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The Future of the Warsaw Convention

A. B. Rosevear, Q.C.*

It is common knowledge that very few of the millions of passengers who travel on the world's airlines ever read the conditions of the contract of air carriage printed on the back of the front cover of the standard form of the IATA [1] ticket. For one thing the conditions are printed in very small type and this alone discourages most people from even making an effort to read them. Then too, the average traveller, who has no knowledge whatsoever of air law can not be expected to understand the true meaning of conditions such as number 2 (a) which reads: "Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not 'international carriage' as defined in the Convention." [2] If questioned, the attitude of most passengers would undoubtedly be that, as they are unable to change any of the conditions, to attempt to read and understand them would be a waste of time. Nevertheless, the importance of these conditions for the passenger can not be underestimated, especially in the light of recent developments in the field of limitation of liability.

For a little over a year now airline passengers have been handed with their tickets, a small form of notice which has a heading printed in red ink and in bold faced type reading: "Advice to international passengers on limitation of liability." The notice is for the purpose of advising all

> passengers on a journey to, from or with an agreed stopping place in the United States... [that] the Convention and special contracts of

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* Formerly General Attorney, Air Canada and later Director, Institute of Air and Space Law, McGill University.

[1] IATA, International Air Transport Association.

[2] Condition 2(a), of course, relates to the *Warsaw Convention.*

carriage embodied in applicable tariffs provide that the liability of... certain carriers, parties to such special contracts, for death of or personal injury to passengers is limited... to... $75,000[3] per passenger. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from or having an agreed stopping place in the United States... liability... is limited... to approximately $8,290 or $16,580.[4]

One may see at a glance that the form of notice above described advises airline passengers that there are now three different limits of liability, depending on whether the *Warsaw Convention,* that Convention as amended by the *Hague Protocol* or a special contract between the carriers under what is known as the *Montreal Agreement* applies. Now the *Warsaw Convention,* which became effective in some countries in 1933 and in Canada in 1947, was designed to regulate "in a uniform manner the conditions of international transportation by air in respect of the... liability of the carrier." [5] The question which arises and which this article will attempt to answer concerns the present value and probable future of the *Warsaw Convention.*

I.

The *Warsaw Convention* was drafted by that talented group of European lawyers known as the CITEJA, (Le Comité International Technique d'Experts Juridiques Aériens) which was created as a committee of the International Private Air Law Conference. Its initial meeting took place in Paris in 1925, and in 1929, in Warsaw,

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[3] American dollars. Unless otherwise indicated, all amounts are in American currency.

[4] The printed advice to passengers respecting limitation of liability is an improvement over the notice contained in the IATA form of ticket. The improvement no doubt resulted, in part, at least, from the decision in the case of *Lisi* v. *Alitalia-Linee Aeree Italiane,* (1966), 253 F. Supp. 237, 9 Avi. 18, 120, affirmed by Court of Appeals, (1966), 370 F. 2d 508, 9 Avi. 18, 374 (N.Y., 2nd Cir.). The majority opinion of that court adopted the words, in part, of the trial judge on the inadequacy of the notice to passengers respecting limitation of liability contained in the IATA ticket. "Camouflaged in Lilliputian print in a thicket of conditions of contract... Indeed, the exculpatory statements on which defendant relies are virtually invisible." Article 3(2) of the Convention, which provides in part that "the absence, irregularity or loss of the passenger ticket shall not affect the... validity of the contract of transportation, which shall none the less be subject to the rules of this convention" was disregarded. The U. S. Supreme Court has granted a *certiorari* to bring this case before it for decision. For a Canadian case on notice to passengers on limitation of liability under the common law see *Grand Trunk Pacific Coast S. S. Co.* v. *Simpson,* (1922), 63 S.C.R. 361.

[5] The Preamble of the Convention.

the CITEJA completed its work on the Convention, which became effective in 1933, when it was ratified by the required minimum of five states.[6] Like most international conventions it was scarcely declared in force when suggestions were made from various quarters respecting the necessity of amending it. It has, nevertheless, been one of the most successful private international law conventions ever drafted.

One should always bear in mind that in 1929, international air transport was in its infancy. Even the most confirmed optimists of that time would not have predicted the rapid growth which the industry has enjoyed, assisted by the grim necessities of World War II. When therefore, the CITEJA provided in the Convention for a limitation of an air carrier's liability arising out of injuries to passengers, including those resulting in death, of $8,290, no one was greatly shocked.[7] The air transport industry was at that time struggling along with small revenues and a scarcity of capital. As the years passed, it became obvious that this comparatively low limitation of liability must be increased and that other amendments should be made to the Convention. World War II intervened, however, and all work on the revision of the Convention was suspended. After the war, the Legal Committee of the International Civil Aviation Organization (ICAO) assumed the work formerly performed by CITEJA. In 1947 the revision of the *Warsaw Convention* was placed high on its work program. It was not, however, until 1955, after the Legal Committee had completed its work on a draft protocol amending the Convention, that ICAO called a diplomatic conference at the Hague to deal with the draft. There were those who believed that the proper way to amend the Convention was to make an entirely new pact containing a provision that when a certain number of states had ratified it, the new Convention would be substituted for the existing one. Unanimity on the nature and scope of the amendments which should be made or even on the necessity for amending the Convention at all did not, however, exist and it was decided, therefore, to amend it by way of a protocol; the Convention itself would continue in those states which did not wish to accept the Protocol. This arrangement had the effect of destroying the uniformity of the *Warsaw Convention* throughout the world.

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[6] Art. 37(2). The *Warsaw Convention* is in force in Canada by virtue of the *Carriage by Air Act*, 3 Geo. VI, S.C. 1939, c. 12; R.S.C. 1952, c. 45 and by virtue of Proclamations of the Governor-in-Council dated June 13, 1947, and January 30, 1948, declaring the said act in force on July 1, 1947, and declaring the Convention in force on September 8, 1947, respectively.

[7] Art. 22(1).

The United States delegation at the Hague Conference left no doubt in the minds of the other participants that difficulty could be expected in obtaining the approval of the United States government to the new limitation of liability of $16,580, as provided in the Protocol.[8] To assist in obtaining this approval the Conference included a special provision respecting legal fees and costs [9] — a complicated problem because of differences in the assessment thereof between one country and another. In all jurisdictions in Canada costs arising between the parties are distinguished from solicitor and client costs. Party and party costs are taxed by the courts against the unsuccessful litigant in accordance with the relevant tariffs in force. Solicitor and client fees, on the other hand, are subject to the inherent jurisdiction of the common law courts to summon solicitors before them to show cause why their fees should not be reduced. In addition to this restraint, the various law societies have the right and do make tariffs of fees which are mandatory. In a number of jurisdictions in the United States, contingency fees are allowed. This is a device whereby a client agrees to pay to his attorney a certain percentage of the amount of damages recovered in litigation or through a settlement. These fees may be as high as fifty percent of the amount of the judgment or settlement but usually they are in the area of one third thereof. They are subject to regulation by the law societies and the courts concerned, and in some American states they are governed by rules of court.[10]

The statement has been made that the entire movement for denunciation of the *Warsaw Convention* by the United States came originally from the National Association of Claimants Compensation Attorneys, now called the American Trial Lawyers Association (A.T.L.A.).[11] Whether this is a fact or not may be open to argument, but there is no doubt that A.T.L.A. conducted a strong lobby in Washington against the ratification of the *Hague Protocol* and for the denunciation of the *Warsaw Convention*. They were, as a result, undoubtedly influential in bringing about the Senate's refusal to

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[8] Art. XI, amending art. 22(1) of the Convention. The *Hague Protocol* is in force in Canada by virtue of *An Act to Amend the Carriage by Air Act*, 12 Eliz. II, S.C. 1963, c. 33 and by a Proclamation of the Governor-in-Council issued pursuant thereto, declaring the effective date of the Protocol for Canada as July 18, 1964.

[9] *Ibid.*, adding art. 22(4) to the Convention.

[10] See Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, (1966-67), 80 Harv. L. Rev. 497 at pp. 562 *et seq.*

[11] Kean, A.W.G., in a speech delivered to a meeting of the Air Law Group of The Royal Aeronautical Society, printed in (1967), 71 Journal of the R.A.S., 501 at p. 505, para. 43.

consent to the *Hague Protocol* and its advice to the government to denounce the Convention. A.T.L.A. used the argument that the right of Americans to recover full damages for personal injuries should not be infringed. They referred to the "narrow philosophical horizons of Warsaw." [12] A fair comment would be that A.T.L.A. is a group of special pleaders who have a financial interest in the denunciation of the Convention.

It is not my intention to give an account in detail of the events which followed the notice of denunciation of the *Warsaw Convention* sent by the State Department of the United States Government to the Government of Poland, as the depository thereof.[13] Since United States air carriers transport a large percentage of the world's air traffic and all the important carriers in the world have air routes to and from the United States, the denunciation by the United States, if it had become effective, would have dealt a severe blow to the unification of private international air law. Both ICAO and IATA exerted every effort to reach an agreement with the United States Government concerning acceptable limits of liability. An agreement between the air carriers which has become known as the *Montreal Agreement* was the result. When it was completed the Department of State of the United States Government notified the Polish Government that the United States wished to withdraw its notice of denunciation. The State Department made it very clear that the step it had taken was temporary, pending the negotiation of an international agreement between the governments concerned, under which they would agree to a substantial increase in the limitation of liability for damages arising out of injuries to passengers.

The legality of the *Montreal Agreement* depends upon the interpretation of the last sentence of article 22(1) of the Convention repeated in the *Hague Protocol*, which reads: "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." By giving notice of the special contract to each air passenger with his ticket it must be assumed that, in accepting delivery of the ticket and in subsequently boarding an aircraft of

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[12] *President's Column, "The Power and the Right"*, (1966), 9 A.T.L.A. Newsletter 145.

[13] For an excellent account of the position of the United States Government and the steps that were taken to bring about the *Montreal Agreement*, see Lowenfeld and Mendelsohn, *loc. cit.* For the text of the press release issued by the U. S. Department of State respecting the notice of denunciation of the Warsaw Convention dated Nov. 15, 1965, see (1966), 60 A.J.I.L. 395; for withdrawal of the notice, see (1966), 60 A.J.I.L. 826.

an airline for a journey, the passenger has agreed to the terms of the contract of carriage. No test of the soundness of this assumption seems to have taken place in the courts, but, at least, under the common law, it has become a question of fact, and not of law, as to whether or not a certain notice to a passenger of special conditions in the contract of carriage limiting a carrier's liability is sufficient to make them binding on a passenger.[14] In the present writer's opinion, the notice required by the terms of the *Montreal Agreement* is sufficient and the fixing of a higher limit of liability is a compliance with article 22(1).[15] In addition the carrier agrees to waive the defence permitted by the Convention to the effect that, if the carrier "proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures," he is not liable to a plaintiff. This defence would probably apply in a case of sabotage affecting the airworthiness of an aircraft or destroying it in flight.[16]

There is, however, one other defence available to the carrier, which is not affected by the *Montreal Agreement.* If the carrier is able to prove that "the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." [17]

Furthermore, the *Montreal Agreement* does not deprive the passenger of his right to break the limitation on the carrier's liability, by proving, either that the carrier failed to deliver a ticket to him (and in addition, under the *Hague Protocol,* failed to notify him of the Convention applying to his contract of carriage and that it contains a limitation of liability) or that the carrier was guilty of wilful misconduct.[18] The Convention, of course, forbids the making of a contract of carriage less favourable to the passenger.[19]

II.

In order to illustrate the absence of uniformity, on a world basis, respecting the limitation on an air carrier's liability for injuries to

[14] See Shawcross and Beaumont, *Air Law,* 2nd ed., (London, 1951), p. 329, note (d).

[15] In Canada, the conditions would also have a statutory sanction because they are in the applicable tariffs which are at least tacitly sanctioned by Canadian Transport Commission.

[16] Art. 20(1).

[17] Art. 21.

[18] Convention, Art. 3(2), Protocol, Art. III; Convention, Art. 25, Protocol, Art. XIII.

[19] Art. 23.

passengers,[20] let us examine the respective rights of four hypothetical passengers travelling on an Air Canada flight from Montreal to Vancouver.

Passenger A holds a ticket, Montreal to Vancouver: The air carrier's liability to him is not limited as the provisions of the *Warsaw Convention* do not cover domestic carriage [21] and liability in this case is subject to the defences allowed by law in Canada.

Passenger B holds a ticket Vienna to Vancouver via Montreal: The limitation of $8,290 applies to him because Austria is a party to the *Warsaw Convention* but not to the *Hague Protocol.* Liability is presumed but may be rebutted.

Passenger C holds a ticket London, England, to Vancouver via Montreal. The limitation in the *Hague Protocol* of $16,600 applies to him because both the United Kingdom and Canada are parties thereto. Liability is presumed but may be rebutted.

Passenger D holds a ticket London - New York - Montreal - Vancouver. The provisions of the *Montreal Agreement* apply to him thus making the limitation either $75,000, including legal fees and costs or $58,000, excluding legal fees and costs, depending upon the rules respecting costs in the jurisdiction where he or his dependents

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[20] While it is true that the *Warsaw Convention* applies to other matters such as liability for the loss of or damage to baggage and freight, a contracting party who is dissatisfied with the provisions respecting passenger injuries cannot denounce them and be a party to the remainder of the Convention. A party must ratify, adhere to or denounce the whole Convention. Now the present crisis respecting the continuance of the Convention is entirely concerning its provisions relating to the limitation of the carrier's liability for passenger injuries. This does not mean that all other provisions of the Convention are working smoothly and do not require amendment. See, for example, Sand, *The International Unification of Air Law,* (1965), 30 Law and Contemporary Problems 400 where the author discusses basic problems, definitions of membership in conventions, transformation of treaties into national laws, interpretation by national courts and amendments; Pourcelet, *The International Element in Air Transport,* (1967), 33 J. Air L. and Com. 75 at p. 83 where the author discusses lack of judicial unification; Pourcelet, *L'Accord du 4 mai, 1966 sur les limites de responsabilité dans le transport aérien international de passagers,* (1966), 29 Rev. Gen. de l'Air et de L'Espace 247 at p. 258 where the author states: "Le système varsovien, s'il mérite encore ce nom, puisque s'y greffent la *Convention de Guadalajara,* le *Protocole de la Haye* et l'accord nouveau — ressemble à un arbre aux branches folles." In comparison to the dissatisfaction of the United States Government over the matter of damages for injuries to passengers, however, the other defects in the Convention are considered of secondary importance. Time and space will not permit a discussion of these matters.

[21] Compare, however, the situation in the United Kingdom where the Convention has been extended to cover domestic carriage.

bring suit. The liability of the carrier is absolute except for the defence of the contributory negligence of the passenger.[22]

In all of the above cases the limitation of liability may be broken if the passenger or his dependents are able to prove wilful misconduct, in the case of the Convention,[23] and intentional or reckless conduct either intending to do harm or knowing that damage would result therefrom, in the case of the *Hague Protocol*.[24]

From the time of the notice of denunciation of the Convention, to which reference has been made above, ICAO took an active part in the arrangements for the temporary solution to the problem under the terms of the *Montreal Agreement*. Following the acceptance of that Agreement by IATA and other carriers and by the United States Government, the ICAO Council in June, 1966, appointed a panel of experts to study the problem of compensation for personal injuries to air passengers and to report its findings and recommendations to the Council.[25]

The panel of experts has had two sessions and has issued a report of their deliberations for each session. Unfortunately these reports were circulated by ICAO on a restricted basis which means that they are semi-confidential. There has, however, been such a wide discussion of the limits of liability for passenger injuries contained in the panel's second report that I believe one would not be violating the restricted nature of the reports by discussing them briefly.

The panel has placed before ICAO two solutions with a recommendation that the second one should be adopted. The first solution recommends a retention of the rules of the *Warsaw Convention* as amended at the Hague with two modifications:

1) the carrier will not be deprived of limitation of liability because of failure to deliver a ticket or notice; and
2) the limits should be in two levels, as follows —
   basic limit $75,000 ($100,000 including costs)
   lower limit $37,000 ($50,000 including costs)

The second solution recommends strict liability. Under this latter proposal the carrier would be liable for death or injury to a passenger caused by an aircraft accident (Article 17 of the Convention), irrespective of how the accident was caused, with the exception of

[22] It should be pointed out that the *Montreal Agreement* does not apply to an airline which is not a party to it and the notice to passengers so states.

[23] Art. 25.

[24] Art. XIII.

[25] 58th Session, 10th Meeting; Doc. 8596 — 10e/964-10.

war or comparable situations. The carrier would retain the protection of article 21 of the Convention relating to contributory negligence (the panel was of the opinion that the Article applies also to cases of deliberate acts of the passenger or claimant). Where the damage resulted from the act or omission of a third party, the carrier's right of recourse against him should not be prejudiced and the new protocol or convention should contain a provision to that effect. The panel supported the view that the carrier should not lose his limitation only because he failed to deliver a ticket or to give notice to a passenger. This would mean a revision of article 3(2) of the Convention and of the Hague amendment thereto. It also recommended that, if the carrier is found guilty of wilful misconduct (article 25) or of intentional acts likely to cause damage or reckless conduct (article 25 as amended by the Protocol), the limits of liability should not apply. The limits which the panel decided upon were as follows:

1) basic limit of $58,000 ($75,000 including costs)
2) lower limit of $33,000 ($43,000 including costs).

The second solution, it is submitted, is to be preferred over the first one. The *Montreal Agreement* has demonstrated that the carriers themselves accept the principle of strict liability. In conceding this, the carriers are not in fact making much of a sacrifice. Under the common law, the courts are likely to apply the rule of evidence known as *res ipsa loquitur,* which makes it insufficient for the defendant to show that there were several hypothetical causes of an accident consistent with the absence of negligence. He must go further and either show that there was no negligence or give an explanation of the cause of the accident which did not connote negligence.[26] In other words, the onus of proof is shifted to the defendant to such an extent that he must explain how the accident happened without negligence on his part — a very heavy onus indeed. Under the civil law, generally, a contract of carriage implies that the carrier will transport the passenger from A to B safely and soundly. His obligation is one of result (*obligation de résultat*) and in order to exculpate himself, he must establish that the accident was caused by *vis major* or some such cause entirely beyond his control.[27] This also constitutes a heavy burden of proof.

[26] Laidlaw, J. A., in *Zerka* v. *Lau Goma Airways Ltd.,* [1960] O.W.N. 166 (C.A.).

[27] In Quebec, of course, carrier suits are taken under articles 1053, 1054 and 1056 C. C. and not under the contract of carriage and article 1024 C. C. In this connection see Crépeau, *Le contenu obligationnel d'un contrat,* (1965), 43 Can. Bar. Rev. 1, at p. 27, where the author states: "L'article 1024 du Code civil décrète enfin que l'on doit insérer dans le cercle contractuel les

Strict liability of the carriers, with a limit on that liability for personal injuries to air passengers would appear to be a better solution to the problem than to retain the principle of presumption of fault contained in the existing *Warsaw Convention.* Under a regime of strict liability the carriers and their insurers would tend to settle claims quickly. The limit, however, might well be set at, say $100,000 inclusive of legal fees and costs and $75,000 exclusive of them. At the same time, article 25 of the Convention relating to wilful misconduct or intentional and reckless acts, as the case may be, should be deleted, thus preventing all attempts to break the much higher limit. The right of the carrier to allege the negligence of a passenger should be retained, as this would not affect the claims of other passengers or their dependents when the same accident caused damage to them. The obligation on the carrier to give adequate notice to passengers of the limits of liability in their contracts of carriage with the precise wording of the notice set out in the Convention should remain. In addition, if the carrier is required to set out these notices of limits in each passenger ticket, then failure to deliver a ticket would, of course, constitute failure to give the passenger notice. The penalty should, in this situation, be a removal of the limits of liability.

It is highly important that there should be only one limit of liability. To the objection, which no doubt will be made by some countries, that the suggested limit is too high, it may be answered that the courts of each country should assess damages according to their several national standards. If to obtain wide acceptance of the Convention containing the proposed limitation, it is necessary to provide for a higher and a lower limit, then the lower limit should only be for a trial period and then become inoperative. This would be a step towards unification.

That part of article 19 of the Convention which provides that the carrier is liable for the delay of a passenger should be eliminated entirely. In any event, the damages for delay should be limited to a refund of the price of the passenger's ticket and payment of his actual out-of-pocket expenses, if any, and should not be awarded unless it is proved that the delay was caused by the carrier's own fault or negligence. It is entirely unreasonable to apply the limits

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obligations implicites qui découlent de la loi. Cette disposition s'applique, à notre avis, aux prescriptions législatives tant provinciales que fédérales. C'est ainsi, par exemple, que la législation fédérale relative au transport aérien international s'incorpore au contrat de transport aérien international au même titre que la législation provinciale touchant les voituriers." See also Prof. Crépeau's remarks respecting air transport and particularly p. 13, note 47.

of liability for the carriage of passengers in the Convention, the Protocol or the *Montreal Agreement* to the quantum of damages which a passenger is entitled to claim for delay under article 19. Where that article refers to damages for delay in the carriage of goods and luggage, however, the limitations on the liability of the carrier, set out in article 22(2), are not unreasonable.[28]

It should be pointed out in passing that questions of law have arisen respecting the application of the rules contained in the *Warsaw Convention* to the hire, charter and interchange of aircraft. Such arrangements introduce a third party into the picture, namely, the contracting carrier who is not the actual carrier of passengers, luggage and freight. The Legal Committee of ICAO dealt with this problem by drafting another international convention which was opened for signature following a diplomatic conference called by ICAO at Guadalajara, Mexico in 1961. This Convention is grafted on to the *Warsaw Convention* as amended by the *Hague Protocol.* It is bound to raise difficult questions of interpretation.[29]

From the foregoing it seems evident that the whole matter of the liability of air carriers should now be submitted to a body consisting of the jurists of the world who are experts in air law for study and for the drafting of an entirely new and consolidated convention. This will, however, no doubt take about ton years to complete, unless it it done as an emergency project. In the meantime it is necessary to deal with the limit of air carriers for injuries to passengers in order to bring about uniformity throughout the world and to prevent the denunciation of the *Warsaw Convention* by the United States and possibly by other countries as well. A body of jurists independent of the Legal Committee of ICAO is suggested in order to avoid, as far as possible, political considerations affecting the initial stages at least of the work. This is not intended as a criticism of the Legal Committee, but it is readily realized, I believe, that in such a body international politics cannot be entirely eliminated or even discounted.

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[28] For a discussion of the subject of delay under the Convention and the Protocol, see Cheng, *The law of "International" and "Non-international" Carriage by Air,* [1964] Law Soc. Gaz. 37 at p. 115.

[29] See Pourcelet, *Transporteur contractucl et transporteur de fait dans la Convention de Guadalajara,* (1963), 9 McGill L.J. 317 and especially at pp. 335-336 where the author states: "N'eût-il pas été préférable d'intégrer dans la *Convention de Varsovie* quelques dispositions relatives aux problèmes de l'affrètement aérien, ce qui aurait eu pour effet immédiat d'éviter des conflits quant aux conditions d'application de la *Convention de Varsovie* et de *Guadalajara.*"

III.

Generally speaking, in North America, public policy has not favoured limited liability in the carriage of passengers. There are a few exceptions to this statement but the general policy of governments is well expressed in section 353 of the Canadian *Railway Act.*[30] That section prohibits the inclusion in any contract of carriage of conditions impairing, restricting or limiting the liability of railway companies without the approval of the Canadian Transport Commission. The section further provides that the Commission may, in any case, determine the extent of any such impairment, restriction or limitation. Railway companies accept full responsibility for injuries to passengers. The same rule also applies to highway transport companies. Although the Canadian *Aeronautics Act*[31] does not have a section corresponding to section 353 of the Canadian *Railway Act,* the Canadian Transport Commission provides by regulation that air transport operators must not limit their liability for injuries to passengers below $20,000 (Can.) per passenger seat. As such a limitation, under the common law, would not be binding, in any event, upon the dependents of a passenger killed in an aircraft accident, the airlines of Canada accept full liability in the domestic field. What justification is there, therefore, for limitation of liability for injuries to passengers in the international field by adherence to the Warsaw Convention?

To answer this, it is relevant to set down the principal advantages which accrue to a plaintiff in Canada seeking relief in damages from an international air carrier under the *Warsaw Convention.* The Convention contains:

First, a presumption of the liability of the carrier;

Secondly, a protection from lower limits of liability than those set out in the Convention; and

Thirdly, the provision of four *fora* in which an action against an international carrier may be commenced. These *fora* are

> at the option of the plaintiff, in the territory of one of the High Contracting parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.[32]

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[30] R.S.C. 1952, c. 234. But for a limit in fatal accident cases of $15,000, see Mass. Gen. Laws Ann. c. 229 No. 2 (1955) as in effect Sept. 1958. This limit has been raised and now stands at $50,000. (Mass. Gen. Laws Ann. c. 229 No. 2 (supp. 1965)).

[31] R.S.C. 1952, c. 2.

[32] Art. 28.

A plaintiff, therefore, escapes from the uncertainty which would otherwise exist as to the proper place in which to found an action.

In addition to the above three advantages there is, as well, uniformity in the choice of law and the right of action and remedies for wrongful death. Article 24 of the Convention leaves open the questions as to who are the persons who have the right to bring suit and what are their respective rights. The *Carriage by Air Act* (Canada) settles these questions by providing that the provisions of the Convention which relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons have the force of law in Canada in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the service.[33] The Act also provides that article 17 of the Convention, the liability of the carrier, applies to cases involving the death of a passenger in substitution for any law in force in Canada and that the Second Schedule to the Act "shall have effect with respect to the manner in which it may be enforced."[34] It follows from the foregoing that when an action is commenced in Canada, in one of the *fora* named in the Convention, the plaintiff is not faced with the problem of the law to be applied in determining the cause of action, who are the persons having a right to bring suit and what are their respective rights. The *Carriage by Air Act*, the law of the forum, applies.[35]

Quite apart, therefore, from the importance of finding a solution to the problem of fixing a limit to the liability of international air carriers which would receive world wide acceptance, it will, I believe, from a careful reading of the foregoing, be conceded that the Warsaw Convention contains provisions helpful to those seeking compensation from international air carriers and that accordingly the Convention should be continued.

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[33] *Carriage by Air Act*, R.S.C. 1952, c. 45., s. 2 (1).

[34] *Ibid.*, s. 2(4).

[35] For a discussion of the difficulties encountered in the United States, see G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, (1959), 26 J. Air L. & Com. 217, 323; for a discussion of the law to be applied, see Lowenfeld and Mendelsohn, *loc. cit.*, at pp. 552 *et seq.*