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MORAL DAMAGES AND EXEMPLARY DAMAGES:

THE SUPREME COURT SETS CERTAIN PRINCIPLES

On October 3, 1996, the Supreme Court rendered two important judgments regarding the criteria for granting and evaluating moral damages and for granting exemplary damages. In both cases, *Syndicat national des employés de l'hôpital St-Ferdinand v. The Public Curator* (24511) and *Augustus v. Gosset* (24607), reasons were delivered by Justice L'Heureux-Dubé.

In the first decision, the Court recognized that moral prejudice, consisting in this case of suffering, may be compensated even where the victim has a limited awareness thereof, although such limited awareness may be considered in evaluating the award. In addition, the Court established the criteria for determining the existence of an intentional interference with a fundamental right giving rise to exemplary damages: this intention exists only if the party at fault acted with full knowledge of the "immediate and natural" or, at the very least, of "extremely probable" consequences of his or her actions, which was not the case in the situation at hand.

In the second decision, the Court reversed its prior jurisprudence and recognized the right to compensation of family members for the death of the victim (*solatium doloris*). It also set forth the criteria to be considered in evaluating this class of damages. However, it denied the right of the heirs to claim damages for the loss of the **victim's life expectancy**. In addition, it declared that no exemplary damages should be awarded given that the death was an unfortunate, but nonetheless undesired, consequence of the police officer's actions.

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THE ST-FERDINAND CASE

The patients of a hospital for the mentally handicapped instituted a class action to claim damages for the inconveniences suffered during an illegal strike which had lasted 33 days. They had not received the care to which they were entitled or at the very least had received such care in a sporadic manner, with sometimes degrading consequences. The trial judge awarded \$1,750.00 to each patient in respect of the moral prejudice suffered and denied all claims for exemplary damages on the grounds that there had been no interference with a fundamental right.

The Court of Appeal confirmed the award for moral damages, but added a lump sum amount of \$200,000.00 as exemplary damages in compensation for the interference with the plaintiffs' right to personal inviolability and personal dignity.

The Supreme Court dismissed the appeal.

■ With respect to moral prejudice

Under this heading, the plaintiffs claimed damages commonly referred to as non-pecuniary damages. The union argued that the functional approach should govern the award of damages and that given their mental state, the patients were not in a position to suffer and even less in a position to obtain any satisfaction from the sums which might be awarded to them for "*substitute pleasures*", as set out by the trilogy of Supreme Court cases on damages in 1978.

The functional approach should not be used in the civil law, given that it is contrary to basic principle of complete restitution. The mere existence of a prejudice gives rise to a right to compensation and this is an objective loss. However, the foreseeable effect of substitute pleasures may be considered in evaluating the prejudice.

As to the evaluation of the prejudice itself, the doctrine has recognized that three approaches may be used - conceptual, personal and functional - and that in Quebec they "*interact*". According to the Court, "*the only rule in this respect is the rule that the victim be compensated in a personalized manner for the loss suffered.*" (which is consistent with the new article 1611 C.C.Q). Consequently, the three theories may apply jointly, not in order to determine entitlement to compensation, but in order to evaluate the damages to be awarded.

The award of \$1,750.00 to each patient is not excessive and, in the absence of a material error, it is not subject to revision.

■ With respect to exemplary damages

- Was there interference with a right?

In this instance, there was no interference with the **right to personal inviolability**, given that such an interference must "*leave some marks, some sequelae which, while not necessary physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner.*"

In this instance, there was no deterioration in the patients' condition, but only temporary discomfort or minor psychological distress; their integrity was therefore not interfered with.

The **interference with the right to personal dignity** refers to any interference with the fundamental attributes of a human being which violates either the respect to which each person is entitled to as a human being or the respect which every person owes to himself or herself.

Such an interference does not depend on the existence of permanent consequences: even when it is temporary, it merits compensation.

In this instance, there was an objective interference with the dignity of the persons involved, even though their limited level of awareness did not necessarily allow them to appreciate the concept of dignity.

- Was the interference unlawful and intentional?

An interference is **unlawful** whenever the infringement of the right results from wrongful conduct. It is therefore only the result of such conduct which must be intentional.

One must resist the temptation to assimilate an unlawful and intentional interference with the civil law concept of gross negligence, fraud or even wilful negligence.

An interference is **intentional** when the perpetrator's state of mind implies a desire or an intent to cause the consequences of his or her wrongful conduct, or when the perpetrator acts with full knowledge of the "*immediate and natural*" or at least "*extremely probable*" consequences which will result from this conduct.

Mere negligence or recklessness of an individual with respect to the consequences of his or her actions, notwithstanding the fact that these actions may be quite unsettling or risky, are not sufficient in themselves to satisfy this criterion.

As to the amount of \$200,000.00 awarded by the Court of Appeal, it is discretionary but in the case at hand, the conduct of the parties inevitably and necessarily implied disturbances interfering with the dignity of the patients, and the Court was not required to consider the other forms of punishment which may have been imposed on the union (injunction, penalty, imprisonment).

These forms of punishment do not constitute a bar to the award of exemplary damages or grounds for reducing the quantum of such damages.

THE GOSSET CASE

The facts are well-known: after his arrest, a young man named Antony Griffin was brought to the station in a police car, without having been handcuffed. Upon arrival, as officer Gosset opened the door, Griffin stepped out of the car and began to run. Gosset chased him, drew his weapon and ordered him to stop. Griffin turned around, but did not come to a complete stop, and Gosset warned him a second time aiming his gun at him. Griffin was hit by a gunshot and died a few hours after having been taken to the hospital. Gosset was acquitted of the criminal charges brought against him.

A civil suit was brought by Griffin's mother for \$858,591.00 and by his father for \$760,000.00.

The Superior Court ruled that compensation for *solatium doloris* is not available under civil law, but it awarded \$9,000.00 to the mother and \$2,000.00 to the father for loss of future moral support. Each parent also received an amount of \$1,795.00 to cover funeral costs. The Superior Court refused to grant an indemnity for *solatium doloris*, a concept which means "*compensation for moral prejudice*" and which is generally defined as the "*injury to feelings caused by the death of a loved one*". The trial judge also granted \$4,000.00 for exemplary damages to each parent on the grounds that there had been an interference with Griffin's fundamental rights.

All of the parties appealed the decision. The Court of Appeal, in a majority decision, reversed the trial judge's decision with respect to the existence of a right of indemnification for *solatium doloris* and awarded

\$15,000.00 to the mother under this heading. It did not intervene in respect of the amount awarded to the father, given that the facts showed that he had abandoned his son. The Court also refused to award any indemnity for interference with parental rights in respect of the loss of the son's life expectancy or with respect to exemplary damages based on an intentional interference with his right to life and security. Mr. Justice Fish, dissenting, would have awarded \$100,000.00 as *solatium doloris* and would also have confirmed the right to exemplary damages for the amount awarded by the trial judge.

Leave to appeal to the Supreme Court was granted only with respect to three issues:

- Is there a personal recourse for *solatium doloris* or interference with rights of parenthood?
- Is the mother, in her capacity as an heir, entitled to compensatory damages for her son's loss of life expectancy?
- Was there an intentional interference within the meaning of section 49 of the *Charter of Human Rights and Freedoms*?

■ **With respect to *solatium doloris*:**

The civil law, unlike the common law, has never denied that a victim by ricochet is entitled to compensation for damages resulting from the death of a person.

However, the adoption in 1866 of article 1056 C.C. restricted the number of persons entitled to compensation in the event of a death. This number is no longer limited since the adoption of the new Civil Code of Québec.

The decision rendered in 1887 by the Supreme Court in *Canadian Pacific v. Robinson* is a historical aberration.

Thus, *solatium doloris* is subject to indemnification, but the Court of Appeal was correct in stating that this notion includes "*all extrapatrimonial damage, both immediate grief and the loss of future moral support resulting from the death of a loved one*".

The principle of complete compensation must be applied, despite the obvious difficulties caused by the evaluation of emotional prejudice. The loss of a child can never adequately be compensated.

Given that the prior doctrine and jurisprudence are founded on an erroneous principle, they are of little use. Similarly, comparisons with the indemnities provided for in certain pieces of social legislation must be limited given that, in general, they provide for smaller awards, and that their intended goal is to compensate a greater number of persons, despite the fact that such persons might not necessarily have been entitled to indemnification under the general principles of civil liability.

As the issue relates to non-pecuniary damages, the Court refers to the upper limit set in matters of defamation (\$300,000.00 in the *Hill* and *Botiuk* cases), and to the upper limit set in the trilogy (\$243,000.00), and concludes that it is necessary to establish objective criteria for evaluating *solatium doloris* and that moderation and predictability in the award of damages must be favoured in accordance with the trilogy.

This requires balancing the intensity of the pain in each case with the broader perspective of ensuring a certain consistency between the different contexts.

Therefore, the Court proposed the following criteria:

- Circumstances of the death;
- Age of the deceased;
- Age of the parent;

- Nature and quality of the relationship between the deceased and the parent;
- Personality of the parent and his or her ability to manage the emotional consequences of the death;
- Effect of the death on the parent's life, in light, *inter alia*, of the presence of other children or the possibility of having other children.

The amount will necessarily be arbitrary to a large extent.

In the case of Mrs. Augustus, the Supreme Court was of the opinion that an indemnity of \$25,000.00 would be fair and reasonable; however given that no evidence was presented in accordance with the aforementioned criteria, the file was returned to the Court of Appeal which will be free to establish the quantum of damages upon hearing the parties and in light of the new criteria.

In addition, Mrs. Augustus had claimed a violation of her parental rights, relying on section 39 of the *Charter*, which provides that "*Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing.*" The Court declared that this section protects the child only and does not confer any fundamental rights upon the parents to maintain and continue a parent-child relationship.

■ **With respect to life expectancy:**

The trial judge correctly stated that there was no evidence that any prejudice may have been suffered by the victim between the time of the gunshot, the immediate loss of consciousness and the death which occurred four hours later.

According to the mother, loss of life constitutes an "*objective*" prejudice which, since the coming into effect of the *Charter of Human Rights and Freedoms* is subject to indemnification.

The Court ruled that the right to life ceases to exist at the time of death, and the coming into effect of the *Charter* does not modify the principle whereby the **heirs** may not claim compensatory damages for the loss of life or the loss of life expectancy of the victim.

It is not immoral that the death of a person does not enrich the patrimony transmitted to his or her heirs, and sound judicial policy favours the continued application of the principles previously set forth by the Supreme Court in 1961 in *Driver v. Coca-Cola* and in 1975 in *Pantel v. Air Canada*.

Prejudice for loss of life is a very particular type of prejudice and, under Quebec civil law, it cannot be transmitted to the heirs; to do otherwise would be to allow the heirs to benefit from suffering which is not theirs. The indemnity awarded for *solatium doloris* is sufficient.

■ **With respect to exemplary damages:**

The mother is a victim by ricochet and, in theory, she is entitled to moral damages, even if these arise from the interference with the life and integrity of her son.

However, as stated in the *St-Ferdinand* decision, the conduct of a party at fault may be generally unlawful, but it is not necessarily intentional.

In the case at hand, the evidence showed that officer Gosset used his weapon in accordance with accepted police practices and with the intention of controlling Griffin from a distance, not with the intention of killing him.

Gosset did not desire the consequences which resulted and, considering police practices, the unfortunate consequences of his actions cannot be described as “*immediate and natural*” or even “*extremely probable*”.

CONCLUSION

These decisions provide important clarifications with respect to the characterization of a fault as “intentional” within the meaning of the *Charter of Human Rights and Freedoms*, and they should prevent claims based on negligence – even gross negligence – or recklessness.

On the other hand, the recognition of a right to compensation for *solatium doloris* and the subjective criteria which must be considered in establishing the amount of such damages may involve a degree of unpredictability in their evaluation, depending on the intensity of the emotional reaction of family members. However, it is clear that the Supreme Court recommends moderation: in the case at hand, it was of the opinion that an amount of \$25,000.00 was fair and reasonable. Therefore, the Court does not seem to be tending towards the upper limits which it had previously set in other situation involving the award of non-pecuniary damages, namely defamation or the indemnification of a victim having survived devastating injuries.

The evolution of the caselaw will surely provide for further reflection and discussion.

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