

CORRESPONDENCE

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Wrongful Death Actions under the Canadian
Carriage by Air Act

TO THE EDITOR:

May I request the privilege of making a brief reply to the letter of my friend, Alastair R. Paterson, which appeared in the December, 1960, number of the Review.¹ Mr. Paterson takes issue with some of the views I expressed in an article entitled "Wrongful Death Actions under the Canadian Carriage by Air Act".² I do not propose to answer Mr. Paterson's arguments point by point. I will content myself with a few general observations.

In my article, I attempted to set limits to the drastic limitation of liability provision of the Carriage by Air Act³ by giving to section 2(4) of that Act a more restrictive meaning than Mr. Paterson is willing to concede. There is, of course, the point that the imposition of the liability under article 17 of the Warsaw Convention is one thing and the assessment of damages is another. A provincial court might decide to use its own law in assessing damages.⁴ The Carriage by Air Act does not repeal the provincial Lord Campbell's Acts, and a court might, therefore, apply a relevant Lord Campbell's Act as a basis for deciding that insurance is not to be taken into account in the assessment of damages and that funeral expenses may be allowed. Such a finding would not violate the clear intention of the Carriage by Air Act to impose a liability limited to \$8,300.00.

With respect to the right of the personal representative of a deceased international passenger to maintain an action for loss to that passenger's estate, due to his early death, I need not repeat the argument I presented in my article with which Mr. Paterson disagrees. My argument rests entirely on a narrow interpretation of section 2(4) of the Carriage by Air Act on the ground that, since rights at common and statute law are curtailed by section 2(4), it should be strictly construed.

¹ (1960), 38 Can. Bar Rev. 635.

² *Ibid.*, at p. 216.

³ R.S.C., 1952, c. 45.

⁴ Dicey, *Conflict of Laws* (7th ed., 1958), pp. 962, 1090 and Falconbridge, *Essays on the Conflict of Laws* (2nd ed., 1954), p. 819.

It is my view that the liability imposed by article 17 of the Warsaw Convention is imposed regardless of whether or not it can be substituted for any liability under any statute. I cannot believe that the absence of provincial legislation relating to wrongful death could nullify the treaty obligations of Canada under the Warsaw Convention. Furthermore, it seems logical to suggest that, if a province did not have a Lord Campbell's Act, the liability imposed by article 17 would be substituted for the common-law rule *actio personalis moritur cum persona*. I am inclined to the view, therefore, that the liability under article 17 exists regardless of the provisions of a provincial workmen's compensation law.

The provision of the Warsaw Convention limiting the liability of an international air carrier for damages resulting from the wrongful death of a passenger to \$8,300.00 is low by Canadian standards. If, in assessing damages under the Carriage by Air Act, funeral expenses cannot be awarded and if the insurance contracts of a deceased international passenger must be taken into account in Warsaw cases, international air carriers are in a more favourable position as to liability than the framers of the Warsaw Convention intended. In many cases the claims of dependants would be reduced to very small sums indeed. Mr. Paterson has, however, presented cogent arguments that this is, indeed, the situation in Canada.

In my opinion this discussion between Mr. Paterson and myself may serve a useful purpose. It appears to me that Parliament should amend the Carriage by Air Act to make certain that when a court assesses damages in cases involving the Warsaw Convention, insurance is not to be taken into account and that funeral expenses, limited to a certain amount, may be allowed, provided such expenses do not have the result of an assessment in excess of \$8,300.00. There is a precedent for the suggested insurance provision in the Canada Shipping Act.⁵ Also, in the United Kingdom the right to an action for damages by the personal representative of a deceased international passenger for loss of expectancy of life has been specifically preserved by statute.⁶

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⁵ R.S.C., 1952, c. 29, s. 727(2).

⁶ Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41.

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TO THE EDITOR:

Mr. Rosevear made available to me his reply to my letter which appeared in the last issue of the Review¹ so that I could write a rejoinder which could be published in the same issue as his reply.

In my view, the Carriage by Air Act creates an entirely new statutory cause of action in the case of the death of a passenger which is substituted for any liability of the carrier in respect of the death of that passenger under any law in force in Canada. When a case comes before them, the provincial courts will have to construe the statute and in particular the phrase, "The carrier is liable for damage sustained in the event of the death . . . of a passenger . . .".² They will have to decide what the word "damage" means in that context and apply that meaning in the assessment of the amount to be awarded.

Those provisions of the Fatal Accidents or equivalent Acts in the various provinces which relate to assessment of damages, for instance, directing that insurance monies be ignored in calculating damages, or making funeral expenses recoverable, relate solely to a cause of action brought under those Acts, and I do not understand how they can be said to be relevant to the interpretation of the word "damage" in article 17 of the First Schedule to The Carriage by Air Act.

The framers of the Warsaw Convention, a translation of which comprises the First Schedule to the Carriage by Air Act, must have foreseen that the appropriate courts would have to interpret ". . . damage sustained in the event of the death . . . of a passenger . . .". It seems clear that they did not concern themselves with how the phrase would be interpreted, nor what factors would be taken into account in converting the interpretation into money. The assessment of ". . . such damages . . . as are proportioned to the injury resulting from . . . death to the persons respectively for whom and for whose benefit the action is brought . . .",³ is not uniform throughout Canada, as in some provinces insurance monies must still be taken into account since they have not been excluded by amendments to the Act as has been the case in other provinces.

Unlike the position in the United States where the Warsaw Convention on ratification became part of the domestic law and affected the rights of its citizens, this convention only became part of the domestic law of Canada by virtue of the express enactment of the Carriage by Air Act.

¹ (1960), 38 Can. Bar Rev. 635.

² Art. 17, First Schedule, Carriage by Air Act, R.S.C., 1952, c. 45.

³ Fatal Accidents Act, R.S.O., 1960, c. 138, s. 3. Identical provisions appear in the Fatal Accidents or equivalent Acts in all the common-law provinces.

In my view, the problem is simply one of interpretation of a Dominion statute, and it is wholly irrelevant for a court to consider whether or not Canada has discharged her treaty obligations.

The Dominion Parliament has provided that "Any liability imposed by Article 17 of the said First Schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of a carrier in respect of the death of that passenger under any law in force in Canada . . .".⁴ When the words "in substitution" are given their ordinary and natural meaning, then if liability does not exist already, for instance, because of provincial workmen's compensation legislation, surely there can be no liability under the Act.

If the Dominion Parliament wishes insurance monies to be excluded from the calculation of damages in wrongful death cases under the Act, or desires that funeral expenses or damages for loss of expectation of life should be recoverable, it can readily do so by amending the Carriage by Air Act. It has not yet done so. Possibly one reason for this may be that in the calculation of damages in death claims under the provincial Fatal Accidents or equivalent Acts, insurance monies are not uniformly excluded from consideration, nor can the full amount of the funeral expenses or damages for loss of expectation of life be recovered in every province.

ALASTAIR R. PATERSON*

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Canadian Association of Comparative Law

TO THE EDITOR:

I would like to bring to the attention of all the members of the legal profession some significant recent developments in Canada in comparative law.

It is not surprising that there has long been an interest and activity in comparative legal studies in Canada, a country whose legal situation provides not only the opportunity of an excellent laboratory for the advancement of that area of legal science but also the challenge of a constant employment of it in the attainment of a national legal self-understanding. Until recently this activity was to be seen in only a few of the law schools, notably those of McGill and Toronto, in the work of the Comparative Law Committee (now defunct) of the Association of Canadian Law Teachers, and in the ever-increasing work of the Comparative Law Section of the Canadian Bar Association.

⁴ Carriage by Air Act, *supra*, footnote 2, s. 2 (4).

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In recent years, however, the time, energy and money devoted to comparative law in Canada has greatly increased. McGill, Toronto and Osgoode Hall law schools each can boast a faculty member qualified in both the civil and the common-law systems, and courses in comparative law are now given not only in those schools but also at Laval and Saskatchewan. The foreign law library of the Centre of Comparative Law at the University of Toronto has been greatly extended with the aid of the Carnegie Corporation. The increasing activity of the Canadian Bar Association has already been noted. In the Province of Quebec a group of jurists promoted last year the incorporation of an association for (*Association québécoise pour l'étude comparative du droit*) And the addition of a common-law to the civil-law section in the Faculty of Law at the University of Ottawa gives promise of much fruitful comparative law activity. It is with the intention and hope of co-ordinating these and other less formalized but no less vital interests in comparative law that the Canadian Association of Comparative Law has been formed.

In 1950 the United Nations Educational, Scientific and Cultural Organization sponsored the creation of what is now called the International Association of Legal Science, whose purpose is to promote the development of legal science throughout the world by making use especially of the comparative method. The International Association of Legal Science has for its members comparative law associations in many countries (now numbering approximately forty), each being appointed as National Committees of the association, and on account of its broadly representative membership the Canadian Association of Comparative Law has been accredited as the National Committee for Canada.

These two incentives to the creation of the Canadian Association—internal activity and external affiliation—have affected the nature of its membership and its programme. In order to bring together the existing comparative law interest, the first council of the Association was made up of two delegates from the Canadian Bar Association (Messrs. J. Matheson and M. C. Shumiatcher, Q.C.), two from the Quebec association mentioned above (Professors L. Baudouin and A. Mayrand) and two from the Association of Canadian Law Teachers (Professors J.-G. Castel and A. B. Weston). To these are presently being added two more by election by the members of the Association. No doubt in this way a united front was immediately achieved and co-ordination of activities was commenced at the earliest possible time; but as that co-ordination progresses, and as the new Association acquires its own life and character, experience may well suggest a change in the constitution of the governing body, presumably by handing over the election of the council to the ever-widening body of members.

It is this rapid growth of membership which constitutes the most sure sign of a stable and fruitful future for the Association. Already over eighty persons are members, and their even distribution among judges, practitioners, teachers and students ensures a desirable representation and variety of points of view. The Association is most fortunate in that from among its members Mr. Justice Judson of the Supreme Court of Canada has accepted the post of its first President, and Professor Castel of Ogoode Hall Law School has agreed to discharge the onerous duties of Secretary-Treasurer.¹

The initial programme of activities of the Association remains to be settled at the first general meeting, but many probabilities present themselves. As part of the International Association of Legal Science, the Association will be the prime point of contact with overseas bodies and will serve as a "clearing-house" for all information on national and international activities in comparative law. On any project undertaken by the International Association of Legal Science, the Association will be asked to report for the Canadian scene, and it will provide delegates to speak for Canadian jurists at international congresses and round-table discussions. Undoubtedly the preparation of a *Bibliographical Guide to Canadian Law* will be undertaken under the auspices of the International Association of Legal Science. With the backing of foundation or governmental funds, the Association could well be active in promoting the publication of other books and materials which are consistent with its aims, and in awarding or recommending the award of scholarships and other assistance to encourage Canadian comparative legal research. The other major activity of the Association, and which would bring in the participation of the greater part of its members, is of course an annual meeting at which papers are read and discussions held on the topic or topics which have been the subject of preparatory work during the year.

With the willingness to do some hard work and the spirit of goodwill which have already been displayed, there is little doubt that the Association will contribute much, not only to international understanding and tolerance, but especially, in the words of its constitution, to "a greater understanding among Canadian common lawyers of Canadian civil law, and among Canadian civil lawyers of Canadian common law."

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¹ Application forms may be obtained from him. The annual membership fee is \$2.00.

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