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Opinion in the Lusitania Cases

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Applying the rule of proximate cause to the provisions of Administrative Decision No. I, no difficulty should be experienced in determining what claims fall within its terms.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner

OPINION IN THE *LUSITANIA* CASES

(*November 1, 1923, pp. 17-32.*)

NEUTRALITY: NEUTRAL PASSENGERS ABOARD ENEMY VESSEL.—ADMISSION OF LIABILITY. Admission by Germany through note of February 4, 1916, of liability for losses sustained by American nationals as a consequence of sinking of British liner *Lusitania* by German submarine on May 7, 1915, during period of American neutrality.

DAMAGES IN DEATH CASES: (1) GENERAL RULE OF MUNICIPAL LAW: COMPLETE PECUNIARY COMPENSATION FOR LOSS TO CLAIMANT; (2) FACTORS: FINANCIAL CONTRIBUTIONS, PERSONAL SERVICES, CLAIMANT'S MENTAL SUFFERING; (3) LIFE-INSURANCE.—EVIDENCE: LAW OF PROBABILITIES AND AVERAGES, LIFE-EXPECTANCY AND PRESENT-VALUE TABLES. General rule in both common and civil law countries is to give complete pecuniary compensation for loss resulting to claimant from death of human being. Applying rule to Germany's obligations under Treaty of Berlin (see Administrative Decision No. 11, p. 23 *supra*), Commission will generally take into account: (*a*) amounts, and (*b*) personal services which decedent would have contributed to claimant, and (*c*) the latter's mental suffering, all reduced to present cash value. Factors to be considered in estimating loss. *Held* that no deductions should be made of payments to claimant under policies of insurance on life of deceased: life-insurance contract is not one of indemnity, but of investment: claimant's rights under contract existed prior to commission of act complained of, hastening of death and of exercise of rights cannot operate to Germany's benefit: not death, but time of death was uncertain, and no speculation is permitted as to who might have received payment in case deceased had survived claimant. *Held* also that in death cases law of probabilities and averages to be applied in estimating damages: standard life-expectancy and present-value tables in connexion with other evidence and with deceased's probable physical and mental capacity and earning powers.

DAMAGES: LEGAL CONCEPT, MENTAL SUFFERING, EXEMPLARY (PUNITIVE, VINDICTIVE) DAMAGES.—PRECEDENT.—JURISDICTION: TREATY OF BERLIN, FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW.—INTERPRETATION: FUNDAMENTAL PRINCIPLE.—INTERPRETATION OF TREATIES: (1) TERMS, CLEAR AND UNAMBIGUOUS LANGUAGE, INTENTION OF PARTIES, (2) FRAMER, BENEFICIARY, PRINCIPLES OF INTERNATIONAL LAW. PENAL CLAUSES. The

legal concept of damages is: judicially ascertained compensation for wrong. *Held* that real and actual mental suffering, though difficult to measure, forms basis of recovery. *Held* also (1) that concept of damages does not include "exemplary (punitive, vindictive) damages" (origin: difficulty for judges in tort cases of clearly instructing juries how to measure mental suffering etc. by pecuniary standards; no precedent in arbitrations between one sovereign State against another presenting claim on behalf of national), and (2) that Commission without jurisdiction to award exemplary damages: (a) terms, clear and unambiguous language of Treaty of Berlin, intention of Parties, (b) fundamental principles of international law. Principles of interpretation: (1) fundamental principle that "it is not allowable to interpret that which has no need of interpretation", (2) of treaties: (a) construction against party who framed language for own benefit, (b) construction so as to best conform to principles of international law, (c) construction of penal clauses against party asserting them.

AWARDS: DATE, INTEREST. Awards in individual *Lusitania* cases shall be made as of date of this decision and shall bear 5% interest per annum from that date.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 361-373; Annual Digest, 1923-24, pp. 193-194, 202-203, 209-211, 339, 340; Kiesselbach, *Probleme*, pp. 186-198 (German text); Witenberg, Vol. I. pp. 22-38 (French text).

Bibliography: Borchard, p. 140; Isay, p. 607; Kersting, p. 1843; Kiesselbach, *Probleme*, pp. 11, 56-66; Partsch, pp. 135-136; Prossinagg, p. 12.

PARKER, *Umpire*, delivered the opinion of the Commission, the American and German Commissioners concurring in the conclusions:

These cases grow out of the sinking of the British ocean liner *Lusitania*, which was torpedoed by a German submarine off the coast of Ireland May 7, 1915, during the period of American neutrality. Of the 197 American citizens aboard the *Lusitania* at that time, 69 were saved and 128 lost. The circumstances of the sinking are known to all the world, and as liability for losses sustained by American nationals was assumed by the Government of Germany through its note of February 4, 1916, it would serve no useful purpose to rehearse them here.

Applying the rules laid down in Administrative Decisions Nos. I and II handed down this date,¹ the Commission finds 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 finding disposes of this group of claims, save that there remain to be considered (1) issues involving the nationality of each claimant affecting the Commission's jurisdiction and (2) the measure of damages to be applied to the facts of each case.

¹ Reference is made to Administrative Decision No. I for the definition of the terms used herein.

We are here dealing with a group of cases all growing out of a single catastrophe. As it is manifestly of paramount importance that the same rules of decision shall govern the disposition of each and all of them, whether disposed of by agreement between the two Commissioners or in the event of their disagreement by the Umpire, this opinion announcing such rules is, at the request of the two Commissioners, prepared by the Umpire, both Commissioners concurring in the conclusions. The principles and rules here laid down will, where applicable, govern the American and German Agents and their respective counsel in the preparation and presentation of all claims.

In this decision rules applicable to the measure of damages in *death cases* will be considered. In formulating such rules and determining the weight to be given to the decisions of courts and tribunals dealing with this subject, it is important to bear in mind the basis of recovery in death cases in the jurisdictions announcing such decisions.

At common law there existed no cause of action for damages caused by the death of a human being. The right to maintain such actions has, however, been long conferred by statutes enacted by Great Britain and by all of the American States. The German Code expressly recognizes liability for the taking of life.² These legislative enactments vary in their terms to such an extent that there can not be evolved from them and the decisions of the courts construing them any composite uniform rules governing this branch of the law. Such statutes and decisions as well as the other governing principles set out in this Commission's Administrative Decision No. II will, however, be considered in determining the applicable rules governing the measuring of damages in death cases.

The statutes enacted in common-law jurisdictions conferring a cause of action in death cases where none before existed have frequently limited by restrictive terms the rules for measuring damages in such cases. The tendency, however, of both statutes and decisions is to give such elasticity to these restrictive rules as to enable courts and juries in applying them to the facts of each particular case to award full and fair compensation for the injury suffered and the loss sustained.³ The statutes of several States of the American Union authorize juries to award such damages as are "fair and just" or "proportionate to the injury". Under such statutes the decisions of the courts give to the juries much broader latitude in assessing damages than those of other States where the statutes expressly limit them to so-called "pecuniary injuries",⁴ which is a term much misunderstood.

² Section 823. See also Huebner's "History of Germanic Private Law", 1918, pages 578-579, and Schuster's "Principles of German Civil Law", 1907, sections 284-286.

³ *Nohrden v. Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105-108, 37 Southeastern Reporter 228, 238-240; *Stuckey v. Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 252-253; *Parker v. Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Bourg v. Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022-1027, 45 Southern Reporter 972, 977-979; *Seaboard Air Line Railway v. Moseley*, 1910, 60 Florida Reports 186, 189; *Peters v. Southern Pacific Co.*, 1911, 160 California Reports 48, 69-71; *Underwood v. Gulf Refining Co.*, 1911, 128 Louisiana Reports 968, 987-1003, 55 Southern Reporter 641, 646-653; *Johnson v. Industrial Lumber Co.*, 1912, 131 Louisiana Reports 897, 910, 60 Southern Reporter 608, 612.

⁴ *Mynning v. The Detroit, Lansing & Northern Railroad Co.*, 1886, 59 Michigan Reports 257, 261-262, 26 Northwestern Reporter 514, 516-517; *Simmons v. McConnell*, 1890, 86 Virginia Reports 494, 496-497, 10 Southeastern Reporter 838, 839; *The Ohio and Mississippi Railway Co. v. Wangelin*, 1894, 152 Illinois Reports 138, 142, 38 Northeastern Reporter 760, 761; *Turner v. Norfolk & W. R. Co.*, 1895, 40 West Virginia Reports 675, 688-689, 693-695, 22 Southeastern Reporter 83, 87, 89; *Strother v. South Carolina & Georgia Railroad Co.*, 1896, 47 South Carolina Reports 375, 383-384, 25 Southeastern Reporter, 272, 274; *Mason v. Southern Railway Co.*, 1900, 58 South Carolina Reports 70, 77, 36 Southeastern Reporter 440, 442; *Parker v. Crowell & Spencer Lumber Co.*, 1905, 115 Louisiana Reports 463, 468, 39 Southern Reporter 445, 446; *Norfolk & Western Railway Co. v. Cheatwood's Administratrix*, 1905, 103 Virginia Reports 356, 364-365, 49 Southeastern Reporter 489, 491-492; *Butte Electric Ry. Co. v. Jones*, 1908, C. C. A., 164 Federal Reporter 308, 311, 18 Lawyers' Reports Anno-

In most of the jurisdictions where the civil law is administered and where the right of action for injuries resulting in death has long existed independent of any code or statute containing restrictions on rules for measuring damages, the courts have not been hampered in so formulating such rules and adapting them to the facts of each case as to give complete compensation for the loss sustained.

It is a general rule of both the civil and the common law that every invasion of private right imports an injury and that for every such injury the law gives a remedy. Speaking generally, that remedy must be commensurate with the injury received. It is variously expressed as "compensation", "reparation", "indemnity", "recompense", and is measured by pecuniary standards, because, says Grotius,⁵ "money is the common measure of valuable things".

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.

In making such estimates there will be considered, among other factors, the following:

(*a*) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him;

(*b*) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

(*c*) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

(*d*) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;

(*e*) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

(*f*) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5% interest rate and standard present-value tables will be used;

(Footnote continued from page 34.)

tated (New Series) 1205, 1208; *Brennen v. Chicago & Carterville Coal Co.*, 1909, 147 Illinois Appellate Court Reports 263, 270-273; *Chesapeake & O. Ry. Co. v. Hawkins* (West Virginia), 1909, C. C. A., 174 Federal Reporter 597, 601-602, 98 Circuit Court of Appeals 443, 447-448.

⁵ "The Rights of War and Peace", by Hugo Grotius, Whewell translation, 1853 (hereinafter cited as "Grotius"), Book II, Chapter XVII, Section XXII; Sedgwick on Damages, 9th (1912) edition (hereinafter cited as "Sedgwick"), section 30.

(g) Neither the physical pain nor the mental anguish which the *deceased* may have suffered will be considered as elements of damage;

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

(i) No exemplary, punitive, or vindictive damages can be assessed.

The foregoing statement of the rules for measuring damages in death cases will be applied by the American Agent and the German Agent and their respective counsel in the preparation and submission of all such cases. The enumeration of factors to be taken into account in assessing damages will not be considered as exclusive of all others. When either party conceives that other factors should be considered, having a tendency either to increase or decrease the *quantum* of damages, such factors will be called to the attention of the Commission in the presentation of the particular case.

Most of the elements entering into the rules here expressed for measuring damages, and the factors to be taken into account in applying them, are so obviously sound and firmly established by both the civil and common law authorities as to make further elaboration wholly unnecessary. As counsel for Germany, however, very earnestly contends that the mental suffering of a claimant does not constitute a recoverable element of damage in death cases, and also contends that life insurance paid claimants on the happening of the death of deceased should be deducted in estimating the claimant's loss, we will state the reasons why we are unable to adopt either of these contentions. The American counsel, with equal earnestness, contends that exemplary, punitive, and vindictive damages should be assessed against Germany for the use and benefit of each private claimant. For the reasons hereinafter set forth at length this contention is rejected.

Mental suffering. The legal concept of damages is judicially ascertained compensation for wrong. The compensation must be adequate and balance as near as may be the injury suffered. In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained, involving such inquiries as how long the deceased would probably have lived but for the fatal injury; the amount he would have earned, and of such earnings the amount he would have contributed to each member of his family; the pecuniary value of his supervision over the education and training of his children; the amount which will reasonably compensate an injured man for suffering excruciating and prolonged physical pain; and many other inquiries concerning elements universally recognized as constituting recoverable damages. This, however, furnishes no reason why the wrongdoer should escape repairing his wrong or why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise. To deny such reparation would be to deny the fundamental principle that there exists a remedy for the direct invasion of every right.

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. The interdependency of the mind and the body, now universally recognized, may result in a mental shock producing physical disorders. But quite apart from any such result, there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effect on the individual and on his capacity to produce. Why, then, should he be remediless for this injury? The courts of France under the provisions of the Code Napoleon have always held that mental suffering or "prejudice morale" is a proper element to be considered

in actions brought for injuries resulting in death. A like rule obtains in several American States, including Louisiana, South Carolina, and Florida.⁶ The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree.

On careful analysis it will be found that decisions announcing a contrary rule by some of the American courts are measurably influenced by the restrictions imposed by the language of the statutes creating the right of action for injuries resulting in death. As hereinafter pointed out, these very restrictions have in some instances driven the courts to permit the juries to award as exemplary damages what were in truth compensatory damages for mental suffering, rather than leave the plaintiff without a remedy for a real injury sustained.

Mental suffering to form a basis of recovery must be real and actual, rather than purely sentimental and vague.⁷

Insurance. Counsel for Germany insist that in arriving at claimants' net loss there should be deducted from the present value of the contributions which the deceased would probably have made to claimants had he lived all payments made to claimants under policies of insurance on the life of deceased. The contention is opposed to all American decisions and the more recent decisions of the English courts. The various reasons given for these decisions are, however, for the most part inconclusive and unsatisfactory. But it is believed that the contention here made by the counsel for Germany is based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto.

Unlike marine and fire insurance, a life insurance contract is not one of indemnity, but a contract absolute in its terms for the payment of an amount certain on the happening of an event certain—death—at a time uncertain. The consideration for the claimants' contract rights is the premiums paid. These premiums are based upon the risk taken and are proportioned to the amount of the policy. The contract is in the nature of an investment made either by, or in behalf of, the beneficiaries. The claimants' rights under the insurance contracts existed prior to the commission of the act complained of, and prior to the death of deceased. Under the terms of the contract these rights were to be exercised by claimants upon the happening of a certain event. The mere fact that the act complained of hastened that event can not inure to Germany's benefit, as there was no uncertainty as to the happening of the event, but only as to the *time* of its happening. Sooner or later payment must be made under the insurance contract. Such payment of insurance, far from springing from Germany's act, is entirely foreign to it. If it be said that the acceleration of death secures to the claimants *now* what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may *possibly* have benefited through Germany's act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability of probabilities in order to offset an

⁶ *Nohrden v. Northeastern Railroad Co.*, 1900, 59 South Carolina Reports 87, 105-108, 37 Southeastern Reporter 228, 238-240; *Stuckey v. Atlantic Coast Line Railroad Co.*, 1901, 60 South Carolina Reports 237, 253; *Bourg v. Brownell-Drews Lumber Co.*, 1908, 120 Louisiana Reports 1009, 1022-1026, 45 Southern Reporter 972, 977-978; *Seaboard Air Line Railway v. Moseley*, 1910, 60 Florida Reports 186, 189-190; *Underwood v. Gulf Refining Co.*, 1911, 128 Louisiana Reports 869, 986, 990-1003; *Johnson v. Industrial Lumber Co.*, 1912, 131 Louisiana Reports 897, 908-909.

⁷ Sedgwick, Sec. 46a.

absolute and certain contract right against the uncertain damages flowing from a wrong.

Use of life-expectancy and present-value tables. Ordinarily the facts to which must be applied the rules of law in measuring damages in death cases lie largely in the future. It results that, absolute knowledge being impossible, the law of probabilities and of averages must be resorted to in estimating damages, and these preclude the possibility of making any precise computations or mathematical calculations. As an aid—but solely as an aid—in estimating damages in this class of cases, the Commission will consider the standard life-expectancy and present-value tables. These will be used not as absolute guides but in connection with other evidence, such as the condition of the health of deceased, the risks incident to his vocation, and any other circumstances tending to throw light on the probable length of his life but for the act of Germany complained of. To the extent that happenings subsequent to the death of deceased make certain what was before uncertain, to such extent the rules of probabilities will be discarded.

Neither will we lose sight of the fact that life tables are based on statistics of the length of life of individuals, not upon the duration of their physical or mental capacity or of their earning powers. In using such tables it will be borne in mind that the present value of the probable earnings of deceased depends on many more unknowable contingencies than does the present value of a life annuity or dower. Included among these contingencies are possible and probable periods of illness, periods of unemployment even when well, and various degrees of disability arising from gradually increasing age. The weight to be given to such tables will, therefore, be determined by the Commission in the light of the facts developed in each particular case.

Exemplary damages. American counsel with great earnestness insists that exemplary, or, as they are frequently designated, punitive and vindictive, damages should be assessed by this Commission against Germany in behalf of private claimants. Because of the importance of the question presented the nature of exemplary damages will be examined and the Commission's reasons for declining to assess such damages will be fully stated.

Undoubtedly the rule permitting the recovery of exemplary damages as such is firmly entrenched in the jurisprudence of most of the States of the American Union, although it has been repudiated by the courts of several of them and its soundness on principle is challenged by some of the leading American text writers.⁸

The reason for the rule authorizing the imposition of exemplary in addition to full reparation or compensatory damages is that they are justified "by way of punishing the guilty, and as an example to deter others from offending in like manner".⁹ The source of the rule is frequently traced to a remark alleged to have been made by Lord Chief Justice Pratt (afterwards Lord Camden) in instructing a jury (*italics ours*) that:¹⁰

"Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

⁸ *Fay v. Parker*, 1873, 53 New Hampshire Reports 342; Sedgwick, sec. 354; Greenleaf on Evidence, 15th (1892) edition, Volume II, sections 253, 254, 266, and 267.

⁹ *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 1893, 147 United States Reports 101, 107.

¹⁰ *Wilkes v. Wood*, 1763, 19 Howell's State Trials (1816) 1153, 1167, Lofft's Reports (1790), pages 1 and 19 of first case.

That such a charge was ever in fact given has been questioned.¹¹ However this may be, this alleged instruction has been quoted and requoted by the courts of England and of America as authority for the awarding of exemplary damages where the tort complained of has been wilfully or wantonly or maliciously inflicted.

In some of the earlier cases the awards of exemplary damages were sustained "for example's sake" and "to prevent such offense in the future", and again "to inflict damages for example's sake and by way of punishing the defendant". In one early New York case¹² it was said:

"We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime."

In our opinion the words exemplary, vindictive, or punitive as applied to *damages* are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong.¹³ The remedy should be commensurate with the loss, so that the injured party may be made whole.¹⁴ The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. Many of the American authorities lay down the rule that where no actual damage has been suffered no exemplary damages can be allowed, giving as a reason that the latter are awarded, not because the *plaintiff* has any *right* to recover them, but because the *defendant* deserves punishment for his wrongful acts; and that, as the plaintiff can not maintain an action merely to inflict punishment upon a supposed wrongdoer, if he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all.¹⁵ It is apparent that the theory of the rule is not based upon any *right* of the *plaintiff* to receive the award assessed against the defendant, but that the *defendant* should be *punished*. The more enlightened principles of government and of law clothe the state with the sole power to punish but insure to the individual full, adequate, and complete compensation for a wrong inflicted to his detriment.¹⁶

An examination of the American authorities leads to the conclusion that the exemplary damage rule owes its origin and growth, to some extent at least, to the difficulties experienced by judges in tort cases of clearly defining in their instructions to juries the different factors which may be taken into account and readily applied by them in assessing the *quantum* of damages which

¹¹ Sedgwick, Sec. 350.

¹² *Cook v. Ellis*, 1844, 6 Hill's (New York) Reports 466, 467.

¹³ Sedgwick, Sec. 571a.

¹⁴ Grotius, Book II, Chapter XVII, Section X; Blackstone's Commentaries, Book II, Chapter 29, Section VII, paragraph 2 (*page 438); Sedgwick, section 29.

¹⁵ *Schippel v. Norton*, 1888, 38 Kansas Reports 567, 572; *Meighan v. Birmingham Terminal Co.*, 1910, 165 Alabama Reports 591, 599.

¹⁶ Vattel's Law of Nations, Chitty edition with notes by Ingraham, 1852 (1857), (hereinafter cited as "Vattel") Book I, section 169, where it is said: "Now, when men unite in society,—as the society is thenceforward charged with the duty of providing for the safety of its members, the individuals all resign to it their private right of punishing. To the whole body, therefore, it belongs to avenge private injuries, while it protects the citizens at large. And as it is a moral person, capable also of being injured, it has a right to provide for its own safety, by punishing those who trespass against it;—that is to say, it has a right to punish public delinquents. Hence arises the right of the sword, which belongs to a nation, or to its conductor. When the society use it against another nation, they make war; when they exert it in punishing an individual, they exercise vindictive justice."

a plaintiff may recover. It is difficult to lay down any rule for measuring injury to the feelings, or humiliation or shame, or mental suffering, and yet it frequently happens that such injuries *are very real and call for compensation as actual damages* as much as physical pain and suffering and many other elements which, though difficult to measure by pecuniary standards, are, nevertheless, universally considered in awarding compensatory damages. The trial judges, following the lead of Lord Camden,¹⁷ have found it easier to permit the juries to award plaintiffs in the way of damages a penalty assessed against defendants guilty of wilful, malicious, or outrageous conduct toward the plaintiffs, rather than undertake to formulate rules to enable the juries to measure in pecuniary terms the extent of the actual injuries.¹⁸ In cases cited and numerous others, the damages dealt with and designated by the court as "exemplary" were in their nature purely compensatory and awarded as reparation for actual injury sustained.

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. The tendency of the decisions and statutes of the several American States seems to be to broaden the scope of the elements to be considered in assessing actual and compensatory damages, with the corresponding result of narrowing the application of the exemplary damages rule.¹⁹

The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals.²⁰ Great stress is laid by counsel

¹⁷ Wilkes v. Wood, note 10 *supra*.

¹⁸ Boydan v. Haberstumpf, 1901, 129 Michigan Reports 137, where it was held (page 140; italics ours) that the term "exemplary damages," as employed in Michigan, "has generally been understood to mean an increased award of damages in view of the supposed *aggravation* of the injury to the feelings by the wanton or reckless act of the defendant", and that "It has never been the policy of the court to permit juries to award capiously any sum which may appear just to them, *by way of punishment* to the offender, but rather to award a sum in addition to the actual proven damages, as what, in their judgment, constitutes a *just measure of compensation* for injury to feelings, in view of the circumstances of each particular case."

Pegram v. Stortz, 1888, 31 West Virginia Reports 220, 229, 242-243; Gillingham v. Ohio River Railroad Co., 1891, 35 West Virginia Reports 588, 599-600; Levy v. Fleischer, Mayer & Co., 1895, 12 Washington Reports 15, 17-18.

¹⁹ See the cases cited in note 6 *supra*. In the case cited from 128 Louisiana Reports the court said, at page 992, "the idea that damages allowed for mental suffering are exemplary, punitive, or vindictive in their character has been very generally abandoned, and they are now recognized by this court and other courts as actual and compensatory".

²⁰ "International Arbitral Law and Procedure", by Jackson H. Ralston, 1910, section 369, where he says:

"While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation. * * *

Borchard's "The Diplomatic Protection of Citizens Abroad", 1915 (1922), section 174, makes substantially the same statement in these words: "Arbitral com-

on the Moses Moke case²¹ which arose under the convention between the United States and Mexico of July 4, 1868. Moke, an American citizen, was subjected to a day's imprisonment to "force" him to "loan" \$1,000. He sought to recover the amount of the "loan" and damages. The American Commissioner Wadsworth speaking for the Commission said:

" . . . we wish to condemn the practice of forcing loans by the military, and think an award of \$500 for 24 hours' imprisonment will be sufficient * * *. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."

This *language* is the nearest approach to a recognition of the doctrine of exemplary damages that we have found in any reported decision of a mixed arbitral tribunal, but we do not regard the *decision* in this case as a recognition of this doctrine. On the contrary, an award of \$500 for the humiliation and inconvenience suffered by this American citizen for the outrageous treatment accorded him by the Mexican authorities can hardly be said to be adequate compensation. Certainly the award has in it none of the elements of punishment, nor can it be evoked as an example to deter other nations from according similar treatment to American citizens.

But it is not necessary for this Commission to go to the length of holding that exemplary damages can not be awarded in *any* case by *any* international arbitral tribunal. A sufficient reason why such damages can not be awarded by *this* Commission is that it is without the power to make such awards under the terms of its charter—the Treaty of Berlin. It will be borne in mind that this is a "Treaty between the United States and Germany Restoring Friendly Relations"—a Treaty of Peace. Its terms negative the concept of the imposition of a penalty by the United States against Germany, save that the undertaking

(Footnote continued from page 40)

missions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages."

Dr. Lieber, Umpire of the Commission under the convention of July 4, 1868, between the United States and Mexico, in awarding the sum of \$4,000 on an \$85,000 claim, said (page 4311, Volume IV, of Moore's "History and Digest of the International Arbitrations to which the United States Has Been a Party," 1898, hereinafter cited as "Moore's Arbitrations"): "Nor can these high damages be explained as exemplary damages. Our commission has no punitive mission, nor is there any offense to be punished."

See also opinion of Umpire Bertinatti in the case of Ogden, Administrator of the estate of Isaac Harrington, in which an award of \$1,000 was made on an original demand of \$160,000 where the claim was made that an American citizen was treated oppressively and with great indignity by Costa Rica. II Moore's Arbitrations, page 1566.

²¹ IV Moore's Arbitrations, 3411.

Counsel also lays much stress on the language used by Umpire Duffield of the German-Venezuelan Mixed Claims Commission in the Metzger Case (pages 578-580, "Venezuelan Arbitrations of 1903", report by Jackson H. Ralston, 1904, hereinafter cited as "Venezuelan Arbitrations 1903"), where it is said (page 580; italics ours): "Neither can anything be allowed in the way of punitive or exemplary damages against Venezuela, *because* it appears, as above stated, that the general commanding the army promptly took action against the offender and punished him by imprisonment." Clearly this is *dictum*. The case was apparently correctly decided and there was no reason for giving any careful consideration to the *right* of the commission to go further than award compensatory damages.

by Germany to make reparation to the United States and its nationals as stipulated in the Treaty may partake of the nature of a penalty.²²

Part VII of the Treaty of Versailles (Articles 227 to 230, inclusive) deals with "Penalties". It is significant that these provisions *were not* incorporated in the Treaty of Berlin.

In negotiating the Treaty of Peace, the United States and Germany were of course dealing directly with each other. Had there been any intention on the part of the United States to exact a penalty either as a punishment or as an example and a deterrent, such intention would have been clearly expressed in the Treaty itself; and, had it taken the form of a money payment, would have been claimed by the Government of the United States on its own behalf and not on behalf of its nationals. As to such nationals, care was taken to provide for full and adequate "indemnities," "reparations," and "satisfaction" of their claims for losses, damages, or injuries suffered by them. While under that portion of the Treaty of Versailles which has by reference been incorporated in the Treaty of Berlin, Germany "accepts" responsibility for all loss and damage to which the United States and its nationals have been subjected as a consequence of the war, nevertheless the United States frankly recognizes the fact "that the resources of Germany are not adequate * * * to make complete reparation for all such loss and damage", but requires that Germany make "compensation" for specified damages suffered by American nationals.²³ For the enormous cost to the Government of the United States in prosecuting the war no claim is made against Germany. No claims against Germany are being asserted by the Government of the United States on account of pensions paid, and compensation in the nature of pensions paid, to naval and military victims of the war and to their families and dependents.²⁴ In view of this frank recognition by the Government of the United States of Germany's inability to make to it full and complete reparation for all of the consequences of the war, how can it be contended that there should be read into the Treaty an obligation on the part of Germany to pay penalties to the Government of the United States for the use and benefit of a small group of American nationals for whose full and complete compensation for losses sustained adequate provision has been made?

The United States is in effect making one demand against Germany on some 12,500 counts. That demand is for compensation and reparation for certain losses sustained by the United States and its nationals. While in determining the amount which Germany is to pay each claim must be considered separately, no one of them can be disposed of as an isolated claim or suit but must be considered in relation to all others presented in this one demand. In all of the claims the parties are the same. They must all be determined and disposed of under the same Treaty and by the same tribunal. If it were possible to read into the Treaty a provision authorizing this Commission to assess a penalty against Germany as a punishment or as an example or deterrent, what warrant is there for allocating such penalty or any part of it to any particular claim, and how should it be distributed? Why should one

²² Oppenheim on International Law, 3rd (1920) edition (hereinafter cited as "Oppenheim"), Vol. II, Sec. 259a, page 353, where it is said (*italics ours*): "There is no doubt that, if a belligerent can be made *to pay compensation for all damage done by him in violating the laws of war, this will be an indirect means of securing legitimate warfare.*"

²³ Articles 231 and 232 and Annex I to Section I of Part VIII of the Treaty of Versailles.

²⁴ See note 11 to this Commission's Administrative Decision No. II handed down this day.

American national who has sustained a loss receive in addition to full compensation "smart money" rather than another? Should the full amount of the penalty be imposed in connection with a particular claim, or in connection with a particular incident out of which a number of claims arose, or in connection with all acts of a particular class? Why impose a penalty for the use and benefit of a small group of American nationals who are awarded full compensation, and at the same time waive reimbursement for the cost of the war which falls on all American taxpayers alike?

If it were competent for this Commission to impose such a penalty, what penalty stated in terms of dollars would suffice as a deterrent? And if this Commission should arrogate to itself the authority to impose in the form of damages a penalty which would effectively serve as a deterrent, where lie the boundaries of its powers? It is not hampered with any constitutional limitations save those found in the Treaty; and if the power to impose a penalty exists under the Treaty may not the Commission exercise that power in a way to affect the future political relations of the two Governments?²⁵ The mere statement of the question is its answer. Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this Commission should treat as justiciable the question as to what penalty should be assessed against Germany as a punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.

The Treaty is our charter. We can not look beyond its express provisions or its clear implications in assessing damages in any particular claim. We hold that its clear and unambiguous language does not authorize the imposition of penalties. Hence the fundamental maxim "It is not allowable to interpret that which has no need of interpretation" applies.²⁶ But all of the rules governing the interpretation of treaties would lead to the same result were it competent for us to look to them. Some of these are: The Treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit, will be strictly construed against it.²⁷ Treaty provisions must be so construed as to best conform to accepted principles of international law rather than in derogation of them.²⁸ Penal clauses in treaties are odious and must be construed most strongly against those asserting them.²⁹

The Treaty is one between two sovereign nations—a Treaty of Peace. There is no place in it for any vindictive or punitive provisions. Germany must make

²⁵ Vattel, Book II, Chapter XVIII, Sec. 329.

²⁶ Vattel, Book II, Chapter XVII, Sec. 263.

²⁷ Vattel, Book II, Chapter XVII, Sec. 264; Digest of Justinian, Book II, Title XIV, paragraph 39, Monro translation, 1904; "Treaties—Their Making and Enforcement" by Samuel B. Crandall, 2nd (1916) edition (hereinafter cited as "Crandall"), sec. 171, page 401; Pothier on Obligations (Evans, 1806), Vol. I, page 58 (7th rule, Article VII, Chapter I, Part I); Woolsey on International Law, 6th (1891) edition, sec. 113; opinion of Ralston, Umpire, Italian-Venezuelan Mixed Claims Commission, Sambiaggio Case, Venezuelan Arbitrations 1903, pages 666 and 688-689.

²⁸ Opinion of Plumley, Umpire, in Arao Mines (Limited) Case, British-Venezuelan Mixed Claims Commission, pages 344 and 386-387 Venezuelan Arbitrations 1903; reference to Sambiaggio Case in note 27 above; Vilas v. Manila, 1911, 220 United States 345, 358-359; Crandall, sec. 170.

²⁹ Vattel, Book II, Chapter XVII, sections 301-303; Grotius, Book II, Chapter XVI, Sec. X and paragraph 3 of Sec. XII.

compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this Commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none.

This decision in so far as applicable shall be determinative of all cases growing out of the sinking of the Steamship *Lusitania*. All awards in such cases shall be made as of this date and shall bear interest from this date at the rate of five per cent (5%) per annum.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH,
German Commissioner

UNITED STATES STEEL PRODUCTS COMPANY
(UNITED STATES) *v.* GERMANY

COSTA RICA UNION MINING COMPANY
(UNITED STATES) *v.* GERMANY

SOUTH PORTO RICO SUGAR COMPANY
(UNITED STATES) *v.* GERMANY

(War-Risk Insurance Premium Claims, November 1, 1923, pp. 33-59.)

DAMAGE: WAR-RISK INSURANCE PREMIUMS, RULE OF PROXIMATE CAUSE.—EXTENT OF LIABILITY UNDER TREATY OF BERLIN, ENLARGEMENT BY AGREEMENT UNDER WHICH COMMISSION CONSTITUTED. Claims on behalf of American nationals for reimbursement for war-risk insurance premiums paid either during period of United States neutrality, or during period of United States belligerency, for protection against acts of naval warfare which never occurred (losses resulting from payments not passed on to purchaser or ultimate consumer). *Held* that, under Treaty of Berlin, Germany not liable: losses not attributable to “acts of Germany or her agents” as proximate cause (reference made to Administrative Decisions Nos. I and II, see pp. 21 and 23 *supra*); and that, in particular, no reimbursement for war-risk insurance premiums, paid during period of United States belligerency, imposed either by Article 232, Treaty of Versailles, carried into Treaty of Berlin (same reference made as above), or by Article I, Agreement of August 10, 1922 (Germany’s liabilities as fixed by Treaty of Berlin cannot be enlarged by Agreement).

PRECEDENTS.—EXTRAJUDICIAL ACTION. *Held* that decisions of Tribunal of Arbitration and of Court of Commissioners in *Alabama* Claims are no controlling precedents: (1) Tribunal, international in character and governed by Treaty of Washington of May 8, 1871, and applicable international law, dealt with “enhanced payments of insurance” in extrajudicial declaration