Airplane Tort Law

George W. Orr

US Aircraft Insurance Group (New York)
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GEORGE W. ORR*

Liability for tort growing out of the use of the airplane sounds as though it would be only of academic interest to the average lawyer. This, of course, is because aviation is comparatively new. But this new industry is making great strides. There are now over 100,000 airplanes registered in the United States. Only a few years ago our airplanes were struggling to pass the 1,000,000 passenger mark. Our airlines carried some 18,828,000 revenue passengers last year.1 True, they have established such a wonderful safety record over the past several years that only a fraction over one passenger was fatally injured in each 100,000,000 passenger miles of flight—making airline safety far greater than driving from office to home in automobile or taxi.2 But even with such safety, there are bound to be some accidents. And accidents produce both claims and law suits. For instance, my office—representing only one of several aviation insurers—supervised the handling of some 2,000 aviation tort claims in 1950 and had 217 suits in the U. S. A. involving aeronautical torts on our suit register at the end of last year. So the subject has in fact grown considerably beyond purely academic interest.

Since the aeronautical operations we insure reach around the globe, I can not attend most trials and use adjusters and attorneys I have never met to handle claims and law suits. The principal difficulty I encounter is the fact that most lawyers have not had aviation practice, therefore know nothing of aviation law or of aviation. We all fear the unknown. In

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my office I solve this difficulty by building a staff of lawyers who are also aviators. We specialize in aviation and aviation law in order to supply the only gap in the equipment of the otherwise competent local attorney. In the hope of contributing something of practical value to the practicing lawyer, I shall try, within the limited space at my disposal, to accomplish somewhat the same result in this paper—so far as the law is concerned.

Aviation Subject to Common Law Rules of Negligence

The comforting thing to the lawyer is that there is really little aviation law, in the sense of law peculiar to aviation. Tort liability has been tinkered with little as yet in connection with aviation and the common law rules of negligence—with which every lawyer is familiar—generally apply. There is a considerable body of law built up by our courts applying these principles, but an adequate discussion of such cases cannot be included in a general paper of this character. Although there have been comparatively few "reported cases" there have been many decisions, charges and opinions by lower courts which indicate the trend in the law. A comprehensive compilation of most decisions and other pertinent material is found in U. S. Aviation Reports and the Commerce Clearing House publishes a very comprehensive service called Aviation Law Report. The idea I wish to convey is that aviation law is not a special branch but an application of the general law with which we are all familiar and quite as accessible as the law relating to any other industry.

There are three exceptions to this: (1) Land Damage Statutes, (2) Guest Statutes, and (3) The international treaty covering liability to passengers, baggage and cargo in international flight known as the Warsaw Convention. These will be discussed later. Let us first take a look at the way our courts have applied the well established doctrines of the common law to a new and revolutionary technological development such as aviation or have modified those rules in a perfect example of the adaptability and flexibility of our wonderful and unique common law system.

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8. U. S. Aviation Reports, Inc., 2301 N. Charles St., Baltimore 18, Md.
Cujus Est Solum Modified to Permit Flying

The very first hurdle, of course, was the old common law doctrine of cujus est solum ejus usque ad coelum—whose is the soil, his it is up to the sky. Literally applied, there could have been no flight without trespass. There are many decisions on the subject, but the U. S. Supreme Court in U. S. v. Causby\(^5\) pretty well sums them up, holding that the above doctrine has no place in the modern world. The air is a public highway and the air space, apart from the immediate reaches above the land, is a part of the public domain. However, the rights of the land owner are fully protected as this court (and many other courts) held that the land owner owns at least as much of the space above the ground as he can occupy or use in connection with the land. Invasions of air space are in the same category as invasions of the surface.

Air Carrier Liability Same as Any Common Carrier

The principle that a common carrier is not the insurer of its passengers' safety is applied to airlines. For instance, in Allison v. Standard Airlines\(^4\) the court held that "the carrier is not an insurer of the safety of its passengers and is not bound absolutely and at all events to carry them safely." The operator not in the common carrier class likewise is held to the same degree of care as the non carrier operator of a vehicle on the surface.

The airline, like other common carriers, is held to the highest degree of care, but this "highest degree" must be interpreted as that consistent with the operation of an airline. For instance, in Law v. TWA\(^8\) there is a good discussion of this problem. In Foot v. Northwest Airlines\(^9\) the court says: "It was the duty of the defendant to exercise the highest degree of care for the safety of the passengers . . . . consistent with the practical operation of the plane itself . . . . We are not to hold people to the impossible."

The airline, of course, is not responsible if the injury occurred from an "Act of God". In Thomas v. American Air-

\(^5\) 9 Coke, 54.
\(^6\) 328 U. S. 256.
\(^7\) 1930 USAvR 292.
\(^8\) 1931 USAvR 205.
\(^9\) 1931 USAvR 60.
ways, for instance, the court charged the jury: "If you believe . . . that the accident happened without fault or negligence . . . or as a result of an Act of God, then it is your duty . . . to return your verdict in favor of the defendant." This principle is still applied as we have, in May, 1951, had a verdict for the defendant affirmed by the U. S. Court of Appeals for the Third Circuit in the case in which the executor of the notorious Earl Carroll sued for $2,000,000 damages resulting from an accident in Pennsylvania.

The principle that a passenger must assume the risk of the mode of conveyance he chooses is applied to aircraft. This principle is well stated in the early case of L&W Co. v. Crumpler " . . . . but there are some casualties which human sagacity could not guard against and foresee, and that every passenger must make up his mind to meet the risks incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance."

The principle that a person is not to be held strictly accountable for decisions made in an emergency has been applied in aviation cases. For instance, in Thomas v. American, supra, the court said: "One who, without negligence on his own part, is suddenly confronted with imminent danger, is not required to exercise that degree of care and skill which would be required after a calm review of the facts after an accident occurred."

Res Ipsa Loquitur as Applied to Aviation

The application of res ipsa loquitur to aviation cases, as to any other type cases, is not consistent in the various states. Most of our courts have recognized and applied the doctrine under certain circumstances, but the conditions under which the courts will apply the doctrine and the method of application vary almost in proportion to the number of jurisdictions. South Carolina courts have repudiated the doctrine but have managed to reach about the same results.

10. 1935 USAvR 102.
11. Schuyler Ex'x. v. United Airlines.
The subject is briefly included, nevertheless, as a rather necessary element of tort law.

The phrase, *res ipsa loquitur*, translated literally, means that the thing or affair speaks for itself. It is merely a short way of saying that the circumstances attending the accident are such as to justify the conclusion that the accident was caused by negligence. The inference of negligence is deductible, not from the mere happening of the accident, but from the attendant circumstances.\textsuperscript{15}

The doctrine is not an arbitrary rule "but rather a common sense appraisal of the probative value of circumstantial evidence. It is a rule of reasonable inferences".\textsuperscript{16} So, where a plaintiff introduces evidence showing at least the probability that a particular accident could not have occurred without negligence of the defendant, an inference of negligence is shown.\textsuperscript{17} However, the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances to permit the application of *res ipsa loquitur*.\textsuperscript{18}

**Effect of Res Ipsa Loquitur**

The law requires a plaintiff to establish the negligence of a person from whom he seeks damages, and it must be established by a preponderance of the evidence.\textsuperscript{19} We thus say the plaintiff has the burden of proof or the burden of proving the defendant's negligence. Let us see then in what way res ipsa eases the plaintiff's burden of proof.

We know that "practically all courts now recognize the distinction between the burden of producing evidence—that is, the risk of non-production of sufficient evidence to justify a finding—and the burden of persuasion—that is, the risk of failing to persuade the trier to make that finding—though many still use the term, burden of proof, to cover both concepts."\textsuperscript{20} This division of the burden of proof may also be

\textsuperscript{15} Jacobs, Evidence in Negligence Cases, 75.

\textsuperscript{16} 1 Shearman and Redfield, Negligence, § 56 (Zipp's ed. 1941); see Galbraith v. Busch, 267 N. Y. 230, 234, 196 N. E. 36, 38 (1935).

\textsuperscript{17} See Loebig's Guardian v. Coca Cola Bottling Co.; 259 Ky. 124, 126, 81 S. W. 2d 910, 911 (1935); Galbraith v. Busch, supra note 16, at 234, 196 N. E. at 38.

\textsuperscript{18} Jenson v. Kress & Co., 87 Utah 434, 49 P. 2d 958 (1935); Franco v. Rutland Ry., 222 N. Y. 482, 119 N. E. 86 (1918); 1 Shearman and Redfield, cit. supra note 16, § 56.

\textsuperscript{19} 65 C. J. S. 996 (1950).

\textsuperscript{20} Morgan, Evidence 10 (Practicing Law Institute 1946).
labeled the burden of going forward with the evidence (to avoid a non-suit), and the burden of persuasion (to convince the jury and get a verdict). We then ask: Does res ipsa satisfy the burden of persuasion or merely the burden of going forward with the evidence?

The majority view is that res ipsa loquitur does not establish a presumption of negligence, but merely raises an inference of negligence sufficient to establish a prima facie case and carry the case to the jury. Thus, it merely aids the plaintiff by carrying the burden of going forward with the evidence, and the plaintiff still must carry the burden of persuasion to get a verdict.

Too many lawyers have made the mistake of assuming that this doctrine will be applied to all aviation cases, therefore, that a situation approximating presumed liability exists with respect to aviation accidents. Nothing could be further from the truth.

Difference Between Res Ipsa and Presumed Liability

There are three major differences between res ipsa loquitur and presumed liability:

First, the courts recognize res ipsa loquitur as an exception to the common law rule that a plaintiff must prove defendant's fault, and as such, they require the plaintiff to justify the use of the doctrine by showing the aircraft was in the exclusive control of the defendant, freedom from contributory negligence, and that such accidents do not ordinarily occur without negligence. Many courts have refused to apply res ipsa loquitur in aviation passenger claims because the plaintiff failed to justify its application. The plaintiff is faced with no such problem where liability is presumed.

Second, res ipsa loquitur is only a rule of evidence which, according to most courts, creates a mere inference of negligence and the burden of proving negligence by a preponderance of the evidence remains with the plaintiff. However, if


presumed liability were in fact imposed by the doctrine, the burden of proving freedom of fault, by a preponderance of evidence, would be squarely placed upon the defendant. In other words, res ipsa loquitur merely aids a plaintiff in proving negligence, but if liability is accepted as presumed, the plaintiff would be freed from proving anything and all of the burden would be placed squarely on the defendant.

Finally, the ultimate effect of the two doctrines—res ipsa loquitur and presumed liability—is quite different. In almost every aviation passenger case in which res ipsa has been invoked, the court or jury has found a verdict for the defendant, whereas incidents are rare, indeed, in which a defendant's verdict is reached when presumed liability is imposed. For instance, in only one case under the Warsaw Convention, which imposes presumed liability,22 has a U. S. A. court or jury found for the defendant. As in all other types of tort cases, there is no magic formula by which a case can be won—either for plaintiff or defendant. There is no substitute for careful preparation.

Evidence in Accidents Where All Aboard Are Killed

This suggests the well known query as to how negligence can be proven in an airplane accident which occurs in a remote section where there are few eye witnesses, if any, and everyone on the plane is killed. This presents an unsurmountable problem to the theorist, but to those with experience in such matters, it presents no problem at all. Let's take an actual airline catastrophe which occurred on an airline my office represented but for which all claims are now settled and, therefore, discussion is permissible. On a regularly scheduled trip of a certificated airline, a DC-3 airliner crashed into a mountain some fifty miles from its scheduled destination, instantly killing all on board—both passengers and crew—and the country in which the crash occurred was so wild that there was not a single witness to the accident or the flight before the accident occurred. It took days to find the wreck and when found, it was almost completely demolished by impact and fire.

This is the type of accident that the theoretical lawyer feels is hopeless, either as to proving negligence or defending a suit

in which the doctrine of *res ipsa loquitur* is applied. Such a conclusion is completely unjustified. The fact is that volumes of factual evidence was available in that case as is usually true in any airline catastrophe. The reason is that more complete records are kept in airline operation than perhaps in any industry. There are complete records of past performance of the aircraft and engines. There is a complete record of all inspections, repairs, and overhauls. There is a complete record of the training and experience as well as the physical condition of the crew. There is a complete record of the loading and dispatching of the aircraft, of the weather before and after the flight was dispatched, with the plan of flight and all radio conversations during airport control and en route. There is a complete record of the examination of the accident site and the wreckage by experts. Furthermore, an exhaustive public investigation—with both the hearing and a transcript of the testimony available to plaintiff and defendant alike—brings out all technical and eye witness evidence far better than any private investigation, since the CAB has the power of subpoena. In what other industry is so much done for the claimant and his attorney?

In the illustration mentioned, the Civil Aeronautics Board published the following finding as to the facts and the probable cause:

"1. The air carrier, the aircraft and the crew were properly certified.
2. There was no failure or malfunctioning of the aircraft, engines or radio disclosed in the investigation. Power was being developed by both engines on impact.
3. The flight experienced light to moderate turbulence.
4. All radio range and air navigational facilities were operating normally with the exception of the Newhall radio range station which was inoperative.
5. Although the Newhall radio range was inoperative, adequate radio facilities were available for instrument flight from Las Vegas to Burbank.
6. Although the flight had reported no difficulty up to the time of the last radio contact at 0337, static conditions and transmissions of other flights on the com-

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pany radio frequency made the communications of Flight 23 difficult.

7. The flight time from 0320 until 0337, was a period of an unusual amount of radio communication.

8. The winds in the mountainous area were higher than forecast at the altitude at which the flight was conducted.

9. Other flights had been able to navigate safely through and about the area of the scene of the accident.

10. The position report 'over Newhall' was in error.

11. The let-down was started without a positive check on the position.

12. The scene of the accident is located 27 miles northwest of the intersection of the southwest leg of the Palmdale radio range and northwest leg of the Los Angeles radio range and 10 miles to the right of the radio range leg on which initial approach let-down was to be made.

13. The aircraft was on an approximate heading of 155 degrees at the moment of impact.”

"Probable Cause:

The Board determines that the probable cause of this accident was the action of the pilot in making an instrument let-down without previously establishing a positive radio fix. This action was aggravated by conditions of severe static, wind in excess of anticipated velocities, preoccupation with an unusual amount of radio conversation, and the inoperative Newhall radio range.”

The amount of evidence available is usually limited only by the zeal and intelligence of the lawyer. Of course some of our brethren do not want to have to use either zeal or intelligence. They do not want both parties to have a fair hearing as provided by our established law. They want liability arbitrarily imposed on the airline—or at least presumed against the airline—so that all they have to do is thumb a code, like looking up a telephone number, to find out what is due and go collect. Fortunately, there have been enough thoughtful lawyers, who respect the struggle during past centuries in developing the protection of our present system, to block the attempted radical departures from established law.
Federal v. State Control of Tort Remedy

Another unjustified conclusion of the uninitiated or of the legal reformer is that the airplane is inherently interstate in character and, therefore, should have interstate or federal regulation as to tort. The standard illustration is that a New York—Washington, D. C., plane flies over six jurisdictions in a matter of minutes: New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia. Of course, this is quite true. Its truth has been recognized by the passage of the Civil Aeronautics Act of 1938 which provides uniform safety and economic regulation, but the conclusion that tort liability regulation is also indicated is completely unjustified. For the federal government to usurp such authority would be an unwarranted invasion of the right of each sovereign state to control the remedy for tort committed within its border. While there is somewhat different law in the different U. S. A. jurisdictions, there has been no conflict and the applicable law is conveniently available to anyone with access to a law library anywhere in the United States. It is well established that the applicable law is that of the place where the "force impinged" causing the injury, the lex loci delictus. To set the airplane apart for a different standard of liability from competing forms of surface transportation is not only a grave injustice to a new and struggling industry, but is an unwarranted invasion of the right of each state to control the happenings within its borders. The states have very different ideas and this is inherent under the theory of our Union. New York, like several other states has a constitutional prohibition against limiting the sum recoverable as damages for wrongful death, whereas the state next door, Connecticut, like many other states chooses to limit such recovery. Of course, the mere fact that an air-

25. 1943 USAvR 1, 293 N. Y. 878, BEAL, CONFLICT OF LAW—Vol. 2, 129.
27. Alaska $15,000; Col. $10,000; Conn. $20,000; Ill. $20,000; Ind. $15,000; Kansas $15,000; Maine $10,000; Mass. $15,000; Minn. $17,500; Missouri $15,000; N. Hampshire $15,000; Oregon $15,000; S. D. $10,000; Va. $15,000; W. Va. $10,000; Wisconsin $15,000. For common carriers only, New Mexico $10,000.
plane crosses state boundaries faster does not make it any more interstate in character than the railroads, buses, truck lines, etc.

**Common Law Has Adapted Itself to Aviation Readily**

As a matter of fact, our courts have found no difficulty in adapting the common law to aviation tort liability, as reported to the New York State Bar Association by its Committee on Aeronautical Law in 1942, when the writer was not a member of that Committee. That Committee found, after an examination of all available authority, that the courts had found no additional law necessary to do substantial justice to the public and all concerned. That conclusion was confirmed in 1950, when the writer was Chairman of said Committee.

The final conclusion justified is that our presently established common law, without the intervention of theoretical reformers or of special statutes, is best able to handle aviation cases just as it does other types of cases, with greatest justice to all parties concerned. The average lawyer will find that he can competently and with confidence prosecute an aviation case on the basis of the law he already knows—much the same principles taught when I graduated from the University of South Carolina School of Law in 1910.

**The Civil Aeronautics Authority and Its Regulations**

There is often some confusion as to (1) just what the Civil Aeronautics Authority is, and (2) as to the effect of the Civil Air Regulations issued by that federal Authority on aviation liability.

(1) The Civil Aeronautics Authority was created by the Civil Aeronautics Act of 1938. Under the Reorganization Act of 1939 the President reorganized the Authority and Public Resolution 75, approved June 4, 1940, provides that Reorganization Plans No. III and IV shall take effect on June 30, 1940. Briefly, the Civil Aeronautics Authority was divided into two organizations, one being the Civil Aeronautics Board, which, among other things, issues civil air regulations and investigates accidents through its Safety Bureau, and the other, the Civil Aeronautics Administrator, who, among other things, is the administrative agency to carry out the regulations of the Board. The term Civil Aeronautics Au-
authority is now used only in referring generally to the whole federal control of aeronautical affairs.

(2) There is presently no federal law (other than the Warsaw Convention) having to do with aviation liability to passengers, goods or the public. Section 701 (e) of the 1938 Act, supra, specifically provided that no part of any report or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports. This is only fair, as this agency has nothing to do with determining liability, its investigations are for a totally different purpose—safety regulation—it receives inadmissible evidence without regard to the safeguards of law and its conclusions which may be interpreted as affecting liability are often unsustainable by legal evidence.

About the only way the civil air regulations of the CAB would affect liability is that compliance with or violation of regulations might be submitted as evidence, if material, in legally determining liability. In other words, violation of Civil Air Regulations and of local flight rules are not necessarily negligence per se, but may be considered by the jury as evidence of negligence when the violation is the proximate and contributing cause of the accident.28

**Statutory Exceptions to Common Law Rules**

I mentioned above three exceptions to the application of the common law rules of liability respecting airplane tort liability:

(1) Land Damage Statutes; (2) Guest Statutes; (3) The Warsaw Convention.

**Land Damage Statutes**

(1) Land Damage laws in a few states impose absolute and unlimited liability on the owner (and certain liability on the operator) for property damage and/or injury to innocent third parties on the surface caused by the operation of aircraft or objects falling therefrom. This appeared as Section 5 of a model form known as the Uniform State Law for Aeronautics promulgated to the states about 1922 before there was any commercial aviation or any experience from

aeronautics operations and while the airplane was an object of fear and distrust within the definition of a dangerous instrumentality. Of course, as soon as there was enough experience with aviation to judge as to its dangers, our courts promptly and almost universally held the airplane not to be a dangerous instrumentality but in the meantime, mostly in the nineteen twenties, almost half the states had passed this model bill. Most of them—including South Carolina—including the antiquated and ill-conceived Section 5.

I describe this absolute liability provision as antiquated because, as explained above, the airplane has proven itself not to be a dangerous instrumentality and there is no justification for imposing upon it a different standard of liability than that applicable to other forms of transportation. I describe it as ill-conceived because the absolute and unlimited liability imposed upon the aircraft owner—regardless of fault or his ability to prove that the injury or damage was not caused of his own lack of care—is a definite detriment to aviation and opposed to our precepts of justice to all parties concerned. With such rigid liability absolutely imposed upon him, the aircraft owner who really understands the situation would not dare own an airplane without insurance for fantastically high limits of liability.

If there was any real need for this drastic treatment, there might be some justification for it. However, such legislation is entirely unnecessary for the protection of the public as I have been unable to find one single instance where any court in states not having this legislation has failed to give adequate relief to innocent third parties on the surface. This is so thoroughly recognized that the states which originally incorporated Section 5 into their law have been constantly repealing this Section until by the end of 1950, there remain only ten jurisdictions that retain the absolute liability provision: Delaware, Hawaii, Minnesota, New Jersey, North Dakota, South Carolina, Tennessee, Vermont, Montana and Wyoming. Two methods have been used to repeal this law, one illustrated by the action of South Dakota in 1949 that provides liability for such tort in accordance with the rules of

law applicable to torts in that state, and another, like the Maryland law, which imposes presumed liability upon the owner—making proof of damage prima facie evidence of liability—but permitting the aircraft owner the opportunity of rebutting this presumption. Georgia, Maryland, Nevada, and Wisconsin now have such laws.

Several legislatures have repealing laws before them during 1951 but a record of final action is not yet available. Vermont obviously attempted to void the absolute liability provision of its law this year by deleting the word "absolutely" and "whether such owner was negligent or not" from the provisions creating liability on the owner of an aircraft for damage or injury on the surface," but whether this was successful is doubtful since the law still declares the owner liable and only the defense of contributory negligence is provided. I am hopeful that South Carolina will soon correct its law—which I believe is Section 7104 in the South Carolina Code—preferably by substituting the text of the South Dakota 1949 amendment. This law is suggested as it not only corrects the liability so that the airplane operator is placed on equal terms with other forms of transportation but also provides for exempting the equity owner to assist in financing the purchase of airplanes. At present, the only relief given the equity owner against these absolute liability laws is the attempt of the 80th Congress in passing Public Law 656, Section 504 of the Civil Aeronautics Act of 1938 as amended.

**Guest Statutes**

(2) Guest Statutes applicable to the aircraft have been passed by a few states, notably South Carolina, California and Indiana. Motor vehicle laws have been generally held inapplicable to aviation and so the guest statutes in such laws would naturally not apply. The Indiana law predicates liability only upon proof of wanton or wilful misconduct and the California statute likewise limits liability definitely but the South Carolina statute appears rather indefinite since it predicates liability on intention on the part of the owner or operator or his "heedlessness". Just what a jury would consider "heedlessness" seems problematical. The tendency ap-

31. § 5908, 1936 Supp.
pears to be to make guest statutes now applicable to automobiles also applicable to aviation, since several such bills are in legislatures this year.

Warsaw Convention

(3) The third exception affecting airplane tort liability is an international "Convention for the Unification of Certain Rules Relating to International Transportation by Air", commonly called the Warsaw Convention. This treaty was adhered to by the U. S. A. in 1934 and is in effect in most of the nations in Europe, Canada and Mexico in North America and only Brazil (with the exception of European dependencies) in Central and South America.

Its application is determined by the contract of transportation and not by the place of accident—when between two nations adhering to the treaty, or from one adhering nation to a destination in that same nation, if there has been an agreed stopping place in another nation whether an adherent or not. It places presumed liability on the carrier for injury to passengers, baggage and/or goods unless the carrier can affirmatively prove that it and its agents have taken all necessary measures to avoid the damage (or in the case of baggage and goods, that the damage was caused by an error in piloting or navigation), and limits recovery: for death or injury of passengers to the present U. S. currency value of $8,291.87; baggage and goods to $16.58 per kilogram (2.2046 lbs.) and $331.67 for objects of which the passenger takes charge himself, unless the passenger affirmatively proves that the damage was caused by wilful misconduct, in which case there would be no limit. The limitation for bringing an action is two years.
Our international air commerce is developing rapidly and this development will continue until it becomes of importance to an ever increasing number of lawyers. As a matter of fact, the subject is not as remote in practical interest as appears on the surface, as many lawyers who do not consider their practice in the field of international law at all are being confronted with the problems growing out of international air transportation—and finding that quite different principles of law are involved. This, of course, is in those cases to which the so-called Warsaw Convention is applicable—and it can be applicable in the most surprising places, for instance, on a purely intrastate flight, let us say, from Greenville to Charleston.43

There have been several decisions of interest in connection with the Warsaw Convention but I am afraid there is time to discuss only one.

The Leading U. S. A. Warsaw Convention Case

The case of Wyman v. Pan American44 was concluded in 1945. This case involved the death of a passenger in 1938 on a passage contract from San Francisco (USA) to Hong Kong (a British colony), both adherents to the Warsaw Convention. The trip required several days with overnight stopovers at a number of points, all under U. S. sovereignty and the accident occurred on the leg of the flight between Guam and Manila, both under U. S. Sovereignty at that time. In other words, the plane had never entered foreign territory and the intended immediate destination, Manila, was still under U. S. A. jurisdiction. Further, the plane disappeared over the no-man's land of the high seas, so the accident or whatever caused the failure to reach port, was assumed to have occurred over the high seas. The many interesting legal questions arising in such circumstances are immediately apparent. The case was tried in the New York State Supreme Court, New York County in June 1943, the decision being that the flight was subject to the Warsaw Convention and that recovery was limited to the U. S. equivalent of the limit provided therein. The decision was unanimously affirmed.

44. 1943 USAvR 1; 181 Mis. 963; 43 N. Y. S. 2d 420, 293 N. Y. 878.
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without opinion by the Appellate Division\textsuperscript{45} and again unanimously affirmed without opinion by the New York Court of Appeals.\textsuperscript{46} Certiorari was denied by the United States Supreme Court, April 23rd, 1945.\textsuperscript{47}

Since this is the first case involving the Warsaw Convention which has been considered by the highest state and federal tribunals, it will probably be classed as the leading American case. In view of the many legal questions so ably presented by counsel for both sides on the several appeals, it is regrettable that we have no opinions from the higher courts. However, Judge Schreiber's decision, so authoritatively confirmed, settled several important points: (1) the rights of the parties are fixed by the Warsaw Convention. (2) The Convention becomes a part of the law of the land. (3) The rules of the Convention were made a condition of the ticket, (4) and in any event are so made by the Convention rules themselves. (5) Warsaw Convention rules are applicable only to international flights (Art. 1) and (6) raise a presumption of liability on the part of the carrier (7) for injury or death of a passenger (8) limited to approximately $8,300 under present U. S. Gold standard, except where the carrier is guilty of "wilful misconduct". (9) There was no proof of wilful misconduct, indeed of any negligence connected with or a proximate cause of the accident (establishing that affirmative proof is necessary). (10) The Warsaw Convention rules permit a recovery that otherwise might be impossible for want of proof. (11) The original place of departure and the final destination is specifically controlling despite breaks in travel routes. (12) Compliance with the law (by the carrier) is always to be assumed unless the contrary is proven. (13) The right to bring a death action is purely statutory. It did not exist at common law, and depends upon the existence of the statute creating a right of action at the place where the "force impinged" causing the injuries. (14) No new substantive rights were created by the Warsaw Convention and all its rules are well within the framework of existing legal rights and remedies. (15) The right to recover must depend upon some statute. (16) The New York Law can have no applica-

\textsuperscript{45} 267 App. Div. 947; 48 N. Y. S. 2d 459.
\textsuperscript{46} 293 N. Y. 878; 59 N. E. 2d 785; 1943 USAvR 1.
\textsuperscript{47} 324 U. S.—No. 1 (advance sheets), page V. Leading British case Grein v. Imperial Airways; 1936 USAvR 184.
tion as the injury and death did not occur within the state. (17) The federal "Death on the High Seas Act"48 is applicable to airplane accidents on the high seas. (18) As interest is not provided in that Act, no interest may be allowed on verdict.

Airplane Tariffs Filed With C.A.B.

While perhaps not strictly tort law, the tariff rules and regulations filed with the CAB in Washington and available in all airline ticket offices, may have very definite effect on both tort cases and claims for loss or damage to baggage and cargo. The Civil Aeronautics Board is similar in some respects to the Interstate Commerce Commission. The Civil Aeronautics Act of 1938 requires that the airlines file a tariff with the Board49 which includes rules and regulations with regard to the value of baggage, right to cancel flights, time in which notice of claim must be given, etc.

The legality and binding effect upon the passenger of such regulations has been amply upheld in a number of suits.50 Rather typical was the case of Meredith v. United Air Lines, in which ear injury was alleged because of failure to maintain pressure in the passenger cabin, even though a pressurized cabin was warranted. Rule 17 (A) provided that no action shall be maintained for injury or death of a passenger unless notice is given in writing to the general office of carrier within 90 days after alleged occurrence and unless action is commenced within one year. Motion for summary judgment was granted, the court holding that airline passengers are bound by conditions stated in the passenger tariffs on file with the CAB and various airline offices. Such conditions, although not appearing on the ticket sold to the passenger, must be complied with respecting form of notice, time of making claim and commencing suit.

There are similar regulations limiting the value of baggage to $100 unless a greater value is declared at the time of checking same and an additional charge (10 cents per $100 on domestic lines) paid.

Any Good Lawyer Can Handle Aviation Cases

I hope that the above brief and very general treatment of the law applicable to airplane torts will, if it does nothing more, disabuse the minds of the average lawyers of the idea that there is any great mystery attached to aeronautical litigation. If I had the time I would attempt to strip the mystery also from aviation. Suffice it to say that any energetic and intelligent lawyer can prepare an aviation case as easily, in fact, more easily, than he can in any other technical field. There is still no substitute for hard work and careful preparation, but where these elements are accepted and faithfully discharged, I believe the average lawyer will find real interest and pleasure in handling aviation cases and that he will find himself quite capable of doing a good job.