

Transportation Notes: Ontario Court Awards \$107 Million against Iran for Ukraine International Airlines Crash

February 3, 2022

By Carlos Martins

The Superior Court of Justice of Ontario has awarded \$107 million CAD to family members of six passengers who died on Ukraine International Airlines Flight PS 752 after the aircraft was shot down by Iranian armed forces in January 2020.

This decision represents the first time that a Canadian court has awarded damages for loss of life caused by terrorism.

Background

On January 8, 2020, Ukraine International Airlines Flight PS 752 departed from Tehran, Iran for Kiev, Ukraine. Shortly after its departure, Iran's Islamic Revolutionary Guard Corps (the "IRGC") shot two missiles at the aircraft, 30 seconds apart. Flight PS 752 became engulfed in flames and crashed four minutes after being shot by the second missile. All 167 passengers and 9 crew members on board the flight died.

The IRGC admitted to being responsible for the crash, stating that it had mistaken the aircraft for a cruise missile.

Five plaintiffs sued the Islamic Republic of Iran, the IRGC, its military commander, the Iranian Armed Forces, and Iranian supreme leader Ali Khamenei (the "Iranian Defendants") for the events of January 8, 2020. The plaintiffs brought the lawsuit in their capacity as surviving family members and/or estate representatives of six deceased passengers.

Although the Iranian Defendants were served with the plaintiffs' claim by the Canadian Minister of Foreign Affairs, they did not file a defence and were subsequently noted in default. The plaintiff moved for default judgment against the Iranian Defendants.

Decision on Liability

Justice Belobaba of the Superior Court of Justice heard the case and granted default judgment against the Iranian Defendants.

In his liability decision dated May 20, 2021,^[1] Justice Belobaba noted that under Canada's *State Immunity Act* (the "SIA"),^[2] foreign states are immune from the jurisdiction of any court in Canada, subject to specific exceptions.

One of the exceptions is found in section 4(1) of the *Justice for Victims of Terrorism Act* (the "JTVA"),^[3] which establishes a civil cause of action against foreign states identified as supporters of terrorism for acts or omissions amounting to terrorism offences under the Canadian *Criminal Code*.^[4] Iran has been listed as a supporter of terrorism under section 6.1(2) of the SIA since 2012.

Under the Canadian *Criminal Code*, it is an offence to "knowingly" instruct any person to carry out "terrorist activity."^[5] The *Criminal Code* defines "terrorist activity" as including "caus[ing] damage to an aircraft in service that renders the aircraft incapable of flight or

that is likely to endanger the safety of the aircraft in flight.”[\[6\]](#)

Exempted from the definition of terrorist activity are acts and omissions committed during “armed conflict.”[\[7\]](#)

There was no dispute that the Iranian Defendants shot down a civilian aircraft with two missiles, killing everyone on board. This would fit within the *Criminal Code*'s definition of “terrorist activity.” Therefore, the only two issues before the court were 1) whether the missile attacks were intentional and 2) whether the Iranian Defendants’ actions occurred during an armed conflict.

Intentional Attacks

Justice Belobaba considered expert reports filed by the plaintiffs, which stated that the Iranian Defendants intentionally shot down Flight PS 752 with a view to destroying it and while knowing that it was a civilian aircraft. The plaintiffs’ experts rejected Iran’s explanation that the IRGC had mistaken the civilian aircraft for U.S. missiles, noting that not one but two missiles had been fired. Relying on these reports, Justice Belobaba found that the missile attacks were intentional.

Absence of Armed Conflict

Justice Belobaba relied on reports by a United Nations Special Rapporteur and the plaintiffs’ experts to conclude that there had been no armed conflict in the region on or around January 8, 2020 when Flight PS 752 was shot down.

Justice Belobaba therefore concluded that the shooting down of Flight PS 752 constituted terrorist activity within the meaning of the *Criminal Code*. The plaintiffs therefore made out its civil claim against the Iranian Defendants.

Decision on Damages

Justice Belobaba discussed the appropriate quantum of damages to award the plaintiffs in a decision released on December 31, 2021.[\[8\]](#)

The plaintiffs sought five types of damages:

As surviving family members:

1. damages for loss of “care, guidance, and companionship” from the deceased passengers under s. 61 of *the Family Law Act* (the “FLA”)[\[9\]](#)
2. damages for intentional infliction of mental distress;
3. aggravated damages (i.e. additional damages for mental distress);

As estate representatives of the deceased:

4. damages for the pain and suffering experienced by the deceased passengers; and
5. punitive damages.

Damages for Loss of Care, Guidance, and Companionship

Justice Belobaba awarded FLA damages to four of the five plaintiffs.

Although Canadian jurisprudence imposes a cap of approximately \$160,000 for FLA awards made by judges, juries can award a higher

amount. The plaintiffs had initially requested trial by jury and only decided to proceed by judge alone after the COVID-19 pandemic delayed civil jury trials. On that basis, Justice Belobaba awarded \$200,000 to each of the four plaintiffs eligible to recover damages under the FLA, with an additional \$200,000 to the plaintiff who had lost both his wife and son in the plane crash, bringing the total FLA damages award to \$1 million CAD.

Damages for Mental Distress

While such damages are typically available in American terrorism lawsuits, Justice Belobaba found that, as a matter of Canadian law, damages for intentional infliction of mental distress and aggravated damages (which are also for mental distress) were not available to the plaintiffs as surviving family members.

Damages for Pain and Suffering on behalf of the Deceased Passengers

Justice Belobaba awarded the plaintiffs, in their capacity as estate representatives, an additional \$6 million CAD for pain and suffering (\$1 million for each deceased passenger). He noted that U.S. judges “uniformly” award this amount to victims of terrorism for physical suffering as well as the mental anguish of knowing death is imminent.

Punitive Damages

Under Canadian law, punitive damages are not intended to compensate plaintiffs but to punish, deter, and denounce defendants. They are only awarded in exceptional cases. In Justice Belobaba’s view, this was an exceptional case justifying punitive damages.

In determining the appropriate quantum of punitive damages, Justice Belobaba rejected as arbitrary and irrational the “three times multiplier” approach adopted by U.S. courts. Under that approach, the quantum of damages is determined by multiplying the amount that Iran spends on funding terrorism by three.

In Canada, the quantum of damages must be determined in accordance with the rule of proportionality. To achieve proportionality, Justice Belobaba considered six factors as follows:

1. the defendants’ blameworthiness
 - The Iranian Defendants committed an intentional act of terrorism.
2. the plaintiffs’ degree of vulnerability
 - The six deceased passengers were highly vulnerable victims as they were physically confined to the passenger jet.
3. the level of harm
 - The harm sustained by the victims was the loss of life.
4. the need for deterrence
 - As billions of dollars in judgments remain outstanding against Iran, the American judiciary has debated the level of deterrence actually achieved by punitive damage awards against this state. Nonetheless, plaintiffs’ counsel provided submissions that some level of enforcement was possible through Iranian-owned assets and investments located in Canada and worldwide.
5. the existence any wrong advantage gained by the defendants
 - By shooting down Flight PS 752, Iran was able to avenge the U.S. killing of Iranian military commander General Soleimani without risking retaliation from the United States.
6. any other penalties or sanctions that have been imposed or will likely be imposed on the defendants
 - The Canadian government has not imposed specific penalties or sanctions against Iran for this incident.

In view of these six factors, Justice Belobaba concluded that a punitive damages award of \$100 million to all five plaintiffs was

proportionate and rational, bringing the total damages award to \$107 million CAD.

Commentary

As mentioned above, *Zarei v. Iran* is an important case as it represents the first time that a Canadian court has considered the appropriate quantum of damages for loss of life caused by terrorism. Justice Belobaba's analysis could serve as the basis for future awards for terrorism-related claims.

By Canadian standards, an award of \$107 million CAD for loss of life is significant. Particularly noteworthy is Justice Belobaba's decision to award \$200,000 in FLA damages for each of the six deceased passengers, despite the judicially imposed cap of \$160,000 applicable to non-jury cases. This perhaps suggests that civil actions involving terrorist activity constitute exceptional cases warranting an exceptional quantum of damages. Arguably, however, a family member's loss of care, guidance, and companionship is not any greater or less depending on the way in which they lost their loved one.

At the same time, *Zarei v. Iran* suggests that Canadian awards for death caused by terrorism will likely pale in comparison to the staggering amounts awarded by American courts for terrorist-related claims, which can go into the billions. Justice Belobaba made it clear that Canadian courts are not to apply the multiplier approach adopted by U.S. judges. In Canada, any award of damages must be governed by the principle of proportionality.

[1] *Zarei v Iran*, 2021 ONSC 3377.

[2] R.S.C., 1985, c. S-18.

[3] S.C. 2012, c. 1, s. 2.

[4] R.S.C., 1985, c. C-46

[5] See *Criminal Code*, R.S.C., 1985, c. C-46, s. 83.22(1).

[6] See *Criminal Code*, R.S.C., 1985, c. C-46, ss. 7(2), 77(c), 83.01(1)(a).

[7] See *Criminal Code*, R.S.C., 1985, c. C-46, s. 83.01(1).

[8] *Zarei v. Iran*, 2021 ONSC 8569.

[9] R.S.O. 1990, c. F.3, s. 61.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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