THE AMERICAN LAWYER
APRIL 2006
ALM

Civilians vs. Terror

Since 1996, lawyers who represent the victims of terror have torn down many hurdles to suing sovereign states and tapped Libya for damages. The new agenda: Saudi Arabia.

By Michael D. Goldhaber

THE WAR ON TERROR IN THE CIVIL COURTS was launched by two unconnected events in April 1995: the bombing of a federal building in Oklahoma City and the U.S. Supreme Court's decision to throw out a final appeal by plaintiffs whose family members died in the 1988 Pan Am Flight 103 bombing over Lockerbie, Scotland.

The Lockerbie plaintiffs had hit a stone wall. Despite ample evidence that Libya was complicit, U.S. judges insisted on respecting sovereign immunity. The only remaining option was to lobby Congress to waive immunity. To launch that effort, one of the Lockerbie widows invited a few Oklahoma families to Thanksgiving dinner.

That dinner led to the April 1996 passage of the Antiterrorism and Effective Death Penalty Act, which celebrates its ten-year anniversary this month. Passed to appease the victims' families, the "death penalty" part paved the way for Timothy McVeigh's execution by placing sharp limits on federal habeas corpus petitions. The "antiterrorism" part waived immunity for any nations that the U.S. Department of State has designated as sponsors of terrorism.

Victims' lawyers—whether they target states or private actors—regard 1996 as a watershed moment. "The 1996 law made the courts a weapon against state-sponsored terror," says Stuart Newberger, a 52-year-old litigator who runs the victims of terror practice in the Washington, D.C., office of Crowell & Moring.

"It was the key stepping stone philosophically," says Allan Gerson of D.C.'s AG International Law, who is willing to follow the trail of terror wherever it leads him. "The epic struggle for accountability started in 1996."

The story of antiterror law can largely be told through the careers of these two D.C. lawyers—one a craftsman, the other a visionary. Newberger, who mastered civil litigation as a U.S. prosecutor in the 1980s, is virtually alone in transforming terror into a successful big-firm practice, despite the U.S. government's mixed feelings about the endeavor. Gerson, who began as a Nazi hunter in Jimmy Carter's Justice Department, was the dreamer behind the Lockerbie claim.

As anticipated, the 1996 law gave Lockerbie lawyers the ability to bring Libya to court—and provided leverage for a historic settlement. In 2002 Libyan leader Mu'ammar Gadhafi agreed to pay more than $2 billion and to make a limited statement of responsibility in return for normalized relations by the United States and the United Nations. Gerson shares credit for this legal coup with New York's Kreindler & Kreindler and Chicago's Sonnenschein, Nath & Rosenthal. The recovery that they obtained stands as the high-water mark of terror litigation. But since September 11, 2001, Gerson has dreamed of something greater.

THE CRAFT OF ANTITERROR LAW

Ten years ago, no serious lawyer dreamed that terror litigation was for real. At the time, Newberger was working pro bono for the journalist Terry Anderson, who had been held hostage in Lebanon by the Iran-sponsored group Hezbollah. All they wanted was to get the U.S. government to cough up documents for Anderson's memoir. Suddenly, after the AEDPA passed, Anderson was getting calls from plaintiffs lawyers saying, "Hey, you're the poster child." When Anderson asked Newberger to sue Iran, the lawyer's response was skeptical. "I'll do it if you want," he said, "but I don't think it will go anywhere."

Newberger correctly recognized that the 1996 law was not enough to make recovery practical. In ensuing years, victims of Hezbollah easily obtained judgments against Iran, which was so brazen as to include a line item in its budget for Hezbollah. But Iran had no assets in the U.S. that plaintiffs could reach.

In 1998 Congress passed a new law, but it, too, fell short. This measure purported to let victims of terror recover against frozen state assets, only to give the U.S. president the power to block all recovery. Bill Clinton immediately barred victims' families from grabbing frozen assets. His action reflected the State Department's eternal concern that civil judgments can limit the executive's flexibility in diplomacy.

Newberger had no illusions about the efficacy of the 1998 amendment, but he saw it as a sign of bipartisan support in

Congress for the cause of terror victims. And he started to see Terry Anderson's case as something more than symbolic. Newberger joined forces with other victims and lawyers lobbying Congress for a meaningful remedy. Most notable among them were Stephen Flatow, a New Jersey plaintiff suing Iran for the Islamic Jihad's murder of his daughter during a visit to Israel; and Ronald Klaiman of Greenberg Traurig, who represented the pilots shot down by Cuba while searching for defectors floating on rafts to Florida.

In 2000 a few victims persuaded Congress to legislate case-specific recoveries. The new act authorized a release of frozen assets to the Cuban families and a payout by the U.S. Department of the Treasury of any compensatory damages obtained by certain families against Iran. As part of the deal, Crowell and Newberger won about $150 million for four sets of Iranian victims in Lebanon, including the Anderson family.

As a result of those cases, Crowell earned contingency fees comfortably exceeding the $15–20 million in billable time that the firm has devoted to terror cases over the past eight years. But from a policy standpoint, the plaintiffs' success was incomplete. To satisfy the State Department, the U.S. effectively bought the Iranian judgments—with the option of later enforcing them against frozen assets, or bargaining them away. Whether Iran ever pays the price remains to be seen.

When the Anderson case was publicized, Newberger was contacted by new plaintiffs. Among them was Anne Dammarell, a U.S. foreign aid officer who had survived the 1983 hit on the U.S. embassy in Beirut, one of the first suicide bombings in history. Crowell made a strategic decision to continue litigating against terrorist states. But this time, Newberger resolved, the nations should pay the price more directly. His new strategy is to enforce judgments against Iran in Europe, where it still does business; and to confront Libya, which is willing to pay judgments to regain its diplomatic standing.

Two decisions last December bolstered Crowell's strategy. That month a D.C. trial court awarded $126 million to the first set of 29 plaintiffs in the Dammarell case against Iran (there are more than 70 plaintiffs in all). Perhaps equally important, an Italian trial court froze an Iranian bank account in Italy at the behest of the families in the Flatow bus bombing. It remains for U.S. plaintiffs to persuade Italian appeals courts that the Italian law on victims of terror is consistent with U.S. law. American victims could potentially collect $619 million in unpaid Iranian judgments in Europe.

On the Libya side of his docket, Newberger is pressing a case known as "the French Lockerbie." In September 2005 he filed for summary judgment on behalf of the U.S. victims in Libya's bombing of the French airliner UTA Flight 772, which took place in 1989 over the Sahara desert. Factually, Crowell is piggybacking on an astonishing French investigation that led to murder convictions for six Libyan spies. The day after the explosion, French soldiers began combing 500 square kilometers of the desert. Police labs in Paris sifted through 15 tons of wreckage and found the smoking guns: a shard from a Samsonite suitcase with traces of an explosive called pentrite, and a bomb timer that had been ordered from Germany by a Libyan spy in Brazzaville, the capital of the Republic of the Congo. (Libya is represented by D.C.–based solo practitioner Arman Dabiri.)

This month, Crowell's Newberger expects to cap his terror litigation with a final filing before the AEDPA's ten-year statute of limitation runs. In this suit, he plans to pin responsibility on Libya for acts committed by the Abu Nidal Organization. If he succeeds, he will effectively make Libya the insurer for Abu Nidal, in the same way that Iran has become the insurer for Hezbollah.

THE ROAD TO RIYADH

While Crowell sees more Libya litigation as the natural sequel to the Lockerbie triumph, Gerson has a different idea. He aims to transform terror litigation in response to the evolution of terror. Rather than continuing to work the Libya groove, Gerson wants to find the funders of Osama bin Laden and hold them liable.

On September 11, 2001, Gerson happened to be finishing a book on Lockerbie, entitled *The Price of Terror*. His publisher rushed it into print—and victims of the Al Qaeda attacks were quick to contact him. Gerson has joined an unlikely team, led by his old friends at Kreindler & Kreindler, the tobacco-rich Motley Rice of South Carolina, and the Philadelphia insurers' firm Cozen O'Connor. Together, they represent 9/11 families and insurers suing Saudi princes, charities, and banks—many of whom are represented by Am Law 200 firms. There are about 400 defendants in all (300 of whom are unrepresented), and the damage claim is a tidy trillion dollars.

Plaintiffs argue that the defendants are a new generation of private (rather than national) sponsors of terror. These cases are rooted in the Antiterrorism Act, which permits individual civil damages suits. Although the Antiterrorism Act was technically on the books since 1990, it was seldom used. The new-generation plaintiffs make a point of relying on the ATA as amended in 1996 and infer civil liability for financing terror from its express criminalization.

Judge Richard Conway Casey of the Southern District of New York is intent on making plaintiffs prove their case. He has ruled that the Saudi royals are entitled to sovereign immunity, and has granted most of the motions to dismiss on the grounds that the plaintiffs failed to plead facts supporting the allegation that the defendants knew that their money or services were being used to support terror.

"The plaintiffs are taking a scattershot

The Wages of State Terror

When the U.S. State Department puts a country on its list of "state sponsors of terror," the country becomes fair game for civil actions that seek to compensate the victims of terrorist attacks. Herewith, the status of "state terror" cases filed in Washington, D.C., federal courts since 1996. —M.D.G.

	Iran	Iraq	Libya	Syria	Sudan
CASES PENDING	25	3	7	3	1
JUDGMENTS ENTERED	34	2	1	0	0
JUDGMENTS PAID	18	2	0	N/A	N/A
AMOUNT PAID	$407 million	$113 million	0	N/A	N/A

Source: Michael Martinez of Crowell & Moring

approach," complains one defense counsel, who declined to give his name for fear of drawing attention to his client. "They're naming every Saudi individual and institution in the phone book. It's as if the Oklahoma victims sued Ryder Truck for providing material support."

Nonetheless, the case is not going away. Two Islamic charities survived the motions to dismiss: Rabita Trust and the International Islamic Relief Organization, which are represented by the Martin McMahon Law Offices. Plaintiffs are proceeding with discovery against the remaining defendants, according to Cozen's Elliott Feldman, and are filing for default judgment against the unrepresented defendants.

In the end, questions of law are likely to decide the future of civil litigation against private sponsors of terror. Plaintiffs are now appealing the ruling on sovereign immunity, and they say they plan to appeal the rulings on Islamic charities and banks. As to the charities and banks, the plaintiffs have a pair of precedents to build on.

Late 2004 saw the antiterror lawyers' first legal victory over charities. In *Boim* v. *Quranic Literacy Institute*, a federal court in Chicago held U.S. nonprofits that allegedly financed Hamas liable for $156 million to a family that lost a child in a Hamas bombing on the West Bank. The trial judge applied an earlier Seventh Circuit holding in the case—that Congress intended to hold a defendant liable for aiding and abetting terror so long as it knew that the party it helped engaged in terror. That decision is on appeal.

Late 2005 saw the first breakthrough against Islamic banks. Citing the standard in *Boim*, a judge in the Eastern District of New York refused to dismiss a case brought by Hamas victims against the Jordan-based Arab Bank, which allegedly served as a conduit for Hamas funds and administered insurance policies for suicide bombers. Gary Osen of Osen & Associates in New Jersey, who is bringing the case, has separately filed claims against the major European banks Nat West and Crédit Lyonnais for allegedly serving as conduits for Hamas funds. (Arab Bank is represented by Winston & Strawn.)

"Obviously we can't deter the committed jihadist from deciding it's his religious duty to murder commuters," says Osen. "We have a much more modest goal, and that's to deter respectable financial institutions from being fellow travelers of the jihad."

WAR WITHOUT END?

When the AEDPA passed ten years ago, the lobbyists spoke sweepingly of "putting terrorists out of business." The main goal was to deter the funding of terrorism and choke off terror's money supply. Whether the 1996 law is achieving this goal, either with respect to state sponsors of terror or private sponsors of terror, is far from clear.

> The modest goal is to deter respectable financial institutions from associating with the Islamic jihad.

The payouts by state sponsors to victims of terror have been limited and indirect. Congress has allowed one Cuban and two Iraqi plaintiffs groups to recover from frozen assets, but critics question the deterrent value of cutting off funds that are already beyond a nation's reach. In any event, the executive branch persuaded Congress in 2003 to block further recovery from the frozen assets of Iraq. Although many of Iran's victims have recovered money, the Treasury Department has paid these judgments, and Iran may never receive the bill. Only in the case of Libya has the rogue state directly paid its victims.

Libya was unique in being subject to universal economic sanctions, which made it eager to reach an accommodation. At the same time, Gerson argues, the U.S. would never have initiated talks with Libya except for the excuse provided by the civil filing. Diplomacy and litigation were mutually reinforcing. Can the Libya success be repeated? Michael Elsner of Motley Rice argues that, sooner or later, the conditions will be right for the other rogues to normalize relations, and when that happens, damages will be part of the equation. "One of the means by which you remove yourself from the official terror list is by making reparations to victims," says Elsner. " Lockerbie's an important model."

Lawyers who sue alleged private funders of terror believe that they have a greater deterrent potential. Often they target defendants, like Saudi princes, whom the U.S. government would not touch. Even when they target defendants that the U.S. government is investigating, the civil litigants can uncover new information, and enjoy a lower standard of proof. "We see ourselves as a prod to government action," says Boim attorney Stephen Landes of Wildman Harrold.

Whether or not terror suits deter terror, they can give victims a day in court, and that itself is an achievement. Newberger's client Anne Dammarell, who was haunted for years by nightmares that replayed the explosion of the Beirut embassy, has never questioned the wisdom of the 1996 law. For her, terror suits are less about monetary damages than psychic damage and accountability. "This thing happened to us," she says. "We never knew who did it, and in a very naive way we never knew why it happened. No schoolmarm got up and said, 'Bad Iran, you shouldn't do that.' This legislation gave me the opportunity to say, 'Iran, you did it.' "

Now, if only the courts will let them, Allan Gerson and the 9/11 families wish to have a word with a few Saudi princes.

E-mail: mgoldhaber@alm.com.