first to the definitional section and the section protecting security interest holders from liability. From these, along with the section that required operation of an aircraft in accordance with safety regulations and certain regulations which made negligent aircraft operation illegal, the plaintiffs found a congressional intent to pre-empt the Oklahoma statute.<sup>31</sup> In rejecting the plaintiffs' theory the court said Congress was "fully capable of making . . . [the] intent [to pre-empt state law] clear directly and not by indirection requiring the circuitous reasoning plaintiffs find themselves driven to employ."<sup>32</sup>

The final blow to any implied action under the federal act was struck by the Tenth Circuit Court of Appeals in *McCord v. Dixie Aviation Corp.*<sup>33</sup> In *McCord*, a pilot rented a plane from the defendant, the operator of a small airfield (known in the industry as a fixed base operator) to transport the plaintiffs. Because of the pilot's negligence, the plane crashed and the plaintiffs were injured. Applicable state law provided no remedy and the plaintiffs made the usual analysis of the federal act. Refusing to follow the *Hoebbe* rationale for a federal

---

28. 435 F.2d 1389 (5th Cir. 1970).

29. *Spartan Aircraft Co. v. Jamison*, 181 Okla. 645, 75 P.2d 1096 (1938).

30. 435 F.2d at 1392.

31. *Id.*

32. *Id.* at 1393. Pre-emption arguments under the Federal Aviation Act have been rejected in several cases. *See, e.g.*, *Loma Portal Civic Club v. Am. Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (state injunctive remedies to prevent certain flight operations not pre-empted by the federal act's enforcement provisions); *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 355 S.W.2d 436 (1962) (no remedy under the federal act for the air carrier's negligence in operation of the plane as this is concern of state law); *Mittelman v. Seifert*, 17 Cal. App. 3d 51, 69, 94 Cal. Rptr. 654, 666 (1971) (similar to *Hurd* case).

33. 450 F.2d 1129 (10th Cir. 1971).



cause of action, the court was not convinced by plaintiffs' argument that "it is the 'deep pocket' of the fixed base operator who has the most assets to reach and that, as a matter of public policy, it would be convenient, logical and consistently even-handed to impute negligence to the fixed base operator."<sup>34</sup> The court concluded that "[r]ecognition of the separation of powers rule leads us to the conclusion that . . . [plaintiffs'] contentions . . . should be directed to the law-making power of Congress and not to the adjudicative power of this court."<sup>35</sup>

While the federal courts' analyses may make good sense as a reflection of the proper role of the federal courts and as an interpretation of congressional intent in enacting section 1301(26), the public policy considerations suggested by plaintiffs in those cases are compelling.<sup>36</sup> Some persons read these decisions to mean that state laws with language like that of the federal act should not be used to impute owner liability for the bailee's negligence.<sup>37</sup> Moreover, a recent commentator has concluded that the federal act interpretations constitute a trend away from the imputation of liability under the state enactments.<sup>38</sup> To the contrary, however, a review of the state law interpretations and consideration of the traditional state role in providing remedies for injuries to persons and damage to property points to the conclusion that state laws generally have been and should be interpreted to give rise to an action against the aircraft owner for his bailee's negligence.

#### STATE LAW

In *Lamasters v. Snodgrass*,<sup>39</sup> the Iowa Supreme Court was faced with an appeal from the dismissal before trial of a complaint for damages for personal injuries against the owner of an aircraft for the negligence of the pilot. The pilot was a student in a flight school operated by the owner and apparently rented

---

34. 450 F.2d at 1131.

35. *Id. Accord*, *Sanz v. Renton Aviation, Inc.*, 511 F.2d 1027, 1029 (9th Cir. 1975); *Lockwood v. Astronautics Flying Club, Inc.*, 437 F.2d 437, 439 (5th Cir. 1971); *Nachsin v. De La Bretonne*, 17 Cal. App. 3d 637, 639-40, 95 Cal. Rptr. 227, 228 (1971).

36. See text accompanying notes 64 to 67 *infra*.

37. See *Ferrari v. Byerly Aviation*, 131 Ill. App. 2d 747, 750, 268 N.E.2d 558, 561 (1971); *Guillen v. Williams*, 27 Misc. 2d 575, 212 N.Y.S.2d 556 (1961).

38. Comment, *Lessor Liability in Aircraft Rental*, 42 J. AIR L. & COM. 447, 464 (1976).

39. 248 Iowa 1377, 85 N.W.2d 622 (1957).

or borrowed the plane from the owner.<sup>40</sup> Recognizing the common law rule that a bailor is not liable for his bailee's negligence, the court found that the Iowa General Assembly had altered the common law rule with the adoption of a statute having language virtually identical to that of section 1301 (26).<sup>41</sup> The court noted that the definitional language of the Iowa statute was enacted in 1945 and that, subsequently, the Iowa legislature enacted the following provision: "It shall be unlawful for any person to operate an aircraft in the air-space above this state . . . in a careless or reckless manner so as to endanger the life or property of another."<sup>42</sup> In 1949, it became a misdemeanor to "operate an aircraft in a careless or reckless manner."<sup>43</sup> In upholding the plaintiffs' claim, the court said that it must sustain the contention that "the owner is, for liability purposes, identified with and treated as an operator . . . [and that] [a]s the operator of an aircraft being operated in careless or reckless manner . . . he would be negligent per se and must be held liable to anyone damaged as a natural consequence of such conduct."<sup>44</sup> Commenting on its interpretation of Iowa law, the court said that:

It is indeed hard to see any other reasonable interpretation of these laws. The words are clear, and while it may well be as contended by defendant that originally the legislature did not intend this chapter as one to give rise to an action for tort, or to extend the owner's personal liability beyond the common law provisions, by the recent amendments any doubt as to the import of the language is removed. The owner is made the operator when he causes or authorizes the use of his aircraft, and the practical effect so far as liability is concerned is much the same as automobile liability placed on the owner in Section 321.493, Code of Iowa 1954, I.C.A.<sup>45</sup>

Other early interpretations of state laws like Iowa's came to the same conclusion. In a case discussed earlier,<sup>46</sup> *Hoebee v. Howe*,<sup>47</sup> the owner of an aircraft was charged with the negli-

---

40. *Id.* at \_\_\_\_\_, 85 N.W.2d at 623.

41. *Id.* at \_\_\_\_\_, 85 N.W.2d at 624-26.

42. *Id.* at \_\_\_\_\_, 85 N.W.2d at 625, citing IOWA CODE ANN. § 328.41 (West 1954).

43. 248 Ia. at \_\_\_\_\_, 85 N.W.2d at 625.

44. *Id.* at \_\_\_\_\_, 85 N.W.2d at 626.

45. *Id.* at \_\_\_\_\_, 85 N.W.2d at 626.

46. See text accompanying notes 16 and 17 *supra*.

47. 98 N.H. 168, 97 A.2d 223 (1953).

gence of a student pilot who was flying the aircraft when plaintiff, standing on the ground, was struck by a horse frightened by the plane. The court ruled that:

It seems to us from reading our act that the intent of our Legislature is clearly to place responsibility on the owner, even though he be without control, for the conduct of one to whom he entrusts his plane. The language is unequivocal and without qualification expressed or reasonably to be implied.<sup>48</sup>

Unlike the decision of the Iowa court, however, the New Hampshire decision put some weight on the ambiguous House Report No. 2091 and on the fact that vicarious liability of the airplane owner merely stated the usual rule applied to ultrahazardous activities.<sup>49</sup>

In *Hays v. Morgan*,<sup>50</sup> the plaintiff alleged that he was injured when struck by defendant's plane while negligently piloted by a third person. The Fifth Circuit Court of Appeals affirmed a decision for the plaintiff under a Mississippi law like its New Hampshire and Iowa counterparts. Noting that one of the purposes of the Mississippi aeronautics act was to promote flying "consistent with the safety and rights of other persons," the court reviewed the act's definition of operation of aircraft and concluded that "[i]t is the evident intent of the statute to protect the public from any negligence and financial irresponsibility of pilots. . . . Under the statute, the liability arises out of the facts as a matter of public policy."<sup>51</sup> The *Hays* court did not rely on federal law in reaching its decision. It was interpreting state law only, and made no mention of House Report No. 2091 or the federal act.<sup>52</sup>

More recently, the Supreme Court of South Dakota in *Heidemann v. Rohl*,<sup>53</sup> construed a Nebraska law like that of Iowa, Mississippi and New Hampshire to make the owner lia-

---

48. *Id.* at \_\_\_\_, 97 A.2d at 225.

49. *Id.* at \_\_\_\_, 97 A.2d at 226. At the time of the enactment of the New Hampshire and federal acts, air travel was considered an ultrahazardous activity and not subject to the usual rule that bailors are not liable for their bailee's negligence. See RESTATEMENT OF TORTS § 520, comment b (1938). That rule has long been changed.

50. 221 F.2d 481 (5th Cir. 1955).

51. *Id.* at 482-83.

52. In *Rogers v. Ray Gardner Flying Serv., Inc.*, 435 F.2d 1389, 1394 (1970), the Fifth Circuit Court of Appeals distinguished *Hays* from its opinion there on the grounds that *Hays* was only interpreting state law.

53. 194 N.W.2d 164 (S.D. 1972).

ble in a wrongful death suit. In this case the owner rented his plane to a pilot who, while carrying passengers from Colorado Springs, Colorado to Sioux Falls, South Dakota flew into bad weather and crashed. All aboard were killed.<sup>54</sup> After reviewing the Nebraska statute the court said:

The Nebraska statute is substantially the same as the federal law found in 49 U.S.C.A. § 1301(26). The federal act has been interpreted as a "definition" which does not create a new cause of action, and does not pre-empt state law with respect to liability for torts arising out of operation of airplanes. Iowa, Mississippi and New Hampshire have statutes similar to the Nebraska law which have uniformly been held to make the owner responsible for the negligent conduct of one to whom he entrusts his airplane. Although the Supreme Court of Nebraska has not been called upon to interpret or apply . . . their law, we may assume for the purpose of this action it would follow the decisions of Iowa, New Hampshire and Mississippi.<sup>55</sup>

In *Heidemann*, the defendant had argued that since the federal act had been construed not to place responsibility on the owner, the state laws must be similarly construed. The court properly noted, however, that questions of creation of a federal common law of torts and preemption of contrary state laws were not present in construing the legislative intent of the Nebraska legislature.<sup>56</sup> Moreover, the state enactments are expressions of the usual state concerns for health and safety while federal law is more concerned with the need for uniformity.

In a 1974 case dealing with a similar Indiana statute, *Allegheny Airlines, Inc. v. United States*,<sup>57</sup> the court relied on *Hays*, *Lemasters* and *Hoebbe* in finding that Indiana places responsibility on the owner for the careless and reckless operation of his airplane by another.<sup>58</sup> In *Allegheny*, a student pilot in a small plane collided with a jet passenger carrier on a landing approach to the Indianapolis airport and a disaster re-

---

54. *Id.* at 165.

55. *Id.* at 166 (citations omitted).

56. *Id.* The Supreme Court enunciated the standards for creation of a federal remedy under state law in *Cort v. Ash*, 422 U.S. 66 (1975).

57. 504 F.2d 104 (7th Cir. 1974) *cert. denied*, 421 U.S. 978 (1975).

58. The Seventh Circuit Court of Appeals also approved plaintiffs' theory under the joint enterprise doctrine. For a thorough discussion of this important aspect of the case, see Note, 41 J. AIR. L. & COM. 511 (1975).

sulted. The student pilot's negligence allegedly caused the crash.<sup>59</sup> In reversing the trial court's decision to strike allegations relating to vicarious liability, the Seventh Circuit Court of Appeals said that "if the Indiana courts had occasion to confront this issue, they would . . . [hold] the absentee owner financially responsible for the negligent acts of a student pilot to whom he had granted the use of his aircraft."<sup>60</sup>

Only an Illinois intermediate court of appeals and the Minnesota Supreme Court have disagreed with the holdings of the cases interpreting state laws to impose vicarious liability through the definition of "operation of aircraft" on owners.<sup>61</sup> The Illinois court's decision reflected the confusion which results from reading cases construing the federal act as applicable to an interpretation of the state law. The Illinois appellate court relied on two federal cases interpreting the federal act as not establishing vicarious liability to discredit the state law interpretations.<sup>62</sup> In both cases, the federal courts were faced with the imposition of a federal pre-emption of state law by imposition of responsibility for another's negligence. Because of considerations of federal-state comity and concern over the problems of creating a federal common law of torts, the federal

---

59. *Id.* at 112.

60. 504 F.2d at 114. An Indiana appellate court has earlier approved an action imputing liability to the aircraft owner for a pilot's negligence under Ohio law and the federal act. Though Ohio did not have a statute like that in Indiana or the other states mentioned in note 9 *supra*, that court relied, probably improperly, on the cases construing those statutes. *Ross v. Apple*, 143 Ind. App. 357, 240 N.E.2d 825 (1968).

61. *Ferrari v. Byerly*, 131 Ill. App. 2d 747, 268 N.E.2d 558 (1971); *Haskin v. Northeast Airways, Inc.*, 266 Minn. 210, 123 N.W.2d 81 (1963). Some commentators include *Guillen v. Williams*, 212 N.Y.S.2d 556, 27 Misc. 2d 575 (1961), as a decision reflecting an unwillingness to impose liability. See Comment, *Lessor Liability in Aircraft Rental*, 42 J. AIR L. & COM. 511, 514, 516 (1975). In *Guillen* a trial court held that the statute relied upon had not been in effect at the time of the crash. The judge observed:

At the time of this accident there was no derivative liability on the owner of an airplane unless the owner himself was negligent. . . . Section 251 of the General Business Law, effective September 1, 1959, imposes a statutory liability on the owner of an airplane for the negligence of one operating with the owner's consent. See, report of Law Revision Commission, McKinney's, 1959 Sess. Laws, p. 1588 et seq. This accident occurred on November 19, 1958. As there is no allegation of negligence by Mrs. Williams, [the owner] her mere ownership at the time of the accident did not subject her to liability for the negligence of her son, Roger [the pilot].

212 N.Y.S.2d at 557, 27 Misc. 2d at 577.

62. 131 Ill. App. 2d at 750, 268 N.E.2d at 560-61, *citing* *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970); *Rosdail v. Western Aviation, Inc.*, 297 F. Supp. 681 (D. Colo. 1969).

act was not read to impose vicarious liability. In fact, in one of the cases the Fifth Circuit Court of Appeals specifically distinguished the factual setting from its earlier decision in *Hays v. Morgan* where it interpreted state law only. Indeed, the fifth circuit court suggested that if it were interpreting a similar state provision its decision would be different. The court commented:

It is one thing to say that the words of a state statute impose vicarious liability on the owner and lessor of an airplane. When those same words embodied in a federal statute are relied upon to widen state tort liability it is necessary additionally to consider federal-state comity and the requirement that Congress clearly manifested an intention to exercise fully its power under the commerce clause.<sup>63</sup>

Moreover, the Illinois court found the state court decisions unpersuasive because they purported to rely in part on the ambiguous language in House Report No. 2091,<sup>64</sup> but the *Hays* court did not even mention the report, the *Lamaster* court gave little, if any, weight to it, and *Hoebee* looked to the report only as supportive of its interpretation, not as the basis for it.

Preoccupied with considering federal and state cases, the Illinois appellate court ignored provisions of the Illinois Aeronautics Act and the implementation of that act by the Illinois Department of Aeronautics.<sup>65</sup> Furthermore, other sections of the act and regulations required the owner to post a bond or otherwise evidence financial responsibility should his plane crash while being flown with his permission.<sup>66</sup> In sum, the Illinois decision represents a questionably reasoned opinion that is contrary to all other state law interpretations of similar statutes and should not be followed by the Illinois Supreme Court.<sup>67</sup>

---

63. 435 F.2d at 1394.

64. 131 Ill. App. 2d at 751, 268 N.E.2d at 560.

65. See ILL. REV. STAT. ch. 15½, § 22.42 (1971). The Department's regulations define operation of aircraft to include owners and lessors and make it unlawful for any "persons [to] . . . operate an aircraft in a careless or reckless manner so as to endanger the life or property of others . . ." Illinois Department of Aeronautics Regulations 1.11, 4.1.1 (1969). Moreover, the *Ferrari* court did not give weight to a declared purpose of the Illinois legislature to promote safety in flying. ILL. REV. STAT. ch. 15½, § 22.25 (1971).

66. See ILL. REV. STAT. ch. 15½, §§ 22.42a, 22.42b (1971); Illinois Department of Aeronautics Regulations 5.2, 5.3 (1969).

67. In *Haskin v. Northeast Airways, Inc.*, 266 Minn. 210, 123 N.W.2d 81 (1963),

Implicit in all of the state law interpretations is a recognition of the states' traditional role of exercising its police power to promote safety and to provide remedies for its citizens. In none of these situations were the courts faced with an argument that required a federal law to be read to usurp state power in an area of traditional state concern.

It is submitted that the interpretations imposing liability reflect a proper statutory interpretation and good public policy. A review of the cases shows a predominance of student pilots or those with little flying experience becoming involved in accidents. These individuals—probably the highest risk pilots in the air—rarely own the plane they are flying and often are not adequately insured. Placing financial responsibility on owners should provide a solvent source to look to for losses and encourage owners to carefully assess the conditions under which aircraft are put in the hands of inexperienced pilots.<sup>68</sup> Though the aircraft owner who holds his planes for rental is naturally inclined to rent as often as possible, the presence of potential liability and increased insurance rates if an accident occurs should encourage more care by the owner.<sup>69</sup>

---

the court was faced with a provision not found in most of the states with legislation modeled on the federal act, to the effect that the liability of the owner of an aircraft to passengers for damage caused was to be determined by the rules of law applicable to torts occurring on land. Minnesota had the common law rule that bailors generally were not responsible for their bailee's negligence. In light of this conflict between the statutory provisions, the Minnesota court felt constrained to decide against vicarious liability. The Minnesota law was an amalgam of the 1925 UNIFORM AERONAUTICS ACT, which included the provision applying the rules of land torts to aircraft mishaps, and the 1938 federal act. In sum, *Haskin* is not helpful when interpreting other state laws having only adopted an act similar to the federal act.

Interestingly, Indiana has a similar combination of the two acts but the Seventh Circuit did not find a conflict in *Allegheny Airlines v. United States*, 504 F.2d 104 (7th Cir. 1974) *cert. denied*, 421 U.S. 978 (1975).

68. Some plaintiffs have been successful in reaching owners under a negligent entrustment theory. Here the negligence is that of the owner, or more likely of his employee, in entrusting the aircraft to the pilot. In *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974) *cert. denied*, 421 U.S. 978 (1975), the court ruled that the plaintiff had stated a case under that theory because of the owner's giving the plane to the student pilot under conditions which he knew or should have known might be dangerous. In *Anderson Aviation Sales Co. v. Lucy Perez*, 19 Ariz. App. 422, 508 P.2d 87 (1973), the court found that a rental company had not properly checked a renter's plans and abilities to make a proposed flight and sustained a jury verdict for the plaintiff in a wrongful death action. *See also Haskin v. Northeast Airways, Inc.*, 266 Minn. 210, 123 N.W.2d 81, 83 (1963) (dictum); *Boyd v. White*, 128 Cal. App. 2d 691, 276 P.2d 92 (1954).

69. Only the better small aircraft rental operations have sophisticated and effective controls over who can rent their planes and under what conditions. Some require not

Finally, as a matter of policy, a uniform rule which would impose vicarious liability on the owner for all airplane accidents, wherever occurring in the United States, would make for fairer results for injured persons and easier and more predictable underwriting for insurers. Air travel is less local in nature than auto travel since a pilot may pass with his passengers through several states in a flight of a few hours.<sup>70</sup> He may meet disaster in a state he never intended to visit but to which he was forced to fly because of bad weather. The place of injury is therefore often entirely fortuitous. It would seem preferable to have one rule apply to a trip whether the accident occurs in Illinois, Iowa or Minnesota. Moreover, insurers would be better able to predict their liability and premium rates if a single rule is applicable.

Though a national rule appears preferable, in its absence the courts must take care not to inadvertently use federal law interpretations to control identical state laws and thereby frustrate legislative intent and deprive injured persons in almost a third of the states of what may be their only viable source of recovery.<sup>71</sup>

---

only test rides with a licensed instructor, but passage of a written test and compliance with flight rules more stringent than FAA requirements. Unfortunately, these operations are not the rule, but the exception, particularly in rural areas.

70. See Note, 48 TEX. L. REV. 488, 490-91 (1970).

71. See generally, Comment, *Lessor Liability in Aircraft Rental*, 42 J. AIR L. & COM. 447 (1976), for discussion of other legislative attempts to deal with compensation for injured persons and property in aircraft accidents.



