

DE MONTIGNY CASE: THE SUPREME COURT RULES ON THE AWARDING OF COMPENSATORY AND EXEMPLARY DAMAGES

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ON NOVEMBER 10, 2010, THE SUPREME COURT OF CANADA¹ RENDERED AN IMPORTANT JUDGMENT CONCERNING COMPENSATORY AND EXEMPLARY DAMAGES.

THE FACTS OF THE CASE

The case has as its backdrop a family tragedy. On the morning of April 22, 2002, Martin Brossard went to the residence of his former spouse, Liliane de Montigny. Following a sequence of events, the order of which could not be determined from the evidence, he strangled his spouse and drowned their two children, Claudia and Béatrice, in the bathtub of the residence. He then hanged himself, leaving a note that clearly explained the reasons for his actions.

THE SUPERIOR COURT²

Liliane de Montigny's father, as well as her two sisters, instituted an action for damages in Superior Court against Brossard's estate. The proceedings included an action by the successors by which they claimed, in their capacity as heirs, compensatory damages for pain and suffering experienced by Liliane and the two little girls before their deaths, as well as reimbursement of the funeral expenses and exemplary (or punitive³) damages for unlawful interference with the victims' rights to life.

Justice Clément Trudel dismissed the claims for pain and suffering experienced by the victims prior to their deaths. The evidence did not show that a sufficient period of time had elapsed between the wrongful acts and their deaths, nor that the victims had actually felt any pain. With respect to the claims for reimbursement of the funeral expenses, Trudel J. denied the one relating to Liliane's funeral but allowed half of the amount relating to the funerals of the two daughters.

With respect to exemplary damages, Justice Trudel relied on the *Béliveau St-Jacques*⁴ decision of the Supreme Court and concluded that exemplary damages can only be incidental to an award of compensatory damages. Since he found that he could not award compensatory damages for the suffering of the victims before their deaths, he concluded that he could not award exemplary damages either. He added that, in any event, the dissuasive function of exemplary damages no longer applied so as to justify awarding them in this case as Brossard was already dead.

Lastly, the action by Liliane's father and two sisters included a direct claim by which they sought damages for *solatium doloris* or loss of moral support, following the deaths of Liliane and the two girls. To Liliane's father, Justice Trudel awarded \$30,000 for the loss of Liliane, and \$6,000 for the loss of each of the girls (his granddaughters). To each of Liliane's sisters, \$10,000 was awarded for the death of Liliane, and \$2,000 for the loss of each of the girls (their nieces).

THE QUEBEC COURT OF APPEAL⁵

The Court of Appeal confirmed that, given the almost instantaneous timing of the deaths, the trial judge was correct in not granting any compensation to the heirs for the pain and suffering experienced by the victims prior to their deaths.

¹ The appeal, heard by Chief Justice McLachlin and Justices LeBel, Deschamps, Fish, Abella, Charron and Cromwell, was the subject of a unanimous decision, without dissent. Justice LeBel authored the Court's judgment.

² 2006 QCCS 1677, [2006] R.J.Q. 1371, Justice Clément Trudel.

³ The Supreme Court emphasized that the two terms are equivalent according to the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992 c. 57, s. 423.

⁴ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345.

⁵ 2008 QCCA 1577, [2008] R.J.Q. 2015 (Justices Pelletier, Bich and Côté, judgment rendered by Justice Pelletier).

The Court upheld the trial judge's decision not to award exemplary damages to the heirs. In doing so, it confirmed that such damages could not exist in the absence of compensatory damages. It also confirmed that the absence of any possible dissuasive effect, in view of Brossard's death, in itself, justified the denial of the claim for such damages.

With regard to the funeral expenses, the Court of Appeal intervened and modified the first instance judgment by allowing the claim for the funeral expenses of all three victims. This aspect was not raised as an issue before the Supreme Court.

With respect to the amount awarded to the plaintiffs for *solatium doloris* or loss of moral support, the Court of Appeal concluded that the trial judge had appropriately applied the principles established by the Supreme Court in the *Augustus v. Gosset*⁶ case, that his assessment of the evidence did not warrant any intervention by the Court of Appeal in that the amounts awarded were comparable to those awarded in other cases that bore some similarity to the present one.

THE SUPREME COURT OF CANADA⁷

Two aspects of the case were raised in the appeal to the Supreme Court; the amount of damages awarded as compensation for the loss of moral support (*solatium doloris*) of Liliane's father and two sisters, as well as the denial of the claim for exemplary damages.

With regard to the issue of moral prejudice, the appellants argued that the Quebec courts seem to consider the amount granted by the Supreme Court in *Augustus v. Gosset*⁸ as a ceiling on compensation, the present value of which should now be much higher. They therefore asked the Court to substantially increase the compensation awarded to them by the lower courts. In addition, it was submitted to the Court that the lower court judges were mistaken when they awarded compensation for moral damages without taking psychological prejudice into account.

The Supreme Court recognized "the delicate nature of judges' work. In civil liability cases, judges sometimes have the difficult task of quantifying the value of concepts as intangible as a person's life, physical inviolability or suffering"⁹. In addition, it stated what has been affirmed many times by appellate courts: the trial judge has discretion when quantifying damages and appellate courts should exercise restraint before modifying the amount of compensatory damages awarded by a trial judge.

As for the appellants' argument that the *Augustus* case is incorrectly viewed in Quebec case law as a limit on compensation, the Court considered that even if the amount of \$25,000 awarded by Justice L'Heureux-Dubé in the *Augustus* case has often served as a reference point for determining amounts awarded as compensation for moral damages, it has never been considered as a ceiling in the same way as the \$100,000¹⁰ awarded in the trilogy rendered by the Supreme Court in 1978¹¹.

The Court therefore confirmed that this amount of \$25,000 must not be regarded as a limit or ceiling on compensatory damages for moral damages, which "does not mean that no restrictions apply when such damages are being assessed"¹²; as stated in the *Augustus* case, the issue of damages for moral prejudice is "an area in which moderation and predictability must always be fostered"¹³.

Lastly, the Court rejected the argument that the lower courts failed to view psychological prejudice as a form of compensable prejudice distinct from the loss of moral support. An analysis of the trial judge's reasons shows that he looked at all the factors that had to be considered in determining the compensation in issue. Moreover, the Court emphasized that there is no reason to categorize the various facets of moral prejudice:

[34] The varying and complex nature of human feelings makes it pointless to try to artificially categorize the various aspects of moral prejudice. What is truly important is that the moral prejudice actually suffered be compensated as precisely and fully as possible. To this end, L'Heureux-Dubé J. in *Augustus* established a non-exhaustive list of factors to be considered in examining such a claim for compensation, namely the circumstances of the death, the ages of the deceased and the parent, the nature and quality of the relationship between the deceased and the parent, the parent's personality and ability to manage the emotional consequences of the death, and the effect of the death on the parent's life in light, *inter alia*, of the presence of other children or the possibility of having others (*Augustus*, at para. 50). Consideration of all these factors provides the judge with an overview of the emotional impact of the victim's death on each of the victim's loved ones so that full compensation can be provided for the resulting moral prejudice, including psychological prejudice, to the extent that this type of loss is compensable given its nature and complexity.

⁶ [1996] 3 S.C.R. 268.

⁷ 2010 SCC 51.

⁸ Cited above, note 6.

⁹ Paragraph [27] of the judgment.

¹⁰ In the three decisions cited in the following note, the Supreme Court decided to set \$100,000 as the amount that can be awarded for non-financial losses in the context of an action for personal injury. This amount, when converted to current value, is approximately \$350,000.

¹¹ *Andrews v. Grand & Toy Alberta inc.*, [1978] 2 S.C.R. 229; *Thornton v. Prince-Georges School District no 57*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287.

¹² Paragraph [31] of the judgment.

¹³ *Id.*

As for the issue of exemplary damages, the Supreme Court examined their awarding under various aspects.

The autonomous character of exemplary damages

The Court first put the *Béliveau St-Jacques* case in a particular context. The facts of this case involved both a public compensation regime (for employment injuries within the meaning of the *AIAOD*)¹⁴ and the civil liability regime. If the fact of considering exemplary damages as dependent on compensatory damages was justified in the context of a public compensation system detached from the concept of fault or intentional acts, the Supreme Court has now stated that outside this particular context the interpretation recognizing the autonomous nature of exemplary damages must prevail:

[45] Therefore, it is my view that the majority opinion in *Béliveau St-Jacques* has been given too broad a scope. That opinion excluded an action under s. 49, para. 2 only in cases involving public compensation systems, such as the system applicable to employment injuries in Quebec. Outside that context, there is no reason not to recognize the autonomous nature of exemplary damages and thus give this remedy the full scope and flexibility that its incorporation into the *Charter* demands.

The Court therefore overturned the decisions of the lower courts and affirmed the autonomous nature of exemplary damages in civil liability law.

The preventive purpose of exemplary damages

The Court recognized that the awarding of exemplary damages "aims at expressing special disapproval of a person's conduct"¹⁵ and that, in Quebec law, such damages are of an exceptional nature. Moreover, the Quebec courts have until now been quite strict in giving effect to the preventive purpose of exemplary damages under article 1621 C.C.Q. by granting them only for the purposes of punishment and dissuasion.

However, according to the Court, this interpretation is too narrow:

[50] It is too narrow a view of the role of punitive damages to say that there is no point in awarding them where the person who committed an unlawful act is deceased. That view does not take account of the social utility of this form of judicial intervention, which requires the courts to take a functional approach that can help achieve all aspects of the preventive purpose assigned to such damages by the legislature.

Due to the particularly heinous nature of the acts committed by Brossard, the Court concluded that the awarding of exemplary damages seemed appropriate "to denounce those acts and affirm the importance of the right to life", and overturned the decision of the lower courts on this point.

Unlawful and intentional interference

Any claim pursuant section 49 para. 2 of the *Charter of Human Rights and Freedoms* must meet two conditions: the act must be unlawful and intentional.

With regard to the unlawful nature of the acts, the Court concluded that there could be no doubt as three murders had been committed. As to the intentional nature of the acts, the Court stated that "At this stage, intentionality refers not to the intent to commit the fault but rather to the intent to cause the result thereof"¹⁷. To satisfy this criterion, the appellants had to show that Brossard intended to deprive his victims of life at the time of his actions. The Court deduced, from the letter that Brossard had written prior to committing the acts, that he had the intention of depriving his victims of life. The Court therefore awarded "a symbolic lump sum"¹⁸ payment of \$10,000 to the three successors, to be shared amongst them equally. The Court stated that, although moderate, this amount was sufficient to achieve the objective of denunciation and it also noted that it was not a matter of punishing or deterring the wrongdoer, "but of setting an amount that sends a message of social denunciation"¹⁹.

The transmission of the right to exemplary damages to the heirs and the possibility of a direct recourse by them

The Court confirmed that the right of action for exemplary damages is a right that belongs to the victims' estates. Therefore, the plaintiffs could claim, in their capacity as heirs²⁰, exemplary damages for depriving the victims of the right to life.

On the other hand, the Court stated that the father and sisters could not have claimed punitive damages, as direct victims or indirect victims, by alleging that Brossard had interfered with their own rights to life. Although the right to life includes the right to psychological inviolability, the evidence did not show, according to the Court, that Brossard intended to interfere with the psychological inviolability of the father and two sisters.

¹⁴ In that matter, the Court was called upon to determine if the recourse for exemplary damages provided for in section 49 paragraph 2 of the *Charter* constituted a recourse in civil liability within the meaning of section 438 of the *Act respecting industrial accidents and occupational diseases (AIAOD)*.

¹⁵ Paragraph [47] of the judgment.

¹⁶ Paragraph [55] of the judgment.

¹⁷ Paragraph [60] of the judgment.

¹⁸ Paragraph [62] of the judgment.

¹⁹ *Id.*

²⁰ The right to exemplary damages is transmissible to heirs - Art. 1610 C.C.Q.

CONCLUSION

This decision of the Supreme Court is important, both with respect to compensatory damages and exemplary damages.

With respect to compensatory damages, it reiterates that appellate courts must exercise restraint before modifying the amount of damages awarded by first instance courts. That restraint was all the more obvious in this case as the amounts awarded by the court of first instance were not very high, in light of the facts of this case.

Another important aspect is that the Supreme Court agreed with the view that the amount of \$25,000 awarded in the *Augustus* case for *solatium doloris* (moral prejudice) must not be considered as a ceiling, while at the same time stating that this is an area in which moderation and predictability must be fostered.

Lastly, the Court maintained that psychological prejudice is not an independent head of damages, that there is no reason to apportion and categorize the various facets of moral prejudice, and that therefore psychological prejudice must be included within and assessed as part of the broad category referred to as "moral prejudice".

With regard to exemplary or punitive damages, the Court distanced itself from the restrictive interpretation of the notion of punishment and dissuasion that until now has been the basis of the right to punitive damages in Quebec law. It recognized the deterrent nature of such damages in our society and decided that they may be awarded even in a context in which the dissuasive effect is nonexistent or futile, as long as it sends a message of social denunciation.

The Supreme Court affirmed that a claim for exemplary damages can be autonomous under the civil liability regime. This decision is important because it substantially reduces the scope of the *Béliveau St-Jacques*²¹ case by limiting its effect solely to situations involving a public compensation system.

In addition, it is interesting to draw a parallel between this decision and a judgment of the Quebec Court of Appeal rendered last February in *Riendeau*²², and commented on in one of our previous publications. In that case, the Court of Appeal was also called upon to state its position on the autonomous nature of punitive damages, but in the context of the *Consumer Protection Act*. As the Supreme Court has just done in *de Montigny*, the Court of Appeal, in *Riendeau*, also recognized the autonomous nature of a claim for punitive damages.

It follows from these recent decisions, that the intention of appellate courts is to recognize the autonomous nature of exemplary damages and thus gives this remedy "full scope and flexibility," to use the words of Justice Lebel in this case. It remains to be seen whether this recognition of the autonomous nature of punitive damages will give rise to lawsuits, including class actions, that seek only exemplary damages.

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²¹ Cited above, note 4.

²² *Brault & Martineau v. Riendeau*, 2010 QCCA 366.

²³ <http://lavery.ca/publications/nos-publications/droit-de-savoir/attention-dommages-interets-punitifs-droit-consommation/>.

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