

THE UNCONSCIOUS PLAINTIFF: CONSCIOUSNESS AS A PREREQUISITE FOR COMPENSATION FOR NON-PECUNIARY LOSS

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I. INTRODUCTION

SOMETIMES reason and emotion are hard to reconcile before the law. This certainly is true in the case of compensation for non-pecuniary loss. In principle it seems impossible that suffering can be made good by payment of money. Different factors, pain and money, are involved, and we cannot exchange one for the other. Because of its very nature, sorrow can be compensated only by happiness.

On the other hand, most victims of tortious conduct consider it unacceptable that it is sufficient if the tortfeasor merely compensates them for the material damage. This makes it seem as if the tort had no consequences other than purely pecuniary ones. In the case of many victims the tortfeasor ought to be made to *know* what harm he has caused in addition to the material damage. What is more: he ought to be made to *feel* it. And because the law simply does not offer many possibilities beyond granting financial compensation, the suffering that the victim has experienced and is still experiencing has to be expressed in terms of money, however inadequate this may be and however impossible it may also prove in principle.

A. *Guilt and Atonement*

The damages to be paid by the tortfeasor are therefore very much in the nature of *atonement* and *punishment*. I am convinced that particularly in the case of victims who are not versed in the law and are still open-minded, damages for non-pecuniary loss will, to a great extent, still have that function of penance. But, comes the immediate rejoinder from the lawyers, that cannot and must not be allowed. Our system of compensatory damages does not have a penance function. In our legal system that function is fulfilled by criminal law.

Criminal law and tort law differ in many ways. For instance, what may be a tort may not be a criminal offence and vice versa. Where a tort constitutes a criminal act, the State will take action. Not because it wants to

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help the victim, but because it sees the defendant's action as an offence against society. It views the tortfeasor's behaviour in a broad context (and usually fails to consider the victim). This would be different if a system of punitive damages were to be allowed. But most countries do not have such an explicitly recognised relic originating from criminal law. Even where we as lawyers (would be willing to) acknowledge such a system, this will at most be in the form of left-overs from the time when civil and criminal law were still combined.

Incidentally, it is interesting to see that in the new Dutch Civil Code, which will be introduced in the Netherlands in a few years' time, the judge is instructed, when determining the level of non-pecuniary loss, to make allowance for all the circumstances of the case. He should thus also consider the *question of guilt* in his examination.¹

B. *Giving Happiness*

What is at stake, therefore, is providing some dogmatic basis for what is in fact logically impossible—making good suffering through money. A penance function is not really enough. But there is still a second avenue: the *compensation function*. This approximates to the principles of the law of compensation more closely than penance. Van Agt, the Dutch Minister of Justice at the time of the parliamentary debates on the new Civil Code, formulated this function as follows:²

It would be so much better if suffering caused during interhuman relations could be made good by bringing happiness. However, since this is impossible in many, if not the majority of cases, we revert to the substitute of material compensation. This can, perhaps, still be given the following justification. Such material compensation is the only way of enabling the injured party—who cannot be provided direct with happiness—to find enjoyment through all the things he can do with that compensation.

In this way, someone who has been forced to stay in hospital for a lengthy period will be able to go on holiday for a week. The amateur pianist who has to face the future with several fingers missing can be given financial help to start a new hobby. And the person who has to live the rest of his life as a serious invalid will perhaps have a small swimming pool excavated at the back of his house to add some pleasure to his life. This compensation function is seen both in the Netherlands and elsewhere as the pre-eminent basis for compensation of non-pecuniary loss.

1. *Parliamentary History of the New Dutch Civil Code Book 6* (Parl. Gesch.), p.377. For more details see R. Overeem, *Smartegeld* (1979), pp.26 *et seq.*

2. A. A. M. van Agt, Parl. Gesch. Boek 6, p.385.

C. The Consciousness Requirement

In this article I discuss the difficult question whether the compensation for non-pecuniary loss requires that victims should be conscious of their suffering. This is a crucial point of principle, and one that touches on the essence of the doctrine of compensation for non-pecuniary loss.³

There are three possible categories of victims. Those who are *unconscious*, usually people in a coma following traffic accidents or medical errors. In this context one must focus on the exact definition of consciousness. Is it possible to establish if a victim is or is not conscious of his suffering? The second category is that of the victims who are *severely mentally impaired*. People who—for instance as a result of the tort—are still able to communicate with those around them, but are not (or no longer) mentally capable of realising their suffering. And, lastly, there are the very young *children* who are accident victims.

These three categories should be kept separate, but rarely are by the courts or in academic writings. This is wrong. For example, the legal cases discussed in this article concern a number of victims who, though *not* in coma, are leading a life which is but a pale reflection of their former existence. While there is every reason for keeping the two categories separate, section III, *infra*, deals with the real coma patient, but also discusses non-coma cases—the reason is that the *legal* arguments on the basis of which a number of foreign judges reached their decisions are directly applicable to the real coma patient. The reader should therefore be prepared for some confusion. But first, what do we in fact mean when we talk of unconsciousness?

II. UNCONSCIOUSNESS, FROM THE NEUROLOGICAL ANGLE

THE term “unconsciousness” is usually defined by reference to its counterpart: “consciousness”.⁴ Consciousness refers to the mental condition in which a human being is aware of his existence and of the world around him. Unconsciousness is the opposite: the unconscious person is not aware of himself or of what is happening around him, not even when he is given external stimuli.⁵ This is one of the ways in which coma differs from sleep.

3. “Diese Fragestellung”, as two West German authors commented in an article, “birgt erheblich mehr juristischen und emotionalen Zündstoff, als es zunächst scheint, da sie an den Grundfesten des Auslegung des §847 BGB rüttelt.” Ursula Lemcke-Schmalzl and Max Schmalzl, *Monatschrift des Deutschen Recht* (1982), p.621; (§847 BGB is the West German provision on damages for pecuniary loss).

4. I have referred chiefly to neurological literature. Naturally, there is also a psychological counterpart.

5. See for instance F. Plum and J. B. Posner, *The Diagnosis of Stupor and Coma* (1981), pp.1 *et seq.* In very concise form: M. Mumenthaler, *Neurology* (1983), pp.163 *et seq.*

There are various degrees of unconsciousness. The most severe is brain death. In the person who is brain dead all functions are permanently switched off. Respiration and circulation no longer work, nor is there any control over body temperature. The patient can be kept alive only briefly (usually for no longer than a few days) thanks to medical science.⁶ Sometimes this is done in order to obtain consent for the patient's still intact organs to be transplanted to another patient.

The patient in coma is in a less acute situation. Coma arises because of a malfunction in the brain, for example due to a blockage to the blood supply to the brain, some toxin which affects the brain, or a disease affecting the cerebral tissue itself. The coma patient seems to be asleep and, according to Plum and Posner, shows no "psychologically understandable response to external stimulus or inner need".⁷ Sometimes the coma patient may murmur a little.

As regards the coma patient a further distinction is made for the patient who is only alive in "a vegetative state". Almost invariably, coma patients who do not regain consciousness within a few hours or a few days enter into a vegetative state. Even then the patient still shows no sign of understanding at all, but it seems as if he has to some extent emerged from his coma. For example, he will open his eyes in response to external sound stimuli. Moreover, the patient has a fixed sleeping/waking cycle⁸; described by the term "*coma vigil*".⁹ Blood pressure, respiration and a number of other functions remain normal. Sometimes such patients still display remnants of communicative or mechanical behaviour, but they remain fully dependent on nursing. Some of them can seemingly still feel a little in the way of positive or negative emotions. But emotions are difficult to measure and are in part always a projection of the emotions of the observer. Discussions about assessing the emotions of such patients therefore always prove fruitless in practice.

But, as said, the patient living in a vegetative state does not otherwise differ from the coma patient. Usually, the patient emerging from a state of coma remains in that vegetative state for only a short time. This then represents an intermediate phase between coma and some other degree of consciousness. But sometimes no improvement occurs and the patient continues to live for many years like a vegetable, after which he dies without ever having regained consciousness. When lawyers refer to coma patients in the context of possible claims for damages, they are

6 Plum and Posner, *idem*, p 9 and especially p 313

7 *Idem*, p 5 In practice a pragmatic approach is usually chosen - coma is a general disturbance of the cerebral function which is serious enough to render verbal communication impossible

8 *Idem*, pp 6 *et seq*

9 E.g. Mumenthaler, *op cit supra* n 5, at p 163

therefore, strictly speaking, referring to patients who are "in a vegetative state".

Then there are the other forms of impaired consciousness which lead to reduced consciousness. The patient is then awake at frequent or less frequent intervals and responds to external stimuli. He often has great difficulty in keeping his attention focused, sometimes reacts in a confused way and has difficulty in finding his bearings in time and space.¹⁰ In this article such a patient is not considered to be unconscious; references to the "unconscious person" or the "coma patient" mean the patient who is not aware of his existence or his surroundings: the truly unconscious person.

But, we might ask, how does one know whether a person has no awareness? How do I know whether a patient is indeed unconscious, or that he is merely incapable of responding? The answer to that question is: we can never know for certain.

Nor can anything be said with certainty about the prognostication for a coma patient or a patient in a vegetative state. Much research is conducted into this, above all into those coma cases which result from brain damage caused by a head injury. This is attributable to the fact that—more than in other coma cases—these cases often involve young people.

In order to make a prognostication, various factors must be taken into account: the patient's age is of great importance. For instance, young victims (the literature refers to patients younger than 20) have much better chances than older victims. Furthermore, the duration of the comatose state is important: the longer the patient has been in coma the worse his prospects are.¹¹ By the time the matter of pecuniary damages arises, many weeks or months have already passed and the patient has usually lapsed into a vegetative state. His life expectancy presents a gloomy picture. Plum and Posner refer to research which shows that "long term survival in the vegetative condition is uncommon and affects only 1 to 2 per cent of all patients in coma either from head injury or severe medical illness".¹² But this may still involve a comparatively large number of patients. We will consider these in section III.

III. THE PROBLEM OF THE UNCONSCIOUS PERSON

ON 23 July 1965 Hoeve, driving his father's car, collided with the minor Tel. Tel was knocked unconscious straight away and died seven and a half months later without ever having regained consciousness. In the meantime his parents instituted legal proceedings in their son's name against the tortfeasor, claiming 50,000 guilders in damages for the pain

10. Plum and Posner, *op. cit. supra* n.5, at pp.4 *et seq.*

11. For more details see *idem*, pp.325 *et seq.*

12. *Idem*, p.338.

and suffering their son experienced and for his loss of enjoyment of life. In most countries the parents themselves have no right to damages. The Court of The Hague had no hesitation about the child's claim and rejected it because: "during his life after the accident there has been no suffering or loss of enjoyment of life which can be made good with money".¹³

In the Dutch legal literature the question of the consciousness requirement has never been treated in any detail. The Dutch author Paul Knol dismisses it in only a few words: "no pecuniary damages, except perhaps where the money may benefit the injured person".¹⁴ Yet the difficulty of reconciling reason and emotion, as I said earlier, does, in fact, make its presence strongly felt in the work of other Dutch authors. Some are apparently unable to accept that the victim should be left with no pecuniary damages at all.¹⁵

As I have said, the problem of the unconscious victim touches on the basic principles of compensation for non-pecuniary loss. If we assume that the unconscious person is not aware of his situation, then both the heads of damages—penance and compensation—seem to be eliminated entirely. The private-law punishment function is ruled out because, however controversial it may be, the victim will not realise that the culprit is doing penance. And the same applies to any compensation. To this extent the unconscious victim differs in no way from a deceased victim. And in the latter case no one will demand the reimbursement of non-pecuniary injury in the form of punitive damages for the deceased.

A. *Is Death Cheaper?*

This leads quite a few people to the curious proposition that it is therefore cheaper to kill someone than to injure him or, in this particular case, that it is better if the victim is and remains in coma than that he is conscious. Anyone who says this from purely financial considerations is correct. But the person who asserts that this points to a shortcoming in the law is wrong. From a legal viewpoint in fact, the statement that it is cheaper to kill than to injure is on a par with such statements as: it is cheaper to kill or injure a pensioner than a young, promising sales representative who is the father of three small children; or, it is better to collide with a rusty old jalopy than with a shining limousine. The point is that we should always see such statements as matters of *damage compensation*. In the chord which makes up this damage compensation every overtone derived from *criminal* law must by definition strike a dis-

13. Court of The Hague, 31 Jan. 1968, NJ 1968, 421.

14. P. C. Knol, *Vergoeding van letselschade* (1986), p.71.

15. Overeem, *op. cit. supra* n.1, at p.30. See also Th. L. van der Veen (1970) V.R. 120-121, and NJB 1968, 362.

cordant note. And so a minor lapse of attention can cause the most serious injury, in which case a high amount of damages will have to be paid. Conversely, an act of tort bordering on malice may give rise to such a slight injury that scarcely any damages may be awarded. Which is yet another indication that criminal law and the law of tort must in principle be kept separate.¹⁶

All in all, therefore, the principle of the tortfeasor doing penance or being punished certainly does not provide a solid basis for awarding damages for non-pecuniary loss to an unconscious person. But we also encounter problems with the principle of compensation, which is, after all, generally regarded as the basis for damages. The problem is that the unconscious person is not aware of his pain and *ergo* cannot suffer pain,¹⁷ moreover, he is not aware of his loss of enjoyment of life, which means that he does not suffer any distress about that either. And, what is more, even if a certain sum of damages were to be granted on an objective basis, what would the victim do with that money? Or, since we are dealing with an unconscious person, how would his legal representatives be able to use that money for his benefit? How can he be given enjoyment?

B The Millionaire and the Monk

Such considerations lead into dangerous territory, for it is generally assumed that the judge should not intervene in the question of what a particular victim actually does with the compensation he has been granted. Often the example is used of the injured millionaire. In determining the level of damages for non-pecuniary loss the judge must not allow himself to be swayed by the fact that that amount will hardly make the millionaire "richer" than he already is.¹⁸ The same applies *mutatis mutandis* to the victim who lives the ascetic life of a monk.

Does this mean that in the case of an unconscious accident victim, too, "the use to which the plaintiff puts such sum is a matter for the plaintiff alone"? Here we come up against two obstacles. Has the plaintiff experienced pain and suffering, does he feel distress for the enjoyment of life that he has lost and will not regain in the future? The answer is no.

And, in the second place even if one were willing to assume the exist-

16 See Lord Reid in *H West & Son Ltd and Another v Shephard* [1964] A C 326, [1963] 2 W L R 1359, [1963] 2 All E R 625, 629.

17 At least, this is what must be assumed see C E Izarel, *Human Emotions* (1977), p 168, quoted by Overeem, *op cit supra* n 1.

18 See Lord Morris of Borth y Gest in *West v Shephard* [1964] A C 326, 350. Also e.g. Diplock LJ in *Wise v Kaye and Another* [1962] 1 Q B 638-671, [1962] 2 W L R 96, [1962] 1 All E R 257. This was the earliest known case dealing with the central question in this article. See also *Winfield and Jolowicz on Tort* (1984), pp 624-625.

tence of pain and suffering, for instance by not considering the subjective circumstances of this unconscious victim, is it still possible to offset such an objectively determined suffering by providing happiness? All the damages for non-pecuniary loss granted to the unconscious person will ultimately by-pass him and go to his heirs.¹⁹ And those heirs are specifically the ones who are not entitled to such damages. The unconscious plaintiff therefore differs from the millionaire and the monk in that, by definition, none of his suffering can be compensated for

C *West Germany Zeichenhafte Wiedergutmachung (Exemplary Damages)*

In a number of countries the question of claims made on behalf of unconscious victims has long been pondered. In 1975 the West German Bundesgerichtshof ruled on a case where a motorist under the influence of drink had driven on to the pavement and collided with a mother and her 14-month-old daughter.²⁰ The mother was killed, the child was so severely injured that, according to the medical reports, she was merely "ein körperliches Überbleibsel einer menschlichen Person" (the physical vestige of a human being). for the rest of her life she would remain in a vegetative state

A claim was submitted for a sum of 100,000 Deutschmarks. The Bundesgerichtshof took the view that in this case compensation (*Ausgleich*) for the injury suffered was not possible. To avoid having to reject the claim, the court based its decision on the penance function (*Sühnefunktion*) of pecuniary damages: "Das bedeutet . . . dass die Zahlung den Schädiger als fühlbares Opfer treffen soll", despite the fact that such a monetary fine would bring "keine irgendwie geartete Empfindung der Genugtuung hervorrufen" (no feeling of satisfaction of whatever nature). An important factor in this decision was the "totally reckless behaviour" of the defendant. The court thus decided on an exemplary or symbolic (*symbolhafte*) penance by the tortfeasor in order to make sure that this severe encroachment on the lives of others would not "remain without at least a symbolic indemnification" (*zeichenhafte Wiedergutmachung*).

In the West German literature the decision by the Bundesgerichtshof

19 In some countries (e.g. Belgium and France) this situation is different. In the Netherlands, however, only the victim is entitled to damages for non-pecuniary loss, limited to £35,000. Furthermore, a comatose patient may constitute a source of income for the family members. For such time as he remains alive, there is an entitlement to compensation. As regards this danger, see Lord Denning in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] Q.B. 196, 217, 1 All E.R. 332, 341 (CA).

20 Bundesgerichtshof 16 Dec. 1975, NJW 1147, MDR 1976, 752, VersR 1976, 660. The exact degree of unconsciousness is not made absolutely clear from this judgment. But it is stated that the "*Ausgleich*" is "*funktionslos*" ("the compensation fulfils no function").

has been criticised by Lemcke-Schmalzl and Schmalzl. They point to the fact that in the case of the severely injured child the court did not take an “unprejudiced and sober” view, because “the natural human emotions have been given too much sway”.²¹ None the less, the decision has continually been used by lower courts as a basis for awarding damages for non-pecuniary loss.²²

D. United Kingdom: “The Damage Has Been Suffered”

It is still principally in the United Kingdom that the discussion has been focused on the actual principles involved. In four rulings judges have decided that the unconscious plaintiff is entitled to damages—not for the pain and suffering, of which the unconscious victim was not aware, but for the “loss of amenities” in which such unconsciousness ought not to play a role. It is worthwhile taking a closer look at these judgments, for almost all of them reflect fundamental dissent on issues of principle between the various judges.

The first case, *Wise v. Kaye*,²³ was decided in 1962 by the Court of Appeal. Veronica Wise, aged 20, was involved in a road accident due to the fault of another. She went into coma immediately and it was certain that she would never recover or become aware of her situation. The second case, a short time later, was that of *West v. Shephard*,²⁴ decided by the House of Lords. Here, again, the victim was a woman, a 41-year-old mother of three children who was knocked down as she crossed the road. She was seriously injured:

As a result of her injuries she became permanently bedridden and in need of continuous nursing attention in hospital; she was unable to speak, but could appreciate the difference between articles of food that she liked or disliked, showing her likes and dislikes by facial expressions; she could show some sign of recognition of relatives and of members of the nursing staff, and she could respond to commands by moving her right hand. Her expectation of life was seven years from the accident.²⁵

In both cases the court found that the victim was entitled to damages for non-pecuniary loss. Not as compensation for the pain and suffering, but because of the loss of amenities. Without being based on any really

21 Lemcke-Schmalzl and Schmalzl, *loc cit supra*, n 3

22 Lemcke-Schmalzl and Schmalzl, *Monatschrift des Deutsches Recht* (1985), pp 359 *et seq*, see specifically LG Munchen II, May 1980, VersR 1981, 69, LG Saarbrücken, Feb. 1980, *Zeitschrift für Schadensrecht* 1980, 330

23 *Wise v Kaye*, *supra* n 18

24 *West v Shephard*, *supra* n 16

25 *Idem* [1963] 2 All E R 625 She was not therefore really in coma and in fact led a life which was slightly more than a purely vegetable existence Remarkably enough, this distinction was hardly dealt with during the proceedings (see *supra*) See also section IV, *infra*

solid argument, Lord Justice Upjohn's considerations in *Wise v Kaye* were as follows²⁶

[F]or my part I am unable to see why the plaintiff while living is prevented from so claiming merely because she is wholly ignorant of the grave loss she has suffered and her chances of recovery are negligible. The injury to her has been done, the damage has been suffered. Her ignorance of either is immaterial. It is difficult to see why, in general, damages for such injury should be affected by ignorance unless the ignorance prevents the head of damage arising as in the case of pain and suffering.

Lord Justice Diplock, dissenting, took the following view²⁷

This unfortunate young woman during the 3½ years that she has existed since the accident has, as the judge said, lost everything in life except mere existence. But if she has lost all joys and pleasures she is also spared all pains and sorrows.

The same pattern can be seen again in *West v Shephard*. Here, too, a distinction is made between pain and suffering on the one hand, and loss of amenities on the other. Lord Morris of Borth-y-Gest said²⁸

An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of, and will eliminate, those heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.

In this case there were again dissenting opinions. The defendant's argument was put by Lord Pearce²⁹

Substantial damages are not awarded, it is said, for physical injury simpliciter, but only for the pain and suffering and general loss of happiness which it occasions. Therefore the deprivation of a limb can only command any substantial compensation in so far as it results in suffering and loss of happiness, and where there is little or no consciousness of deprivation there can be little or no damages.

This argument was rejected by the majority. It should, however, be borne in mind that the cases differed in that the victim in the first case was in coma, while the second victim—though not aware of her situation—did respond to some extent to external stimuli. What is rather

26 Upjohn LJ in *Wise v Kaye* *supra* n 18 [1962] 1 Q B 638, 660

27 Diplock LJ *idem* p 673

28 Lord Morris of Borth y Gest in *West v Shephard* [1964] A C 326 349, [1963] 2 All E R 625 633

29 Lord Pearce *idem* pp 642–643

surprising is that these cases are lumped together in one and the same category by almost all judges (both by advocates and opponents of damages for non-pecuniary loss). This must be wrong; the matter is discussed *infra*.

In both cases the victims were awarded the full amount of damages for the loss of amenities (£15,000 and £17,500 respectively), in other words regardless of whether or not they were aware of their situation.³⁰ (At today's values both amounts represent well over £100,000.)

In two subsequent cases, *Lim Poh Choo v. Camden Health Authority*³¹ and *Croke v. Wiseman*,³² fairly substantial amounts were also awarded (£20,000 and £35,000 respectively). But that does not mean that a number of judges did not have at least some doubts about the correctness of the decision. Currently the situation seems to be that the English judges do not wish to return to their original course.³³ If there is indeed a need for a change in the policy towards unconscious victims, this is considered to be more a matter for the legislature. In this context it is significant that the Pearson Commission has recommended that damages for non-pecuniary loss no longer be awarded to unconscious victims.³⁴ The Commission does indeed recognise that "the 'majority' approach reflects a natural human feeling", but it still advises that no entitlement to such damages be given to the permanently unconscious victim. A number of authors likewise advocate this change.³⁵

E. Canada, Australia, Belgium and France

As long ago as 1966 the Supreme Court of Canada adopted the approach taken shortly before by English judges.³⁶

Of more interest is the ruling from the same period by the High Court of Australia in *Skelton v. Collins*.³⁷ This case again involved a traffic accident as a result of which a 17-year-old went into permanent coma

30 See also *Swift v Prout* 108 S J 317 (CA)

31 See *supra*, n 19

32 *Croke v Wiseman* [1982] 1 W L R 71

33 As was explicitly stated by the House of Lords in *Lim Poh Choo* [1980] A C 174, 189 (*per* Lord Scarman) "If the law is to be changed by the reversal of *H West & Son Ltd v Shephard*, it should be done not judicially but legislatively within the context of a comprehensive enactment dealing with all aspects of damages for personal injury"

34 *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 7054 Vol I, para 393 e v

35 *McGregor on Damages* (1988) paras 1524 *et seq*, *Charlesworth and Percy on Negligence* (1983), pp 276 *et seq* and *Winfield and Jolowicz on Tort* (1984), pp 625 *et seq* Cautious approval P S Atiyah, *Accidents, Compensation and the Law* (1980), pp 217 *et seq* In the latest version (1987), edited by P Cane, the relevant passage has been abridged, p 188

36 *The Queen in the Right of the Province of Ontario v Jennings* [1966] 57 D L R (2d) 644

37 *Skelton v Collins* [1966] 115 C L R 94

with no prospects of recovery. In an extensive discussion of the English cases, the majority of the Australian judges opted for the "dissenting opinions" in *Wise* and *West*.³⁸

Where all the faculties are destroyed the loss is of all opportunities of happiness but, being to some indefinable extent off-set by the gain consisting of release from all liability to unhappiness, should be allowed for by a very moderate sum

In Belgium, too, there is reticence. There have been several verdicts in which the claim made on behalf of the comatose patient was rejected.³⁹ However, in Belgium—as in France—the pain of the close relatives is alleviated to some extent in that, if the victim dies, they themselves are entitled to compensation. But the unconscious person cannot, according to most judges, claim any right to "moral" compensation. In 1972, for instance, the court in Ghent ruled "A person's suffering can scarcely be compensated for by an amount paid out to another."⁴⁰

In France the question of consciousness as a requirement for damages for non-pecuniary loss has been explicitly dealt with in the case of the 42-year-old Jean-François Mouriec, victim of another person's negligent driving, he no longer realised what had happened to him or knew who he was.⁴¹ Just as in a number of English rulings, no distinction was made here between the really unconscious person (the coma patient) and the person who is severely mentally impaired. The ruling was worded in very general terms. In both lower courts Mouriec was awarded 60,000 francs. The same verdict was also reached by the Cour de Cassation: the compensation for the loss of enjoyment of life is not dependent on the victim being aware of his suffering. The Court's ruling reads in French as follows:

Attendu que Mouriec qui ne se rend pas compte de son état et ne se souvient pas de sa vie antérieure, ne serait pas conscient d'éprouver un tel préjudice, la décision attaquée énonce que l'indemnisation d'un dommage n'est pas fonction de la représentation que s'en fait la victime, mais de sa constatation par les juges et de son évaluation objective dans la limite de la demande dont ils sont saisis

In two annotations set out under the judgment, the ruling is regretted.⁴² For instance, Brousseau⁴³—without making a distinction between truly unconscious people and victims like Mouriec—takes the view

³⁸ *Idem* pp 101–102

³⁹ E.g. Corr. Brussel 14 Dec 1976; *De Verz.* 1976, 831; Corr. Luik 27 June 1977, *De Verz.* 1977, 407. See also (1984) *Tijdschrift voor Privaatrecht* 691 and J. L. Fagnart *Journal des Tribunaux* (1970) p 45

⁴⁰ Court of Appeal in Ghent 25 Jan 1972; *Rechtskundig Weekblad* 1971–1972, 1599

⁴¹ Cass. crim. 3 avril 1978, *J. C. P.* (1979) II 19168

⁴² C. Larioumet, *Recueil Dalloz Sirey* (1979) IR 64 *et seq.*

⁴³ S. Brousseau *J. C. P.* (1979) II, 26–27

“Nous savons que la victime est en état de démence complète et qu’elle n’est même pas en mesure de s’adonner aux joies de la lecture. Que répareront ces 60.000 F.?”

F. Discussion

A person who has died no longer suffers, so far as we can tell. The next-of-kin may lament the person’s death, but the deceased no longer experiences that as such.

The question, then, is whether the same applies to people who are unconscious, in coma. Assuming that no more stimuli penetrate through to the brain, are they still any different from a dead person? Certainly. So far as the law is concerned the unconscious person is alive and is not dead. He is still registered as a living person, he can receive legacies and bequests and he can make valid a right to damages for non-pecuniary loss. And yet, materially, he hardly differs, if at all, from a deceased person.

He has permanently lost control over his senses. As a contrast to the expression “seemingly dead”, some people refer to such a person as “seemingly alive”. Moreover, he is not *conscious* of his situation. But we must take care here, as people who are not living in a vegetative state, such as very young children or people who are severely mentally impaired, are not conscious of their situation either.

One could take the view that there ought to be no difference in principle between damages for pecuniary and non-pecuniary loss. If someone loses his leg through the tortious act of another, pecuniary damages are determined by calculating the financial consequences of that loss: loss of income, medical costs, costs of adapting the home, etc., *regardless* of whether the victim is aware of this loss. Or, to put it in rather unusual terms, the question relates to the extent of the personal injury. Why should this be different in the case of compensation for non-pecuniary loss? Consequently, this view assumes that there should be no difference in principle between compensation for pecuniary loss and compensation for suffering experienced and to be experienced. The non-pecuniary loss is, at it were, converted to an objectivised situation, is decoupled from the circumstances of this particular victim.⁴⁴

The English judges have—often by a tiny majority—always opted for “the objective way”, as have the French and Canadian judges. The German judge takes a middle road, a compromise between nothing at all and everything. The Dutch judge (one ruling), the Belgian and the Australian judges reject the claim.

44. See *Charlesworth and Percy on Negligence* (1983), pp.278–279.

I would choose none of these three solutions. Conscious or not conscious?—that is the wrong question. First, it may give rise to the very thorny question: can one be certain that the victim is truly not aware of his situation? Nothing can be said *with certainty* about this. But other difficulties are raised by this question when we consider those victims who are mentally so severely impaired that they are definitely unconscious of their situation. They may perhaps suffer pain and, on that basis, they may perhaps be able to assert a limited claim, but it is not possible to say that they are subjectively losing the *enjoyment of life*. They are unaware of the latter and in that respect they are not suffering. On the other hand, they are often very capable of communicating at a certain level with those around them. The person who believes that the truly unconscious patient cannot make good a claim for non-pecuniary loss because he is not suffering must—if he is to be consistent—reach the same conclusion as regards the severely mentally impaired person who is, basically, not suffering either. And yet there is no one who would deny such damages to the latter; see also section IV, *infra*.

The question: conscious or not? is therefore wrong. To arrive at a rational and emotionally more satisfying solution, lawyers ought to ask themselves a different question. This brings me back once again to the parliamentary history of the new Dutch provision for damages for non-pecuniary loss, and what the Dutch Minister of Justice Van Agt had to say: “[material compensation] is the only way of enabling the injured party—who cannot be provided direct with happiness—to find enjoyment through all the things he can do with that compensation”.⁴⁵

In other words: is the victim aware of the attempts being made to provide him with happiness in some way or another? And this is the crux of the question: the unconscious victim is not *receptive* to the enjoyment which could be given to him with the aid of damages. Damages for non-pecuniary loss can no longer provide anything which can enable the victim to experience happiness. Damages for non-pecuniary loss cannot ultimately provide any compensation for the loss of a leg, for a scarred face or for the loss of the sense of smell or taste—in the same way as pecuniary loss is normally made good. How does one measure grief for the loss of, say, a leg? Damages for non-pecuniary loss should be viewed in relation to the purpose they serve: providing happiness. In other words, not compensation *per se*, but compensation *with a purpose*. If this purpose cannot be achieved, no damages for non-pecuniary loss should be awarded. For this reason the claim for damages for the unconscious person should be rejected, and that for the mentally impaired person should be accepted.

45. Van Agt, *op. cit. supra* n.1, at p.385.

This seems to be exactly the reason why the Pearson Commission decided on a rejection of such claim. The Commission said⁴⁶

We think the approach should be to award non-pecuniary damages only where they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost. Non-pecuniary damages cannot do this for a permanently unconscious plaintiff. As Justice argued in their evidence to us, "When we compensate someone for non-economic loss, we are essentially seeking to relieve his suffering, and suffering is by its nature an experience subjective to the victim."

In the law we sometimes seem to forget that a legal judgment is not self-contained, it is a ruling that must also be explained to the people concerned, in this case the close relatives of a coma patient. The judge is more than just an oracle. If he explains his rejection of the claim with the words, "Sir, Madam your child has no right to damages because he (or she) is not suffering", he can expect astonishment and disbelief. On the other hand, however, an explanation saying "You would never be able even to start doing anything for the benefit of your child whatever the amount of damages awarded" will certainly sound somewhat more convincing to the parents.

Reason and emotion are thus reconciled in the best possible way. Despite what the German philosopher Ernst Marcus once said "Herz und Verstand sind Nachbarn, sie grüssen sich, machen sich Konvenienzbesuch, aber Freunde werden sie nie."

IV THE MENTALLY IMPAIRED PERSON

IN a certain sense the decision on damages for non-pecuniary loss in the case of unconscious victims is often fairly simple. First, they are not aware of their suffering, but in addition they cannot be aware of compensation—whatever form it takes.

Much more difficult and perhaps also more emotional is the situation of those victims who, as a result of a tortious act by another person, have to continue their lives at such a low mental and emotional level that they are not aware of their suffering, even though communication with those around them may certainly be possible.⁴⁷ Here we probably always have to differentiate between—in brief—the pain which the victim feels despite his physical state, and the past and future loss of amenities. The victim in fact knows nothing about that loss. Does this therefore mean that the mentally impaired person has no right to

⁴⁶ *Report, op cit supra* n 34 at para 397

⁴⁷ One can also think of the situation in which a tortious act is committed against a mentally impaired person: an idiot loses his leg through the fault of another person.

damages for non-pecuniary loss? No judge is willing to address this issue, either in the Netherlands or elsewhere.

Does the victim have any notion of his deteriorated situation? Does he realise the extent of the pleasures of life he has lost and will be losing? I am firmly convinced that, in the final analysis, these are not the questions which are involved (see section III.F, *supra*). In the case of the mentally impaired victim, too, we must shift our attention to the question of whether, assuming his loss of the amenities of life,⁴⁸ anything can be done with the damages for non-pecuniary loss to provide the victim with happiness as a form of compensation. The truly unconscious person and the mentally impaired person as discussed here therefore do not differ from each other in the sense that one is not aware of his suffering while the other is; but, where they do differ fundamentally is that the former cannot be offered compensation in any way, yet the latter can.

On 5 December 1966 an 11-year-old boy, Jeroen Pielage, was severely injured in a road accident caused by another person. Jeroen suffered severe brain damage and remained in coma for several months. After he emerged from the coma it was found that he would be completely incapacitated for the rest of his life: his power of speech was lost—he could express his thoughts only by using message boards; almost all the joints in his limbs were in the contracted position—the limited movements were spastic; he had no control over his legs; he was unable to pull himself upwards, and fell sideways when placed in a sitting position; he was completely incontinent; his body revealed severe scoliosis (lateral curvature of the spine), the spinal column was deformed and his eyes had a permanent squint.

Jeroen's parents, as his legal representatives, claimed 100,000 guilders damages. They wished to use some of the money to buy a jeep in which to take Jeroen at weekends to a quiet spot on the beach where they could let him bathe in the sea. The parents also considered having a swimming pool built in the garden of the family home. The defendant refused to pay damages for non-pecuniary loss: Jeroen, it was claimed, was not aware of his situation nor would be in future, so that he neither experienced nor would experience any grave suffering.⁴⁹

Let us—for argument's sake—assume that Jeroen was not aware of his dramatically deteriorated state, as the defendant asserted. Is he entitled to damages for non-pecuniary loss, or should that claim be rejected in the same way that the claim of the unconscious victim ought to be rejected? Both these victims cannot in any event be classed in one

48. This has to be judged on some form of objective basis.

49. Amsterdam Court 8 June 1973 and 1 Feb. 1974, VR 1975, 61 and 62 respectively. The doctors' opinion on Jeroen was "that Jeroen must be considered as capable of perceiving the tragedy of his situation".

and the same category, as the victim with these serious physical and mental injuries is at least still communicating with the world around him. Even though this may perhaps be at a low intellectual and emotional level. This is a highly relevant distinction. Jeroen may indeed be unaware of the difference before and after the events of 5 December 1966, but he does express feelings of pleasure and displeasure. With the damages for non-pecuniary loss it will be possible to provide him with some happiness: he can be taken to the beach and can swim a little with his parents' help. A just decision should therefore be that Jeroen is entitled to a certain amount of damages. The Dutch court awarded 70,000 guilders "weighing up all circumstances and also taking into account the possibility that Jeroen has no full awareness of the situation he is in"

This decision seems to tally with a sense of justice, but is it also sufficiently justified from a dogmatic point of view? In fact, the court was not entirely clear: on the one hand it acknowledged that the damages awarded could be spent for Jeroen's benefit, but on the other it took explicit account of the fact that Jeroen had no full realisation of his actual situation. Apparently, the court felt that the absence of full awareness must lead to a *reduction* in the damages for non-pecuniary loss.

My central proposition in the present article, however, is that the determining factor ought to be whether the victim is aware of the *compensation*, not in the sense that he realises *why* a certain amount of money is being awarded to him (because he cannot realise that), but because he is capable of deriving happiness from that which is bought for him with the money. To formulate it in slightly more abstract terms: the consciousness requirement in the case of compensation for non-pecuniary loss should relate to the victim's receptiveness to the happiness that can be given to him via the damages for that loss. This means that the fact that Jeroen had no full realisation of his sorry situation may be the very argument in favour of awarding him a *higher* amount than a conscious victim would have been entitled to under the same circumstances. In fact, providing happiness to Jeroen may possibly cost more than to an identical victim who differs from Jeroen only in being fully aware of his situation. Conversely, there might also be arguments in a specific case for awarding a non-aware victim *lower* damages, but such a decision would have to be reasoned, based on the facts. I therefore disagree with the Dutch court,⁵⁰ which obviously believed that Jeroen's

50 The second highest judge in the Netherlands. The Supreme Court of the Netherlands has not yet given any opinions on questions of this type. Since this article was written the Court of Appeal of New York has given a ruling in the case of *MacDougald v Garber* (21 Feb 1989). The case involved a woman who went into coma as a result of a professional medical error. The Court of Appeal's verdict on the claim for pecuniary compensation was "that we conclude that cognitive awareness is a prerequisite to recovery for loss of enjoy

reduced awareness ought *automatically* to lead to lower damages for non-pecuniary loss.

An added advantage of this solution is that the parties need not enter into an unsavoury squabble about the extent to which the victim is exactly unaware or aware of his situation and his future prospects.

V. THE VERY YOUNG CHILD

It is also asserted that very young children are not aware of their suffering and therefore have no right to compensation.

In 1971 a lorry collided with a car in which three children aged seven, four and two were passengers. A Dutch judge considered "that it is a miracle that the children have escaped so comparatively lightly, although they have suffered severe pain, and to this day are still walking about with scars on their faces and elsewhere". None the less, the cantonal judge found that the damages of 250 guilders claimed for each of the children ought not to be awarded.⁵¹

Here we must make a distinction between the pain and the scars. Undoubtedly, very young children suffer pain, in this case even a great deal of pain. The cantonal judge took this fact as his starting point but then went on to state that, specifically in view of their young age, the children would also forget the pain relatively quickly. This seems to be a strange line of reasoning: it inevitably leads to the conclusion that "older" people are more squeamish about pain than children. If it is thought that very young children should have no right to damages for non-pecuniary loss, it would be better to use the argument that very young children are indeed aware of the pain, but not of the enjoyment that can be bought for them with the money. They are too young to have had that experience. I would tend towards accepting such an argument, though whether it would still apply to a child of four is questionable. It certainly no longer holds true for a child of seven. Such a child is definitely receptive to the benefits of, though perhaps unaware of the reason for, the compensation. And yet there may be justification for awarding a young child lower damages for non-pecuniary loss than an older victim with comparable injuries. For the suffering of the older victim may indeed be very much greater. This can perhaps be best expressed by making the distinction between "pain" and "suffering", the criteria applied by English judges: the pain experienced may be identical, but

ment of life. We do not go so far, however, as to require the fact finder to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated. With respect to pain and suffering, the trial court charged simply that there must be 'some level of awareness' in order for plaintiff to recover. We think that this is an appropriate standard for all aspects of nonpecuniary loss"

51. Cantonal judge in Apeldoorn 25 Aug. 1971, VR 1973, 38.

the older victim will perhaps be much more worried about his recovery and will therefore suffer more. No doubt the judge who has to decide in such a case will have sufficient indications to arrive at a fair and equitable judgment.

VI. CONCLUSIONS

THE unconscious victim has no right to damages for non-pecuniary loss for such time as he is unconscious. He is probably not aware of his deteriorated situation, but the really important point is: he is not receptive to the happiness with which the damages are intended to provide him.

In England, West Germany, Canada and France the courts take other views, but from a dogmatic viewpoint they undeniably fall into difficulties. Apparently in sad cases like these they do not venture to take a decision which would have the same outcome as in those cases in which the victim dies. There is much criticism of these verdicts, and rightly so. The most conspicuous critic is the Pearson Commission, which advocates abolition of damages for non-pecuniary loss in cases of this kind.

Mentally impaired victims usually do have a right to damages for non-pecuniary loss. Even though they may perhaps not be aware of their deteriorated situation, they are almost always receptive to a greater or lesser extent to the happiness that can be provided with the aid of monetary compensation. And that is what counts. It is wrong if lower damages for non-pecuniary loss are automatically awarded to a victim who has no mental awareness of the condition he is in.

Very young children (one or two years old) will usually be aware of the pain they are experiencing, but that is all their suffering amounts to. They are not entitled to damages for non-pecuniary loss because they are not receptive to the happiness that is provided to them through the use of the money. That situation changes in the case of slightly older children, although their suffering will probably be less than that of older victims under the same circumstances. In so far as the suffering continues until an older age, there is no reason whatever for denying very young children the right to claim damages.