

CHAPTER TWO SCOPE OF PROTECTION

2.1. PROTECTION OF LIFE, PHYSICAL INTEGRITY, HEALTH AND FREEDOM

2.1.4. BELGIAN, ITALIAN, SWEDISH AND DUTCH LAW

Introductory Note

c) As mentioned in the General Introduction, Art. 1382 and 1383 of the **Belgian** Civil Code are literally the same as Art. 1382-1383 C.civ. The generality of these articles has allowed Belgian courts to grant compensation for all kinds of material and non-material injury claims by primary *and* secondary victims (including those dependent on the primary victim's income) as a consequence of interference with health or bodily integrity (wounding or death). As for material injury, such compensation includes recovery of all expenses incurred by the victim or third parties to restore the injured person's health or to reduce his/her pain and suffering.¹ It also covers loss of income on the part of the victim or those dependent on him or her, including loss of income suffered by third parties who received voluntary maintenance payments from the deceased victim, as demonstrated by the judgment of the Court of cassation of 4 September 1972.² Obviously, loss of maintenance to which the beneficiary was legally entitled must be compensated as well, provided that the court finds, as a matter of fact (i.e. without the possibility of review by the court of cassation), that the beneficiary has obtained, claimed or would have claimed maintenance payments.³

As for non-material injury (*dommage moral*), compensation will not only be allowed to the primary victim but also to close relatives or friends, subject, however, to the defence of contributory negligence committed by the primary victim.⁴ Even if the

¹ See, however, in respect of services rendered by close relatives taking care of the victim which, if the relatives had been remunerated, would have caused expenses to be recovered from the tortfeasor: Cass., 30 November 1977, RW 1978-79, 1157.

² *Infra*, 2.B.20. That judgment is also considered as a valid precedent under French law.

³ See in the case of a minor person Court of Cassation., 19 March 1991, AC 1990-91, 755, Pas. 1991.I.670.

⁴ See Court of Cassation, 19 December 1962, Pas. 1963.I.491, RW 1962-63, 1235, with Opinion of Advocate General F. Dumon. Compensation for non-material damage can also be awarded to a legal person, including the State, for infringement of its honor: see Court of Cassation, 9 February 1948, Pas. 1948.I.88.

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plaintiff was not aware, because of a serious mental handicap, that the award was intended to make good the injury, a tort claim will not be dismissed on that ground only.⁵ Nor does the fact that the pain and suffering sustained by a close relative, in that case the father of the victim, must be regarded as part of “the normal experiences of parenthood” (*een normaal beleefd ouderschap*) lead to dismissal of the claim.⁶

Compensation for material and non-material damage can even be granted to the victim and his parents in a situation where no fault has been committed, provided that the injury is exceptional in the sense that it was not suffered by other persons subjected to the same measure.⁷ Such no-fault liability is based on Art. 11 of the Act concerning the Council of State, which constitutes an expression, albeit limited in scope and application, of the principle of equality of citizens before public burdens.⁸

d) With respect to **Italian** law, in addition to what was mentioned before, Art. 2059 of the *Codice civile* must be read in conjunction with Art. 185(2) of the *Codice penale*, which provides that “[a]ny criminal offence which causes material or non-material injury obliges the wrongdoer, as well as any person who is responsible for the conduct of the wrongdoer according to civil law, to compensate that injury”. Since causing injury to the person, intentionally or negligently, constitutes a criminal offence, non-material injury will then be recoverable on the basis of Art. 185 of the *Codice penale*. Moreover, in these situations, as is demonstrated by the judgment of the Corte di Cassazione (sezioni unite) of 6 December 1982, the Court interprets Art. 2059 of the *Codice civile* in conjunction with Art. 185 of the *Codice penale* broadly since the Court in that judgment does not require the tortfeasor to be condemned: for the award of damages for non-material losses, it suffices that the act of the tortfeasor fulfills the constitutive element of the criminal offence.⁹

In that case the Belgian State obtained compensation for infringements to its honor by a citizen who during the war had been disloyal to Belgium.

⁵ See Court of Cassation, 4 April 1990, Pas. 1990.I.913, JT 1992, 829, annotated by L. Hervé.

⁶ Cass., 3 February 1987, *infra*, **2.B.21**.

⁷ See Council of State, 16 December 1992, No. 41396, *Paasch-Jetzen*, JT 1993, 333, annotated by J. Sohler, where damages were awarded against the Belgian State on the basis of a Royal Decree imposing compulsory vaccination of young children against polio in the case of a child that was permanently crippled as a result of the vaccination

⁸ Consolidated by Royal Decree of 12 January 1973, BS/MB, 21 March 1973, 3459. The competent jurisdiction under Art. 11 is the Council of State, which under Belgian law (as opposed to French law) has no jurisdiction normally to allow compensatory relief against the State. It only has such jurisdiction when no other court has jurisdiction - that is in the present case when no compensation can be granted for wrongful conduct on the basis of Art. 1382-1383 of the Civil Code. In such case, the Council of State may grant compensation “in equity and taking into account all circumstances of public and private interest”.

⁹ *Infra*, **2.I.23**.

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e) The law of **Sweden** and the other **Nordic** countries take a special place, because of the considerable impact which the social security and other insurance systems have upon the compensation of injury in those countries. Indeed, if the victim of a tortious act falls under the Swedish social security legislation, he or she must in the first place request compensation from his or her own social insurance (medical expenses, pension rights).¹⁰ The general tortious liability regime only comes into play if the victim cannot obtain compensation from the social security system, as in the case of a foreigner who is not affiliated to Swedish social security.

Injury to bodily integrity is compensated, to the extent that it is not covered by social security, in accordance with § 5:1 SKL: It comprises (i) *sjukvårdskostnad* (medical expenses), (ii) loss of income and (iii) pain and suffering¹¹ and other non-material damage such as reduction in the enjoyment of life.¹² To assess the damage for each of these three categories, two successive periods are distinguished: the first covers the period of temporary illness, whilst the second starts from the moment of consolidation, that is when the invalidity or illness becomes stable and permanent.¹³ Compensation for injury consequential upon the death of the victim is regulated by § 5:2 SKL: it extends exclusively to funeral and other related expenses, as well as loss of maintenance, whether legally prescribed or otherwise obtained.¹⁴

A judgment of the Swedish Supreme Court is reproduced below, relating to a special situation where compensation was awarded for physical and mental pain and suffering, and for violation of privacy closely linked to the criminal offence of assault and battery.¹⁵

¹⁰ See further H. Witte, "Landesbericht Schweden", in C. von Bar and H. Grothe, eds., *Deliktsrecht in Europa*, (Köln: Heymanns, 1994) at 67.

¹¹ In a judgment of 7 April 1993, the Supreme Court dealt with the claim of a 17-month old child who was thrown out of a third-floor window (the culprit was sentenced for attempted murder). The child was, despite his age, awarded compensation for mental suffering.

¹² *Supra*, Chapter I, **1.SW.28**. See further H. Witte, "Landesbericht Schweden", in C. von Bar and H. Grothe, eds., *Deliktsrecht in Europa* (Köln: Heymanns, 1994) at 72-73.

¹³ H. Witte, *ibid.* at 68-72.

¹⁴ See further, for the assessment of both loss of income and loss of maintenance, § 5:3 to § 5:5 SKL. As for the possibility for the court to mitigate the duty of compensation, see § 6:1 to § 6:4 SKL.

¹⁵ *Infra*, **2.SW.24**.

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Court of cassation, 4 September 1972¹⁶
Association Saint-Jean Baptiste v. Steenhout

2.B.20.

DEPRIVATION OF LEGITIMATE ADVANTAGE

Loss of income by religious community

If a religious community loses income as a result of the death of one of its members who had voluntarily assigned his salary to the Community, this constitutes damage within the meaning of Art. 1382 of the Civil Code.

Facts: The victim, a priest in a teaching order, was killed in a car accident for which the defendant was responsible. The victim had voluntarily assigned his salary to the order, a non-profit-making religious organization, which had been receiving the salary of the victim for many years. The plaintiff sought material damages amounting to the victim's net salary, i.e. after deduction from the claim of the expenses which the plaintiff incurred in maintaining the victim.

Held: The judgment of the court of appeal was quashed on the ground that it had wrongly dismissed the claim on the ground that the damage, even if it constituted the loss of a legitimate material benefit, could not be categorized as an infringement of a legally protected interest.

Judgment: "According to the judgment [of the court of appeal], the damage for which the plaintiff seeks compensation springs from the deprivation of the advantage consisting in the fact that a member of its teaching staff assigned his salary as a teacher to it when that staff member was involved in a fatal accident attributable to fault on the part of the defendant, Steenhout. The judgment states that the damage suffered by the plaintiff is incontestable and that its interest damaged thereby is a legitimate one. Nevertheless, [the court of appeal] decided that the interest concerned is one which 'is completely unprotected by any right' and that therefore the damage concerned will not sound in damages under Art. 1382 of the Civil Code.

It appears from the grounds of the judgment that, in order to reach that decision, the court of appeal based itself on the fact that the advantage conferred by the person concerned upon the plaintiff lay outside any legal or contractual obligation and therefore could not be enforced by a legal claim and left him 'completely free to dispose over his property'.

Art. 1382 of the Civil Code obliges a person responsible for an unlawful act to make reparation for any damage caused by that act in so far as the damage is proven and does not consist in the deprivation of an unlawful advantage. The fact that the beneficiary of a lawful advantage had no legal claim to enforce it against the person who granted it purely benevolently does not preclude the disadvantaged party from bringing a legal claim for damages pursuant to Art. 1382 of the Civil Code against a third party on account of the damage flowing from the deprivation of the advantage by reason of the fault of that third party, provided that the advantage appeared sufficiently stable as far as the beneficiary was concerned so as to

¹⁶ Pas. 1973.I.1, RW 1972-73, 715, JT 1972, 674. Translation by R. Bray.

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cause the damage suffered to be regarded as certain.

Accordingly it could not be lawfully inferred from the grounds on which the judgment is based that compensation could not be obtained by the plaintiff pursuant to Art. 1382 of the Civil Code.

The ground of appeal is therefore well-founded...”

Note

In this decision the Belgian Court of Cassation made it clear that an action in tort can be founded on an interference with a legitimate interest accruing to a plaintiff who is not “legally entitled” to it, *provided* that the benefit which the plaintiff lost as a consequence of the fault of the defendant is sufficiently stable to make the damage certain. The Court of Cassation thereby confirmed a ruling which it had given for the first time by judgment of 16 January 1939.¹⁷ In that case the court had held, however, that “the fact that the plaintiff in an action for damages has no right, enforceable at law, against the person who procured him the advantage of which he has been deprived by the unlawful act may influence the decision of the judge of the facts concerning the certainty of the damage and its quantum; but Art. 1382 of the Civil Code does not make the obligation to make reparation for the damage caused by an unlawful act depend on the existence of such a right”.

The French Cour de Cassation, after having adopted a broad definition of the concept of damage as well, reversed that position (following the example of the Conseil d’État) in a judgment of 2 February 1931 by which it denied compensation for bereavement (*préjudice d’affection*) to a plaintiff who had no family ties with the victim.¹⁸ However, after following that restrictive interpretation for several years, the Cour de cassation changed its position again in accepting the claim of a fiancée in a judgment of 5 January 1956.¹⁹ The court saw no flaw in the decision of the trial judge whereby, he had held, in order to allow the claim, that there was “direct, actual and certain harm... justifying the award of damages”, in view of the fact that the public notices had already been posted and other preparations made for the wedding. That position was reconfirmed by the Cour de cassation in its judgment of 27 February 1970.²⁰

¹⁷ Pas. 1939.I.25, RGAR 1939.3002.

¹⁸ Cass. civ., 2 February 1931, D 1931.I.38.

¹⁹ Cass. civ., 5 January 1956, D 1956.Jur.216.

²⁰ *Supra*, 2.F.19.

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*Court of cassation, 3 February 1987²¹
De Vos v. Dedobbeleer*

2.B.21.

COMPENSATION FOR PAIN AND SUFFERING

Father sees injured son deteriorate

Pain and suffering felt by a parent who sees the condition of his son deteriorate following an accident gives rise to a claim for non-material injury, which cannot be dismissed on the ground that sympathy and compassion are a normal part of parenthood.

Facts: The plaintiff suffered non-material damage in witnessing the deterioration of the physical condition of his son subsequent to his injury in an accident.

Held: The judgment of the court of appeal which had dismissed the claim for compensation was quashed by the *Court of cassation* for having wrongly interpreted the legal notion of causation.

Judgment: “[The court of appeal dismissed plaintiff’s claim for BEF 100,000 in compensation of non-material damage for the following reasons.] When one takes into account the whole of the concrete circumstances which gave rise to the plaintiff’s suffering and the way in which it was felt, that suffering does not appear to be exceptional or of a kind that can be regarded as harm in the sense of Art. 1382 of the Civil code. As a result of the particular ties of love and affection with his/her child, any parent experiences joy and also pain and suffering as a result of the happy or unhappy events which the child encounters:... this sympathy is part of a normally experienced parenthood. It can be derived therefrom that the suffering of parents... does not constitute damage in the sense of Art. 1382... Only suffering which, because of particular circumstances, is of an exceptional character can be considered to be non-recoverable damage. This is not the case here... [since plaintiff does not prove] that the suffering which he feels himself because of the physical condition of his son, as a consequence of the accident, is more exceptional than the suffering which is part of a normally experienced parenthood. Moreover, it is seriously questionable whether it is in accordance with human dignity to allow monetary compensation for suffering which is the result of the observation of another person’s suffering, however considerable it may be...

[The Court of cassation quashed the judgment of the court of appeal on the following ground.] The claim for compensation of non-material damage aims to mitigate one’s pain and suffering or any other non-material grief and, to that extent, to repair damage. No exception to this principle is to be made for non-material suffering which parents sustain as a consequence of wounds suffered by their child.

Although it is ultimately for the trial judge to determine, as a matter of fact, the existence and the amount of non-material damage caused by defendant’s illicit act and, within the boundaries of the claim,

²¹ Cass. 1986-87, 724, Pas. 1987.I.644, RW 1987-88, 220, RGAR 1989.11572. Translation by W. Van Gerven and Y.P. Salmon.

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to assess the amount needed to repair the damage, he cannot dismiss the claim without violating the legal concept of causality, on the ground only that sympathy and compassion is part of a normally experienced parenthood;

The claim is well-founded.

The judgment of the court of appeal is quashed in so far as it decided the claim... relating to [non-material] damage.”

Note

The judgment is reproduced mainly to draw attention to the reasons given by the court of appeal to reject the claim for compensation of non-material damage, which resemble the arguments used in other legal systems to reject such claims for compensation of non-material damage in similar cases. However, in line with the traditionally broad interpretation which the Belgian and the French Courts have given to Art. 1382 of their respective Civil Codes, the decision of the appeal court is quashed by the Belgian Court of Cassation.

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*Corte di Cassazione, 6 December 1982*²²

2.I.23.

NON-MATERIAL INJURY WHEN PENAL LAW IS VIOLATED IN THE ABSTRACT

Killed by a minor

Compensation of non-material damage can be recovered under Art. 2059 of the Codice civile in conjunction with Art. 185 of the Codice penale when the material features of the criminal offence are established in the abstract, even if the tortfeasor cannot be held criminally responsible for the act.

Facts: The plaintiffs' son was killed as a consequence of a fractured skull caused by the defendant who had hit him on the head. Since the defendant was a minor, he could not be held liable under penal law. The plaintiffs, mother and father of the victim, the latter also acting on behalf of the victim's brother, asked compensation for amongst other things, non-material damage.

Held: The court of first instance awarded damages to each of them on all heads of damage. The court of appeal refused compensation for non-material injury. The Corte di cassazione held that damages for non-material injury can be awarded on the basis of Art. 2059 of the *Codice civile* in combination with Art. 185 of the *Codice penale* if the tortious act constitutes a criminal offence in the abstract that is although the offender cannot be punished because of young age.

Judgment: "...[T]he key issue... has to do with whether damages may be awarded for non-material loss in the event that a criminal charge cannot be brought against the tortfeasor on the ground that he is a minor...

A first line of cases (a more established one, to which the court below adhered), followed by guidance in textbooks [references omitted] held that damages could not be awarded for non-material loss in the case of an unlawful act committed by a person against whom criminal proceedings could not be brought... on the fundamental ground that 'since the legislature tied damages for non-material loss to criminal liability (Art. 2059 of the *Codice civile*; Art. 185 of the *Codice penale*), where there is no criminal liability because the perpetrator of the act constituting the offence cannot be charged, no damages may be awarded, particularly since... whether a charge may be laid cannot be divorced from the ingredients of the offence by regarding that aspect as a mere presupposition or an independent and separate legal factor, in so far as only persons capable of understanding and forming an intention may be adjudged responsible for unlawful conduct on the ground that only such persons are capable of realizing the legal or at least the social import of the acts they commit.'... In contrast, a second, more recent line of cases [references omitted] allowed an award of damages for non-material loss. It has been held that where the law makes the award of damages for non-material loss contingent upon the existence of a criminal offence, what is meant is an act which may be categorized 'ontologically' in the abstract as an act which is unlawful under the criminal law, regardless of whether that act may actually be punishable...

²² No. 6651, Giur. it. 1984-I-1-150.

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After having considered the question thoroughly, the Sezioni Unite of the Corte di Cassazione conclude that they should subscribe to the second of the approaches taken in the case law for the following complex reasons, relating to the interpretation of the individual provisions and, above all, of the entire system of law relating to this matter. The legislative provisions interpreted are extremely well-known. On the one hand, Art. 2059 of the *Codice civile*, in dealing with compensation for damage arising out of civil wrongs (non-contractual or tortious liability)..., establishes that it is also possible to award damages for non-material loss, but only 'in cases provided by law'. On the other hand, Art. 185 of the *Codice penale* (which is the most important, if not the only, 'case provided by law') states that '[a]ny criminal offence which causes material or non-material injury obliges the wrongdoer, as well as any person who is responsible for the conduct of the wrongdoer according to civil law, to compensate that injury'... This court cannot but associate itself with the way in which the concept [of unlawful act] has been construed in the most recent academic writings where it is given a uniform definition: depending on the applicable legislation, an unlawful act is any conduct of a particular person which harms an interest, protected by the legislation, of another person with the result that a certain sanction is imposed on the perpetrator of the unlawful act. This unitary concept takes on different roles depending on the nature of the provision which prohibits and lays down the sanction for the unlawful act and which moreover cannot but protect a particular interest. The protected interest constitutes the motive and fundamental reason for the protection and hence for the sanction, and it is precisely according to such a protected interest that differentiations and different categorizations of unlawful acts are made, above all between unlawful acts under civil law and under criminal law...

[I]t is quite possible for the same harmful conduct, that is to say, the same harmful event or act, to harm more than one interest at the same time, i.e. both the general public interest protected by the criminal provision and the civil, private law interest protected by the civil provision. As a result, the same act may constitute both an unlawful criminal act and a civil wrong, but... each unlawful act has separate categorizations and a distinct make-up and entails different sanctions, leaving aside the fact that the physical act is the same. It is precisely the fact that the act is identical but the consequences different which Art. 185 of the *Codice penale* seeks to make clear. By providing that the facts constituting the offence which cause damage carry an obligation to make that damage good, it refers to the civil law concept of damage and of the consequences of the unlawful act. This is borne out by Art. 185 itself, which, by authorizing the award of damages also against a party answering for another, establishes the fundamental distinction between criminal and civil liability: criminal liability is always personal and direct (only a person who committed the crime or helped to do so is answerable therefor), while civil liability, in addition to being personal and direct, may also be vicarious inasmuch as circumstances exist in which damage inflicted by one person may be answered for by another on the basis of special relationships linking the two persons or the person responsible for the thing damaged. Hence the fundamental inference which basically resolves the problem: [on the one hand,] owing to the existence of the unlawful criminal act, the fact that that act is punishable and the imposition of the sanction, it is necessary to apply the criminal law and criminal law concepts, whilst [on the other hand] owing to the existence of the unlawful civil act, it is necessary to apply civil law concepts and the civil law...

The following fundamental systematic interpretative inference can be drawn from our analysis. Given that the concept of the unlawful act is unitary solely as concerns the physical act of the perpetrator, every form of liability is governed by, and its constitutive elements laid down in, the particular branch of law having regard to the specific characteristics of the interest protected. Compensation for loss, even non-material loss, is governed exclusively by the civil law, since it is the civil law which governs that particular

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infringement of private interests which [the infliction of] damage represents. [In contrast,] liability to punishment and the criminal ingredients characterizing an act constituting an offence are matters left to the criminal law. It cannot but be inferred [from the foregoing] that a dual infringement will obtain only where the unlawful act, considered in the abstract, is such as to harm concurrently both the interest protected by the criminal law and the interest protected by the civil law. Moreover, this is the rationale of the restriction laid down by Art. 2059 of the *Codice civile* and Art. 185 of the *Codice penale*. The award of damages for non-material loss is allowed only in the most serious cases in which the unlawful act affects not only an interpretative interest, but affects or is liable to affect also one of the public law and collective interests which are protected by the criminal law. Since such an act poses a greater danger to society..., a higher degree of compensation is warranted simply because that great danger exists or is liable to exist. This is why it is immaterial for the purposes of compensating non-material loss whether the act constituting an offence actually has all relevant elements from the point of view of criminal law or whether it may be punished: all that matters is whether that act, viewed in the abstract, is capable of constituting a criminal act such as to pose a major disturbance to the social conscience. It further follows that when the unlawful fact may constitute in the abstract a criminally relevant infringement, the concurrent infringement of the civil interest must be compensated together with the greater non-material loss. As a result, this principle holds good even where the perpetrator of the act cannot be charged under criminal law because he is not criminally responsible, since criminal responsibility is solely concerned with imputing to the person in question the capacity to answer for his conduct pursuant to criminal law; yet as far as civil liability is concerned, the only relevant question is whether the unlawful act affects or is liable to affect the interests which, viewed in the abstract, are protected by the criminal law, since civil responsibility and its definitions are regulated in a different matter by the civil law (Art. 2046). Consequently, given this interpretation, no relevance may be attached to the fact that criminal responsibility is a necessary element of the criminal offence... in so far as that certainly is extrinsic to whether the act may be viewed in the abstract as an infringement of the interest protected by the criminal law, this being the only pertinent concept for present purposes. This conclusion, which has been arrived at by interpreting Art. 2059 of the *Codice civile* and Art. 185 of the *Codice penale* logically and systematically, is not precluded by the wording of the law, more specifically by the expressions actually used in Art. 185 of the *Codice penale*, which refers to 'criminal offence' and 'wrongdoer'...

For the purposes of consistency of interpretation, the words 'criminal offence' and 'act' must be given the same meaning, that is to say, they must be construed as an act constituting in the abstract a criminal offence...

Consequently, since, in the contested judgment, the court of appeal affirmed the contrary principle that damages may not be awarded for non-material loss where the unlawful act was committed by a person who cannot be held criminally responsible because he is under fourteen years of age, the... appeal should be granted and the court to which the case is remitted shall determine this issue having regard to the principle that 'damages may be awarded for non-material loss even where the person which committed the act which, viewed in the abstract, is contemplated by the law as a criminal offence, that is to say, an act whose material features are capable in the abstract of constituting also an infringement of an interest protected by the criminal law, is not responsible under the criminal law because he is under fourteen years of age.'..."

Note

Until the annotated judgment Art. 2059 of the *Codice civile* was interpreted by

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some to mean that non-material injury cannot be recovered if the tortfeasor is not punishable on the ground that the subjective constitutive element of the criminal offence is not established to exist, for example because the offence cannot be imputed to the offender because of young age. In the annotated judgment the Corte di cassazione endorses the more liberal position according to which it is sufficient that the wrongful act is objectively (i.e. in the abstract) to be regarded as an offence.

*HD, 4 April 1990*²³

2.SW.24.

PAIN AND SUFFERING FOR FEAR OF INFECTION WITH HIV

Woman bites police officer

A woman who bit the hand of a police officer and falsely declared that she was infected with HIV is liable to pay damages for the ensuing mental anguish.

Facts: After Marie M. had been arrested and put in a police car, she bit a police officer, Karin S., in the hand. During the ride, Marie M. declared that she was HIV-positive. Karin S. claimed damages for an amount of SEK 10,000 from Marie M. The claim concerns both compensation for the pain and suffering as a result of the physical injury inflicted (SEK 3,000), as well as for mental suffering, because of the fear that she might have been infected with HIV (SEK 7,000).

Held: The judgment of the court of appeal is confirmed by the HD. Compensation of SEK 10,000 in total is awarded for pain and suffering as a result of the injury (on the basis of Chapter 5, § 1 of the *Skadeståndslagen*) and of the fear of HIV infection (on the basis of Chapter 1, § 3 of the *Skadeståndslagen*).

Judgment: "... In the Supreme Court proceedings, Marie M. admitted that she was liable for the injury she caused Karin S at the given occasion.

According to § 5:1 SKL, damages to a person that has suffered an injury should include compensation for pain and suffering, among others. Pain and suffering include physical as well as mental suffering during the acute period of injury or illness. The bites that Karin S suffered have caused physical suffering in the shape of pain and uneasiness for a week after the accident. Because of Marie M's statements about the HIV infection, Karin S also became frightened and worried that she had been infected with HIV. Even if she has not been on sick leave, her anxiety was of such a serious nature that a physician prescribed her special psychotherapeutic treatment. The heavy psychological pressure she had to suffer must be considered to constitute the kind of suffering that can be compensated as pain and suffering. Since she could not receive any definite answers on whether she was infected with HIV until six months after the incident, the mental suffering must be found to have lasted at least that long.

²³ NJA 1990, 186. Translation by M. Tranälv.

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Karin S's claim for compensation for mental suffering also includes compensation for the manner in which she was treated in contacts with other persons, who considered her to be infected by HIV even in some cases suffering from AIDS. This degrading treatment must be seen as a predictable consequence of the injury, and it ought to qualify as the kind of non-material harm that is regulated in § 1:3 SKL.

According to the HD, compensation should be granted not only for pain and suffering, but also for non-material damage within the meaning of § 1:3 SKL. For liability in damages to occur according to this provision, someone must have caused suffering to another person while committing a crime against personal freedom or liberty or some other abusive behaviour that includes a criminal offence. Assault and battery constitutes an abuse of the kind which the provision refers to. However, it is first and foremost Marie M.'s statements on HIV that brought about the violation of privacy. Yet those statements have been made in conjunction with the assault and have such a close connection with it, that the violation (of privacy) must be said to have been caused by the assault.

In this case, there is no reason for dividing the damages into one amount for such mental suffering as personal injury and another amount for such suffering as § 1:3 SKL refers to. Karin S should therefore be granted damages which include compensation for both kinds of non-material injury. The amount claimed, SEK 10,000 is reasonable.”

Note

In this judgment, the HD gives a broad interpretation of both § 5:1 (damages for pain and suffering) and § 1:3 (damages for non-material injury in general) SKL. This case is to be compared with the judgment of the Danish Højesteret of 13 December 1994 which comes to a different conclusion.²⁴

²⁴ UfR 1995, 185.