As far as I am aware there are no reported cases in Canada on problems arising out of wrongful death claims under the provisions of the International Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12th, 1929, and known as the Warsaw Convention. There are, however, reports of cases relating to this important subject in other jurisdictions, such as the United States, the United Kingdom and France.

The Carriage by Air Act was enacted by the Parliament of Canada in 1939 for the purpose of giving effect to and of enabling Canada to perform her obligations respecting the Warsaw Convention. The Carriage by Air Act was not proclaimed in force until July 1st, 1947. Canada’s accession to the convention was registered with the Government of Poland on June 10th, 1947, and became effective on September 8th of that year.

Due to the high percentage of passenger fatalities accompanying a serious air transport accident, the most frequently recurring cases in tort, relating to “international carriage” of passengers by air, are those involving wrongful death. It is my hope that this article will be of some assistance to Canadian practitioners who are called upon to advise on wrongful death claims under the Warsaw Convention.

Article 17 of the Warsaw Convention (First Schedule of the Carriage by Air Act) provides, inter alia, that an air carrier in “international carriage”, as defined in article 1, is liable in damages for the death of a passenger if the accident which caused the damage took place on board an aircraft or in the course of any of the operations of embarking or disembarking. The air carrier’s only defences are that he and his agents took all necessary measures to
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avoid the damage or that it was impossible for him or them to take such measures or that the damage was caused by or contributed to by the negligence of the injured person. The onus of establishing these defences is on the air carrier and in cases involving contributory negligence the law of the forum applies. A United Kingdom court has ruled "all necessary measures" to mean that the carrier by his agents or servants "exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger . . . ." This interpretation of article 20 of the Warsaw Convention has been approved in other countries.

Under the provisions of article 22 of the convention, the air carrier's liability for the wrongful death of a passenger is limited to 125,000 gold francs, which is the equivalent of approximately $8,300, unless the plaintiff establishes that the wrongful death was caused by the air carrier's wilful misconduct, or that the air carrier failed to deliver a ticket to him. The limitation period within which an action must be brought is two years.

The courts of France and the United States are in agreement on the point that a plaintiff who alleges "wilful misconduct" or its equivalent in the civil law must prove such an allegation. The United States courts have held that "wilful misconduct" means wilfully performing "any act with knowledge that the performance of that act was likely to result in injury to a passenger" or performing "that act with reckless and wanton disregard for its probable consequences". The Hague Protocol to amend the Warsaw Convention, which is now open for signature on behalf of contracting states, contains a complete revision of article 25 of the convention. This revision, which is an attempt to express the collective views of jurists on the subject of "wilful misconduct", reads as follows:

The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the car-

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3 First Schedule of The Carriage by Air Act, supra, footnote 1, arts. 20 and 21.
6 First Schedule of R.S.C., 1952, c. 45, arts. 25 and 3(2).
7 Ibid., art. 29.
rier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.  

A slight digression from the main theme is indicated at this point to discuss the anomaly in Canadian law arising out of the difference between the concept of liability of air carriers to compensate Warsaw passengers, under the provisions of the convention, and that which prevails with respect to domestic passengers. For instance, one passenger on an aircraft may hold a ticket reading London, England, to Vancouver. Another passenger on the same aircraft may hold a ticket reading Montreal to Vancouver. Whereas, subject to the exceptions set out above, the liability of the airline to compensate the first mentioned passenger for injuries sustained by him is limited to $8,300, its liability to the second passenger is unlimited. This anomaly could be removed by extending the Warsaw regime to all carriage of passengers by air in Canada by means of appropriate legislation or an order in council issued pursuant to the provisions of section 4 of the Carriage by Air Act, which grants to the Governor in Council the right to extend the Warsaw regime to domestic carriage. The limitation of liability will be increased to approximately $16,000 if the Hague Protocol is ratified by Canada and other contracting states. This higher limitation of liability might make the application of the Warsaw regime to domestic carriage more acceptable in Canada. It is interesting to recall that the Warsaw regime has been extended to domestic carriage in the United Kingdom and other states.

Divergent views have been expressed in France and the United States respecting the law to be applied in wrongful death cases arising out of international carriage as defined in the Warsaw Convention. The French view is that the cause of action arises in contract, but in the United States the courts have held that it arises in tort. If the cause of action is founded in contract, the *lex loci contractus* would apply unless the circumstances of a

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9 I.C.A.O., Doc. 7632, art. XIII.
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One cannot expect lawyers trained in the civil law to have the same legal philosophy as those trained in the common law, and this accounts in part for divergence of opinion. But in addition to this divergence due to different philosophies, jurists in the United States are struggling with another difficulty. The Warsaw Convention in United States law is a treaty approved by the Senate and as such is a part of the paramount law of the land. Congress has not enacted a statute similar to the Canadian Carriage by Air Act and the Warsaw Convention itself is silent respecting the law to be applied in wrongful death cases. Under these circumstances, the United States courts have looked to the law of the place where the accident happened to determine the parties who have the right to claim damages in Warsaw cases just as they would in other wrongful death cases. Some United States jurists contend that the courts should found Warsaw wrongful death cases in contract and not in tort. Up to the present time, judicial decisions in the United States in “international” cases involving wrongful death have not supported this theory.

I submit that the difficulties which are found in the interpretation and application of the Warsaw Convention in the United States jurisprudence are not present to the same extent in Canadian law. In Canada the provisions of the Carriage by Air Act determine if the carriage is “international”, not only the law to be applied in wrongful death cases, but, as well, the persons entitled to damages. The Carriage by Air Act provides in section 2(1) that, subject to section 2, the provisions of the Warsaw Convention, which are set out in the First Schedule to the Act, in so far as they relate to the rights and liabilities of carriers, passengers, and other persons, are to 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 which performed the carriage. Subsection (4) of section 2 provides that any liability imposed by article 17 of the convention on the carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of a passenger under any law in force in Canada. Subsection (4) also refers to the Second Schedule of the Act and provides that the provisions of the Second Schedule shall have effect with respect to the persons by and

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for whose benefit the liability imposed by article 17 of the convention is enforceable and that the provisions of the Second Schedule shall have effect with respect to the manner in which the liability may be enforced. These provisions are in substitution for the conflict of laws rule in tort actions as well as any other statute or law relating to the same subject matter.

Article 1 of the Second Schedule provides that the liability for wrongful death shall be enforceable for the benefit of such members of a deceased passenger’s family as sustained damage by reason of his death. The expression “member of a family” is defined as the wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child and grandchild. The article also provides that in deducing any such relationship any illegitimate person and any adopted person shall be treated as being, or as having been the legitimate child of his mother and reputed father, or, as the case may be, of his adoptors.

Article 2 of the Second Schedule provides that an action to enforce the liability may be brought by any person who, under the law in force in the province in which such action is brought, is entitled to act or is recognized as the representative for any one or more of the persons for whose benefit the liability is enforceable.

Article 3 of the Second Schedule confers jurisdiction on the court before which an action is brought to make any order as may appear to such court to be just and equitable, in view of the limitation of liability of a carrier under the convention and, in view of any proceedings which may have been commenced elsewhere in respect of the death of the same passenger. This article also confers jurisdiction on the court in which the action is brought to stay proceedings with a view to avoiding multiplicity of actions, and to divide the amount recovered between the persons entitled.

I have set out the above provisions of the Carriage by Air Act in order to lay a foundation for the discussion which follows. The Carriage by Air Act in effect creates a new wrongful death statute which, nevertheless, depends for its complete enforcement upon some provisions of the various provincial laws. Does the Act have the effect of nullifying all the remaining provisions of provincial wrongful death statutes, article 1056 of the Civil Code of Quebec, and other laws and statutes respecting liability flowing from a fatal accident occurring in “international carriage” as defined in the Warsaw Convention? In order to give a satisfactory answer to this question I propose to compare the provisions of the Carriage by Air Act respecting wrongful death with those
contained in the Ontario Fatal Accidents Act.\textsuperscript{13} For all practical purposes, the wrongful death statutes of the other common-law provinces contain similar provisions to the Ontario statute, and article 1056 of the Civil Code of Quebec is not seriously at variance with them.\textsuperscript{14}

Section 1 of the Ontario Fatal Accidents Act which defines “child” and “parent” is superseded by article 1 of the Second Schedule of the Carriage by Air Act. Section 2 of the Ontario Act, which provides for the liability of a person who causes a wrongful death, is superseded by sections 2(1) and 2(4) of the Carriage by Air Act and articles 3(2), 17, 20, 21, 22, 23, and 25 of the First Schedule thereto which provide for liability, the right to enforce same, defences of the carrier, the limit of liability, a prohibition against the carrier arranging for a lower limit of liability and the removal of the limit of liability in cases where the carrier is guilty of wilful misconduct or has failed to issue a ticket. Article 1 of the Second Schedule of the Carriage by Air Act, dealing with the persons for whose benefit an action for wrongful death may be brought, is substituted for that part of section 3(1) of the Ontario Act dealing with the same subject. As stated above, article 2 of the Second Schedule, however, provides that an action to enforce liability may be brought by any person who, under the law in force in the province in which an action is brought, is entitled to act or is recognized as the personal representative of a deceased passenger. An action may also be brought by any person named in the Second Schedule for whose benefit the liability is enforceable or by any person who, under the law in force in the province in which the action is brought, is entitled to act or is recognized as the representative for any of the persons for whose benefit liability is enforceable under the Second Schedule. It will be observed from the foregoing that provincial law applies in part by virtue of the provisions of the Second Schedule.

The provisions respecting funeral expenses which are set out in section 3(2) of the Ontario Act present a problem. Are funeral expenses recoverable under the provisions of the Carriage by Air Act if the accident causing the wrongful death occurred in Ontario? I am of the opinion that they are not recoverable if the awarding of them would have the result of increasing the limit of liability of the carrier beyond $8,300, as that limit is substituted for any damages which might otherwise be ordered. Since, how-

\textsuperscript{13} R.S.O., 1950, c. 132.
\textsuperscript{14} Nadeau, Traité de droit civil de Québec, vol. 8 (1949), p. 490.
ever, the Carriage by Air Act is silent respecting the liability of a carrier for funeral expenses, a court is free, it seems to me, to award them to a plaintiff under provincial law in cases where the awarding of them would not have the result of increasing the limit of liability of a carrier. In cases where an air carrier cannot avail himself of the limit of liability, funeral expenses do not present a problem.

Section 3(3) of the Ontario Fatal Accidents Act provides that a court is not to take into account any sum paid or payable on the death of the deceased or any future premiums payable under any contract of insurance. The Carriage by Air Act is silent respecting "any sum paid or payable" on the death of a passenger as well as respecting future insurance premiums. In my opinion, section 3(3) of the Ontario Fatal Accidents Act is not at variance with the provisions of the Carriage by Air Act and, in cases where Ontario law applies, insurance is not to be taken into account by the courts in assessing damages arising out of the death of a Warsaw passenger. This problem of whether or not insurance is to be taken into account in assessing damages may be a source of controversy since its solution depends upon the law of the place where the accident happened. It is a pity that the Carriage by Air Act does not contain a provision which would effectively dispose of the problem.

Sections 4 to 9, both inclusive, of the Ontario Fatal Accidents Act are procedural in nature. They deal, inter alia, with such matters as a prohibition against the bringing of more than one action and the time within which an action is to be commenced, the furnishing of evidence as to the persons entitled to relief, the right of any of the persons interested to bring an action after a lapse of six months in cases where there is no executor or administrator appointed, the apportionment of the compensation recovered and the power of a court to determine the persons entitled to relief. The Carriage by Air Act, inter alia, extends the time within which an action may be brought from one year to two years and empowers the court to provide for the representation of all interested persons, the staying of proceedings with a view to avoiding multiplicity of actions, in a province or elsewhere, involving the death of the same "international" passenger and for the division of the amount recovered, after deducting costs not recovered from the defendant, between the persons entitled in such proportions as the court may direct. From the foregoing analysis, it will be readily conceded that the Carriage
by Air Act supersedes the Ontario Fatal Accident Act provisions respecting the limitation period and the power of a court to stay proceedings when actions relating to the same subject matter have been commenced in another jurisdiction.

The plaintiff's right to bring suit is conferred by section 2(4) and by article 2 of the Second Schedule of the Carriage by Air Act. As stated above, these provisions of the Carriage by Air Act not only substitute article 17 of the First Schedule for any liability of the carrier in respect of the death of a Warsaw passenger but also provide for the person or persons who may maintain an action for wrongful death. The intent of the Carriage by Air Act is to make the Warsaw Convention workable as a uniform code of law in wrongful death cases.15

There are, however, two further problems to be discussed. The first is if dependents of a Warsaw passenger, who met his death in an aircraft accident, are entitled to workmen's compensation benefits, may these dependents commence an action against a Canadian carrier contrary to the provisions of some of the provincial Workmen's Compensation Acts?16 The Workmen's Compensation Act of Manitoba, for example, provides that when an employee dies from personal injuries received in an accident arising out of and in the course of his employment the employee's dependents have no right of action against an employer in any industry within the scope of the Act or against any workman of such an employer.17 A Canadian airline involved in an accident resulting in the wrongful death of a Warsaw passenger is such an employer under most of the workmen's compensation Acts. The Carriage by Air Act imposes liability on an air carrier for the wrongful death of a Warsaw passenger in substitution for any liability existing in Canada in respect of that passenger's death. The right of the dependents of a deceased person to receive compensation payments under a Workmen's Compensation Act is not a liability for which the liability under subsection (4) of section 7 of the Carriage by Air Act may be substituted. Subsection (1) of

15 Grein v. Imperial Airways Ltd., supra, footnote 4, at p. 91.
16 R.S.A., 1955, c. 370, s. 24(9); R.S.B.C., 1948, c. 370, s. 11(4); R.S.M. 1954, c. 297, s. 5; R.S.N., 1952, c. 253, s. 12; R.S.N.B., 1952, c. 255 s. 10; R.S.N.S., 1954, c. 319, s. 47; R.S.O., 1950, c. 430, s. 9(5). An action is only maintainable by a workman in an industry under Schedule 1 against an employer in an industry under Schedule 2 and employees of that employer; a self-insured airline is an industry under Schedule 2 and suit could therefore be maintained against that company if the workman concerned were employed by an industry under Schedule 1. Note also that suits against third party employers and their employees are not prohibited in Quebec.
17 Ibid., s. 5(6); also R.S.S., 1953, c. 256, s. 11.
section 2 of the Carriage by Air Act provides that the Warsaw Convention (the First Schedule of the Carriage by Air Act) shall have the force of law in Canada and subsection (4) of that section provides that the Second Schedule shall have effect with respect to the persons for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced. The Second Schedule provides, as well, that the liability is enforceable for the benefit of members of a deceased passenger’s family as therein defined. In my opinion, the clear meaning and intent of the Carriage by Air Act is that the dependents of a deceased Warsaw passenger have a right of action even in a case where a provincial Workmen’s Compensation Act denies that right. Some jurists have expressed the opinion that workmen’s compensation is substituted, in some jurisdictions, for any right of action which the dependents of a deceased workman might have against his employer and certain third party employers and their employees, including Canadian airlines, and that there is, as a consequence, no liability for which the liability under the Carriage by Air Act may be substituted. As a result, the dependents of a deceased Warsaw passenger entitled to workmen’s compensation benefits, would have no right of action under the Carriage by Air Act against a Canadian airline. I submit that this position is unsound as it is contrary to the spirit and intent of the Carriage by Air Act.

One should also bear in mind that the dependents of a deceased Warsaw passenger have four choices of a forum and are free to choose one where a right of action may exist. This would not necessarily be a Canadian court. The court seized of the action would, find it necessary to consider and decide, at least in the case of an accident which occurred in Canada, which Workmen’s Compensation Act applied. It seems to me that a Canadian court would hold that the Workmen’s Compensation Act of the place where the accident happened would apply and in that event the question of whether or not the dependents have a right of action would arise if the relevant Workmen’s Compensation Act contained the provision to which reference has been made.

The second point involves the right of the personal representative of a deceased passenger to maintain an action against an air carrier for loss sustained by that passenger’s estate by reason of his earlier death. An action by the dependents of a deceased passenger, alleging damage resulting from his wrongful death, is an independent right entirely apart from an action for loss to the
deceased passenger’s estate. If the Carriage by Air Act creates in effect a new Fatal Accidents Act, it would follow that an action under a provincial Trustee Act is maintainable since the liability under the Carriage by Air Act is substituted for that under a relevant Fatal Accidents Act, and not for an action under a Trustee Act. Any damages, however, recovered under the provisions of a Trustee Act would be taken into account in assessing damages under the Carriage by Air Act. There might, therefore, be little advantage to the dependents of a deceased Warsaw passenger arising out of a successful action under a Trustee Act for loss to that passenger’s estate.\textsuperscript{18} The question arises here also as to which Trustee Act is to be applied. This would depend upon whether the suit by an executor or administrator is brought in contract or in tort. In addition to a claim for damages for loss of expectation of life under a Trustee Act, an executor or administrator could also maintain an action for damages for loss of a deceased Warsaw passenger’s personal effects in an air transport accident, subject to the limitations provided in the Carriage by Air Act and the First Schedule thereto.\textsuperscript{19}

The dependents of a deceased Warsaw passenger, as indicated above, have other fora than the courts of Canada in which they may bring an action. There are four fora available provided the forum chosen is in the territory of one of the contracting parties to the convention. These fora are, first, the court having jurisdiction where the air carrier is ordinarily resident, second, where the air carrier has its principal place of business, third, where the air carrier has an establishment by which the contract of carriage was made, fourth, at the place of destination of the deceased passenger.\textsuperscript{20}

The foregoing illustrates some of the many interesting features of the Carriage by Air Act which, on the one hand, grafts upon the existing laws in force in Canada some new concepts of carrier liability and, on the other, substitutes new rules for existing ones.\textsuperscript{21}

\textsuperscript{18} See Shawcross and Beaumont, op. cit., supra, footnote 12, p. 375, par. 397 and footnotes (b) and (i).

\textsuperscript{19} Carriage by Air Act, supra, footnote 1, ss. 2(1) & 2(4); First Schedule, art. 22(2) & (3).

\textsuperscript{20} Carriage by Air Act, Ibid, First Schedule, art. 28.

\textsuperscript{21} For the purposes of the foregoing discussion, I have assumed the constitutional validity of the Carriage by Air Act. The Act deals with the control and regulation of aeronautics and is, therefore, within the powers of the Parliament of Canada. In re the Regulation and Control of Aeronautics in Canada, [1932] A.C. 54; Johanneson et al v. Rural Municipality of West St. Paul et al, [1951] 4 D.L.R. 609. I am also aware that there is room for argument as to whether or not all the views I have expressed in this article would be acceptable to Canadian courts.