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Recommended Citation
Larry S. Kaplan, Predicting the Application of Vicarious Liability to Fixed Base Operators: Still Guesswork after All These Years, 47 J. Air L. & Com. 53 (1981)
https://scholar.smu.edu/jalc/vol47/iss1/3
PREDICTING THE APPLICATION OF VICARIOUS LIABILITY TO FIXED BASE OPERATORS: STILL GUESSWORK AFTER ALL THESE YEARS

LARRY S. KAPLAN*

THE FIXED BASE OPERATOR (FBO)\(^1\) is fast becoming a target for blame in virtually every general aviation accident case.\(^2\) Almost as a matter of course, today's victims of small aircraft accidents file suit against the FBO in their attempts to recover damages. This practice seems to be followed whether or not the FBO has had any actual responsibility for the victim's injuries, and is fostered in large measure by the pervasiveness of statutes and court holdings which make the owner and lessor of aircraft vicariously liable for the negligence of the pilot.

The term "vicarious" means to fill the place of another.\(^3\) When liability is imposed vicariously, legal responsibility is extended from the actual wrongdoer to an innocent person or entity designated by law to fill the wrongdoer's place.\(^4\) The dilemma that is presented to insurers and lawyers involved in the defense of actions brought against the FBO is that in many states, due to inconsistent court decisions and vague

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\(^1\) See text accompanying notes 4-10 infra.

\(^2\) The Civil Aeronautics Board defines "general aviation" as all civil aircraft except those used by general carriers.

\(^3\) WEBSTERS NEW WORLD DICTIONARY 1581 (2d ed. 1978).

\(^4\) W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 458-59 (4th ed. 1971) [hereinafter cited as PROSSER].
statutory language, it is difficult to predict whether or not the courts will impose vicarious liability on the fixed base operator for accidents which are caused by pilot negligence.

Because of the formidable financial exposure that accompanies an aviation disaster, there is a compelling need to be able to gauge the direction in which a court is likely to turn on the issue of vicarious liability. The purpose of this article is to examine the history and present status of the law as it relates to the vicarious liability of lessors and owners of light aircraft for the negligence of renter pilots. It is hoped that this type of review will not only provide some insight into the likely trend of future decisions, but that it will also assist those involved in the defense of fixed base operators in narrowing the range of unpredictability inherent in our present body of law.

I. THE FIXED BASE OPERATOR GENERALLY

One of the basic functions of the standard FBO is the leasing of aircraft to renter pilots at an hourly charge. The FBO either owns its own aircraft or possesses it on a leaseback agreement with the owner. In carrying out its daily operations, the FBO owes the same duty of reasonable care to the public that the common law of negligence imposes on everyone. For example, the courts impose a responsibility on the FBO to maintain its aircraft in an airworthy condition. The courts also require that the FBO refuse to rent to persons whom the FBO knows or should know to be reckless. In the

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* Leaseback agreements are common in the general aviation industry. They typically involve a contract between the owner of an airplane and an FBO whereby the FBO, in exchange for being given possession of the aircraft and the right to rent it out at an hourly charge, agrees to maintain the aircraft and to provide the owner with a percentage rebate of the rental income. By this means, the owner of a small aircraft who does not use his aircraft regularly can help defray the expenses of owning and maintaining an airplane.

* Prosser, supra note 4, at 149-66.

* D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954). In D'Aquilla, the court held that where the rental aircraft is airworthy and properly maintained; the renter pilot is duly qualified; and aviation is not considered to be an ultra-hazardous activity; the owner will not be held responsible for an accident occasioned by the pilot's negligence.

event that an accident occurs, either as a result of a defective condition in the aircraft of which the FBO should have been aware, or because the renter pilot was unqualified for the given conditions and the FBO should have known about this lack of qualification, the courts will impose liability on the FBO for all damages which result. The courts reason in such situations that had the FBO exercised reasonable care, the accident never would have occurred.

Vicarious liability goes beyond the "reasonable care" standard. When imposed, it extends blame to the FBO for conduct over which the FBO had no control. In a vicarious liability state, the FBO may take all necessary precautions before renting his aircraft, but if an accident occurs because of an unforeseeable pilot error, the FBO will nevertheless bear full liability for the accident. 1

An FBO conducting his business in a careful and reasonable manner in a jurisdiction which does not impose vicarious liability can avoid negligence liability for any accident which occurs through the operation of his aircraft. Where vicarious liability is imposed, however, there is nothing an FBO can do to avoid having to answer for the negligence of another. It is precisely because of this lack of control an FBO has over his own

There, it was held that where a student pilot was involved in a mid-air collision, if it was found that the owner should have known of the pilot's lack of familiarity with the rules of aerial navigation, then the owner would be liable for the pilot's negligence. Id. 1

Anderson Aviation Sales Co., Inc. v. Perez, 19 Ariz. App. 422, 508 P.2d 87 (1973). In Perez, the renter pilot was not in compliance with FAR 61.47(b) dealing with night flying experience. The court felt that the FBO was responsible for negligent entrustment for any one of the following reasons: (1) Allowing their receptionist to handle the rental arrangements; (2) Insufficient checking of the pilot's currency with the FARs; (3) No checkout for night flying; (4) Allowing the pilot to take off without filing a flight report; (5) Failure to notify the pilot of weather over the proposed destination airport and failure to notify the pilot that the destination airport had a problem with its lights. 508 P.2d at 92. See also George v. Tonjes, 414 F. Supp. 1199 (W.D. Wisc. 1976) where a Federal District Court in Wisconsin held that a complaint against the lessors of an aircraft for an injury resulting from an aircraft accident was sufficient where it alleged that the lessors leased a defective aircraft, said defect being the proximate cause of plaintiff's injuries. Id. at 1201-02. But see Rushing v. International Underwriters, Inc., 604 S.W.2d 239 (Tex. Civ. App.- Dallas 1980, writ ref'd n.r.e.) where the Texas Aviation Court of Civil Appeals held that an FBO had no duty to check out a rental pilot in a Cesena 182 before leasing him the plane.

See Appendix infra.
legal destiny that lawyers and insurers working on behalf of these operators must be in a position to know when and where vicarious liability will be imposed.\textsuperscript{11}

II. VICARIOUS LIABILITY: A HISTORY

The Uniform Aeronautics Act, promulgated in 1922 by the National Conference of Commissioners on Uniform State Laws,\textsuperscript{12} made owners, operators, and lessees of aircraft absolutely liable for injuries which resulted from the operation of their aircraft.\textsuperscript{13} At that early time in the history of aviation, aircraft use was considered to be an ultrahazardous activity

\textsuperscript{11} Financial Responsibility Laws pertaining to aircraft ownership have been adopted by a number of states. Even where adopted, however, Financial Responsibility Laws do not settle the question of vicarious liability of the aircraft owner for pilot negligence. The standard financial responsibility law requires the owner or lessee of an aircraft to provide insurance to each renter pilot for the renter pilot's own negligence. If the owner or lessor violates a state Financial Responsibility Law by not providing the renter pilot insurance, the penalty is typically the suspension of the owner's operating privileges. Financial Responsibility Laws do not impose liability on the FBO for the pilot's negligence in the event of a violation, nor do they require that the FBO's insurer indemnify the pilot where the FBO had failed to obtain insurance for the renter pilot. Therefore, even in states that have a Financial Responsibility Law for aircraft owners and lessors, the question of whether the owner can be held vicariously liable for the pilot's negligence will continue to be an issue where the owner has violated the Financial Responsibility Law or where the owner's own insurance coverage is greater than that procured for the renter pilot. Also, even where the owner or lessor has complied with the state Financial Responsibility Law and where substantial coverage has been procured for the renter pilot, victims of aviation disasters will continue to seek recovery from the owner or lessor, in addition to that which they can obtain from the pilot, if the nature of the state law on aircraft owner liability might be interpreted as imposing vicarious liability for pilot negligence. In this age of astronomical verdict awards, accident victims are sure to include all parties in their lawsuits from whom recovery can be achieved. While Financial Responsibility Laws, where complied with, provide a guaranteed fund for accident victims, they will not prevent accident victims from also going after the owner or lessor if such an action has any chance of success. They therefore do not alleviate the confusion created by liability laws which are less than clear on the issue of vicarious liability. \textit{See Comment, Lessor Liability in Aircraft Rental, 42 J. Air L. & Com. 447, 452 (1976).}

\textsuperscript{12} \textit{National Conference of Commissioners on Uniform State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-Second Annual Meeting} 105-06, 313-28 (1922).

\textsuperscript{13} \textit{Uniform Aeronautics Act} § 5 (act withdrawn 1943). Section 5 of the Act read as follows: "The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to person or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft . . . whether such owner was negligent or not, . . ."
which required the imposition of liability regardless of fault.\textsuperscript{14} By definition, an ultrahazardous activity was beyond the safety control of its participants.\textsuperscript{15} Therefore, one who chose to engage in such an activity must have been prepared to accept responsibility for any harm which resulted, regardless of that participant’s complete freedom from negligence.

Eventually, twenty-two states adopted the Uniform Aeronautics Act imposing vicarious liability on owners, operators and lessees of aircraft.\textsuperscript{16} By 1943, however, the Act was withdrawn as obsolete.\textsuperscript{17} Implicit in its withdrawal, was the consensus that flying an airplane was no longer an ultrahazardous activity.\textsuperscript{18} This opinion was echoed in the 1954 California case of \textit{Boyd v. White,}\textsuperscript{19} in which the court stated, “the operation of an airplane in the year 1954 is not such a dangerous activity that it can be placed in this [ultrahazardous activity] category.”\textsuperscript{20}

Ironically, at a time when certain jurists and legal scholars were taking aviation out of the ultrahazardous activity category because of the technical and safety advancements that had occurred between 1922 and the post-World War II era, other legal authorities were taking the opposite approach. The Restatement of Torts which was in effect at the time of the 1954 decision in \textit{Boyd} took the position that:

\begin{quote}
Section 520 of the Restatement of Torts defines an ultrahazardous activity as one which “(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of public usage.” See also section 519 in effect in 1954 which states “one who carries on an ultrahazardous activity is liable to another . . . although the utmost care is exercised to prevent harm.” \textit{Restatement of Torts §§ 519-20 (1938).}
\end{quote}

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\textsuperscript{16} Id.

\textsuperscript{17} National Conference of Commissioners on Uniform State Laws, \textit{Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Third Annual Meeting 66-67, 148, 305-07 (1943).}

\textsuperscript{18} Whitehead, Jr., \textit{Legal Liability of Owners and Operators of Aircraft in General Aviation for Damages to Third Parties}, 15 Syracuse L. Rev. 1, 17 (1963).


\textsuperscript{20} 276 P.2d at 100.
Aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash to the injury of persons, structures and chattels on the land over which the flight is made.\(^1\)

The Civil Aeronautics Act,\(^2\) adopted by Congress in 1938, deemed any person who “authorizes” the operation of an aircraft, to be engaged in “the operation of aircraft” for the purpose of applying the rules and penalties contained in the Act.\(^3\) As will be discussed, this provision has been interpreted by a number of courts as making the owners and lessors of aircraft responsible for pilot negligence.\(^4\) The language relating to owner responsibility was not modified when it was readopted as the Federal Aviation Act of 1958.\(^5\) The post-World War II era brought with it, therefore, more than one legal viewpoint as to the degree of hazard associated with normal aircraft use. This divergent viewpoint resulted in inconsistent application of liability standards to owners and lessors of aircraft. Traced, in large measure, to the Civil Aeronautics Act and the vague and ambiguous language contained therein, this inconsistency has persisted to present times.

III. THE CIVIL AERONAUTICS ACT AND ITS PROGENY


The Civil Aeronautics Act,\(^6\) under its definitional provisions, explained “operation of aircraft” as follows:

“Operation of aircraft” or “operate aircraft” means the use of aircraft for the purpose of air navigation and includes the navi-

\(^1\) Restatement of Torts § 520, Comment (b) (1938).
\(^3\) Id. § 401(26).
\(^4\) See notes 32-59 infra.
LIABILITY OF FIXED BASE OPERATORS

gation 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.\(^\text{27}\)

Congress apparently had two purposes for the passage of this section of the Act. The first purpose was to make it clear that regardless of whether a pilot is the owner, lessee, permissive or non-permissive user of his aircraft, he will be subject to the rules and penalties contained in the Act.\(^\text{28}\) The second purpose was also to subject those persons who authorize aircraft use, whether or not they are the ones who actually operate the aircraft, to the rules and penalties contained in the Act.\(^\text{29}\) This application presumably would include owners and lessors who lease their aircraft to renter pilots. What is not made clear by the terms of this section is whether Congress intended to make the person who “authorizes” the aircraft’s use equally responsible with the operator for operator error, or whether the intent was simply to make the owner subject to the rules and penalties for conduct over which he has some control.

The Civil Aeronautics Act became the model of many state aviation statutes,\(^\text{30}\) and in 1958, the Federal Aviation Act adopted the “operation of aircraft” provision, word for word.\(^\text{31}\)

\(^{27}\) Id. § 401(26).

\(^{28}\) The text uses the term “apparently” because a close review of the legislative history of the Civil Aeronautics Act reveals that the purpose behind the particular wording of the “operation of aircraft” provision was never discussed in published debates. Senator McCarran (Nevada), one of the Congress’ more outspoken members about the proposed Act, best summed up the mood and intent of Congress at the time of the Act’s passage. “In thinking of safety in aviation we must consider not only the aircraft but also the facilities, personnel, and appurtenances, both in the air and on the ground, that enter into or in any way affect the operation and maintenance of aircraft.” 83 Cong. Rec. 6631 (1938). In mirroring the Congressional mood, Senator McCarran expressed the intent of Congress to adopt a pervasive piece of legislation which would apply to all persons and facilities which could have an effect on aviation safety.

\(^{29}\) Id.

\(^{30}\) See appendix, infra.

Unfortunately, this wide-spread reliance on vague and ambiguous statutory language has resulted in years of chaos, confusion and inconsistency on the part of the nation's courts in interpreting the language of the provision. As a result, at present the ability to predict with certainty when and where vicarious liability will be applied to the owners and lessors of aircraft is not in keeping with that which a nation's body of law is designed to provide.

It is somewhat surprising that it took fifteen years after the passage of the Act of 1938, and the subsequent adoption by various states of identical aviation statutes, for the language contained in the "operation of aircraft" provision to meet its first judicial test. That test occurred in *Hoebee v. Howe*, where the New Hampshire Supreme Court looked to the language in the "operation of aircraft" provision of the Civil Aeronautics Act, and the identical provision in the New Hampshire state code, to impose liability on the owner of an aircraft when a negligent, low flying pilot caused a horse to bolt and injure the plaintiff's son. The court, in expressing its opinion that language in the respective statutes placed the same responsibility on the person who authorizes aircraft use as it does on the actual operator of the aircraft, stated:

> 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 the plane. The language is unequivocal and without qualification expressed or reasonably to be implied.

In the year following *Hoebee*, the Fifth Circuit Court of Appeals, in *Hays v. Morgan*, looked to a Mississippi statute which mirrored the "operation of aircraft" provision of the Civil Aeronautics Act to affirm the imposition of liability on the owner of a cropdusting plane for the negligence of the pi-

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83 98 N.H. 168, 97 A.2d 223 (1953).
85 97 A.2d at 224.
86 Id. at 225.
87 211 F.2d 481 (5th Cir. 1955).
88 MISS. CODE ANN. § 7536-26(9) (1942).
Two years after Hays, the Iowa Supreme Court, in Lamasters v. Snodgrass, relied upon an Iowa statute which again copied the "operation of aircraft" provision of the Civil Aeronautics Act to hold an aircraft owner liable for the negligence of the pilot. The courts had found a new toy to play with. It did not seem to matter that for fifteen years no one looked to the Act of 1938, or to the state statutes which it spawned, as a guide to the issue of aircraft owner liability. No one seemed to reason that if Congress intended to institute vicarious liability for aircraft owners on a nationwide scale in 1938, it might have indicated its displeasure at having that intention go ignored for so long long before 1953. Instead, future courts built on the holdings of Hoebee, Hays and Snodgrass, rather than coming to terms with the inherent vagueness in the federal and state "operation of aircraft" provisions, and the questions which should have been raised by Congress' fifteen year silence. In some cases, they even extended those decisions.

Certain courts began to apply the aviation code of foreign states when dictated by "choice of law" rules. Even in cases of first impression, the courts interpreted the "operation of aircraft" provisions of these foreign codes as imposing vicarious liability. In Ross v. Apple, which involved an air crash near Cincinnati, Ohio, an Indiana court applying Ohio law looked to Ohio's aviation statute which mirrored the federal Act. It concluded that the language clearly imposed vicarious liability on the owners of the aircraft for the negligence of its

38 221 F.2d at 482-83.
39 248 Iowa 1377, 85 N.W.2d 622 (1957).
40 IOWA CODE ANN. § 328.1(14) (West 1946).
41 85 N.W.2d at 3-28.
42 See notes 45-59 infra.
43 "Choice of Law" rules are the means by which each state determines whether its own local law or the local law of another state shall be applied by it to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements. These laws are referred to as choice of law rules because they do not themselves determine the rights and liabilities of the parties, but rather guide decisions as to which local law rule will be applied to determine these rights and duties.
pilots, thus reversing a trial court decision striking the plaintiff's allegation of vicarious liability against the aircraft owner.\footnote{\textit{Id.}}

In \textit{Allegheny Airlines v. United States},\footnote{504 F.2d 104 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975).} a case involving a mid-air collision between a small plane and an airliner, the Seventh Circuit Court of Appeals, in a 1974 decision, imposed vicarious liability on the owner of the small aircraft for the negligence of that aircraft's pilot.\footnote{\textit{Id.}} The court justified the imposition of vicarious liability by looking to the Indiana Statute's "operation of aircraft" provision\footnote{\textit{Id.}} which is a word for word copy of the provision of the Civil Aeronautics Act. The court acknowledged that the state courts in Indiana had not yet had occasion to rule on the interpretation of their "operation of aircraft" provision, but it relied on \textit{Hoebee, Hays and Snodgrass} to argue that, if given the occasion, the Indiana courts would interpret the provision as imposing vicarious liability on aircraft owners for the negligence of the pilot.\footnote{504 F.2d at 114.}

In \textit{Heidemann v. Rohl},\footnote{86 S.D. 250, 194 N.W.2d 164 (1972).} a case involving the crash in Nebraska of a light aircraft which was transporting the Augustana College debate team from South Dakota to a tournament in Colorado, the South Dakota Supreme Court, imposed vicarious liability on the owner of the aircraft.\footnote{194 N.W.2d at 167.} The Court applied the Nebraska aviation code which mirrored the federal Act, and which had not yet been interpreted by a Nebraska court. The \textit{Heidemann} court stated: "Although the Supreme Court of Nebraska has not yet been called upon to interpret or apply Section 3-101(11) of their law, we may assume for the purpose of this action that it would follow the decisions of Iowa, New Hampshire and Mississippi."\footnote{\textit{Id.}}

Perhaps the most over-reaching decision imposing vicarious
liability which looked to the Civil Aeronautics Act and its successor, the Federal Aviation Act, for its justification, was made by the United States District Court for the Southern District of Texas in Sosa v. Young Flying Service. There, the defendant/FBO had leased a plane to a student pilot, who then flew to Hebbronville, Texas, picked up three passengers, and crashed near Laredo, Texas. All aspects of the flight had occurred within the State of Texas. The Texas state legislature, in 1961, had repealed that section of its aviation statute which had arguably imposed vicarious liability on aircraft owners for the negligence of pilots. In spite of the fact that the Texas state legislature had indicated its displeasure with vicarious liability by virtue of the 1961 repeal, the court in Sosa found the definitional “operation of aircraft” provision in the Federal Aviation Act to be so compelling, it justified its imposition of vicarious liability on the aircraft owner solely on the basis of the federal Act.

If the analysis in the Sosa decision were to be followed by all courts, vicarious liability would exist on a national basis for all aircraft owners. Sosa looked beyond state law and concluded that the Federal Aviation Act warranted the imposition of vicarious liability. Since the Federal Aviation Act applies equally to all aircraft owners, regardless of state boundaries, the implications of that decision are clear. If Sosa were to be strictly followed by future courts, it would result in the federal pre-emption of all state laws which pertain to the liability of aircraft owners.

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65 Id. at 555.
69 For an interesting article on the doctrine of federal preemption in the area of aviation law, see Conklin, Doubt in the Courthouse: Is the Federal Law Supreme or Not? 44 Ins. Council J. 265 (1977) [hereinafter cited as Conklin]. Generally, Congress must intend to occupy a given subject matter and there must be a showing by clear evidence that the state law is repugnant to the federal law before the presumption of the validity of the state law can be overcome. Id.
B. State Liability Statutes Conflicting With Federal "Operation of Aircraft" Provision

Following the pattern of applying inconsistent liability standards to aircraft owners established in this country in the early part of this century, a number of courts, subsequent to the Hoebee, Hays and Snodgrass decisions, looked closer at the Federal Aviation Act and came to different conclusions regarding its intent. In Haskins v. Northeast Airways, Inc., an injured passenger asked the court to impose vicarious liability on the owner of an aircraft for the negligence of the pilot. The court determined that there was no agency relationship between the pilot and the owner; that there was no defect in the plane of which the owner should have had knowledge; and that the aircraft had not been used by a person whom the owner should have known to be reckless. If any liability was to be imposed on the owner, the court reasoned that it would have to be vicarious liability for the pilot's negligence.

The court acknowledged that Minnesota had adopted a state aviation code with an "operation of aircraft" provision similar to the Federal Aviation Act's provision. The court also acknowledged that New Hampshire, Mississippi and Iowa had interpreted their own similar state statutes as imposing vicarious liability on the owners of aircraft for pilot negligence. Minnesota, however, had a second statute which stated, in effect, that aircraft owners would be vicariously liable for injuries to people on the ground, and that liability for injuries to passengers would be determined by the rules of law applicable to torts occurring on the land.

Minnesota law, therefore, was in an apparent conflict. One statute stated that owner liability for passengers should be determined by the law applicable to torts occurring on the land,

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60 266 Minn. 210, 123 N.W.2d 81 (1963).
61 123 N.W.2d at 82.
62 Id.
63 Id.
64 Id.
65 MINN. STAT. ANN. § 360.012(10) (West 1966).
66 Id.
which in Minnesota required looking to the common law of
bailment which did not impose vicarious liability.\textsuperscript{68} The sec-
ond statute had been interpreted by three other states as im-
posing vicarious liability on owners. Additionally, the Federal
Aviation Act, applicable to all owners of aircraft, could have
been interpreted by the court, as it later was in \textit{Sosa},\textsuperscript{69} to ap-
ply regardless of the state law scheme. Nevertheless, the Min-
nesota court in \textit{Haskins} looked to the statute which advised
that the law applicable to torts occurring on land be followed
in instances of aircraft passenger injury and resolved the con-
lict in favor of the owner.\textsuperscript{70}

In \textit{Haskins}, the court found in favor of the owner in spite of
the existence of the Federal Aviation Act’s “operation of air-
craft” provision. The plaintiff, however, had not urged the
court to follow the Federal Aviation Act. He relied instead on
a state statute which was in conflict with another state stat-
ute. Thus, the \textit{Haskins} court was not compelled to interpret
the effect of the Federal Aviation Act if it was, in fact, in con-
lict with state law.

The first court to come to grips with the issue of federal
preemption was the court in \textit{Rogers v. Ray Gardner Flying
Service, Inc.}\textsuperscript{71} In \textit{Rogers}, a pilot rented an aircraft from the
defendant/FBO and, as a result of his own negligence, crashed
killing his wife and his wife’s sister, both passengers on
board.\textsuperscript{72} The parents of the wife and sister filed suit against
the FBO on the basis of the Federal Aviation Act’s “operation
of aircraft” provision, seeking to impose vicarious liability on
the fixed base operator for the pilot’s negligence.\textsuperscript{73} The Fed-
eral District Court in Oklahoma denied the defendant/FBO’s

\textsuperscript{68} Szyca v. Northern Light Lodge No. 121, 199 Minn. 99, 271 N.W. 102 (1937); Cornish v. Kreuer, 179 Minn. 60, 228 N.W. 445 (1929); Mogle v. A.W. Scott Co., 144
Minn. 173, 174 N.W. 832 (1919)(all held that in the absence of a statute, a bailor is
not liable for the negligence of his bailee in Minnesota).

\textsuperscript{69} Sosa v. Young Flying Service, 277 F. Supp. 554 (S.D. Tex. 1967). See text accom-
ppanying note 54 \textit{supra}.

\textsuperscript{70} Haskins v. Northeast Airways, Inc., 266 Minn. 210, 123 N.W.2d 81 (1963). See
text accompanying note 64 \textit{supra}.

\textsuperscript{71} 435 F.2d 1389 (5th Cir. 1970).

\textsuperscript{72} Id. at 1390.

\textsuperscript{73} Id. at 1391.
motion for summary judgment and the defendant appealed to the United States Court of Appeals for the Fifth Circuit.\textsuperscript{74} The Court of Appeals held that the federal statute did not preempt the provisions of state bailment law.\textsuperscript{75} It found further that in 1938, the Oklahoma Supreme Court had specifically held that the negligence of the bailee/lessee of an airplane may not be imputed to the bailor.\textsuperscript{76} Thus, in the case before it, the Court of Appeals held that the negligence of a non-agent operator/lessee may not be imputed to the operator/lessor of an airplane for hire.

In Nachsin v. De La Bretonne,\textsuperscript{77} involving an air crash that occurred prior to the adoption of the California Public Utility Code section which imposes limited vicarious liability on the owners of aircraft,\textsuperscript{78} the court looked to the California law in effect at the time of the accident, rather than the Federal Aviation Act, as urged by plaintiff, to determine the owner's liability.\textsuperscript{79} The applicable California law in effect in 1966 stated

\begin{quote}
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 1392-95.
\textsuperscript{76} Id. at 1391. See Spartan Aircraft Co. v. Jamison, 181 Okla. 645, 75 P.2d 1096 (1938), where the bailee/lessee used the plane to tow an electric advertising sign at night. Apparently due to the more powerful battery installed to light the sign, the navigation lights set the plane on fire. The decedent rushed from a hangar with a fire extinguisher and was killed when struck by the spinning propeller.
\textsuperscript{77} 17 Cal. App. 3d 637, 95 Cal. Rptr. 227 (1971).
\textsuperscript{78} CAL. PUB. UTIL. CODE § 21404.1 (West Supp. 1981).
\textsuperscript{79} Limitation on Liability

(a) The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by Section 21404 and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($15,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($5,000) for damage to property of others in any one accident.

(b) An owner, bailee of an owner, or personal representative of a decedent is not liable under this section for damages imposed for the sake of example and by way of punishing the operator of the aircraft. Nothing in this subdivision makes an owner, bailee of an owner, or personal representative immune from liability for damages imposed for the sake of example and by way of punishing him for his own wrongful conduct.
\end{quote}

\textsuperscript{70} 17 Cal. App. 3d at 639, 95 Cal. Rptr. at 228.
that aviation tort liability should be determined by the rules of law applicable to torts occurring on land or water. Looking to the California common law of torts, the court determined that negligence of the pilot alone, absent the independent negligence of the owner or an agency relationship between the owner and the pilot, was not imputable to the owner.

C. Interpreting the Federal "Operation of Aircraft" Provision as Definitional

Many courts, even when they were not faced with a conflicting state statute regarding aircraft owner liability, began to ignore the Federal Aviation Act as a source of civil liability in their decision making processes. In Rosdail v. Western Aviation, Inc., decided two years after Sosa, the Federal District Court sitting in Colorado held that the "operation of aircraft" provision of the Federal Aviation Act was not meant to provide a civil remedy to the victim of an aviation accident. In Rosdail, the plaintiff rented an aircraft from the defendant and hired a pilot to fly him and others to Illinois and Iowa from Colorado. The crash occurred in Iowa. During trial, the plaintiff argued that the "operation of aircraft" provision of the Federal Aviation Act required the imposition of vicarious liability on the defendant/FBO and the defendant/owner for the pilot’s negligence. There was a pending question before the court whether Iowa or Colorado law was to apply to the facts of the case. The court, however, restricted its decision to the plaintiff's allegation that the pilot's negligence could be imputed to the owner and lessor pursuant to the Federal Aviation Act.

81 17 Cal. App. 3d at 639, 95 Cal. Rptr. at 228.
82 See notes 83-104 infra and accompanying text.
84 Id. at 687.
85 Id. at 682.
86 Id. at 683.
87 Id. at 682.
88 Id. at 682-83.
Unfortunately for the plaintiff in *Rosdail*, the court did not view the Federal Aviation Act in quite the same manner as the *Sosa* court. Acknowledging, but then choosing not to follow *Sosa*, the court took the position that the Federal Aviation Act was never meant to provide a civil remedy to accident victims. The court interpreted the "operation of aircraft" provision of the Act as being a strictly definitional provision. The court explained that state law dominates the law of tort, and that in the absence of compelling reasons for uniformity, inadequate state remedies, or national interest, there is no justification for implying a civil remedy from the Federal regulations.

In *McCord v. Dixie Aviation Corp.*, in which the plaintiff alleged vicarious liability against the defendant/aircraft owner for the pilot's negligence based upon the Federal Aviation Act, the court rejected plaintiff's argument, stating that the Act did not apply and that Congress never intended to provide a civil remedy as a result of the enactment of its "operation of aircraft" provision. The court in *McCord* did not even speak to the issue of federal pre-emption of state law. Its holding stands for the proposition that the Federal Aviation Act should not be looked to as a civil remedy regardless of whether there is or is not a conflicting state law.

In *Sanz v. Renton Aviation, Inc.*, a federal court of appeals again refused to apply the Federal Aviation Act as a civil remedy where the plaintiff urged the imposition of vicarious liability on the aircraft owner for the negligence of the pilot. There, the court held that the purpose of the "operation of aircraft" provision was to subject owners equally with pilots to the rules, regulations and penalties of the Act. The court went on to state that if Congress had intended to im-

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89 Id. at 685.
90 Id. at 683.
91 Id.
92 450 F.2d 1129 (10th Cir. 1971).
93 Id. at 1131.
94 See Conklin, supra note 59 for discussion of federal preemption.
95 511 F.2d 1027 (9th Cir. 1975).
96 Id. at 1029.
pose vicarious liability on aircraft owners for pilot negligence, it could have stated that concept far clearer than the language contained in the "operation of aircraft" provision.\textsuperscript{97}

Perhaps the case whose reasoning has most minimized the importance of the Federal Aviation Act as a source of vicarious liability for aircraft owners is \textit{Lockwood v. Astronautics Flying Club, Inc.}\textsuperscript{98} In \textit{Lockwood}, the widow of a deceased passenger brought suit against the aircraft owner alleging vicarious liability for the pilot's negligence.\textsuperscript{98} Although the action was filed in Florida, the accident occurred over the "high seas." The court acknowledged that Florida state law imposed vicarious liability on aircraft owners,\textsuperscript{100} but reasoned that federal law should apply due to the accident site.\textsuperscript{101}

In cases prior to \textit{Lockwood},\textsuperscript{102} which rejected the Federal Aviation Act as a civil remedy for accident victims, one common theme running throughout those decisions was the concept that tort law should remain in the dominion of the state. In \textit{Lockwood}, however, the court was compelled to ignore state law because the accident site demanded the application of federal law.\textsuperscript{103} If ever invocation of the "operation of aircraft" provision in the Federal Aviation Act to impose vicarious liability was likely, it would have seemed so in a case such

\textsuperscript{97} Id.
\textsuperscript{98} 437 F.2d 437 (5th Cir. 1971).
\textsuperscript{99} Id.
\textsuperscript{100} Orefice v. Albert, 237 So. 2d 142 (Fla. 1970), where appellee was the co-owner of an airplane. The plane crashed as a result of the negligent piloting by the other co-owner, killing the pilot and his son. The court held that no damages were recoverable by the spouse of the negligent pilot for the wrongful death of her child caused by the negligence of her husband possessing proper custody of the child. The administratrix of the child's estate did have a cause of action against the co-owner because vicarious liability grows out of the ownership of the airplane.
\textsuperscript{101} 437 F.2d at 438.
\textsuperscript{102} In Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d 1389, 1394 (5th Cir. 1970), the court emphasized that "tort law has historically been left to the states." In Nachsin v. De La Bretonne, 17 Cal. App. 3d at 640, 95 Cal. Rptr. at 228 (1971), the court concluded that "tort law has historically been left to the states." In Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 683 (D. Colo. 1969), the court stated that "state law predominated the law of torts."
\textsuperscript{103} The aircraft accident which was the subject of \textit{Lockwood} occurred at sea. The lawsuit was brought in admiralty and the court held that federal maritime law was applicable. 437 F.2d at 438.
as Lockwood, where the court was compelled to apply federal law, and where the state law for that jurisdiction would have imposed vicarious liability if it were applicable. Nevertheless, the court in Lockwood rejected the Federal Aviation Act and refused to impose vicarious liability on the aircraft owner, stating:

We think Rogers made it clear that the Federal Aviation Act was intended only to subject owners equally with pilots to the rules, regulations, and penalties provided in the Federal Aviation Act. The Act was not envisaged as creating a basis for a cause of action against owners of aircraft for wrongful death.\(^\text{104}\)

The Lockwood decision probably raised more questions than it answered. If the Federal Aviation Act was not meant to provide a civil remedy to air crash victims, even when a case demanded the application of federal law, then what could be said about the effect on owner liability of the multitude of state aviation codes which had adopted the identical language of the federal Act? Were those codes also to be viewed as regulatory only, and not as a source of civil remedies?

D. Interpreting the State "Operation of Aircraft" Provisions as Definitional

States which have been forced to interpret their own state statutes in light of Lockwood have not been given clear direction. Allegheny Airlines\(^\text{106}\) and Heidemann\(^\text{106}\) are examples of decisions occurring subsequent to Lockwood, which interpret state aviation codes identical to the federal Act as imposing vicarious liability. Other courts have taken a different approach, looking to the legislative intent of the state code and the ambiguous language contained therein to ignore vicarious liability.\(^\text{107}\) In Broadway v. Webb,\(^\text{108}\) renter pilot negligence

\(^{104}\) Id. at 439.

\(^{105}\) 504 F.2d 104 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975).

\(^{106}\) 86 S.D. 250, 194 N.W.2d 164 (1972).


was responsible for causing a crash. Plaintiff alleged vicarious liability against the aircraft owner based on the North Carolina statute which mirrored the "operation of aircraft" provision of the Federal Aviation Act. The court looked to the clarity of the language in the North Carolina statute, which imposed vicarious liability for automobile owners, to conclude that the legislature would have utilized more decisive language in its aviation statute than that contained in its "operation of aircraft" provision if it had intended to impose vicarious liability on aircraft owners for the negligence of pilots. The decision was thus resolved in favor of the owner.

In Ferrari v. Byerly Aviation, Inc., plaintiff, the estate of a passenger killed in a plane crash, alleged vicarious liability against the owner of the plane for the pilot's negligence. The court looked to the Illinois aviation code which had an "operation of aircraft" provision identical to the Federal Aviation Act, and reasoned that the Illinois legislature did not intend to affect the civil liability of aircraft owners when passing the statute.

In Haker v. Southwestern Ry. Co., where the Montana "operation of aircraft" provision was practically identical to the Federal Aviation Act's, the court looked to the fact that there was no intent on the part of the Montana legislature to impute pilot negligence to owners and lessors in order to deny the imposition of vicarious liability. The court also pointed out that the language in the Montana statute was not nearly

110 Id. § 20-71.1 (1978).
111 462 F. Supp. at 433.
112 Id.
114 ILL. REV. STAT. ch. 15 ½, § 22.11 (1973).
115 268 N.E.2d at 561.
118 The Montana statute defined "operation of aircraft" to include "the navigation or piloting of aircraft." Id. (emphasis added). The Federal Aviation Act limited its definition to "the navigation of aircraft." See text accompanying note 57 supra.
119 578 P.2d at 726.
as clear as the language in other state statutes\textsuperscript{120} which decisively imposed vicarious liability on aircraft owners and that had the Montana legislature meant to impose vicarious liability, it could have done so with more clarity and not within the confines of a definitional provision.\textsuperscript{121}

IV. \textbf{STATE STATUTES WHICH DIVERGE FROM THE FEDERAL ACT LANGUAGE}

As has been seen in the review of decisions interpreting the Federal Aviation Act and the state laws which copy it, identical statutory language can mean different things to different courts. At least one case which was examined held that the federal Act imposed vicarious liability on aircraft owners regardless of state law.\textsuperscript{122} A second case which was reviewed held the federal Act to be a definitional provision, not meant to provide a civil remedy to accident victims.\textsuperscript{123} One line of cases held that the state codes mirrored after the federal Act imposed vicarious liability on aircraft owners.\textsuperscript{124} Another line

\textsuperscript{120} Id. at 728. The Haker court cited N.J. Stat. Ann. § 6:2-7 (West 1973) which states:

\begin{quote}
\textit{Liability for injuries to person or property: lien on aircraft; mortgagors, vendors and trustees not deemed owners. The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An airman who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or object falling from it. A chattel mortgagee, conditional vendor or trustee under an equipment trust, of any aircraft, not in possession of such aircraft, shall not be deemed an owner within the provisions of this section.}
\end{quote}

\textsuperscript{121} Id., 578 P.2d at 728.


\textsuperscript{123} Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437 (5th Cir. 1971).

\textsuperscript{124} Allegheny Airlines, Inc. v. United States, 504 F.2d 104 (7th Cir. 1974); Hays v.
of cases which were noted held that state codes identical to the federal Act are definitional and do not impose vicarious liability. This lack of consistency has predominated the way in which the "operation of aircraft" provisions of the federal Act and the various state statutes have been interpreted.

Perhaps as a response to the lack of predictability which would result from reliance on a state aviation statute identical to the Federal Aviation Act, certain states utilize their own statutory language to address the issue of aircraft owner liability. In some cases, these state codes do not go as far as the Federal Aviation Act when interpreted as imposing vicarious liability on the aircraft owners. In some cases, however, they go further.

A. State Statutes Restricting Vicarious Liability

The state codes which apply a modified form of vicarious liability limit the exposure to aircraft owners in various ways. The California Public Utility Code makes the aircraft owner liable for pilot negligence, but limits the liable exposure to $15,000.00 for one person; $30,000.00 for more than one person; and $5,000.00 for property loss. In Cummins v. Sky Cruiser, Inc., the passenger/decedent's wife filed a wrongful death action against the FBO that rented the aircraft, alleging vicarious liability for the pilot's negligence. The California court refused to extend even this limited form of vicarious liability to the defendant rental facility because the defendant did not own the subject aircraft. The court determined that

Morgan, 221 F.2d 481 (5th Cir. 1955); Ross v. Apple, 143 Ind. App. 357, 240 N.E.2d 825 (1968); Lamasters v. Snodgrass, 248 Iowa 1377, 85 N.W. 2d 622 (1957); Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1953).


See appendix infra.

See appendix infra.


Id. at 987, 130 Cal. Rptr. at 900.
the FBO sold the plane just prior to the crash and that it maintained it at the time of the accident on a leaseback agreement with the new owner. The court held that the California Public Utility Code only imposed its limited form of vicarious liability on the true legal owner of the aircraft.

In Nastasi v. Hochman, the court held that the New York aircraft owner vicarious liability statute did not apply to an accident occurring outside the State of New York. In that case, the FBO was located in New York, the pilot and passenger rented the aircraft in New York, but the crash took place in Connecticut. In Heidemann, although the South Dakota Supreme Court applied the aviation code of Nebraska, it acknowledged the vicarious liability law of South Dakota which limited aircraft owner vicarious liability to injuries occurring to persons or property on the ground. The states which have modified the application of vicarious liability to aircraft owners have thus done so by limiting the dollar exposure per victim, by applying liability only to the true legal owner of the aircraft, and by limiting liability exposure to injuries occurring to persons or property on the ground.

B. State Statutes Expanding Vicarious Liability

A number of states have taken the opposite approach in their non-Federal Aviation Act codes, and have extended the vicarious liability of aircraft owners beyond any interpretation of the federal Act. In Florida, the courts have developed a doctrine which declares that the owners of dangerous instru-

138 Id. at 985, 130 Cal. Rptr. at 898.
139 Compare this interpretation of the California Public Utility Code to the interpretation of the Federal Aviation Act and its state code progeny, which extends unlimited vicarious liability to anyone who "authorizes" the operation or use of an aircraft, regardless of their ownership interests.
140 N.Y. GEN. BUS. LAW § 251(1) (McKinney 1968).
141 396 N.Y.S.2d at 218.
142 Id.
143 S.D. COMP. LAWS ANN. §§ 50-13-6, 50-13-7 (1967).
144 See California, appendix, infra.
145 See California, appendix, infra.
146 See appendix, infra.
147 See appendix, infra.
mentalities will bear vicarious liability for the negligence of any person operating said instrumentality. In *Orefice v. Albert*, the Florida Supreme Court determined that an airplane was a dangerous instrumentality for the purpose of applying vicarious liability. As a result, under Florida law, vicarious liability is imposed on the aircraft owner regardless of whether the owner “authorizes” the use of the aircraft, as long as some implied consent for its use can be found. The only way an aircraft owner can defeat the imposition of vicarious liability for pilot error in Florida is to prove that the pilot stole the airplane.

In *Storie v. Southfield Leasing, Inc.*, the Court of Appeals of Michigan had occasion to interpret the Michigan state statute which imposes vicarious liability on aircraft owners. The statute provides as follows:

> The owner or operator or the person or organization responsible for the maintenance or use of an aircraft shall be liable for any injury occasioned by the negligent operation of the aircraft, whether the negligence consists of a violation of the provisions of the statutes of the state, or in the failure to observe ordinary care in the operation as the rules of the common law require.

*Storie* involved an airplane crash which occurred due to pilot error, killing the pilot and passenger. Plaintiff's decedent alleged vicarious liability against the owner of the aircraft which had leased it to the pilot's company almost five years prior to the accident. Defendant exercised no control over the aircraft owner.

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143 237 So. 2d 142 (Fla. 1970).
144 *Id.* at 143-44.
145 *Id.* at 144-45.
146 Jensen v. Sel-Nar, Inc., No. 77-20740 (17th J. Dist., Broward County, Fla., May, 1979). This author was involved in a jury trial on behalf of the fixed base operator before a Florida state court in which the only defense to the action was that the accident victim had taken the aircraft without the implied consent of the fixed base operator. It was therefore necessary to prove that the victim had stolen the aircraft. The jury returned a verdict in favor of the fixed base operator.
149 *Id.*
a aircraft at the time of the accident. The court acknowledged Section 1404 of the Federal Aviation Act which exempts from liability lessors of aircraft subject to a lease of 30 days or more. The court determined, however, that the Michigan state code, which extends vicarious liability beyond the Federal Aviation Act to "the owners or operators or the person or organization responsible for the maintenance . . . of an aircraft" [emphasis added] regardless of the control or authority that they maintain over aircraft use and operation, should prevail. The court emphasized that the purpose of the Michigan statute was to encourage increased supervision over maintenance of aircraft.

The reasoning in the Storie decision and the Michigan aviation statute which it relies upon make little sense. Imposing vicarious liability for pilot error on a lessor who has given up possession of the aircraft five years prior to the crash will not encourage increased supervision over maintenance, nor will improved maintenance be fostered by imposing vicarious liability on a repair facility which exercises no control over the persons operating the aircraft. Pilot error can be responsible for an aircraft accident even when the plane is in excellent condition, and placing blame on absentee lessors and maintenance facilities in the interests of better maintenance is misplaced in those instances. Common tort law imposes a duty of reasonableness which requires that airplanes be maintained in an airworthy condition. Reasonableness is the standard which will encourage supervision over maintenance, not vicarious liability for pilot error. Imposing vicarious liability for pilot error in the interests of improved maintenance is a clear example of the over-reaching which some state legislatures and courts have done in their confusion over the proper liabil-

105 282 N.W.2d at 418.
108 282 N.W.2d at 421.
109 Id. at 419.
110 See also, Federal Air Regulations, 14 C.F.R. § 43 (1980), which sets out requirements for aircraft maintenance.
ity standard that should be applied to the owners and lessors of aircraft.

Although the Storie decision uses unsound reasoning to extend vicarious liability in Michigan far beyond even the most liberal interpretation of the Federal Aviation Act and its state code progeny, one state court, in its interpretation of its own state aviation code, has gone even further. In Ewers v. Thunderbird Aviation, Inc., the Minnesota Supreme Court had occasion to interpret the Minnesota vicarious liability statute which had been enacted in 1976 in a delayed response to the Haskins v. Northeast Airways, Inc., decision rendered 13 years earlier. Haskins resolved two conflicting state liability statutes in favor of the aircraft owner on the issue of vicarious liability. The 1976 Minnesota statute provides as follows:

When an aircraft is operated within the airspace above the state or upon the ground surface or waters of this state by a person other than the owner, with the consent of the owner, expressed or implied, the operator shall in case of accident be deemed the agent of the owner of the aircraft in its operation.

In Ewers, an aircraft which had been purchased from the defendant and then leased back to it was rented by the defendant to a pilot and passenger in Minnesota. The plane took off in Minnesota, but crashed on approach to a Denver, Colorado airport. The passenger's widow filed suit against the FBO alleging vicarious liability for the pilot's negligence. Colorado law did not impose vicarious liability on the aircraft owner, but plaintiff urged the application of the Minnesota statute, even though the accident took place in Colorado. The Minnesota Supreme Court accepted plaintiff's reasoning and imposed vicarious liability on the defendant. The court interpreted Minnesota's statute as applying to aircraft acci-

187 289 N.W.2d 94 (Minn. 1979).
189 Id.
190 289 N.W. 2d at 96.
191 Id. at 97.
dents, regardless of where they occur, as long as the aircraft is operated within the State of Minnesota during any part of the flight.\textsuperscript{163}

The dissenting opinion in \textit{Ewers} correctly points out the dangerous implications of the majority opinion.\textsuperscript{163} It explains that as a result of the court's decision, \textit{any} flight which crosses Minnesota airspace, however briefly, will be subject to the Minnesota statute, even where the flight originates and crashes in a state other than Minnesota.\textsuperscript{164} Thus, victims of the crash in Montana of a flight bound from Chicago to Seattle, which passed over the State of Minnesota, could rely on the reasoning in \textit{Ewers} to impose the Minnesota vicarious liability law on the aircraft owner.

\textbf{V. \ SOME RECOMMENDATIONS}

It should be clear that the Federal Aviation Act and its state code progeny are not the only codes pertaining to aircraft owner and lessor liability which create confusion.\textsuperscript{165} Many of the state statutes which depart from the language of the federal Act have also resulted in inconsistent and unpredictable court rulings. The only conclusion that can be safely reached on the subject of FBO liability is that, until the passage of a uniform federal act to the contrary, all FBO's, their insurers and lawyers should be aware of the possible application of vicarious liability and thus respond to the question of accident risk as if vicarious liability for pilot negligence were the applicable standard of care. As long as decisions such as \textit{Ewers} exist, it is possible that vicarious liability will be imposed regardless of the FBO's place of doing business or the accident site.

Responding to the needs of risk minimization should require the FBO to make a greater than "reasonable" effort in determining the qualifications of all rental pilots. Once the

\textsuperscript{163} \textit{Id.} at 98.
\textsuperscript{164} \textit{Id.} at 100-01 (Otis, J., dissenting).
\textsuperscript{165} See discussion at notes 128-64 \textit{supra}, regarding the state aviation codes of California, New York, Florida, Michigan and Minnesota.
FBO is made to understand that he is likely to share equally in the liability incurred by a negligent pilot, perhaps his rental standards will increase. Additionally, the FBO should respond to every accident involving any of his aircraft as if he will be the one held to blame. This requires a gathering of all pertinent information immediately after notice of an accident is received, so that an eventual defense which might prove necessary if vicarious liability is imposed is not prejudiced by delay. The FBO should also contact his insurance company regarding all accidents involving his aircraft, as well as any other person or organization he feels may be of assistance in conducting a proper and thorough investigation on his behalf.

For the insurance company, the exposure created by a vicarious liability holding against the FBO is the same as that which exists when the company provides coverage for the renter pilot. In view of the unpredictable status of vicarious liability, the insurance company which insures the FBO should therefore charge a premium equal to that which it charges when a renter pilot endorsement of equal limits is included in the FBO's policy. The insurance company should also take all necessary steps to investigate accidents involving aircraft owned by its insured FBO as soon as notice of the accident is received. In the event that vicarious liability is applied to the FBO, the insurance company will not want to be in the position of having to commence its investigation well after the accident has occurred.

Lawyers who represent FBO's and their insurers should be familiar with every state's vicarious liability law which might arguably be applied to the facts of a particular accident. This would include particularly the state where the flight originated and the state where the accident occurred, but might also include any other state which has a significant con-

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166 A renter pilot endorsement is a common clause in an aviation insurance policy whereby the insurance company, on an owner's or FBO's policy, also agrees to defend and indemnify the renter pilot for liability incurred up to a stated policy limit. Typically, the owner or FBO will pay a higher premium for a policy which includes a renter pilot endorsement, and he will utilize the existence of this coverage as an added selling point in promoting the rental of his aircraft to potential renter pilots.

167 See appendix, infra.
tact with the accident or its victims. In the event that the
state whose law is applied maintains an aviation code identi-
cal to the Federal Aviation Act, arguments can be made re-
garding the true intent of the statute not to impose a civil
remedy for aircraft victims.\(^\text{168}\) In the event that a state statute
which diverges from the federal Act language is applied, the
state law should be examined carefully and analytically so
that the absurdities of a broad reading can be utilized to nar-
row the court's interpretation of its intended effect.

Perhaps the best solution to the problems which result from
the unpredictable status of aircraft owner liability would be
the Congressional enactment of a statute designating a clear
liability standard, applicable nationwide to all aircraft owners.
To this day, there is not a court in the country which appears
to know with certainty whether that was the intent of Con-
gress in 1938, when it passed the Civil Aeronautics Act. Until,
and unless, such a uniform federal guideline is adopted, how-
ever, FBO's, their insurers and lawyers, must be prepared to
react quickly and to investigate thoroughly all accidents in-
volving aircraft owned or leased by FBO's, regardless of the
apparent cause of the crash. This type of response is the best
guarantee available for minimizing the adverse consequences
of the unpredictability still inherent in our present vicarious
liability laws.

\(^{168}\) Recently the Supreme Court has been faced with the issue of whether a federal
statute gives rise to a civil remedy available to private litigants and has taken a very
restrictive approach. In Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979), the
Court, in reversing and remanding the judgment of the U.S. Court of Appeals for the
Second Circuit, held that the Securities Exchange Act of 1934, § 17(a) (as amended
by 15 U.S.C. § 78q(a) (1975)) did not create an implied private cause of action for
damages in favor of a broker-dealer's customers against the accounting firm which
allegedly conducted an improper audit and certification of the broker-dealer's
financial statement. The court stated that the violation of a federal statute which
results in injury or damages does not automatically give rise to a private cause of
action in favor of the person injured. Further, it stated that where plain language of
the statute weighs against the implication of a private remedy, the fact that the legis-
lateive history provides no suggestion or evidence that the statute was to give rise to a
suit for damages reinforces the court's decision not to find such a right of action
implicit in the statute. Accord, Kissinger v. Reporters Committee, ___ U.S. ___, 100
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (Investment Advi-
## APPENDIX

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<td>State statute imposes restricted vicarious liability but has not been interpreted.</td>
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<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>Maine</td>
<td>Yes. ME. REV. STAT. ANN. tit. 6, § 3(24) (1964).</td>
<td>No interpretation</td>
<td>N/A</td>
</tr>
<tr>
<td>STATE</td>
<td>ADOPTED CAA &quot;Operation of Aircraft&quot; Provision Language in State Aeronautics Code</td>
<td>STATE STATUTE INTERPRETED AS IMPOSING VICARIOUS LIABILITY ON OWNER OF AIRCRAFT FOR PILOT NEGLIGENCE</td>
<td>VARIATIONS IN THE APPLICATION OF VICARIOUS LIABILITY ON OWNER OF AIRCRAFT</td>
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<tr>
<td>Maryland</td>
<td>No</td>
<td>Md. Transp. Code Ann. § 5-1005(a) (1977). State statute imposes a rebuttable presumption of vicarious liability on the owner or lessee for the pilot's negligence for injury or damage to persons or property on ground or water of state. Vicarious liability rebuttable by proof that owner or lessee were free from negligence. Statute not interpreted.</td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Yes. Mass. Ann. Laws ch. 90, § 35(j) (Michie/Law. Co-op)</td>
<td>No interpretation</td>
<td>N/A</td>
</tr>
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<td>STATE</td>
<td>ADOPTED CAA &quot;Operation of Aircraft&quot; Provision Language in State Aeronautics Code</td>
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<td>Minnesota</td>
<td>Yes. MINN. STAT. ANN. § 360.013(10) (West 1966)</td>
<td>Yes (Expanded) Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94 (Minn. 1979)</td>
<td>State vicarious liability statute applied whenever any part of flight occurs over Minnesota airspace. Also, a lessee or sublessee is an &quot;owner&quot; within the meaning of the vicarious liability statute.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Yes. MISS. CODE ANN. § 61-1-3(1) (1972)</td>
<td>Yes. Hays v. Morgan, 221 F.2d 481 (5th Cir. 1955).</td>
<td>N/A</td>
</tr>
<tr>
<td>Missouri</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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<tr>
<td>Nebraska</td>
<td>Yes. NEB. REV. STAT. § 3-101(11) (1977)</td>
<td>In Heideman v. Rohl, 194 N.W.2d 164 (S.D. 1972), a South Dakota court interpreting Nebraska law assumed that Nebraska would interpret its own law as imposing vicarious liability</td>
<td>N/A</td>
</tr>
<tr>
<td>STATE</td>
<td>ADOPTED CAA “OPERATION OF AIRCRAFT” PROVISION LANGUAGE IN STATE AERONAUTICS CODE</td>
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<tr>
<td>Nevada</td>
<td>No</td>
<td>Nev. Rev. Stat. § 493.060 (1979). State statute imposes a rebuttable presumption of vicarious liability on the owner or lessee for the pilot’s negligence for injury or damage to persons or property on the ground or water of the state. Vicarious liability rebuttable by proof that owner or lessee was free from negligence.</td>
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<tr>
<td>New Jersey</td>
<td>No</td>
<td>Yes (Restricted)</td>
<td>N.J. Stat. Ann. § 6:2-7 (West 1973) owner of aircraft absolutely liable for injury or damage to person or property on the ground or water in the state, unless injury caused in whole or in part by negligence of person injured or bailee of damaged property.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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<tr>
<td>New York</td>
<td>No</td>
<td>Yes</td>
<td>N.Y. Gen. Bus. Law § 251 (McKinney 1968) owner (or lessee for more than 30 days) vicariously liable for injury or damage to persons or property within or above the state in any case where person using or operating the aircraft would be liable.</td>
</tr>
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<td>STATE</td>
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<tr>
<td>N. Dakota</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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<tr>
<td>Ohio</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Oklahoma</td>
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<td>No</td>
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<td>Oregon</td>
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<td>No</td>
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<tr>
<td>Pennsylvania</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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<tr>
<td>Rhode Island</td>
<td>No</td>
<td>State statute imposes a rebuttable presumption of vicarious liability on the owner for the pilot's negligence, rebuttable by proof that owner was not in control of the aircraft at the time of the accident. R.I. GEN. LAWS § 1-4-3 (1976)</td>
<td></td>
</tr>
<tr>
<td>S. Carolina</td>
<td>No</td>
<td>Yes (Restricted) S.C. Code § 55-3-60 (1976)</td>
<td>Vicarious liability only imposed for injuries to persons or property on the ground.</td>
</tr>
<tr>
<td>S. Dakota</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
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<tr>
<td>Tennessee</td>
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<td>No</td>
<td>N/A</td>
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<td>Texas</td>
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<td>Utah</td>
<td>No</td>
<td>No</td>
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<td>Virginia</td>
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<td>No</td>
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<tr>
<td>Washington</td>
<td>No</td>
<td>No</td>
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<tr>
<td>W. Virginia</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>No</td>
<td>State statute imposes rebuttable presumption of vicarious liability on owner or lessee for injuries to persons or property on ground. Vicarious liability rebuttable by proof that owner or lessee was free from negligence. Wis. Stat. Ann. § 114.05 (West 1974).</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>No</td>
<td>WYO. STAT. § 10-4-303 (1977)—owner of aircraft vicariously liable for actual damages caused by forced landing of aircraft on another’s property.</td>
<td></td>
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</tbody>
</table>