Second Study Commission: Questionnaire for the 2008 Meeting

Second Study Commission
Civil Law and Procedure

QUESTIONNAIRE

DAMAGES FOR PERSONAL INJURY

BELGIUM

Part I – General questions

1a. Does your system of law have any rules governing damages for personal injury? If so, what do they provide?

The principles of liability for personal (physical) damage are set out in the Belgian Code Civil (art 1382 et seq.).

As soon as the fault and the damage originating from this fault are established, a liability for the damage is created in the person of the wrongdoer. The wrongdoer has to compensate for the integral damage.

No distinction is made between damage due to a tort or due to a crime. Both tort and crime are considered as fault.

The indemnification implies that the victim is placed as good as possibly in the situation wherein he should have stayed or should have evolved in case the wrongful act would not have taken place.

The only criterion for the indemnification is the damage. This applies also to physical damage.

1b. Is non-patrimonial (non-pecuniary) compensation limited to cases provided by law?

The compensation of physical damage is not limited to particular cases by Belgian law. This is so for patrimonial damage and for non-patrimonial damage. The former is called “material damage” and the latter is called “moral damage” in Belgian law.

The principle is that every moral damage, originated of a fault of a wrongdoer, gives a right to indemnification by this wrongdoer.

2. Which are the criteria to distinguish patrimonial and non-patrimonial damage? What are the consequences of the distinction if it exists?
Patrimonial damage relates to every harmful effect on someone means or assets. This includes on one side damage of goods and on the other side expenses, costs, the loss of income and more generally every negative economical repercussion due to a harmful effect on the physical integrity of someone (bodily injury).

Moral damage – non-patrimonial damage – relates to the pain, the sorrows and grief or any other physical or psychical distress, suffered by the victim or by the closest persons to the victim (to which the victim has a bond of affection), and due to bodily injury of the victim.

As said before an indemnification implies that the victim is placed as good as possibly in the situation wherein he should have stayed or should have evolved in case the wrongful act would not have taken place.
This is an attainable objective in case of patrimonial damage: loss of economic value principally can be compensated through an equivalent payment.
Moral damage however is not repairable through an equivalent payment. Any form of payment is here only a form of consolation or solace.
This distinction makes that in the case of patrimonial damage the furnishing of proof regarding the loss of economic value must be solid and specific. Only then the amount of the equivalent payment can be settled.
In the case of moral damage, once this kind of damage is proved, there shall always be an estimation of the amends by the judge on grounds of “equity” (fairness) and reasonableness.

3a. What are the primary aim and the general principle of the law of damages for personal injury (e.g. prevention, sanction, distributive function, adequate compensation)?

Physical damage can be both patrimonial (material) and moral.

It is patrimonial when there is a loss of income or a loss of the economic value of the victim on the labour market.
Then the indemnification has only as purpose to compensate the economic repercussion on the means or assets of the victim.

Physical damage is moral when there is a physical or mental distress.
Then the indemnification has only as purpose to balm and to recover the pain, sorrows and grief or any other mental suffering.

The primary aim and the general principle in Belgian law is thus to give an adequate compensation when there is personal (physical) injury.
The damages are not related to an aim or principle of prevention, sanction or distributive function.
3b. Do different forms of damages for personal injuries exist (e.g. compensatory, exemplary, punitive damages)?

The amount of the indemnification is only determined by the damage and not by the (possible) reprehensible nature of the wrongful act that caused the damage. There are no different forms of damages and they have no exemplary or punitive aim.

4. Does your system of law recognize different categories of damages for personal injury, particularly:

- physical pain
- mental suffering due to permanent loss of abilities
- mental suffering due to false imprisonment
- mental suffering due to damage to intangible rights of personality
- sentiments of fear (e.g. the worry caused by the fear of developing cancer)
- mental suffering caused by the death of a close relative

Belgian law doesn’t recognise different categories (ways) of damages (indemnification) for the personal injuries enumerated in this question. All these cases can give reason to moral amends, when the existence of the damage is proved and the damage is caused by a wrongful act. The extent of the pain or the suffering is considered to determine the amount of the damages.

5a. What methods are used to assess the non-patrimonial damage? Are there any statutory rules on sums to be awarded (e.g. minimum, maximum sums)? Are there any judicial tariffs?

Moral (non-patrimonial damage) damage is assessed by fixing a lump sum.

Generally a judge will use the “Indicative Table” to determine the lump sum.

This table (list) is the result of a conference held by a group of judges, lawyers, university professors and insurers. It has no real legal strength but it has a great impact on the legal practice.

In this table sums are determined corresponding to the kind of damage.

So there are no statutory rules (laws) in Belgian law on sums to be awarded (no minima, no maxima). There is only a “free to use” tariff (as example) in reference to lump sums.

5b. According to your system of law, which circumstances should be taken into consideration in assessing non-patrimonial loss (e.g. nature, intensity and duration of the injury and/or suffering; individual circumstances of the victim; social position; financial situation)?
All circumstances regarding the mental suffering are taken in consideration to determine the moral damage. These circumstances includes for instance the special fears related to the sort of damage, the fact of being hospitalised or having special ambulant medical treatment, the gravity of the surgical intervention, the gravity of the pains, the length and the difficulty of the process of physical revalidation, the length of the time to the total recovery (if possible) or to the medical consolidation, the fact that there is a lifelong injury, the aesthetical damage and also the “loss of joy” (e.g. incapacity of doing sport or incapacity of having sexual pleasure).

In case the amount of the damage caused by the wrongdoer is influenced by the predestination or receptivity of the victim for certain lesions, this circumstance will not have an effect on the damages due by the wrongdoer: “The wrongdoer must take the victim as he finds him”.

5c. What is the role of an expert appointed by the court in assessing non-patrimonial loss?

The expert appointed by the court gives the judge his opinion on the nature and the gravity of the injuries, on the medical treatment the victim has had and shall have to go trough in the future, on the recovery process, on the nature and the gravity of the mental suffering and on the aesthetical damage.

This expert is a medical doctor specialised in the evaluation of physical damage. This doctor is allowed to cooperate with other medical specialist if necessary or even with a non-medical specialist such as an ergonomist.

The rapport of the expertise forms an authentic (non contestable, except by forgery) proof with respect to the facts the expert has stated and which were to be stated by the expert in accordance with the order he received from the court. The evaluations in the rapport are only to advise the judge. The judge is not obliged to follow the views of the expert.

II - Cases

6. A defective product harms V, a 25-year-old woman. Her right eye is severely injured (the sight is reduced to 50 %). What kind of non-patrimonial (non-pecuniary) damages is she entitled to?

The victim is entitled to the following moral damages (based on the “Indicative List”):
- when she stayed in a hospital with surgery: € 37.50 a day
- when she stayed in a hospital without surgical interventions: € 31 a day
- after (or without) staying in the hospital to the day of the medical consolidation: € 25 during 100 % disability, with proportional reduction afterwards
- after medical consolidation, for the lifelong injury (reduced visibility): a degree (percentage) of invalidity must be specified (by an expert), € 875 per degree
- aesthetical damage: supposedly in this case “slight” to “light” = € 250 to € 1,500.
7. A, a 20-year-old student, suffers severe brain injuries. He is reduced to a living dead. Are his parents who take care of him entitled to a compensation for their mental suffering?

The parents of the student are entitled to compensation for their mental suffering, which is considered as a consequence of the fact that they have to see their son in his painful situation. The care that the parents give to their son however is a kind of material damage (given instead of professional nursing).

8. A publisher publishes an article, which contains many untrue and offending statements of B's life. B sues for compensation. When assessing the non-patrimonial loss does it make any difference if B is a rock star, a politician or an unknown citizen?

The case is primarily not to be considered as a question of indemnification. It is in the first place a question of the distinction to make between the protection of their name and fame a well-known person and an unknown citizen have right to. A well-known person (politician, star) has only right to a limited protection. He is considered as “public property”. He has to endure some gossip and satire.

But when the good name and fame of a well-known person is really violated by a wrongful act, his moral damages will be in the same amount as these of an unknown citizen in the same circumstances. Most probably the distinction between the well-known person and the unknown citizen lies here in the larger material damage the violation of the good name and fame the former has to suffer.

9. A who is slightly injured in a car accident misses a trip to Australia he had booked recently. Is he entitled to a compensation because he was prevented from enjoying his holiday (non-pecuniary damages)?

The victim is entitled to moral damages if he can prove that he suffers mentally because he misses his holiday (loss of joy). The specific circumstances of the case are to be considered (was this the first trip to Australia of the victim? was the trip only postponed or definitely cancelled? etc.)

10. A's house is burgled and he cannot sleep for months after the event. Is he entitled to monetary compensation of his distress?

If the victim can prove causality between the burglary and his sleeping problems, he is entitled to moral damages.

III
11. Are there any proposals for reform of the legislation governing damages for personal injury?

The Belgian legislator has recently outlined a form of “no-fault” liability in case of medical responsibility. A statutory and compulsory insurance for medical patients shall be established to cover medical faults. (Law of 15.05.2007)

The system is not operational due to the lack of decrees to implement this law.

12. What points would you wish to discuss in greater detail?

13. What subject do you suggest for the next meeting?

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With thanks to Fr. Peeters, President of the 2nd Chamber of the Court of Appeal of Antwerp