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Administrative Decision No. VI

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tiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Done at Washington October 31, 1924.

Edwin B. PARKER
Umpire

ADMINISTRATIVE DECISION No. VI

(*January 30, 1925, pp. 208-211; Certificate of Disagreement by the Two National Commissioners, January 5, 1925, pp. 195-207.*)

DAMAGES IN DEATH CASES: VALUE OF LIFE LOST, LOSS TO DECEDENT'S ESTATE, LOSS TO SURVIVORS; SURVIVORS' ORIGINAL, NOT DERIVATIVE, RIGHT TO RECOVER DAMAGE, RECOGNITION IN CIVILIZED NATIONS; RIGHT TO ESPOUSE SURVIVORS' CLAIMS.—INTERPRETATION OF TREATIES: TERMS. Claims on behalf of American nationals for damage through death of British passengers lost on *Lusitania* on May 7, 1915 (see Opinion in the *Lusitania* Cases, p. 32 *supra*). Held that Treaty of Versailles (Part VIII, Section I, Annex I, para. 1), as carried into Treaty of Berlin, like statutes and judicial decisions of civilized nations, expressly recognizes right of survivors to recover damage sustained by them resulting from death of a person, a right *directly* vested in survivors, and thus original, not derivative, and that in cases under consideration United States may espouse claims, though damage was inflicted through taking of *British* life: since Great Britain, under Treaty of Versailles, can only claim damage suffered by British nationals as surviving dependents, the reverse would make Germany not liable for damage suffered by American nationals during war period and attributable to Germany's act as proximate cause, which is repugnant to terms of Treaty of Berlin.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 630-633; Annual Digest, 1925-26, pp. 239-240; Kiesselbach, *Probleme*, pp. 332-334 (German text); Wittenberg, Vol. II, pp. 64-68 (French text).

Bibliography: Annual Digest, 1925-26, p. 240; Kiesselbach, *Probleme*, pp. 11, 56-66, 92.

CERTIFICATE OF DISAGREEMENT BY THE TWO NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree upon the jurisdiction of the Commission over claims growing out of the death of an alien, their respective Opinions being as follows:

Opinion of Mr. Anderson, the American Commissioner

The question here presented is whether or not, under the terms of the Treaty of Berlin, Germany is obligated to make compensation for losses suffered by an American national on account of the death of an alien through the sinking of the *Lusitania*, assuming that the claim is of American nationality as defined in Administrative Decision No. V.

The German Commissioner holds that neither the terms of the Treaty of Berlin nor the rules of international law impose any liability upon Germany to make compensation in such cases. The American Commissioner, on the other hand, holds that by the terms of the Treaty of Berlin, as interpreted by this Commission, Germany is clearly obligated to make compensation for losses

suffered by American nationals in such cases, estimated in accordance with the rules laid down by this Commission in the Lusitania Opinion.

This Commission held in Administrative Decision No. I:

The financial obligations of Germany to the United States arising under the Treaty of Berlin on claims other than excepted claims, put forward by the United States on behalf of its nationals, embrace:

(A) All losses, damages, or injuries to them, including losses, damages, or injuries to their property wherever situated, suffered directly or indirectly during the war period, caused by acts of Germany or her agents in the prosecution of the war, etc.

In Administrative Decision No. II this Commission held:

Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants. * * * The problem in such cases is, not to distribute a given amount assessed against Germany amongst several persons, but to assess separately the damages suffered by each of such persons who jointly present independent claims.

Applying the rules laid down in Administrative Decision Nos. I and II this Commission held in its Lusitania Opinion that:

Germany is financially obligated to pay to the United States all losses suffered by American nationals, stated in terms of dollars, where the claims therefor have continued in American ownership, which losses have resulted from death or from personal injury or from loss of, or damage to, property, sustained in the sinking of the *Lusitania*.

This Commission further held in its Lusitania Opinion that:

In death cases the right of action is for the loss sustained by the *claimants* not by the estate. The basis of damages is not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses?

Bearing in mind that we are not concerned with any problems involving the punishment of a wrongdoer but only with the naked question of fixing the amount which will compensate for the wrong done, our formula expressed in general terms for reaching that end is: Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant.

The German Commissioner does not agree with the American Commissioner as to the effect of the foregoing decisions because, as appears from his Opinion, he considers that the basis of the claim is the death of the person who was lost and not the loss suffered by the surviving dependents, which resulted from such death. In other words, he considers that the loss suffered by the survivors is merely the measure of the damage caused by the death.

The same question was discussed, with a slightly different application, in the Opinions of the National Commissioners in the Life-Insurance Claims. There the German Commissioner reached the conclusion that:

As well under international law as under the Treaty of Berlin it is not sufficient that a national has suffered a *loss*, but the loss—or damage or injury—must have been sustained in the *person* or the *property* of the national.

The American Commissioner, on the other hand, pointed out in his Opinion that the Commission had definitely decided in Administrative Decision No. I, as shown by the extract therefrom above quoted, that the losses, damages, or injuries to the person or property of American nationals constitute only a part of the losses, damages, or injuries to them for which Germany is obligated to make compensation under the Treaty.

By the Decision of the Umpire, to whom this difference of opinion between the two National Commissioners was referred for decision, it was definitely settled that Administrative Decision No. I meant—

Germany is financially obligated to pay to the United States all losses suffered by American nationals as surviving dependents resulting from deaths of civilians caused by acts of war. Such claims for losses are embraced in the phrase "all losses, damages, or injuries to them" found in the rule above quoted from Administrative Decision No. I.

The Umpire further held in that Decision that:

Applying this test, it is obvious that the members of the families of those who lost their lives on the *Lusitania*, and who were accustomed to receive and could reasonably expect to continue to receive pecuniary contributions from the decedents, suffered losses which, because of the natural relations between the decedents and the members of their families, flowed from Germany's act as a normal consequence thereof, and hence attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death. Had there been any doubt with respect to such losses being proximately attributable to Germany's act, that doubt would have been removed by their express recognition in the Treaty of Versailles.

The American Commissioner considers that these rules as laid down by the Umpire in his Decision in the Life-Insurance Claims correctly interpret the rule laid down in Administrative Decision No. I and apply to the question here under discussion and that consequently Germany is liable under the Treaty of Berlin for all losses, damages, or injuries, which American claimants have suffered in consequence of the loss on the *Lusitania* of persons upon whom they were dependent, or from whom they received contributions, or whose loss caused them any other damages, which can be measured on a pecuniary basis, whether or not the persons lost were aliens or citizens of the United States.

Inasmuch, therefore, as these claims come within the terms of the Treaty of Berlin, it is unnecessary to consider whether or not Germany would be liable for them under any principles of international law independently of that Treaty, because Germany's liability under that Treaty is not limited to claims which can be supported by international law independently of that Treaty.

The Opinion of the German Commissioner refers to some discussions of the Commissioners during the winter of 1922-1923 for the purpose of explaining his understanding of the meaning of the *Lusitania* Opinion. The American Commissioner is not in a position to comment on these discussions, because he was not a member of the Commission at that time, and such explanations were not brought to his attention at the time that he participated in the Commission's decision on the *Lusitania* cases.

Chandler P. ANDERSON

Opinion of Dr. Kiesselbach, the German Commissioner

The question here to be decided is whether or not a claim on behalf of an American national who has suffered a pecuniary loss as a result of the death of a non-American relative as the proximate result of an act of Germany is a valid claim under the Treaty of Berlin.

The question thus presented is from the scientific viewpoint of international law one of the most important questions to be laid before this Commission, touching as it does the primary and leading principles governing the intercourse of nations.

The facts in the specific case in which the question is raised show that the petitioner, born a British subject, in 1909 became an American national as a result of her marriage to an American citizen; that after her marriage, her father, a subject of the British crown resident in the United States, gave her a monthly allowance of \$200, and that her father was killed in the *Lusitania* disaster as the result of an act of Germany (Claim Docket No. 93).

In presenting the case in his memorial the American Agent stated that the United States claimed "not as indemnity for the death" of the father killed in the disaster "but as pecuniary losses resulting to" the daughter on account of the "killing of her father".

The American Agent in his printed brief (pages 3-4) bases his argument solely on the language of this Commission in Administrative Decision No. II and in the Opinion in the *Lusitania* Cases:

Original and continuous ownership of claim.—In order to bring a claim (other than a Government claim) within the jurisdiction of this Commission, the loss must have been suffered by an American national, and the claim for such loss must have since continued in American ownership. (Administrative Decision No. II, page 8.)^a

In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses? (Opinion in the *Lusitania* Cases, page 19.)^b

The American Agent argues that inasmuch as the claim is not made for the death of the decedent but for the losses resulting to the American national from such death the United States is entitled to claim on behalf of such national.

This argument is in my opinion not justified, since it does not follow that because "in death cases the right of action is for the loss sustained by the *claimants*, not by the estate" of the deceased, a valid claim may therefore be presented on behalf of an American dependent who has suffered losses as a result of the killing of a British subject.

The conception under which I concurred in that part of the conclusions of the *Lusitania* Opinion is the following:

The genesis of this part of the *Lusitania* rules goes back to discussions of the Commissioners during the winter of 1922-1923. The question then arose how far the Commission is entitled and/or bound to apportion sums awarded in claims where two or more claimants are joined in one case, especially in death cases.

Both Commissioners at first believed Germany to be without interest in the question of such apportionment, but even under this assumption hesitated how to deal with it. They agreed that it was governed by international law, as contained in the provisions of the Treaty; and both Commissioners agreed further that for *measuring the damage* they had to consider "the circumstances and conditions, not only of the deceased but of each claimant as well" (Administrative Decision No. II, page 9).^c

Now, it was obvious that if the Commission should nevertheless award lump sums and leave their apportionment to other bodies (Government or court),

^a Note by the Secretariat, this volume, p. 26 *supra*.

^b Note by the Secretariat, this volume, p. 35 *supra*.

^c Note by the Secretariat, this volume, p. 27 *supra*.

the result would in many cases be very unjust and wholly in disregard of what the Commission had intended to adjudicate. For instance, the Commission might have made an award after carefully considering the circumstances and conditions of each claimant in the sums of a, b, c, d dollars to a dependent father, mother, wife, and child of the decedent, afterwards adding such sums together to make a lump-sum award of dollars. How could another body be able to redistribute the single findings of the Commission?

In discussing this problem the Commissioners found a useful analogy in the decision cited in Administrative Decision No. II, page 9, Spokane and Inland Empire Railroad Co. v. Whitley (237 U. S. 487). The leading principles of this decision were the following:

(1) The *liability* for a death occurring in a certain State (Idaho) is to be determined by the law of that State, the domicile of the deceased being immaterial.

(2) The *measure* of damage is to be controlled by the same law.¹

Therefore in analogous application of these principles it followed that as the liability for death cases brought before the Commission was determined by international law, the rules governing the *measuring* of damage had to be taken from the same source.

Now, all questions of international law being within the Commission's jurisdiction, it followed further that it was the Commission which had to "determine how much *each* claimant is entitled to recover" (Administrative Decision No. II, page 9). So it was this *international* law character of this part of the claims which made their apportionment fall within the province of the Commission. And the corollary of this principle was, that every legal issue governed by *municipal* law is *outside* the Commission's² jurisdiction.

The apportionment of claims belonging to the estate of a deceased, as for instance, for property lost, being controlled by municipal law, was therefore excluded.

This was—at least as I understand it—the reasoning by which the conclusion was reached under the *Lusitania* Opinion. And the rules show this origin in that they are headed by the term "Apportionment of awards" and are established "to arrive at the *quantum* of damages suffered by each claimant" (Administrative Decision No. II, page 9), and in that they provide that it is the loss of the single claimant and *not of the estate* which is to be *measured*.

It is obvious that this question of measuring the damages is wholly different from the question of determining the liability.

And as I have to deal here with the question of Germany's liability, recurrence must be made to the Treaty of Berlin by the terms of which the adjudications of this Commission are controlled, to decide whether a claim of an American national suffering a pecuniary loss through the death of an alien relative comes within the jurisdiction of the Commission.

But as the *Lusitania* rules are taken from the principles of the law of nations and as the principles of international law may further be helpful for the interpretation of the Treaty, I may consider first the problem from the viewpoint of international law.

Under international law it is the *nation* which must be injured, to justify the state's interposition on behalf of a claim. A nation can not be injured save

¹ "We must look to the Idaho statute to determine what the obligation is, to whom it runs, and the persons by whom or for whose benefit recovery may be had." (Spokane case, p. 495.)

² To avoid misunderstandings I may remark here that this argument of course does not apply to private debts.

through one of its nationals. Therefore it follows that one of its nationals must have suffered the injury. Although this principle is so indisputable that it seems scarcely necessary to state it, doubt has arisen as to its meaning.

A national can be injured either by an invasion of rights in relation to his person, as health, life, liberty, or honor, or by an invasion of rights in relation to things, that is, in his property rights. But in both cases it is the *national himself* who is wronged.³

The question at issue here therefore is: In death cases is the wrong inflicted not only an *original* injury to the *deceased*, but also and in its origin an *original injury to his survivors*?

This question is not identical with the question: Has the survivor suffered a loss? As already pointed out in my opinion on the life-insurance question, a "loss"⁴ is nothing but a consequence of an injury. A "loss" must be the consequence of the "injury to a national" to make a nation embrace a claim—but the injury to the *national* always remains the decisive criterion. And the whole doctrine of proximate cause serves only to establish the scope of liability growing out of an act committed against a *person*. And since, as already said, the term "national" comprises the *personal* and the *property* relations, the act must have been committed against his *person* or *property* to establish liability.

"*Injury to person or property*," not "*loss* suffered by a *national*," is therefore the premise and criterion for an international claim, and "*injury to person or property*" is the term used in international treaties.⁵

Therefore, as the survivors are certainly not injured in their own *persons* they could only have been injured in their *property*.

Now, assuming for argument's sake that rights of a survivor could be pronounced property, it would remain to define what kind of rights could be considered as "property." Is it the right to support in case of dependency, the "right" to contributions (including the "right" to voluntary gifts), or even the right to compensation for mental suffering?

If these "rights", though varying in every country and recognized by this Commission only under the principles of international law, were of such moral and pecuniary weight as to be considered as deserving independent and direct diplomatic protection, where then is the difference between these "rights" and the "rights" of an indigent mother in relation to her son, disabled through a wrongful act? Her mental suffering may be even greater through being ever renewed by the sad sight of her injured son, and her right to support is exactly the same in legal conception as in the case of a son killed. Nevertheless no government would think of embracing such a claim if the son were an alien. The clear and simple reason is because the injury is considered as committed against the *person* of the injured as such only, and that the incidents of the case serve only to measure the damage.

And further if the "rights" of the survivors are property in the sense discussed here, then a claim would be justified on behalf of the American relatives of a

³ See also Administrative Decision No. II, page 8: "The enquiry is: Was the United States * * * injured through *injury to its national*?" (*Note by the Secretariat*, this volume, p. 26 *supra*.)

⁴ See Opinions and Decisions in Life-Insurance Claims, page 111. (*Note by the Secretariat*, this volume, p. 97 *supra*.)

⁵ See Claims Convention of August 7, 1892, between the United States and Chile: "claims . . . arising out of acts committed against the *persons or property of citizens*".

Treaty of Washington, May 8, 1871, between the United States and Great Britain (Alabama Claims): "arising out of acts committed against the *persons or property*". And the same wording, for instance, in the Claims Convention of July 4, 1868, between the United States and Mexico.

neutral or even a German national. And if under the existing complexity of human relations a naturalized American citizen were survived by parents of British nationality and perhaps by a wife retaining her French nationality, all the nations concerned would be entitled to claim, because their own nationals were injured in their "property" rights.

In my opinion these consequences show that the premise can not be sound.

And though I am not dealing at this moment with the Treaty of Berlin and its provisions, but with international law only, it is nevertheless significant that the makers of the Treaty, who certainly were conversant with international law, do not mention the rights of survivors under the *property* clause (clause 9) but under clauses 2 and 3 of Annex I following Article 244, dealing with death cases. The reason therefor is that it is not the "property" of the *survivors*, but the death of the *national* that should be compensated for.

It is of further significance that the Secretary of State expressly mentions cases like that at issue here in his report to the Senate, dated March 2, 1921, saying:

In some instances an American citizen has endeavored to claim for the death of British relatives; . . . naturalized citizens have sought to claim for losses or damages suffered while declarants; declarants have undertaken to claim as such.

These cases do not possess the element of continuous American nationality. . . . Record has been made of these cases in the Department of State for use in the event that the department may be able to assist the claimants hereafter.

This statement clearly shows that the Secretary of State did *not* consider the survivors of British relatives as originally injured in their own "property". And it is nowhere shown that the United States nevertheless tried to protect these claims through provisions of the Treaty.

A sound and leading principle of international law gives a nation the right to claim satisfaction for the death of *its own national* only. Such claim being a national one, the government injured may choose the method of measuring the damage, either by claiming a lump sum as frequently is done⁶ under international arbitrations or by computing the damage from the specific items of the single case.

But under both methods the only object is the *measure* of damage accrued through the *death of the person*.⁷

Thus under international law it is the *nationality* of the *deceased* which gives a nation the right to compensation.

There remains the question of whether the Treaty of Berlin and especially Annex I following Article 244 changes this principle. There is no possible doubt that that could have been done. But if so, the provision must then show in clear and unambiguous language that the Treaty really intended to establish an independent and original right of the survivors in their own behalf.

Now, clauses 2 and 3 of Annex I following Article 244 deal with "damage . . . to civilian victims * * * and to the surviving dependents of such victims".

But does that mean to create original rights in the dependents capable of protection even in the case of the death of an alien?

⁶ For instance, Ralston's International Arbitral Law and Procedure, section 362, page 176.

⁷ It is significant, for instance, that Ralston in his book on International Arbitral Law and Procedure deals with the question at issue under the heading "Measure of Damages in Case of Death" (page 175).

The interpretation given to it through the Secretary of State in his statement⁸ mentioned above of March 2, 1921, shows clearly that he at least did *not* understand this provision in that way.

But even if there would be a doubt as to the interpretation of the clauses 2 and 3, it must be borne in mind that following the rules of interpretation under international law as repeated in the *Lusitania* Opinion, page 31, the language of the clauses must be "strictly construed" against their framers and further that they "must be so construed as to best conform to accepted principles of international law rather than in derogation of them."

Therefore as no serious dissension is possible in the question at issue here as far as international law is concerned, the clauses must be read and interpreted as in accordance with such law.

But if the clauses were to be understood as giving independent contractual rights to the survivors, they would clearly give such rights to the surviving dependents only.

Therefore such rights would be conditional on the dependency, so that a survivor, being dependent on the deceased, could be entitled either to all rights allowed under the principles of international law, including the right to compensation for mental suffering, or his rights could be considered as restricted to rights growing out of dependency. Under the first interpretation it would be rather surprising that a person because of his dependency should be so privileged. But in both alternatives a person not being dependent would have no rights at all, and especially no right to compensation for mental suffering.

This consequence, though perfectly logical, is not in accordance with the *Lusitania* Opinion of the Commission.

It is not the establishment of new and detailed principles of original rights of the survivors, but it is the simple basis of measuring the damage in death cases, that is meant by the treaty clauses and established in the *Lusitania* Opinion.

That this is the correct interpretation is clearly shown by the way the Allies themselves have applied the provisions. No nation has presented claims on behalf of surviving dependents as such, though doubtless many nationals of the Allied and Associated Powers were afflicted through the death of relatives not of their own nationality. On the contrary, the way the damages have been assessed makes it clear that no State has claimed special compensation for the surviving dependents of aliens. The reparation account of Great Britain shows that Great Britain measured the damage caused through the death of her civilians by examining a "considerable number of cases" on lines, substantially

⁸ The statement shows clearly that the Government of the United States was well aware that some claims might not be protected by the Treaty of Versailles. Nevertheless, it certainly has not been its intention to bring all those claims under the terms of the Treaty of Berlin. Otherwise the Government of the United States would not have informed the German Government before the conclusion of the Treaty of Berlin through the Dresel Note that "it is the belief of the Department of State" (the same which made the statement of March, 1921) "that there is no difference between provisions of the proposed treaty relating to rights under the Peace Resolution and the rights covered by the Treaty of Versailles except in so far as a distinction may be found . . . which relates to the enforcement of claims . . .".

And otherwise the United States would have included, for instance, the claims of declarants—expressly mentioned in the statement of March, 1921—in the provisions of the Treaty of Berlin.

Therefore, there is no room for the argument that a claimant must have a standing before this Commission because otherwise he would have no right to recover.

the same as established by this Commission as to rights growing out of dependency merely, and that by thus reaching an *average* amount they valued the life of each civilian national on that basis *regardless* of whether the deceased left surviving dependents or not.

The French and Belgian method deviates in so far as they take as a basis the amounts actually paid to surviving dependents under domestic law, whilst other Powers simply take an arbitrary valuation of lives lost—as, for instance, Italy, Greece, Portugal. So the result is that the compensation claimed in death cases is measured on an average valuation which is considerably less than under the rules of this Commission.⁹ Great Britain claims an average damage of £1,699 in respect of the loss of the life of each passenger, £1,237 in respect of the loss of the life of each seaman, £1,462 in respect of the loss of life through air raid; while France claims Frs. 16,593, Belgium Frs. 12,450, Italy Lire 40,000, Greece Drachmen 30,000, Portugal M. 20,000, Japan M. 34,000, etc., for each life.

So it is obvious that all Powers concerned have understood the respective provisions of the Treaty as a rule to *measure* the damage, and that they did not intend to establish special and original rights in the survivors.

If it were otherwise, the right to compensation would rest *solely* on the provision in behalf of the surviving *dependents*. An unavoidable consequence under the maxim “*expressio unius est exclusio alterius*” would be that the damage due under the Treaty would *exclude* compensation for mental suffering, as indeed no Power has made an allowance for such suffering or even mentioned it.

On the other hand, if the rights of the surviving dependents are *only* an item to be taken into account in *measuring* the damage caused through a death case, nothing would prevent the Commission from considering other items as well. Mental suffering could then be adjudicated upon under the general principles of international law. But then the alternative consequence would be that the Treaty has *not* established specific and original rights in surviving dependents and that therefore, in the case of the death of an alien, American surviving nationals have no original rights of their own.

Therefore, to accept the Treaty provisions as constituting independent and original rights on behalf of the *surviving dependents* means to deny their right to compensation for mental suffering.

On the other hand, to consider those provisions as intending only to establish items for measuring the damage accrued in the person of the deceased means to leave the question of measuring such damage to international law.

Mental suffering may then be taken into account as a further item, but the right to compensation is restricted to the case of the death of a *national*.

And this is the more sound and reasonable as otherwise Germany could be made to pay twice or three and fourfold in the same death case, if the surviving dependents happened to be of different nationalities.

Dr. W. KIESSELBACH

⁹ For instance, the amount awarded in the first 55 *Lusitania* death cases is \$17,890 on the average.

The two National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over claims for the death of an alien.

Done at Washington January 5, 1925.

Chandler P. ANDERSON

American Commissioner

W. KIESSELBACH

German Commissioner

Decision

PARKER, *Umpire*, in rendering the decision of the Commission delivered the following opinion:

The question here certified by the National Commissioners has its source in a small group of cases in which the United States seeks awards on behalf of certain of its nationals who have been damaged through the deaths of British passengers lost with the *Lusitania*. The answer will be found in a brief consideration of the nature of damages resulting from death, in connection with the applicable provisions of the Treaty of Berlin as construed by the previous decisions of this Commission.

A right to recover damages resulting from death accrues when, but not until, the death occurs. Manifestly a decedent can not recover for his own death, nor can his estate, in a representative capacity, recover what the decedent could not have recovered had he lived. No system of jurisprudence has ever undertaken to measure by pecuniary standards the value to a man of his own life. But an 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 corresponding liabilities and not one merely for measuring damages. It is expressly recognized by the Treaty of Versailles in the first of ten categories enumerating Germany's obligations to make reparation payments¹ and is incorporated in the Treaty of Berlin. By virtue of this provision Germany is expressly obligated to make compensation for damages suffered by the nationals of the Allied and Associated Powers resulting from the deaths of civilians caused by acts of war.

It is competent for a nation to exact reparation from another nation for the economic loss that the former may have sustained through the wrongful taking of the lives of its nationals by the latter. Such exactions sometimes take the form of demands for the payment of indemnities on a per capita basis for the lives lost, without any attempt to measure by pecuniary standards the value of such lives. The United States has not elected to make such demands on Germany.² But it has, under the Treaty of Berlin, including the provision above referred to of the Treaty of Versailles incorporated therein, put forward numerous demands on behalf of its nationals for damages suffered *by them* resulting from deaths caused by Germany's acts. The right to such compensation does not vest in the claimant through the decedent, for such right was never lodged in the decedent. On his death the initial right to demand compensation for damages suffered vests in the survivor. The basis of the liability to respond in damages is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting

¹ See paragraph 1 of Annex I to Section I of Part VIII, Treaty of Versailles.

² See Opinion in the *Lusitania* Cases, Decisions and Opinions, pages 29-31. (*Note by the Secretariat*, this volume, pp. 42-43 *supra*).

to the survivor from the death. The claim of such survivor is original and not derivative.

In the group of cases here presented, Germany's obligation, as fixed by the Treaty of Berlin, is to make compensation and reparation, measured by pecuniary standards, for damages suffered by American survivors of civilians whose deaths were caused by Germany's acts in the prosecution of the war. Where, measured by such standards, no damage has been suffered no liability exists.

The Government of the United States was careful to incorporate in the Treaty of Berlin broad and far-reaching provisions designed to compensate American nationals for all losses, damages, or injuries suffered directly or indirectly by them, during the war period, caused by acts of Germany or her agents in the prosecution of the war. As this Commission has heretofore held, these provisions embrace claims for damages suffered by surviving American nationals resulting from death.³ Such claims asserted by the United States before this Commission as were impressed with American nationality both (1) on the date when the loss, damage, or injury occurred and (2) on November 11, 1921, when the Treaty of Berlin became effective, fall within the terms of that Treaty, and this Commission's jurisdiction attaches.⁴

A claim put forward by the United States on behalf of an individual who was an American national both on May 7, 1915, the date of the destruction of the *Lusitania*, and on November 11, 1921, when the Treaty of Berlin became effective, and who has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject, fully meets these tests and falls within the terms of the Treaty of Berlin. In such a case an American national has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as a proximate cause. The fact that the damage was inflicted through the taking of the life of a British subject is immaterial. To the extent that damages were suffered by British nationals as surviving dependents of the British subject whose life was taken, Germany is obligated under the Treaty of Versailles to compensate Great Britain.⁵ But a claim on behalf of an American national, who has been damaged through the taking of the life of the British subject, can not be asserted against Germany by Great Britain.⁶ It is impressed with American nationality in point of origin and, when it is also American owned at the time the Treaty of Berlin

³ See Opinion in the *Lusitania* Cases, Decisions and Opinions, page 17, and Opinions and Decision in Life-Insurance Claims, pages 132-133 and 138. (*Note by the Secretariat*, this volume, pp. 33, 111 and 115 *supra*, respectively).

⁴ See Decisions and Opinions, page 188. (*Note by the Secretariat*, this volume, p. 150 *supra*.)

⁵ In estimating the damages sustained by its nationals through the loss of civilian lives, Great Britain applied substantially the same rules as are recognized by this Commission in its Opinion in the *Lusitania* Cases. See "Table B—British Claim against Germany for Reparation in Respect of Loss of Life of Civilians", found in the report made by Great Britain in connection with "British Claim for Reparation against Germany under Part VIII of the Treaty of Versailles". The British claim was based on the damages sustained by the survivors, and not on the value of the life lost. Only survivors possessing British nationality were taken into account. See the final report dated February 26, 1924, of the "Royal Commission on Compensation for Suffering and Damage by Enemy Action" within Annex I to Section I of Part VIII of the Treaty of Versailles (Cd. 2066).

⁶ Cases have come to the attention of this Commission in which Great Britain has declined to consider claims of American survivors of a British subject whose life was destroyed with the *Lusitania* and referred such claimants to the Government of the United States.

became effective, it may be espoused internationally by the United States on behalf of its national and by no other nation.

To hold that such a claim can not be put forward by the United States because it grows out of the act of Germany in taking the life of a British subject would be to hold that Germany is not liable under the Treaty of Berlin for damages suffered by an American national during the war period and attributable to Germany's act as a proximate cause. Such a holding would be repugnant to the terms of the Treaty and the decisions heretofore rendered by this Commission construing it. It would amount to a denial to the individual survivor, because of his American nationality, of all right to compensation for a pecuniary injury suffered by him proximately caused by Germany's act, where, had he been a British national, Germany's obligation to make compensation would have been clear. Where the survivor is British the claim is British in point of origin and must be put forward by Great Britain. Where the survivor is American the claim is American in point of origin and must be put forward by the United States.

The Umpire decides that Germany is obligated to make compensation for damages suffered by American survivors of a British subject whose life was destroyed with the *Lusitania*. The rule here announced is in entire harmony with the uniform practice of this Commission in repeatedly denying to the United States the right to put forward claims on behalf of British dependents of American nationals lost with the *Lusitania*.

Done at Washington January 30, 1925.

Edwin B. PARKER
Umpire

MAUD THOMPSON DE GENNES (UNITED STATES) *v.* GERMANY

(*March 11, 1925, pp. 215-219; Certificate of Disagreement by the National Commissioners, February 16, 1925, pp. 213-215.*)

NATIONALITY OF CLAIMS: CONTINUOUS NATIONALITY.—ESPOUSAL OF CLAIM.—

EVIDENCE: DIPLOMATIC CORRESPONDENCE. Claim on behalf of widow of American national lost on *Lusitania* on May 7, 1915, who on November 17, 1917, by subsequent marriage, lost American nationality. *Held* that claim does not fall within Treaty of Berlin since not impressed with American nationality on November 11, 1921 (reference made to Administrative Decision No. V, see p. 119 *supra*); and that lodging of claim with Department of State in August, 1915, and German assumption of liability by note of February 4, 1916, do not take case out of Administrative Decision No. V: United States never espoused this particular claim until long after claimant relinquished American nationality (evidence: diplomatic correspondence), and German offer of February 4, 1916, never accepted by United States as satisfactory.

Cross-references: A.J.I.L., Vol. 19 (1925), pp. 803-806; Annual Digest, 1925-26, pp. 416-417; Kiesselbach, *Probleme*, pp. 337-339 (German text); Witenberg, Vol. II, pp. 71-75 (French text).

Bibliography: Borchard, p. 72; Kiesselbach, *Probleme*, pp. 12, 36-55.