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دادگاه داری

DUPLICATE  
ORIGINAL  
نسخه برابر اصل

CASE NO. 71  
CHAMBER ONE  
AWARD NO. 25-71-1

LILLIAN BYRDINE GRIMM,  
Claimant,  
and  
THE GOVERNMENT OF THE ISLAMIC  
REPUBLIC OF IRAN,  
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری داری ایران - ایالات متحده	
فیلد شد - FILED		
Date	۱۳۶۲ / ۱۱ / ۲ 22 MAART 1983	تاریخ
No.	71 71	شماره

DISSENTING OPINION OF HOWARD M. HOLTZMANN

I.

I regret that I must dissent from the Award by the majority of this Chamber which bars the door of the Tribunal on jurisdictional grounds to the widow of an American executive who was assassinated in Iran. The Chamber thus refuses to consider the merits of Mrs. Lillian Grimm's claim for the loss of financial support by her husband, whose death she alleges was due to the failure of the Government of Iran to provide adequate protection to him.

The primary questions in determining the jurisdiction of the Tribunal in this case are whether Mrs. Grimm has a "property right" in the financial support of her deceased husband, and whether the alleged failure of the Government

of Iran to protect his life is one of the "measures affecting property rights" that fall within the scope of Article II, paragraph 1 of the Claims Settlement Declaration. That provision confers jurisdiction on the Tribunal over claims of United States nationals, such as Mrs. Grimm,\* if the claims "arise out of ... measures affecting property rights."

In my view, international law firmly establishes that a widow has a property right in support by her husband, and a claim of failure by Iran to protect his life is squarely within the jurisdiction of this Tribunal under the terms of the Claims Settlement Declaration.

## II.

At the time of his assassination in December 1978 Mr. Grimm was the highest ranking executive of United States nationality present in the Iranian oil industry. In that capacity, he was in a most visible -- and vulnerable -- position. Mrs. Grimm's claim is based not on any affirmative act by the Iranian Government but, rather, on its alleged omission to act in protecting him.

In this respect, I have no fundamental difference with the majority. For the Award states, albeit begrudgingly, that "It would perhaps be possible to accept that the words 'other measures' may cover both acts and failures to act...." The gratuitous insertion of the word "perhaps" is not explained in the Award. The plain, simple and universally-accepted rule is that acts and omissions are equal grounds for liability. See II Y.B. Int'l Law Comm'n 180 (1973).

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\* Mrs. Grimm's birth certificate has been submitted in evidence to the Tribunal and establishes her United States nationality.

III.

The majority ignores established international law when it concludes that the phrase "property rights", as used in Article II, paragraph 1 of the Claims Settlement Declaration, is insufficient to cover a widow's right to financial support. The ordinary meaning of "property rights", as made manifest by relevant international law, is to the contrary.

Applying the Vienna Convention on the Law of Treaties of 1969, the words "property rights" as used in the Claims Settlement Declaration must "be interpreted in good faith in accordance with the ordinary meaning to be given [them] in their context and in the light of [the treaty's] object and purpose." Article 31(1). In order to find that ordinary meaning, we are directed to take into account "any relevant rules of international law applicable in the relations between the parties." Id. at Article 31(3)(c). Such rules of international law are found in the decisions of past tribunals which have determined that a wife has a property right in her husband's support. Thus, in the Baldwin Case (U.S. v. Mexico) reported in 1 Whiteman, Damages in International Law 24-5 (1932), the Mexican Claims Commission issued an award in favor of the widow of an American mine superintendent who had been murdered by Mexican outlaws. See also the Standish Case (United States v. Mexico), 3 Moore, International Arbitrations 3004 (1898)(award to widow whose husband was wrongfully killed by Mexican government action).

It has consistently been held over objections of Respondent States, that the proper claimant in a wrongful death case is the surviving dependent. For example, in the Plehn Case (Germany v. Mexico), reported in Whiteman, supra at 640-41, the President Commissioner rejected Mexico's assertion that a claim for indemnity based on the murder of a German citizen by bandits could only be presented on

behalf of the executor or legal representative of the late Mr. Plehn, and not, as was sought, on behalf of his widow. The Commissioner stated that the claim was "a personal demand, not 'in the name of the deceased,' but as a consequence of his death. The right to indemnity for the death of Mr. Plehn did not figure among the assets of the deceased and was born of the personal right of the widow, at the moment of the murder of her husband." It was required therefore, for jurisdictional purposes, only that Mrs. Plehn establish her German nationality and "her actual financial dependency on [Mr.] Plehn."\* The scores of awards issued in the Lusitania Cases were issued to surviving dependents, including spouses, children, and siblings, and parents. See generally id. at 685-698 (discussing 67 such cases as examples, "at random, without any effort to be exhaustive").

In its Administrative Decision No. VI, 7 R.I.A.A. 155, 164 (1925), the Commission which decided the Lusitania Cases explained that its theory of recovery was that the "right to recover damages resulting from death ... does not vest in the claimant through the decedent, for such right was never lodged in the decedent." Thus the survivors of Lusitania victims could lodge their claims not as claims for personal injury, but as claims for "economic losses" to themselves as individuals who were "dependent for contributions upon the physical or mental efforts of those whose producing power was destroyed by death. The aggregate amount of the property loss became fixed when the ship sank...." Providential Mutual Life Ins. Co. (United States v. Germany), id. at 81, 113 (1924) (emphasis added). This was an explicit holding that the "losses" claimed by surviving dependents were "property losses" within the meaning of the governing and interrelated jurisdictional grants of the Treaty of Versailles, Part VIII (Annex I), June 28, 1919, the (Berlin)

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\* In the Plehn Case, it happened that Mrs. Plehn prevailed on the merits by showing a failure by the "competent authorities ... to take reasonable measures for suppressing the acts of banditry" leading to Mr. Plehn's murder. Whiteman, supra at 641. Her property loss in him was awarded as \$20,000 in gold, based on a calculation of life expectancy and earning power. Id. at 679.

Treaty of Peace of August 25, 1921 Between the United States and Germany, and the Agreement Between the United States and Germany Providing for the Determination of the Amount of Claims against Germany, August 10, 1922.

The Lusitania Cases emphasized in the strongest terms the right of surviving dependents to recover damages for their property losses:

[A]n enlightened public opinion, expressed in the statutes and judicial decisions of civilized nations, has recognized the right of survivors to recover pecuniary damages sustained by them resulting from the death of another. This is a rule declaratory of rights and correspondent liabilities and not one merely for measuring damages.

Administrative Decision No. IV, id. at 164 (emphasis in original). The point is further emphasized in the Providential Mutual Life Ins. Co. Case, id. at 115:

There are few classes of losses which have been more generally recognized by all civilized nations as a basis for the recovery of pecuniary damages than that of losses sustained by surviving dependents for injuries resulting in death [of a relative].... International arbitral tribunals, independent of any express provision in the governing treaties or protocols, have never hesitated to recognize this rule.

The majority in its Award attempts to distinguish the cases arising under the United States-Mexican General Claims Convention\* and the Treaty of Versailles, which was incorporated by reference in the (Berlin) Treaty of Peace, by

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\* The majority for some reason has relied on the jurisdictional terms of the 1923 Convention establishing the United States-Mexican General Claims Commission, even though the relevant jurisdictional grant in light of the actually decided cases is that set forth in the 1868 Convention establishing an earlier U.S.-Mexican Claims Commission.

pointing out that those treaties refer to personal injuries as well as to losses of property, whereas the Claims Settlement Declaration covers only claims based on "measures affecting property rights". That argument of the majority is unavailing, however, because, as explained above, the Mexican and Lusitania cases all awarded damages in recognition of the losses of property rights by surviving dependents, not upon any theory of personal injury.

Recent commentaries and treatises have also affirmed the existence of a wife's property right as the basis for a claim. The "Draft Convention on the International Responsibility of States for Injuries to Aliens", reprinted in 55 A. Jrn'l Int'l L. 545, 575 (1961) states in Articles 14(1) and 14(2)(b) that "a loss or detriment caused to an alien by a wrongful act or omission which is attributable to a State" includes any "loss sustained by an alien as a result of the death of another alien." Article 20(2)(b)(1) of the 1961 Draft Convention then defines an "injured alien" to include, "in the case of the killing of an alien, another alien who is ... a spouse of the decedent." (Emphasis added). Similarly, the Restatement (Second) of Foreign Relations Law of the United States, Section 164, comment d (1965) refers to any "loss sustained [by an alien] through the death of another alien."

A further source of international law applicable in the relations between the parties is the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, T.I.A.S. 3853. The Treaty was unquestionably in force at the time of the event which gave rise to this claim. See Case Concerning United States Diplomatic and Consular Staff in Tehran [1980] I.C.J. Reports 3, 29. Article IV(2) of that Treaty states:

Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law.

As the cases cited above indicate, Mrs. Grimm's right to continued support from her husband constituted property. Accordingly, Iran was obligated to give that property its "most constant protection." Iran had a parallel obligation under Article II(4) of the Treaty of Amity to provide "the most constant protection and security within [its] territories" to Mr. Grimm, as a national of the United States. The alleged failure to protect Mr. Grimm led to Mrs. Grimm's property loss, since the injury in cases involving the death of an alien "derives not from the actual loss of life, but from the prejudice suffered in consequence thereof by ... the dependent of the deceased." Garcia-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens 115 (1974). The cases have therefore sought to measure in pecuniary terms the scope of that loss, a meaningless effort if the loss were not a loss of property. "Money", as Grotius said, "is the common measure of all valuable things." H. Grotius, The Law of War and Peace, Book II, Ch. 17 §22 (Loomis trans. 1949). Thus, in death cases "[t]he basis of damages is, not the physical or mental suffering of the deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death." Lusitania Cases (United States v. Germany), 7 R.I.A.A. 32, 35 (1923).

In the face of the over-whelming weight of international law from various sources, it is hard to understand how the majority can say that Mrs. Grimm's property rights were not "affected" and that the alleged failure to protect her husband "just affected the life and safety of Mr. Grimm."

The majority writes as though Mrs. Grimm was merely an unaffected bystander whose loss of the earning capacity of her husband, who had been her sole source of financial support for the thirty-two years of their marriage, was not to be considered.

#### IV.

While it is international law which controls this case, I think it is instructive that Iranian law as well vouchsafes to wives a property right in their husbands' support.

Specific provisions of the Civil Code of Iran indicate that a wife has a property right based on her husband's obligation to provide for her "costs of maintenance", which include "dwelling, clothing, food, furniture", etc. Civil Code of Iran, Article 1106-07 (M. Sabi trans. 1973). Under Article 1111 of the Civil Code, the husband's failure to provide such maintenance gives rise to a cause of action in his wife to obtain a court order compelling him to fulfill that obligation. See M. Langaroudi, 4 Legal Encyclopedia 222 (1957) (F.Vittor trans. 1983). The existence of such a cause of action clarifies that the wife has a quantifiable property right in her husband's support, the loss of which is recoverable at law. Moreover, in Article 1127 of the Civil Code a reference to the wife's "right to cost of maintenance" uses the same word in Farsi for "right" as is used in the unofficial\* Farsi translation of the phrase "property rights" in Article II, paragraph 1 of the Claims Settlement Declaration. By categorizing the wife's entitlement to support as a property "right", Iranian law is thus consistent with the very language used in the Claims Settlement Declaration.

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\* There exists no official Farsi translation of the Algiers Declaration.

Indeed, Iran has in the past recognized its international obligation to pay a surviving wife damages for the loss of her husband due to violence within Iran. Thus, in the Imbrie Case, the Persian government paid Mrs. Imbrie \$60,000 as a damage settlement after her husband, the U.S. Vice-Consul, was murdered in 1924 by a mob in Tehran. 1 Whiteman, supra at 732-33. This followed a 1904 incident in which the Persian Minister of Foreign Affairs explicitly affirmed the Persian Government's intent, "for the support of the deceased's family to grant a sum of money as an indemnity for the price of blood" in the case of a claim interposed by the American Minister on behalf of the widow of an American national who had been murdered by Kurds near Urmia, Persia. Id. at 725. That such is in accordance with Islamic law was established as early as 1827 by a payment by the sheiks of the Habr Owul Tribe of Soomalees, African East Coast, of an indemnity "for the support of the families of [certain] murdered men, according to the Mahomedan law in such cases." Id. at 638. Taken as a whole, then, existing Iranian law on a wife's right to receive the financial support of her husband accords with a reading of the Article II, paragraph 1 phrase "property rights" sufficiently broad to encompass Mrs. Grimm's rights against the Government of Iran.

V.

In an effort to bolster its position, the majority invokes the legal maxim of ejusdem generis. The majority bases this on the fact that Article II, paragraph 1 of the Claims Settlement Declaration provides that the Tribunal has jurisdiction over claims which "arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights". In that context, the Award states that the phrase "other measures affecting property rights" should be read as being limited to measures "construed as generically similar to 'expropriations' and the alleged failure to provide protection is in no way

similar to expropriations." In my view, that statement is wrong for at least three reasons:

First, Mrs. Grimm's claim is not for failure to provide protection to her husband, but rather for the damage she suffered when his financial support was taken away from her. In that respect, there was, in fact, a taking not unlike an expropriation.

Second, Article II, paragraph 1 lists a series of broad categories of claims as to which the Tribunal has jurisdiction: (i) debts, (ii) contracts, (iii) expropriations and (iv) other measures affecting property rights. Ejusdem generis applies, if at all, only when very specific categories are followed by a highly vague and general phrase such as "or otherwise." Here that is not the case because all of the categories listed are general in nature and in pari materia. Rather than "other measures affecting property rights" being limited by the preceding category of "expropriations",\* its inclusion in the treaty simply adds a further category, leaving the Tribunal open to find liability arising out of any measures which result in diminution of the value of property.

Third, judges and commentators have long observed that vague legal maxims such as ejusdem generis are of doubtful value in aiding treaty interpretation. See McNair, "Application of the Ejusdem Generis Rule in International law", [1924] Brit. Y.B. Int'l Law 181; see also Reisman, Nullity and Revision: The Review of International Judgments and Awards 621 (1971).

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\* "Expropriation" is a general term which covers a variety of forms of taking of property, encompassing not only formal measures, but also indirect and "creeping" takings. As Chamber Two of this Tribunal has held, the terms "expropriations" and "other measures affecting property rights" have "broad meaning under international law," Harza Engineering Co. and Iran, Award 19-98-2 (30 December 1982).

VI.

The majority misreads the claim in this case when it seeks to support its decision by stating that "compensation for mental anguish, grief and suffering can obviously not be a property right that was affected by the alleged failure to provide adequate protection for Mr. Grimm." It is important to understand the context in which "mental anguish, grief and suffering" appear in the claim.

The claim does not, as the majority appears incorrectly to assume, seek damages for Mrs. Grimm's "mental anguish, grief and suffering." Rather, it seeks to recover in addition to Mrs. Grimm's loss of Mr. Grimm's earnings, an amount by way of punitive or exemplary damages in view of the circumstances of the case. In some systems of law, punitive or exemplary damages are awarded when the damage to property rights "was aggravated by circumstances of violence". Black's Law Dictionary 467-68 (4th ed. 1951). The mental anguish and grief suffered by Mrs. Grimm are referred to in the claim not as a basis per se for damages, as might be the case if Mrs. Grimm were claiming for her personal injuries, but rather as an indication of the aggravated circumstances which the claim contends warrant the imposition of additional damages as a punishment or example to others.

I do not in this dissent need to reach the question of whether punitive or exemplary damages are warranted in this case. I discuss this matter only to explain why the references in the Award to mental anguish and grief do not, in my view, support the majority decision.\*

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\* Nor is the majority decision supported by the reference in the Award to pleadings in Haji-Bagherpour and the United States of America, Award 23-428-2 (26 January 1983). As the majority itself notes, that case arose in a different context and the Award of Chamber Two was made without "addressing the issue at hand" in this case.

VII.

Finally, one must consider whether, even if Mrs. Grimm's claim falls within Article II, paragraph 1 of the Claims Settlement Declaration because it alleges damage due to "measures affecting property rights", the Tribunal's jurisdiction would nevertheless be ousted by paragraph 11 of the General Declaration which excludes claims arising out of certain injuries "as a result of popular movements in the course of the Islamic Revolution which were not an act of the Government of Iran." This subject did not need to be reached in the majority Award, other than to note the Respondent's contention with respect to it. Correspondingly, I will not give it full analysis here.

Suffice it for the purposes of this dissent to observe that paragraph 11 has a much narrower scope of application than the Respondent contends. Paragraph 11, by its express terms, relates only to the seizure of the 52 United States nationals on November 4, 1979. First, it provides that the claims relating to these 52 hostages then pending before the International Court of Justice will be withdrawn. The paragraph then goes on to "bar and preclude any future claim of the United States or a United States national" relating to four specified events:

(A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. (Emphasis added).

Clause (D), read in context, relates only to "the United States nationals," who constituted the 52 persons seized on November 4, 1979 and to "their" property. Otherwise, there

would be no meaning for the word "the". Further emphasizing that paragraph 11 relates only to the hostages incident, the remaining sentence of the paragraph provides that the United States will bar prosecution in its courts of claims by any persons who were not among "the [52] United States nationals", arising out of the hostage incident. Mrs. Grimm not being one of the 52 hostages and her claim being entirely unrelated to the hostage incident, paragraph 11 has no effect upon the jurisdiction of the Tribunal in this case.

Moreover, the present Government of Iran is, in my view, responsible for acts in furtherance of the achievement of the goals of the Islamic Revolution. In this case, Mrs. Grimm's claim arose out of the alleged assassination by revolutionary forces of her husband, then the most important non-Iranian involved in oil field operations, in order to further frustrate those operations as a means of achieving the success of the Revolution. By late 1978, in fact, that success was not far away. The assassination of Paul Grimm on December 23, 1978 had a tangible impact on the expatriate community in leading to a further exodus of companies and personnel. See, e.g., "The Rush From Iran", Newsweek, January 15, 1978 at p. 64 ("For many foreigners, the final straw was the assassination late last month of U.S. oil executive Paul Grimm."). The acts of the revolutionaries became "attributable to the State in which the group established itself as the government", that is, the new Islamic Republic of Iran. "Draft Convention on the International Responsibility of States for Injuries to Aliens," Article 18, reprinted in 55 Am. Jrnl. Int'l L. 545, 576 (1961).\*

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\* A useful comparison may be made to the Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rpts. 3, 36, where the Court held that the Islamic Republic had, by its ratification of the acts of the persons occupying the American Embassy, "transform[ed] the ... continuing occupation of the Embassy and detention of the hostages into acts of that State." States established through revolutionary action have similarly become liable in the past for the consequences of the revolutionary acts which led to their establishment. No more than that was asked of Iran here.

VIII.

For all of the foregoing reasons, I would hold that the Tribunal has jurisdiction over this claim and I would proceed to a trial on the merits.

Dated: The Hague  
17 March 1983



Howard M. Holtzmann