CITATION: Zarei v. Iran, 2021 ONSC 3377
COURT FILE NO.: CV-20-635078
DATE: 20211231

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MEHRZAD ZAREI personally and on behalf of the Estate of ARAD ZAREI deceased or as Personal Representative of ARAD ZAREI deceased and

SHAHIN MOGHADDAM personally and on behalf of the Estate of SHAKIBA FEGHAHATI deceased or as Personal Representative of SHAKIBA FEGHAHATI deceased and on behalf of the Estate of ROSSTIN MOGHADDAM deceased or as Personal Representative of ROSSTIN MOGHADDAM deceased and

ALI GORJI, personally and on behalf of the Estate of POUNEH GORJI deceased or as Personal Representative of POUNEH GORJI deceased and on behalf of the Estate of ARASH POURZARRADI deceased or as Personal Representative of ARASH POURZARRADI deceased and

JOHN DOE, JANE DOE, BILL DOE and SAM DOE

Plaintiffs

-and-

ISLAMIC REPUBLIC OF IRAN, ISLAMIC REVOLUTIONARY GUARD CORPS, aka ARMY OF THE GUARDIANS OF THE ISLAMIC REVOLUTION also known as IRANIAN REVOLUTIONARY GUARD CORPS, IRANIAN ARMED FORCES aka ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, ALI KHAMENEI also known as SUPREME LEADER OF IRAN, MOHAMMAD BAGHERI also known as MOHAMMAD-HOSSEIN AFSHORDI, HOSSEIN SALAMI, SEYYED ABDOLRAHIM MOUSAVI and AMIR ALI HAJIZADEH

Defendants

BEFORE: Justice Edward Belobaba

COUNSEL: *Mark H. Arnold and Jonah Arnold* for the Plaintiffs

No one appearing for Defendants

HEARD: November 1, 2021 via Zoom video with follow-up written submissions

Motion for Default Judgment - Damages

[1] In a decision released on May 20, 2021, I concluded on a balance of probabilities that the Islamic Republic of Iran was civilly liable for shooting down Ukraine International Airline Flight PS 752 on January 8, 2020 shortly after it departed from Tehran enroute to Kiev.[1]

[2] Flight PS 752 was carrying 9 crew and 167 passengers, including 85 Canadian citizens or permanent residents and 53 others who were on their way to Canada via Kiev. The two missiles launched by the Islamic Revolutionary Guard Corps destroyed the aircraft and killed all 176 on board, including family members of the plaintiffs.

[3] I concluded on the expert evidence before me that the missile attacks were intentional. I further concluded that the shooting down of the civilian aircraft constituted terrorist activity under applicable federal law and exposed the defendants to civil liability.[2]

[4] As I explained in the Liability Decision:

> I rely mainly on the expert reports filed by the plaintiffs. The expert reports are detailed in their analyses and unequivocal in their conclusions. In the opinion of Dr. Jeldi, an Iranian analyst with the Canadian Society for Persian Studies, "the IRGC knew Flight PS 752 was a civilian airplane and purposefully shot it down with the intent to destroy it." Dr. Jeldi explains:

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[1] *Zarei v. Iran,* 2021 ONSC 3377 ("Liability Decision").

[2] *Ibid.* In a Corrigendum issued on June 4, 2021, I corrected a typographical error in para. 27 of the reasons so that the proper statutory reference was s. 83.22(1) of the *Criminal Code*, not s. 83.02(a).

> Considering the TOR-M1 advanced military capabilities, two radars and control system, pre-approved flight plans and control of the airspace resting with the IRGC, and the firing of not one, but two missiles, it is not possible for two missiles to be fired by mistake as IRGC claims. There are multiple redundant systems and procedures to prevent accidental shooting of civilian aircraft. Also, the IRCG did not target the other aircraft in flight at the same time. The military in Iran controlled the airspace and aircraft within that space and knew that Ukraine International Airways PS 752 was a civil aircraft and was not hostile.
>
> In my opinion, based upon the research I have conducted, the documents reviewed and listed and my experience, the Islamic Republic of Iran, IGRC and other parties listed as defendants in this claim planned and deliberately committed the intentional act of shooting down Ukrainian International Airlines PS 752 on January 8, 2020.

This was also the conclusion of Elireza Nader, Senior Fellow at the Foundation for the Defense of Democracies:

> It is my opinion that the IRGC's shoot down of PS752 was intentional. It is highly unlikely that the IRGC operators mistook PS752 for a U.S. missile as the Iranian government claims. It is highly unlikely that a technical "misalignment" or "human error" caused the IRGC operators to shoot down PS752. The firing of not one but two surface-to-air missiles at PS752 also reinforces the intentional nature of the IRGC's actions.

Based on these national and international reports and in particular on the detailed analyses in the Jeldi and Nader expert reports, I find on a balance of probabilities that the missile attacks on Flight 752 were intentional.[3]

[5] Having established liability, the plaintiffs now seek compensatory and punitive damages. Counsel advise that this is the first time that a Canadian court is being asked to determine a damages award for loss of life caused by terrorism.

[6] Compensatory damages will most certainly be awarded. When the compensatory damages are supplemented by punitive damages, the resulting monetary amount will be

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[3] *Ibid.,* at paras. 42-44.

substantial. It is therefore incumbent upon this court, particularly on a motion for default judgment (where the defendants elected not to attend and make submissions) to ensure that the basis for the damage awards is fully explained and understood.

The plaintiffs

[7] In the months following the events in question, many of the affected families commenced individual or class actions.[4] This particular civil action was initially filed by three named plaintiffs and a Jane Doe who was granted anonymity by this court because she feared reprisal from the defendants. As was a second plaintiff, John Doe, who is advancing similar claims and has recently been added.

[8] The five plaintiffs sue in their capacity as surviving family members and as estate representatives of six deceased who were killed when Flight PS 752 was shot down. Mehrzad Zarei lost his 18-year-old son, Arad. Shahin Moghaddam lost his wife Shakiba and their young son Rosstin. Ali Gorji lost his niece Pouneh and her husband Arash (counsel advise that no claim is being advanced for Arash). Jane Doe lost her husband and John Doe lost his brother.

The plaintiffs' impact statements

[9] Each of the plaintiffs filed a victim impact statement and attached photographs from happier times. The impact statements contained moving descriptions of the loved ones who were lost and explained in considerable detail how the plaintiffs' lives have been uprooted by the defendants' act of terrorism. The plaintiffs described their grief, their ongoing emotional and psychological problems, their inability to sleep or work and their loss of faith in life itself — in one case, an attempted suicide.

[10] If the words in the victim impact statements do not convey the full measure of loss, the family photos that were attached to the affidavits certainly do. In each case, the images show proud parents, beaming children and joyful family gatherings. The images depict what life was like in happier times, before the terrorist attacks on Flight PS 752 — and in doing so the images, even more than the words, reveal the enormity of the losses.

[11] This court well understands that damage awards are a poor substitute for the lives that were lost. But a monetary award is the only remedy that a civil court can provide. As a U.S. federal judge noted in *Peterson v. Islamic Republic of Iran*[5], one in a series of American cases involving Iran and Iran-sponsored terrorism:

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[4] The proposed class action, *Arsalani v. Iran,* CV-20-634770-CP, is not yet certified.

[5] *Peterson v. Islamic Republic of Iran,* 515 F. Supp. 2d 25 (D.D.C. 2007).

> [Although] this Court can neither bring back the husbands, sons, fathers and brothers who were lost in this heinous display of violence, nor undo the tragic events of that day, the law offers a meager attempt to make the surviving family members whole, through seeking monetary damages against those who perpetrated this heinous attack. The Court hopes that this extremely sizeable judgment will serve to aid in the healing process for these plaintiffs, and simultaneously sound an alarm to the defendants that their unlawful attacks on our citizens will not be tolerated.[6]

[12] These words apply with equal force here.

The claims for damages

[13] The plaintiffs advance damage claims in two discrete capacities under five separate heads:

- *As surviving family members*, the plaintiffs claim damages:

  (i) under s. 61 of the *Family Law Act*[7] ("FLA") for the loss of "care, guidance and companionship";

  (ii) at common law for the intentional infliction of mental distress (or solatium); and

  (iii) at common law for aggravated damages;

- *As estate representatives of the deceased,* the plaintiffs seek damages under s. 38 of the *Trustee Act*[8]:

  (iv) for the pain and suffering endured by the decedents as Flight PS 752 was shot down and plummeted to earth; and

  (v) significant punitive damages given the magnitude of the defendants' wrong-doing.

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[6] *Ibid*., at 75.

[7] *Family Law Act,* R.S.O. 1990, c. F.3.

[8] Section 38(1) of the *Trustee Act,* R.S.O. 1990, c. T. 23, provides as follows: "Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Act*."

[14] I will deal first with the claims for compensatory damages (the first four claims) and then turn to the more difficult issue of punitive damages.

Compensatory damages

[15] Counsel for the plaintiffs initially relied on American caselaw and tried to advance claims for compensatory damages that are commonly available under American law. This reliance on American law was, to some extent, understandable. Courts in the U.S., sadly, have had considerable experience with compensation claims relating to acts of international terrorism, particularly claims against the Islamic Republic of Iran. However, in cases involving wrongful death, it is essential to understand that American federal and state law differs in several important respects from that of the common law provinces of Canada.

[16] Only three of the damage claims being advanced by the plaintiffs are viable under Ontario law on the facts herein: (i) the surviving family member's FLA claim, (ii) the estate's claim for pain and suffering, and (iii) the estate's claim for punitive damages.

[17] The other two claims being advanced by the surviving family members — damages for the intentional infliction of mental distress which counsel correctly describes as "solatium" (that is damages for mental anguish, bereavement and grief)[9] and aggravated damages, both of which are typically available in wrongful death/terrorism actions under American law — are not available under our law.

[18] As the Court of Appeal noted in *Lord v. Downer*[10], surviving family members are limited to the damage claims provided under the FLA and in wrongful death cases cannot claim either "solatium" damages (mental anguish and grief) or aggravated damages. Both of these damage categories are generally available under American wrongful death law and have routinely resulted in damage awards in the millions of dollars.[11] Not so in Ontario.

[19] It may be useful to set out Justice Sharpe's explanation in *Lord v. Downer* in some detail:

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[9] U.S. caselaw involving terrorism-related damage claims states repeatedly that "intentional infliction of emotional distress" and "solatium" claims are "indistinguishable" and that solatium claims are claims for "mental anguish, bereavement and grief": see *Akins v. Islamic Republic of Iran*, 332 F. Supp. 3d 1 (D.D.C. 2018) at fn. 14; and *Belkin v. Islamic Republic of Iran,* 667 F. Supp. 2d 8 (D.D.C. 2009) at 23.

[10] *Lord (Litigation guardian of) v. Downer*, [1999] O.J. No. 3661 (C.A.).

[11] See, for example, the caselaw as summarized and discussed in *Peterson, supra,* note 5; *Cohen v. Islamic Republic of Iran,* 286 F. Supp. 3d 19 (D.D.C. 2017); and *Fritz v. Islamic Republic of Iran,* 324 F. Supp. 3d 54 (D.D.C. 2018).

> At common law, the right to bring an action in tort did not survive the death of the victim. Neither the estate of the victim nor the victim's relatives had a right to sue for their losses … Fatal accidents legislation, first introduced in England in 1846 and in this jurisdiction in 1847 gave enumerated dependants a statutory cause of action for "damages.": see *Fatal Accidents Act*, R.S.O. 1970, c. 164, s. 2. As explained by this Court in *Mason v. Peters* (1982), 39 O.R. (2d) 27 at 31 … this provision only allowed recovery for pecuniary losses. Dependants of the deceased tort victim had no right to recover damages for the non-economic losses of guidance, care and companionship, nor could they claim damages as solatium for grief or mental anguish. Over time, the rights of the dependants were perceived to be too limited. Fatal accidents legislation was replaced in 1978 by the *Family Law Reform Act* ("FLRA"), s. 60. The FLRA provision was in turn replaced, in virtually identical terms, by the presently applicable *Family Law Act, supra* ("FLA"), s. 61.[12]

[20] Section 61(1) of the FLA as it pertains herein provides as follows:

> If a person is … killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse … children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their **pecuniary loss** resulting from the … death from the person from whom the person … killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

[19] Section 61(2) goes on to provide that the damages recoverable under the FLA are limited to certain enumerated pecuniary or financial losses and also a non-pecuniary loss:

> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

[21] I pause here to make two points. First, four of the five surviving family member plaintiffs fall within the scope of these provisions and one does not — counsel agree that as an uncle, Mr. Gorji is not an eligible FLA claimant and cannot make an FLA claim relating to his niece. He can, however, pursue claims as an estate representative. Secondly, none of the four eligible FLA claimants are making any ‘financial loss’ claims. They are content to limit their claims to s. 61(2)(e), namely claims for “the loss of guidance, care and companionship” resulting from the wrongful deaths of their family members.

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[12] *Supra,* note 10, at para. 4 [caselaw citations omitted].

[22] Under Ontario law, claims for "the loss of guidance, care and companionship" in wrongful death cases cannot include claims for mental anguish or grief ("solatium") or aggravated damages which (on the facts herein) cover "a similar if not identical loss". Here again, is Sharpe J.A. writing for the Court of Appeal in *Lord v Downer*:

> In my view, in the light of *Mason v. Peters, supra*, the inevitable conclusion is that such losses are not recoverable. In that case … Robins J.A. concluded that while the Act (there, the FLRA, s. 60(2), now, the FLA, s. 61(2)), allows for the recovery of the non-pecuniary loss of care, guidance and companionship, the trial judge had properly excluded (at p. 39) "grief, sorrow and mental anguish" suffered by reason of the death as compensable items of damage. Non-pecuniary loss of this kind, unlike guidance, care and companionship, are not provided for in the Act and under its terms remain non-recoverable.
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> *Mason v. Peters, supra*, did not deal with the issue of aggravated damages. However, it is my view that by holding that the statute does not allow recovery for grief, sorrow and mental anguish, the decision effectively precludes recovery of aggravated damages as they aim to compensate a similar, if not identical, loss.
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> **[T]**he law has long distinguished between loss of guidance, care and companionship on the one hand and grief, sorrow and mental anguish on the other. The nature of the injury addressed by aggravated damages is closely akin to, if not identical with, compensation for grief, sorrow and mental anguish. As the latter is excluded from the statutory right created by the FLA, s. 61(2), there is no basis in law for recovery of aggravated damages [case citations omitted]. [13]

[22] I am therefore obliged to conclude that the plaintiffs' damage claims for solatium and aggravated damages on the facts herein are not available under Ontario law. Thus, in terms of compensatory damages, the only viable FLA claims of the surviving family members are the ones being advanced under s. 61(2)(e) for "the loss of guidance, care and companionship."

(1) Loss of guidance, care and companionship

[23] There is no statutory cap on damage awards for "the loss of guidance, care or companionship" under s. 61(2)(e) of the FLA. The caselaw is also clear that the judicially-imposed cap on non-pecuniary general damages that applies in certain personal

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[13] *Supra,* note 10, at paras. 11-12.

injury cases as first established in the *Andrews* decision,[14] does not apply to claims under s. 61(2)(e) of the FLA.[15]

[24] There is, however, another judicially-imposed cap or ceiling that does apply. The Court of Appeal directed in 1992 that $100,000 was the "high end" for a "guidance, care and companionship" claim.[16] This amount was increased to $125,000 in 2005 after being adjusted for inflation[17]. Today the adjusted "high end" for the "guidance, care and companionship" claim relating to a deceased family member killed in 2020 (as happened here) is about $160,000.

[25] I note, however, that if a jury is involved and decides to award more under this head of loss, such as the $250,000 awarded in *Moore*,[18] the Court of Appeal will not disturb the jury award unless the amount awarded "shocks the conscience of the court".[19] I also note that here each of the surviving family members ask for $250,000 and initially requested trial by jury. It was only after the Covid-19 pandemic intervened to delay the availability of civil jury trials that the plaintiffs reluctantly waived the jury notice and decided to proceed by judge alone. In my view, there is every likelihood, on the evidence herein and with the additional advantage of oral testimony, that if a jury had heard this matter, as was originally intended, they would have awarded the $250,000 amount requested by the plaintiffs.

[26] Given the thwarted jury request and the compelling nature of the evidence as set out in the victim impact statements and attached images, I find it fair and reasonable to adjust the "high end" suggested for judge-alone trials and award $200,000 to each of the four eligible plaintiffs (plus an additional $200,000 to Mr. Moghaddam who lost both his wife and his son).

[27] The total FLA award for the loss of guidance, care and companionship is $1 million ($200,000 times five). Again, Mr. Gorji does not qualify because he was an uncle and as such does not fall within FLA coverage. Counsel has properly withdrawn his FLA claim.

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[14] *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 SCR 229.

[15] *Fiddler v. Chiavetti,* 2010 ONCA 210, at para. 76.

[16] *To v. Toronto Board of Education*, (2001) 55 O.R. (3d) 641 (C.A.) at para. 37

[17] *Fiddler, supra,* note 15, at para. 80.

[18] *Moore v. 7595611 Canada Corp*., 2021 ONCA 459.

[19] *Ibid.,* at para. 29.

(2) Pain and suffering

[28] In their capacity as estate representatives under s. 38 of the *Trustees Act*, all five plaintiffs advance claims for the pain and suffering endured by the decedents as Flight PS 752 sustained two missile strikes and plummeted to earth. The missile strikes were spaced about 30 seconds apart. It took another four minutes for the aircraft to descend and crash, killing all onboard.

[29] How exactly should a court monetize the terror that both crew and passengers must have felt after being hit by the first missile? And 30 seconds later, by a second missile? And then over the next four minutes as the plane hurled towards earth and inevitable death?

[30] In the U.S., in terrorism-related damage claims against the Islamic Republic of Iran, federal courts have routinely awarded damages for pain and suffering in the millions of dollars. I also note that in many of the American decisions, U.S. judges have "uniformly" awarded $1 million where the victim of terrorism endured pain and suffering for a period of several hours or less,[20] and in doing so were influenced "not only by the length of time that the victim endured physical suffering but by the victim's mental anguish stemming from the knowledge that death was imminent."[21]

[31] Here, the plaintiffs ask for a pain and suffering award in the amount of $1 million for each of the decedents. I cannot say that this is in any way unreasonable. The judicially-imposed $100,000 cap on pain and suffering damages in cases involving negligence (first imposed in *Andrews*[22] in 1978 and valued at about $402,850 in today's dollars) does not apply in cases of intentional wrongdoing involving criminal behaviour, such as here.[23]

[32] I therefore award the plaintiffs in their capacity as estate executors $1 million for each of the six decedents for the pain and suffering (the terror they must have endured) as Flight PS 752 was struck by two missile attacks and then plunged to earth and inevitable death. Anything less would be completely unprincipled and entirely speculative.

[33] The total award for pain and suffering is $6 million.

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[20] *Peterson, supra,* note 5, at 29 and caselaw discussed therein.

[21] The Iran-related caselaw is noted in *Baker v. Socialist People's Libyan Arab Jamahirya,* 775 F. Supp. 2d 48 (D.D.C. 2011).

[22] *Andrews, supra,* note 14.

[23] *Barker v. Barker,* 2021 ONSC 158 at para. 56, citing *S.Y. v F.G.C.* 1996 CanLII 6597 (BCCA) and *Young v. Bella,* [2006] 1 S.C.R. 108.

Punitive damages

[34] This is the most challenging component of the damages analysis. Counsel advise that this is the first time that a Canadian court has been asked to decide a punitive damages award against a foreign state for lives lost in an act of terrorism. It is obviously important that this decision be made in a principled and judicious fashion.

[35] I begin with the long-accepted proposition that punitive damages are not compensatory and should only be awarded in exceptional cases The focus is not on the plaintiff's loss but the defendant's misconduct. The objective is punishment, deterrence and denunciation.[24] As the Supreme Court noted in *Whiten v. Pilot Insurance*:[25]

> Punitive damages are awarded against a defendant in exceptional cases [where] there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.[26]

[36] It is beyond dispute that shooting down a civilian airliner and, in essence, murdering 176 innocent people falls within the category of "highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."[27]

[37] The question here is not whether punitive damages are justified — they clearly are — but the amount that should be awarded.

[38] Counsel points to the punitive damage amounts that have been awarded in the U.S. and asks for $500 million for each of the six decedents — or $3 billion in total. These are staggering sums, to be sure, but counsel is right.

[39] In a series of decisions relating to Iranian-sponsored acts of terrorism that killed or injured Americans living or travelling in the Middle East, U.S. federal courts have indeed imposed punitive damage awards in the hundreds of millions, and sometimes billions, of dollars: see, for example, the $1 billion award in *Valore*[28] (suicide bombing of Marine barracks in Beirut in 1986) and the $1.35 billion award in *Levinson*[29] (kidnapping

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[24] *Whiten v. Pilot Insurance Co.,* 2002 SCC 18.

[25] *Ibid.,* at paras. 36 and 94.

[26] *Ibid.,* at para. 94.

[27] *Ibid.*

[28] *Valore v. Islamic Republic of Iran,* 700 F. Supp. 2d 52 (D.D.C. 2010).

and torture of a former FBI agent who never found and was presumed dead). It is fair to say that many of the American awards are in the hundreds of millions of dollars.

[40] The plaintiffs rely on the expert evidence of Dr. Patrick Clawson, a widely renowned specialist on the Islamic Republic of Iran and Iran-related terrorism. Dr. Clawson is the Director of Research at the Washington Institute for Near East Policy. His expert opinions have been accepted by U.S. federal courts in more than 30 civil actions involving Iran-sponsored terrorism. In the report that he filed in this proceeding, Dr. Clawson provides the following background:

> Revolutionary Iran has from its earliest days embraced terror attacks as an important means to advance its objectives … A cornerstone of the Iranian revolution is opposition to the United States and its influence in the Middle East. The United States is seen as a hostile power determined to undermine or overthrow the Iranian revolution. Revolutionary Iran has devoted much effort to driving the United States out of the Middle East …
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> [A] U.S. State Department report [titled *Outlaw Regimes*] notes that some of Iran's activities, especially those outside the Middle East, are carried out directly by agencies of the Iranian government, principally the Quds Force of the Islamic Revolutionary Guard Corps (IRGC-QF) and the Ministry of Intelligence and Security (MOIS). To quote the report:
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> > Although the Middle East bears the brunt of the consequences, Iranian-sponsored terrorist activity is a global problem. Since the Iranian regime seized power in 1979, Iran has planned and executed terrorist plots, assassinations, and attacks in more than 35 countries worldwide, primarily through the IRGC–QF and MOIS but also via its partner Lebanese Hezbollah.

[41] Dr. Clawson notes that despite the many U.S. decisions imposing large damage awards, Iran has increased and widened its support of terrorism:

> Considering the factors inherent in awarding punitive damages, that of punishment and deterrence, we note that in the wake of these lawsuits Iran has not decreased its support for terrorism, but has dramatically increased and widened its support for terrorists, terrorist organizations and terrorist activities throughout the world. Punishment can be measured, largely in assessing significant financial damages for the continued and expanded wide-ranging world-wide support for terrorism

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[29] *Levinson et al v. Islamic Republic of Iran,* Civil Action No. 17-511 (TJK) (D.D.C. 2020). The federal court in the District of D.C. awarded each of the nine family-member plaintiffs $150 million for a total of $1.35 billion.

> supported by the Islamic Republic of Iran and its governmental arms. Iran is blatant in its support of terrorism. As to deterrence there are two factors to consider: deterring such conduct by others and making further efforts to deter Iran in its bold and increasing support for terrorism, which Iran uses to expand its influence, its reach and its force by terrorist means.

[42] Dr. Clawson urges this court to impose "substantial punitive damages that would be interpreted by Iranian officials as indicating broad international support for firm opposition to Iranian support for terrorism":

> In my opinion, Iranian officials pay close attention to what the outside world has to say about the Iranian government and its policies. Iran has shown itself to be sensitive to punitive damages levied against it and knows that such damages have been a common feature in actions against Iran for its support of terrorism. Were this Court not to impose significant punitive damages for the airplane shot down that this Court has determined was an intentional terrorist act in which many people died, this would be interpreted by Iranian government officials as indicating a significant weakening of Western pressure on Iran to end its support for terrorism. But were this Court to impose substantial punitive damages that would be interpreted by Iranian officials as indicating broad international support for firm opposition to Iranian support for terrorism.

[43] U.S. courts, for the most part, have accepted Dr. Clawson's recommendation that punitive damage awards be determined by multiplying the amount that Iran spends each year on funding terrorism by a factor of three to five. Most of the U.S. decisions have adopted the "three times" multiplier. Thus, if the Islamic Republic of Iran spends say $100 million annually funding terrorist organizations such as Hezbollah, the punitive damages award would be $300 million.[30]

[44] Based on his research, Dr. Clawson concludes that Iran is currently spending about $800 million per annum funding and supporting non-state terrorist groups:

> A conservative estimate of Iran's support for non-state terrorist groups is $800 million a year: $700 million to Hezbollah and $100 million to Palestinian groups. That is likely an underestimate. Another route would have been to adopt an expansive definition of what constitutes terrorism which would lead to a conclusion much like that in *Outlaw Regimes*, which states: "Since 2012, Iran has spent over $16 billion propping up

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[30] See the discussion in *Flatow v Islamic Republic of Iran*, 999 F. Supp. 28 (D.D.C. 1998) or in almost any of the other U.S. cases that are cited herein.

> the Assad regime and supporting its other partners and proxies in Syria, Iraq, and Yemen." Spending $16 billion over eight years would imply an average of $2 billion a year.

[45] If one accepts the more conservative $800 million estimate and the "multiplier" method of calculation, the punitive damages award in this case should fall somewhere in the range of $2.4 billion (using the three times multiplier) to $4 billion (using the five times multiplier). Thus, the plaintiffs' request for $3 billion is not outlandish.

[46] My concern with the "multiplier" approach is not in the large numbers that result. Canadian courts have comfortably enforced large American judgments and damage awards in terrorism-related cases. For example, in *Tracy,*[31] the Court of Appeal recognized and enforced several U.S. federal court judgments totalling more than $1 billion. In doing so, the Court noted that "recognizing and enforcing large damage awards against Iran is consistent with the public policy animating [Canadian anti-terrorism law]" and that:

> [A]warding damages that may have a deterrent effect is a sensible and measured response to the state sponsorship of terrorism and is entirely consistent with Canadian legal morals.[32]

[47] My concern is with using a multiplier as a method for calculating the punitive damages award. The problem is two-fold: one, the multiplier method has been recently discredited by the Chief Judge in the very court (the District Court in D.C.) that previously adopted and employed this method of calculation; and two, even if it were otherwise, the multiplier (or any formula) method is not available under Canadian law.

[48] I will explain each of these points in turn.

[49] In *Christie,*[33] which related to the 1996 bombing of a residential apartment complex in Saudi Arabia by Iran-funded Hezbollah, the Chief Judge of the District Court of D.C. concluded that the multiplier method (three to five times Iran's annual expenditure for terrorism) was unreliable and overly focused on the goal of deterrence. The Chief Judge also noted that large punitive damage awards against Iran "are not likely to have a meaningful deterrent effect" and would constrain the executive branch in its management of foreign policy.[34]

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[31] *Tracy v. Iran (Information and Security),* 2017 ONCA 549.

[32] *Ibid.,* at para. 96.

[33] *Christie v. Islamic Republic of Iran,* 2020 U.S. Dist. LEXIS 116378 (D.D.C. 2020).

[34] *Ibid.,* at 67-8, 89 and 92-3.

[50] Instead, the Chief Judge awarded punitive damages equal to the compensatory amount, in essence using a 1:1 ratio. Given the larger awards available under American law, including solatium, the plaintiffs in *Christie* (14 injured apartment residents and their 21 family members) received $132 million in compensatory damages and another $132 million in punitive damages.

[51] The lesson from *Christie,* for my purposes here, is that the multiplier method being advanced by counsel for the plaintiffs has fallen out of favour in the very court that first embraced its use. And the 1:1 ratio method may fare no better. Given the relatively modest compensatory award in this case ($7 million in total), the 1:1 ratio method would result in an overall $7 million in punitive damages, an amount that, on any measure, would be grossly inadequate — a $7 million punitive damages award would be more appropriate in an insurance company misconduct case than in a case involving a terrorist act of unmitigated brutality.

[52] In any event, and more importantly, in calculating punitive damage awards, neither multipliers nor ratios are available under Canadian law.

[53] The Supreme Court made clear in *Whiten* that damage awards, both compensatory and punitive, should be determined "without resort to formulae or arbitrary rules such as ratios."[35] As I explain further below, neither multipliers nor ratios should be used because they are inherently arbitrary and irrational.

[54] The "governing rule" under Canadian law is proportionality.[36]

[55] A proportionate punitive damages award is only as large as rationally necessary to achieve the objectives of retribution, deterrence and denunciation — if the award overshoots its purpose, it is irrational.[37]

[56] Proportionality is achieved by considering (i) the defendant's blameworthiness, (ii) the plaintiff's degree of vulnerability, (iii) the level of harm, (iv) the need for deterrence and (v) any advantage wrongfully gained by the defendant. An award of punitive damages must also take into account (vi) any other penalties or sanctions that have been or are likely to be imposed on the defendant for the misconduct.[38]

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[35] *Whiten, supra,* note 24, at para. 127.

[36] *Ibid.,* at para. 74.

[37] *Ibid.,* at paras. 94 and 111.

[38] *Ibid.,* at paras. 112-125.

[57] The use of a multiplier or ratio, whether based on a state's annual expenditures on terrorism or on the compensatory amount, is the antithesis of a thoughtful and fact-specific proportionality analysis. The appropriate analytical framework under Canadian law requires a consideration and balancing of the factors just listed.

[58] The first three factors are beyond dispute and easily addressed. The shooting down of Flight PS 752 was an intentional act of terrorism.[39] The six decedents, as well as the other 170 victims, were highly vulnerable victims, being physically confined within a civilian passenger jet departing from the state defendant's airport. The level of harm sustained by each of the victims could not have been higher – the loss of their life.

[59] The fourth factor, the need for deterrence, is on its face self-evident. No one would dispute the proposition that acts of terrorism should be deterred and ideally eliminated. Whether and to what extent a large punitive damages award against the Islamic Republic of Iran will achieve any level of deterrence, however, is a legitimate question.

[60] There is a debate in some U.S. courts[40] and in the legal literature about the futility of making any further damage awards against this particular state defendant when billions of dollars in judgments remain outstanding, many of which will probably never be enforced.[41] Counsel for the plaintiffs has noted, for example, that in Ontario and British Columbia alone, the publicly available Writ Reports currently show about $500 million in outstanding judgments against the Islamic Republic of Iran.[42]

[61] Nonetheless, says counsel, viable Iranian-owned assets and investments remain accessible not only in Canada but world-wide. I have reviewed counsel's detailed

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[39] Liability Decision, *supra,* note 1 at paras. 36-44.

[40] For example, see *In re Islamic Republic of Iran Terrorism Litigation.*, 659 F. Supp. 2d 31 (D.D.C. 2009) at 121, where the court suggested that civil ligation in this context was a "failed policy" because of the inability to enforce judgments against the foreign state that sponsored or engaged in terrorist activity.

[41] In a study published in 2008, it was estimated that $11.4 billion in damage awards against Iran remained outstanding and that Iran had about $400 million in assets in the United States of which only $91 million were not immune from attachment and enforcement: see Coombes, "The Quest for Justice for Victims of Terrorism: International Law and the Immunity of States in Canada and the United States" (2018) 69 U.N.B.L.J 251, at 297.

[42] Counsel makes this point to further support the submission that the punitive damages award herein should be large enough to accommodate the diluting impact of provincial creditors relief legislation which requires that any monies recovered must be shared *pro rata* with all duly registered judgment creditors. Counsel points out that this includes American judgment creditors who will benefit disproportionately because of the much larger American judgments. I do not accept this submission. This may well be the result but, as counsel well understands, this is a consequence of jurisdictional legal differences and protocols relating to the recognition of foreign judgments. In any event, punitive damages are not about plaintiff compensation but defendant misconduct: *Whiten, supra,* note 24, at para. 92.

submission in this regard and I am satisfied that some level of enforcement may well be possible and some level of deterrence may well be achieved.

[62] The fifth factor — any wrongfully gained advantage — was described by counsel for the plaintiffs as follows: by shooting down a non-American (Ukrainian) passenger jet, Iran was able to avenge the U.S. killing of General Soleimani[43] without risking retaliation from the United States.

[63] The final factor — other penalties or sanctions imposed or likely to be imposed on the defendant for its misconduct — was answered by counsel for the Government of Canada in a written submission to this court. The court was advised that although Canada continues in its efforts to engage Iran in state-to-state negotiations (mainly about paying reparations), no specific penalties or sanctions have been imposed by the federal government for the shooting down of Flight PS 752.

[64] The analysis of the factors just noted suggests the need for a significant award of punitive damages. But in what amount? What is an appropriate and proportionate punitive damages award where the defendant state, listed as a supporter of terrorism,[44] brazenly persists in openly funding and engaging in terrorist activity? Indeed, as an American judge noted in *Flatow*, "the Islamic Republic of Iran is so brazen in its sponsorship of terrorist activities that it carries a line item in its national budget for this purpose".[45]

[65] In my opinion, a rational and proportionate punitive damages award lies in the range of $60 million at the low end (or $10 million to each deceased) to $100 million at the high end (or about $16 million to each deceased). I am mindful of the fact that other civil actions, including proposed class actions, on behalf of the other 170 crew and passengers of Flight PS 752 are or will be proceeding. I note what was said by the U.S. federal court in *Ewan* that courts should recognize the "full scope" of the damage caused by the defendants without "unfairly imposing the same punishment repeatedly across multiple cases."[46] In my view, in cases such as this where multiple lawsuits are likely, the required proportionality analysis should take this into account and not jeopardize the potential for achieving some level of fair-minded distribution. Hence, my suggested range of $60 million to $100 million.

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[43] *Whiten, supra,* note 24, at para. 38.

[44] *Ibid.,* at para. 22.

[45] *Flatow, supra,* note 30, at 34.

[46] *Ewan v. Islamic Republic of Iran,* 486 F. Supp. 3d 286 (D.D.C. 2020) at 252.

[66] As for the precise amount within this range, I conclude on balance that a punitive damages award at the suggested high end — $100 million — is the appropriate and proportionate amount. I make this decision primarily for the following three reasons.

[67] First, the enormity of the defendants' misconduct — intentionally shooting down a civilian Ukrainian passenger jet and killing every person on board, none of whom had anything to do with the attack on General Soleimani and Iran's professed "vow to exact revenge"[47] on the United States. Of course, the shooting down of a civilian American aircraft killing equally innocent people would have been no less heinous — but the defendants' horrific indifference in choosing what appears to be a random act of mass murder cannot go unnoticed.

[68] Secondly, the Supreme Court's comments in *Nevsun Resources,*[48] on the need for "stronger responses" for breaches of customary international law (surely no dispute here) and the continuing importance of civil remedies in the ongoing war against terrorism. The Court's majority opinion cited the following passage with approval:

> As Professor Koh wrote about civil remedies for terrorism:
>
> > Whenever a victim of a terrorist attack obtains a civil judgment [in a court of law], that judgment promotes two distinct sets of objectives: the objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism … the … court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.[49]

[69] This court is prepared to add its voice to others in the international community collectively condemning the terrorist actions of the defendant state.

[70] My third reason is this. In *Whiten,* the Supreme Court directed that proportionality in punitive damage awards will be achieved by asking "what is the *lowest* amount" that

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[47] Liability Decision, *supra,* note 1, at para. 38.

[48] *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5, at para. 129, per majority opinion.

[49] *Ibid.,* at para. 130, quoting from Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at 675.

will serve the purposes of punishment, deterrence and denunciation?[50] In my view, the lowest amount, for all the reasons set out above, is $100 million.

[71] I thus conclude that it is rational and proportionate to award $100 million in overall punitive damages. I emphasize again that the focus of the punitive damages award is not the plaintiff's loss but the defendant's misconduct. And the fact that a large punitive damages award may be seen by some as a "windfall"[51] for the plaintiffs should not detract from its underlying purpose and rationale: to punish, deter and condemn the defendant state's "highly reprehensible" misconduct.[52]

Final comment

[72] If I have erred in my analysis and have imposed damage awards that have undershot or overshot the mark, either side can take corrective action. The plaintiffs can appeal this decision as is their right. The defendant state can move under the special procedures provided under ss. 10(2) and (4) of the *State Immunity Act*[53] to have the judgment set aside or revoked. As already noted, this may be the first time that a Canadian court has been asked to determine damages for lives lost to terrorism. Appellate review, if only to affirm the appropriate framework for analysis, would obviously be of considerable benefit.

[73] For my part, I am satisfied that the compensatory and punitive damage awards set out herein are just and appropriate and accord with the applicable law.

Disposition

[74] This court awards the following damages:

(i) One million dollars ($1 million) in compensatory damages under the FLA for the loss of guidance, care and companionship – that is, $200,000 to each of Mehrzad Zarei, Jane Doe and John Doe, and $400,000 to Shahin Moghaddam;

(ii) Six million dollars ($6 million) in compensatory damages for pain and suffering – that is, $1million to each of the estates of the six deceased;

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[50] *Whiten, supra,* note 24, at para. 71.

[51] *Ibid.,* at para. 94.

[52] *Ibid.*

[53] *State Immunity Act,* R.S.C., 1985, c. S-18.

(iii) One hundred million dollars ($100 million) in punitive damages to be shared by the estates of the six deceased – that is, apportioned according to their respective share of the compensatory awards.[54]

[75] The overall total is $107 million ($107,000,000) plus appropriate interest.

Costs

[76] The plaintiffs ask for $94,947.28 in costs on a full indemnity basis. This costs request is inclusive of fees, disbursements and HST and covers the work that was done on the damages portion of this motion for default judgment. I have reviewed the costs outline and I am satisfied that a costs award on a full indemnity scale is both justified and appropriate. The reasons why costs should be awarded on this elevated scale were set out in the Liability Decision[55] and apply here as well.

[77] Costs are therefore fixed at $$94,947.28, payable forthwith.

[78] Orders to go accordingly.

Signed: Justice Edward Belobaba

Notwithstanding Rule 59.05, this Judgment [Order] is effective and binding from the date it is made and is enforceable without any need for entry and filing. Any party to this Judgment [Order] may submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: December 31, 2021

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[54] This court will be pleased to provide further direction in this regard if this will assist.

[55] Liability Decision, *supra,* note 1, at paras. 57-58.