The Transmissibility of Damage Claims

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I. Introduction.

The various heads of damages under which the courts of the Province of Quebec have regularly awarded compensation in an action taken by the injured party have been quite clearly established although there has been much variation in the method of arriving at, and the precise measurement of, the quantum; however, such uncertainties as have attended delictual actions taken by the victim himself are but small in comparison with the problems rife in a delictual action taken either for the first time, or *en reprise d'instance,* by the heirs of the deceased. There are, on the one hand, the difficulties created by article 1056 whose very presence in the Code implies the existence of damages different from those which the victim or his heirs may claim under article 1053 [1] and, on the other hand, the complications resulting from the legal principle espoused by the common law, *actio personalis moritur cum persona.*[2]

This article will deal with those damages which the victim might successfully claim *de son vivant* and the problems involved in their transmissibility in the event of his decease before the trial. Thus,

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[1] The damages awarded under art. 1056 are those "occasioned by such death" and these are not limited to those damages which result from the fault directly. Fault, which is both the *causa causans* and the *causa sine qua non* of the damages claimed by the plaintiff under art. 1053, is only the *causa sine qua non* of the damages claimed under art. 1056, the death being clearly established by the Code as the *causa causans.* See, e.g., *Smith* v. *Pelletier,* [1942] B.R. 664, at p. 669, *per* Prévost, J. *Contra: Leblanc* v. *Ville de East Angus,* (1927), 33 R. de J. 530, at p. 533, *per* Archambault, J.

[2] The principle, enshrined in the old case of *Baker* v. *Bolton,* (1808), 1 Camp. 493, 170 E.R. 1033, has, of course, been rendered obsolete in the United Kingdom by the introduction of the *Law Reform (Miscellaneous Provisions) Act, 1934,* 24 & 25 Geo. 5, c. 41, and the decision of the House of Lords in *Rose* v. *Ford,* [1937] A.C. 826, [1937] 3 All E.R. 359.

the *frais funéraires* [3] and the *frais de deuil*,[4] which do not apparently have a solid doctrinal or jurisprudential basis under either article 1053 or article 1056, will not be treated since, *ex hypothesi*, they cannot be transmitted; nor, generally speaking, will those other damages which also do not form part of the succession be discussed.

On this basis, then, the heads of damages with which this article will deal are the following: disbursements; pain, suffering and inconvenience; total temporary incapacity; partial permanent incapacity; and loss of enjoyment of life. Each of these heads will be described more fully below, together with a determination in each instance of the transmissibility of the right of the deceased to claim those damages. In addition, the question of the right to damages for the shortening of life will be dealt with in the context of the last category, that of the loss of enjoyment of life, since the two categories have generally been confused by the courts of the Province of Quebec.

II. Transmissibility.

1)a) *Material and Moral Damages*

Before discussing each of the heads of damages independently, it will be necessary to focus briefly on the general distinctions which the courts have found to be crucial in the determination of the question of transmissibility. There are two distinctions to be made: that between material and moral damages on the one hand and that between patrimonial and extra-patrimonial damages on the other hand.

Nadeau gives a precise definition of material damages:

> Le dommage matériel est celui qui atteint la victime dans ses biens ou dans sa personne physique.[5]

Clearly, according to this definition, material damage denotes a depletion of the assets of the patrimony and connotes easy assessibility of the quantum of the depletion: for example, the addition

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[3] For a discussion of the claim for *frais funéraires*, the reader is referred to A. Nadeau, *Traité de droit civil*, t. 8, (Montréal, 1949), nos. 602, 605-606, pp. 516-518, 519-522; A. Perrault, *Critique des arrêts*, (1944), 4 R. de B. 502, at pp. 506-507; O. Frenette, *L'Incidence du décès de la victime d'un délit ou d'un quasi-delit sur l'action en indemnité*, (Ottawa, 1961), nos. 145-154, pp. 106-111, and the cases cited in these authorities.

[4] For a discussion of the claim for *frais de deuil*, see Nadeau, *op. cit.*, n. 3, nos. 603, 605-606, pp. 518, 519-522; Perrault, *loc. cit.*, n. 3, p. 508; Frenette, *op. cit.*, n. 3, nos. 155-160, pp. 111-114.

[5] *Op. cit.*, n. 3, no. 581, p. 502.

of medical, surgical and hospital bills; the cost of drugs and nursing fees; the price of a new car or repairs to the old one to put it back into running order; the loss of salary over the period of recovery and the necessary diminution of salary as a result of incapacity.

Moral damages, one might conclude, are those which do not affect the victim's assets or his physical person.

> Moral damages may be said to include all compensatory damages not affecting the body or the fortune.[6]

At least two other Quebec authors[7] adopt the view of René Savatier that moral damage is "... toute souffrance humaine qui n'est pas causée par une perte pécuniaire".[8] Thus, included in this category would be infringement of one's reputation or honour, infringement of one's affections or sensibilities, and, most relevant to this article, "... les souffrances physiques et morales que subit la victime du dommage".[9] Although these damages, in the words of the late L. Baudouin,"... sont moins liés à un préjudice pécuniaire",[10] they are nonetheless subject to pecuniary compensation.[11] That these damages are essentially personal and not readily susceptible of calculation in no way detracts from the necessity of awarding them as a measure of the civil responsibility of the tortfeasor.[12]

b) *Patrimonial and extra-patrimonial damages*

The distinction between patrimonial and extra-patrimonial damages is quite clear and obviously germane to this entire discussion,

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[6] G.V.V. Nichols, *The Responsibility for Offences and Quasi-Offences under the Law of Quebec*, (Toronto, 1938), p. 114.

[7] Nadeau, *op. cit.*, n. 3, no. 582, p. 503 and L. Baudouin, *Le droit civil québecois*, (Montréal, 1953), p. 832.

[8] R. Savatier, *Traité de la responsabilité civile en droit français*, (Paris, 1939), t. 2, no. 525, p. 101.

[9] Baudouin, *op. cit.*, n. 7, p. 833. See also Nicholls, *op. cit.*, n. 6, p. 114; Nadeau, *op. cit.*, n. 3, no. 583, p. 504; and A. Mayrand, *Que vaut la vie?*, (1962), 22 R. du B. 1, at p. 2.

[10] Baudouin, *op. cit.*, n. 7, p. 833.

[11] Owen, J. in *Lévesque* v. *Malinosky*, [1956] B.R. 351, at p. 360, stated that "...all of these items are basically the same and all can be expressed in terms of money."

[12] See, for example, in *Rose* v. *Ford*, [1937] A.C. 826, [1937] 3 All E.R. 359, the statements of Lord Wright at [1937] A.C. 848, [1937] 3 All E.R. 372, and Lord Roche at [1937] A.C. 859, [1937] 3 All E.R. 379, and the view of Cartwright, J., as he then was, in *Driver* v. *Coca-Cola Ltd.*, [1961] S.C.R. 201, at p. 217. Mayrand, *loc. cit.*, n. 9, at pp. 9-10, impliedly shares this opinion.

since the heirs of the deceased step into his shoes with respect to his patrimony and with respect to that alone. The patrimony is the assemblage of the rights and obligations of the deceased which are appreciable in money.[13] Into this juridical universality enter all those rights and obligations which are susceptible of economic evaluation.[14] Those rights are extra-patrimonial which have no economic value and which are, furthermore, by their very nature, relevant only to the person who possesses them.[15] They include, by way of example, the right of cohabitation of the husband, the right to take an action in separation from bed and board and the right to vote.

The importance of the distinctions made above is, in the opinion of the writer, the following: whether the damages are material or moral will be relevant in determining whether or not the right to sue for them came into existence at all; whereas the patrimonial or extra-patrimonial quality of the damage which has been caused by the fault will form the basis for the decision regarding the transmissibility of the claim.

2) *The effect of instantaneous death*

One must also consider the relevance (in determining whether the right came into existence in the patrimony of the deceased at the time of the accident) of the effect of the instantaneous death of the victim. It is a question which, before the famous case of *Driver* v. *Coca-Cola Ltd.*,[16] only appears to have arisen once in

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[13] Aubry et Rau, *Cours de droit civil français*, 3e éd., t. 2, (Paris, 1863), no. 162, pp. 2 et 3. See also the definition of Taschereau, C.J., in *Driver* v. *Coca-Cola Ltd.*, [1961] S.C.R. 201, at pp. 204-205.

[14] See, for example, the description by Jean Carbonnier, *Droit civil*, 3e éd., t. 2, (Paris, 1962), no. 2, p. 2: "Il ne faut, cependant, comprendre dans le patrimoine que les droits qui ont une signification économique et sont susceptibles d'être évalués en argent. Les autres en sont exclus et sont dits, pour cette raison, *droits extra-patrimoniaux.*"

[15] It follows from the definition of extra-patrimonial rights given in the text that this writer does not agree with Taschereau, C.J., as to the nature of an extra-patrimonial right. The Chief Justice defines the right as one which has no "valeur pécuniaire que pour [son] titulaire" (*Driver* v. *Coca-Cola Ltd.*, at p. 205). One would conclude from this definition, for example, that usufruct was an extra-patrimonial right, a clearly incorrect idea which might have enormous consequences in a case where the death of the victim was not instantaneous and the judgment turned on this point rather than the "naissance du droit".

[16] [1961] S.C.R. 201; aff'g [1960] B.R. 313.

Quebec,[17] whereas in France and the United States, the jurisprudence is replete with examples of the problem.

In France the issue appears to be settled. Despite the impressive number of judgments to the contrary,[18] the Cour de Cassation has settled the issue [19] by holding that instantaneous death does not affect the coming into existence of such rights as the French courts recognize in damage actions. Those authors who treat the point are nearly unanimous in their support of this position. Thus, for example, Mazeaud and Tunc have stated:

> Le dommage est nécessairement subi par la victime avant son décès. Si rapide qu'ait été la mort, il s'est forcément écoulé entre elle et les coups portés au moins un instant de raison. Obligatoirement les coups ont précédé la mort. Dans cet instant, si bref fût-il, où la victime déjà atteinte n'était pas encore décédée, dans cet instant où son patrimoine existait encore, est née la créance d'indemnité...[20]

The prevailing American viewpoint, suggests Prosser,[21] is that "since the decedent has had not time to suffer any appreciable damages... no cause of action ever has vested in him",[22] but Prosser's own view is that this is not a necessary conclusion of a court ruling under a "survival" statute [23] since the swiftness of the demise of the victim must only be significant relative to those damages which require either consciousness or duration to *exist* at all,

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[17] *Tessier* v. *La Compagnie du Grand Tronc*, (1899), 5 R. de J. 1 (C.S.).

[18] See, for example, *Boillon* v. *Chem. de fer Lyon-Méditerranée*, Besançon, 1 déc. 1880, D. 1881.2.65 et note, S. 1881.2.20; *Goossens* v. *Chem. de fer du Nord*, Amiens, 10 juillet 1901, S. 1902.2.8; *Auel* v. *Chem. de fer du Midi*, Toulouse, 17 avr. 1902, S. 1905.2.81, note P. Lacoste; *Chem. de fer Paris-Orléans* v. *Noblet*, Angers, 13 mai 1929, D. 1929.2.161, note Josserand; and cases cited by Mazeaud et Tunc, *Responsabilité civile*, 5e éd., t. 2, (Paris, 1958), no. 1912, p. 886, no. 4.

[19] *Comp. gén. des Omnibus* v. *Sanson*, Req., 10 avril 1922, S. 1924.1.153, note P. Esmein, D.P. 1923.1.52, note H. Lalou.

[20] Mazeaud et Tunc, *op. cit.*, n. 18, no. 1912, p. 886. See also Baudry-Lacantinerie et Barde, *Des obligations*, 2e éd., t. 13, no. 2884, p. 1118; P. Lacoste, S. 1905.2.81; R. Savatier, *Le dommage mortel*, (1938), 37 Rev. trim. droit civil 187, at 193; Planiol et Ripert, *Traité pratique de droit civil français*, éd. P. Esmein, t. 6, 2e éd., (Paris, 1952), n. 658, p. 924, n. 1; P. Esmein, note, S. 1924.1.153.

[21] W.L. Prosser, *The Law of Torts*, 3rd ed., (St. Paul, 1964).

[22] *Ibid.*, p. 924. See the cases cited there in n. 45 and the cases *contra* in n. 46 on the following page.

[23] One must remember that the statutory remedy, being exceptional, will be restrictively interpreted.

while remaining irrelevant insofar as those damages which, being independent of these factors, may be objectively ascertained.[24]

The *Driver* v. *Coca-Cola Ltd.*[25] case clearly does not put an end to the discussion of this issue in the Province of Quebec.[26] The Chief Justice[27] does not deal with the issue generally; he only discusses instantaneous death insofar as it relates to specific heads of damages,[28] which might, at a future date, leave the door open for a lawyer who was not pleading the same damages.[29] Cartwright, J., dissenting in part, assumes a position which clearly indicates that he favours the coming into being of the right in such circumstances,[30] while Fauteux, J., relying on the French authors and jurisprudence, supports the view of the French jurists with their very turn-of-phrase.[31]

One must conclude that the better view of the law is that the death of the victim, whether after an attenuated agony or at the instant of the accident, cannot suppress the birth of a right of action in the patrimony, for the patrimony continues to exist, *uninterrupted* by death, devolving from one heir to another throughout the continuum of time. It is the patrimony to which the damage has been

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[24] This statment is impliedly supported by *Naylor* v. *Yorkshire Electricity Board*, [1966] 3 All E.R. 327, at p. 332, [1967] 1 Q.B. 244, at p. 257, *per* Salmon, L.J. See also *Salmond on Torts*, 13th ed., ed. R.F.V. Heuston, (London, 1961), p. 93.

[25] [1961] S.C.R. 201.

[26] It is significant that the Court of Appeal does not discuss the issue of instantaneous death or even the question of consciousness. Galipeault, C.J., contents himself with remarking, "[o]n le sait, la victime est décédée le jour même de l'accident. A-t-elle vécu quelques heures, nous l'ignorons:" [1960] B.R. 313, at p. 317. One wonders where Taschereau, C.J., found evidence to support his conclusions regarding the instantaneous nature of the death.

[27] With whom Ritchie and Abbott, JJ., concur.

[28] [1961] S.C.R. 201, at p. 207.

[29] As, for example, a lawyer who was pleading the damages mentioned in the last clause of the immediately preceding paragraph.

[30] *Op. cit.*, n. 28, at pp. 216-217.

[31] *Ibid.*, at p. 218. He appears, however, at p. 220, to contradict himself and one may justifiably wonder what conclusion one may extrapolate from his words. His statements are the following:

(Pp. 218-219) "Sans doute et dans l'intervalle de temps, fût-ce même un seul instant de raison, s'écoulant entre le coup mortel et la mort qui s'ensuivit, on peut dire que la victime a été nantie d'un droit à la réparation de tout préjudice subi par elle en raison du quasi-délit commis à son endroit."

(P. 220) "La disparition juridique de la personne se produit à l'instant précis de son décès et, à ce même instant, s'éteint juridiquement la possibilité pour elle d'acquérir des droits ou des obligations."

caused and it is the successors to that patrimony who have the right to protect its integrity and to judicially call upon whosoever violates its integrity to repair the damage he has wrought. The damage results from the delict, *not* from the death, and hence the timing of the decease is irrelevant as regards the "naissance du droit".

3) *The Theory of Transmissibility*

Although the Civil Code defines succession as "... the transmission by law or by the will of man... of the property and the *transmissible* rights and obligations of a deceased person," [32] it gives no indication that there may be certain delictual claims which do not fall into the category of transmissible rights.[33] The articles dealing with the seizin of heirs [34] and the legatees [35] impose no limitation regarding the transmissibility of rights or actions. Article 607 reads, in pertinent part:

> Les héritiers légitimes lorsqu'ils succèdent sont saisis de plein droit des biens, droits et actions du défunt...

Article 891 is worded differently, but has much the same effect:

> Le légataire... est par le décès du testateur... saisi du droit à la chose léguée... ou du droit d'obtenir le paiement, et d'exercer les actions qui résultent de son legs...

The tendency of the authors and the courts in the past to impose a limitation on the transmissibility of certain claims resulted from the old legal maxim, *actio personalis moritur cum persona.* While the courts have unanimously supported the transmission of claims for material damage,[36] they have hesitated with respect to claims for moral prejudice which, appearing to be more closely connected to the person [37] in their origin than to the patrimony, they have often held to be intransmissible.

Even if it be admitted that claims for moral prejudice such as pain and suffering are personal to the victim, the writer would suggest that this does not conclude the issue. According to article

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[32] Art. 596 C.C. Emphasis added.

[33] Furthermore, one might add that the Code does not, in any *general* way, indicate which rights are transmissible and which are not.

[34] Art. 607 C.C.

[35] Art. 891 C.C.

[36] See, for example, the statement of Owen, J., to this effect in *Lévesque* v. *Malinosky,* [1956] B.R. 351, at p. 361.

[37] Casey, J., has suggested that such claims "...may even be said [to be] exclusively attached to the person" in *Green* v. *Elmhurst Dairy Limited,* [1953] B.R. 85, at p. 89.

607, the heirs succeed to the *property, rights and actions* of the deceased; [38] the article, if anything, seems broad enough to cover both categories, namely, material *and* moral claims. One might argue that article 1031, on the other hand, is restrictive: creditors may not exercise "... those rights which are exclusively attached to the person." Suffice it to say that such a limitation does not exist in the text of article 607.[39]

Those rights relating to the person which are not transmissible are, in the opinion of the writer, of two types: first, those rights which are clearly designated as intransmissible; [40] and second, those rights which are impliedly intransmissible since they belong to a person only by virtue of his juridical status and are, *ex hypothesi*, not transmissible to anyone whose juridical status is not the same.[41] If there are "personal" rights which are not transmissible, they are clearly these.

Furthermore, not only are such rights not transmissible in virtue of the provisions of the Civil Code, they are, according to the definition given above,[42] extra-patrimonial and not transmissible on the principle that the heirs succeed to the patrimony of the deceased and to that alone. All other rights, being patrimonial in nature, may be validly claimed by the heirs of the deceased,[43]

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[38] Pothier, *Oeuvres*, éd. Bugnet, (Paris, 1861), t. 8, pp. 111 *et seq.*, stated the issue in the following way in a passage on which the codifiers relied in the drafting of art. 607. He stated, at pp. 113-114:

"Cette saisine consiste en ce que tous les droits du défunt, toutes ses obligations, dès l'instant de sa mort, passent de sa personne en celle de ses héritiers, qui deviennent en conséquence, dès cet instant, chacun pour la part dont ils sont héritiers ...propriétaires de toutes les choses dont le défunt était propriétaire, créanciers de tout ce dont il était créancier, débiteurs de tout ce dont il était débiteur; ils ont, dès cet instant, le droit d'intenter, toutes les actions que le défunt avait eu droit d'intenter..."

See also Pothier, *op. cit.*, t. 9, pp. 188 *et seq.*

[39] Casey, J., in *Green* v. *Elmhurst Dairy Limited*, [1953] B.R. 85, at p. 90, described art. 607 as "...couched... in the widest terms."

[40] For example, arts. 224 (the right of the father to disavow a child) and 236 (the right of a child to establish his filiation).

[41] For example, arts. 117, 148 (dealing with the action for annulment of marriage) and 243 (paternal authority).

[42] See *supra*, at p. 678.

[43] With the exception, of course, of usufruct which terminates on the death of the usufructuary (art. 479) and the life-rent (art. 1910). Both these rights are clearly patrimonial and it is only by the express declaration of the Code that they are not transmissible.

whether they be material or moral. This is also the view of the jurisprudence.[44] Thus, Casey, J. has held:

> I can find no reason for saying that while we must admit the transmissibility of the right to claim for the "material" damages arising out of bodily injuries, we must deny this character to the right to claim for those called "moral".[45]

Three years later the Court of Appeal was faced with the same problem,[46] which Owen, J. dealt with in a slightly different manner from that of Casey, J. He stated that

> ...all the items which can be claimed as damages resulting from an offence or quasi-offence are by definition susceptible of being expressed in terms of money. Fundamentally they are all of the same nature. The pecuniary value of some items can be established more easily than that of others. Hospital and medical expenses can be established by producing accounts which set out the exact amount in dollars and cents. This cannot be done in the case of pain and suffering where an arbitrary amount is awarded. In spite of this difference, as to the ease or otherwise with which the calculation is made and the amount of the award is determined, all of these items are basically the same and all can be expressed in terms of money.[47]

As medical science has become more sophisticated and the courts have become readier to award higher damages for a larger number of complaints, the victim has been correspondingly rewarded in a more comprehensive fashion. Where moral prejudice may one hundred years ago not have been compensated at all, today such damages are susceptible of economic evaluation and the right to claim them is, as a result, clearly patrimonial. As such, it is a right which the heir or legatee may justifiably expect to find in his inheritance.

Mazeaud and Tunc offer the following explanation of the transmissibility of the claim to moral damages:

> ...la personne de la victime se survit dans ses héritiers. Les héritiers sont les continuateurs de la personne du défunt. Les actions attachées à la personne du *de cujus* ne s'en détachent donc pas lorsqu'elles sont

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[44] *Green* v. *Elmhurst Dairy Limited*, [1953] B.R. 85; *Lockwood* v. *Canadian Steel Sales Ltd.*, [1956] C.S. 426; *Lévesque* v. *Malinosky*, [1956] B.R. 351.

[45] *Green* v. *Elmhurst Dairy Limited*, [1953] B.R. 85, at p. 94.

[46] *Lévesque* v. *Malinosky*, [1956] B.R. 351. None of the judges sitting in this case, namely, Hyde, Owen and Bissonnette, JJ., had sat in the earlier case, in which Galipeault, C.J., St. Jacques, S. McDougall, Casey and Rinfret, JJ., had taken part.

[47] *Ibid.*, at p. 360.

> exercées par les héritiers. Rien ne s'oppose à ce que l'action née du dommage moral se transmette aux héritiers de la victime.[48]

The view of Savatier, on the other hand, is that the action for moral prejudice is not transmissible unless the victim has instituted his action and the heirs are merely continuing it *en reprise d'instance.*[49]

> ...l'action en réparation du dommage moral ne se transmet pas héréditairement, à moins d'avoir déjà été convertie en droit pécuniaire par l'assignation du demandeur. Nous croyons, en effet, que, seule, la victime du dommage moral a qualité pour opérer cette remarquable transformation d'un préjudice extrapatrimonial en droit patrimonial.[50]

The French jurisprudence follows the view of Mazeaud and Tunc, which is, in the opinion of this writer, the more consistent and sensible.

III. Heads of damages.

1) *Disbursements*

Disbursements, stated most simply, are the „"out-of-pocket" expenses of the victim which are the direct and immediate consequence of the accident.[51] They are, *ex hypothesi,* material damages and, on the basis of the principles regarding transmissibility outlined above,[52] their patrimonial nature clearly gives the heirs who succeed to the claim of the deceased for such amounts the right to make the claim themselves *ès-qualité.*[53]

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[48] *Op. cit.*, n. 18, t. 2, no. 1909, p. 884. See also *Editions de Paris* v. *Zay,* Civ., 17 janv. 1955, J.C.P. 1955. II. 8529 et note Blin. This is the case as long as there is no act implying renunciation of the claim.

[49] R. Savatier, *Le dommage mortel,* (1938), 37 Rev. trim. droit civil 187, at pp. 193, 194. This is also the view of Casault, J., in *Thompson* v. *Strange,* (1879), 5 Q.L.R. 205, at pp. 209-210 and *Lemelin* v. *Ladrie,* (1921), 59 C.S. 456.

[50] Savatier, *loc. cit.*, n. 49, at p. 194.

[51] For a more elaborate discussion of this classification of damages, see A.D. Guthrie, *Principles of Assessment of Personal Injury Claims,* (1967), 27 R. du B. 157, at pp. 163-167.

[52] See *supra,* at pp. 682 *et seq.*

[53] Frenette, *op. cit.*, n. 3, at no. 162, p. 114 and no. 218, p. 161, approaches the problem differently. The expenses incurred by the victim, being "une créance exécutoire sur les biens de cette personne," are transmitted *as a debt* to the heirs who then, equitably, he suggests, should be entitled to reimburse themselves by an action under art. 1053.

2) *Pain, Suffering and Inconvenience*

The right to claim for pain and suffering is well recognized by the courts of the Province of Quebec.[54] Clearly, however, where the victim dies instantaneously,[55] is unconscious from the time of the accident until his death,[56] or even remains in a coma for a prolonged period of time before succumbing,[57] the claim for pain and suffering never comes into existence in the first place and, as a result, is never transmitted to the heirs. This would presumably also be the case where the victim, although conscious, could not feel pain or suffer at all due to brain damage of such a nature as to cause this effect.[58]

Where the victim survives for any length of time and is conscious of his pain and suffering, the right to claim damages under this head comes into existence. The quantum should, however, be directly proportional to the duration of the pain and suffering (as well, of course, as to the intensity thereof), insofar as accurate quantification of this sort is conceivable; it follows that the quantum ceases to increase upon the decease of the victim.[59]

Following the definitions given above[60] and the opinion of Casey, J. in *Green* v. *Elmhurst Dairy Ltd.*,[61] it is apparent that pain and suffering fall into the category of moral damages, which are, on the basis of the position delineated above,[62] transmissible to the heirs, notwithstanding the position of some of the older jurispru-

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[54] *Green* v. *Elmhurst Dairy Ltd.*, [1953] B.R. 85, at p. 90, *per* Casey, J.; *Redfern* v. *City of Montreal*, (1937), 75 C.S. 497, at p. 500, *per* Mackinnon, J. See also Guthrie, *loc. cit.*, n. 51, at p. 167.

[55] *Naylor* v. *Yorkshire Electricity Board*, [1966] 3 All E.R. 327, at p. 332, [1967] 1 Q.B. 244, at p. 257, *per* Salmon, L.J.; *Morgan* v. *Scoulding*, [1938] 1 All E.R. 28, at p. 30, [1938] 1 K.B. 786, at p. 790.

[56] *Benham* v. *Gambling*, [1941] A.C. 157, at p. 162, [1941] 1 All E.R. 7, at p. 10, *per* Viscount Simon, L.C.; *Driver* v. *Coca-Cola*, [1961] S.C.R. 201, at p. 207, *per* Taschereau, J., as he then was.

[57] *Wise* v. *Kaye*, [1962] 1 All E.R. 257, at p. 264, [1962] 1 Q.B. 638, at p. 652, *per* Sellers, L.J. Also at [1962] 1 All E.R. 267 and [1962] 1 Q.B. 659, *per* Upjohn, L.J.

[58] *Oliver* v. *Ashman*, [1961] 3 All E.R. 323, [1962] 2 Q.B. 210, particularly the remarks of Willmer, L.J., at [1961] 3 All E.R. 335 and [1962] 2 Q.B. 236.

[59] *Smith* v. *Pelletier*, [1942] B.R. 664, at p. 668, *per* Prévost, J.

[60] See *supra*, pp. 677-678.

[61] [1953] B.R. 85, at pp. 90-91.

[62] See *supra*, pp. 682 *et seq.*

dence to the contrary.[63] The French jurisprudence also supports the transmissibility of the claim for pain and suffering.[64]

3) *Total Temporary Incapacity*

Total temporary incapacity, the award compensating the loss of earnings during the period when the victim was wholly unable to work, is clearly a material damage and, upon any theory of transmissibility, the heirs succeed to this claim. A full discussion of the factors involved in the calculation of this claim is not within the scope of this article,[65] but it must be noted that the amount will cease to accrue immediately upon the decease of the victim [66] and the amount to be claimed will be limited to the loss of salary between the date of the accident and the death of the victim.[67]

4) *Partial Permanent Incapacity*

Partial permanent incapacity is intended to compensate the victim for the partial loss of earning power which he will suffer as a result of his accident. It comes into existence when total temporary incapacity ceases and is largely a future damage by nature. In the hypothesis with which this article deals, namely, the death of the victim before trial, it is unlikely that an award under this

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[63] See, for example, *Thompson* v. *Strange*, (1879), 5 Q.L.R. 205, at p. 209, *per* Casault, J.; *Lemelin* v. *Ladrie*, (1921), 59 C.S. 456, at p. 459, *per* Belleau, J.; *Vallée* v. *Provost Cartage Co.*, [1958] C.S. 127, at p. 131, *per* Brossard, J.; and *Smith* v. *Pelletier*, [1942] B.R. 664, at p. 668, *per* Prévost, J. This is also impliedly the view of Mignault, *La responsabilité délictuelle en la province de Québec*, Journées du droit civil français (Montréal, 1936), 333, at p. 343, and expressly the view of Mayrand, *loc. cit.*, n. 9, at p. 15, given the current state of Quebec legislation on the matter: "Etrange paradoxe! On refuse aux héritiers le prix de la douleur *(solatium doloris)* qu'ils éprouvent personnellement au décès d'un être cher, mais on leur accorde le prix de la douleur *(pretium doloris)* éprouvée par le *de cujus;* il y a d'une part douleur sans réconfort, d'autre part enrichissement sans douleur."

[64] *Avril* v. *Kahn*, Civ., 4 janv. 1944, D.A. 1944.106, Gaz. Pal. 1944.1.128; *Dupuy* v. *Roussel*, Montpellier, 4 déc. 1940, Gaz. Pal. 1941.1.236 et note.

[65] On this point, see the article by Guthrie, *loc. cit.*, n. 51, at pp. 184-192.

[66] *Pauchet* v. *Lauvergnat*, Civ., 24 nov. 1942, Gaz. Pal. 1943.1.50 et note; *Miser* v. *Marshall*, Civ., 15 juillet 1943, Gaz. Pal. 1944.1.86 et note, D.A. 1944. 3, J.C.P. 1943.2.500.

[67] *Vallée* v. *Provost Cartage Co. Ltd.*, [1958] C.S. 127; *Cie d'Assur. La Nationale* v. *Tournemire*, Civ., 24 mars 1953, D. 1953.336, Gaz. Pal. 1953.1.376 et note.

head would be made at all.[68] If it could be, it would be an assessment of the damages between the time of the accident and the time of the death. Clearly a material prejudice, the claim arising out of incapacity, is transmissible.[69]

5) *Shortening of Life*

In discussing any damages relating to the shortening or loss of life one must keep in mind a distinction not always made by the high courts of this country, namely, the distinction between the shortening of the life expectancy of the victim, on the one hand, and the loss of enjoyment of those years during which the victim may expect to live, on the other.[70] The distinction, as we shall see, is crucial since the first type of damages may be objectively appraised and relate to different factors than those damages which fall in the second category, and which may be subjectively appraised.

Damages for the shortening of life relate to the increasingly accepted proposition that life itself is an asset,[71] the most precious of all assets, in fact, and one in which every man has a legal right.[72]

> Si misérable soit-il, l'homme normal tient à la vie comme un plus précieux des biens; la lui enlever, c'est lui causer le plus grand préjudice qui se puisse concevoir... A juste titre on peut considérer la vie comme le plus précieux des biens de la terre, puisqu'elle est le bien sans lequel les autres ne sont que néant...[73]

Every man has the legal right to ensure that the integrity of this most precious of all assets be not violated and, if it is, that the right to receive compensation for the damage caused by the author of the delict, which right is a patrimonial one, be exercised by himself or by his heirs, as the case may be.

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[68] It could clearly be made where the victim had recovered sufficiently from his injuries to return to work before his death, either from the accident or some other cause, but it must be kept in mind that the action for damages under art. 1053 C.C., being prescriptible by one year (art. 2262(2) C.C.), any award for partial permanent disability would be quite small. (It is, to begin with, only a percentage of the cost of an annuity equivalent to the annual earnings multiplied by the percentage of incapacity. See Guthrie, *loc. cit.*, n. 51, pp. 192-206, for a deeper discussion of the point.) *Marin* v. *Sauce*, Paris, 8 mars 1949, Gaz. Pal. 1949.2.26. See also *Cie d'Assur. La Nationale* v. *Tournemire*, Civ., 24 mars 1953, D. 1953.336, Gaz. Pal. 1953.1.376 et note.

[69] *Marin* v. *Sauce*, Paris, 8 mars 1949, Gaz. Pal. 1949.2.26.

[70] See Owen, J., in *Lévesque* v. *Malinosky*, [1956] B.R. 351, at p. 362.

[71] Mayrand, *loc. cit.*, n. 9, at p. 2.

[72] Guthrie, *loc. cit.*, n. 51, at p. 179.

[73] Mazeaud et Tunc, *op. cit.*, n. 18, no. 1913, p. 887.

This is clearly the view of the Quebec jurisprudence [74] although, even subsequent to the two leading decisions of the Court of Appeal,[75] judges of the Superior Court, misinterpreting the portent of those cases, have followed them and denied to defendants partial inscriptions in law for loss of *enjoyment* of life.[76] The English courts have come to the same conclusion on the matter of awarding damages for the shortening of life and one finds a certain advantage in reading their judgments on this matter since the judges there appear to be less equivocal and indeed quite outspoken and incisive in dealing with the issue.[77] The first decision of the House of Lords, which appears to have stated the law for all time, *Rose* v. *Ford*,[78] contains the following statements by Lord Russell of Killowen:

> I am of opinion that if a person's expectation of life is curtailed he is necessarily deprived of something of value, and that if that loss to him is occasioned by the negligence of another, that other is liable to him in damages for the loss.[79]

And Lord Wright:

> ...a man has a legal right in his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal

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[74] *Lévesque* v. *Malinosky*, [1956] B.R. 351; *Green* v. *Elmhurst Dairy Limited*, [1953] B.R. 85; *Lockwood* v. *Canadian Steel Sales Ltd.*, [1956] C.S. 426; *De La Sablonnière* v. *The Karam Co. Ltd.*, [1958] R.L. 436 (C.S.).

[75] *Green* v. *Elmhurst Dairy Limited*, [1953] B.R. 85; *Lévesque* v. *Malinosky*, [1956] B.R. 351.

[76] *Honsberger* v. *Godbout*, [1955] R.P. 311; *Lavoie* v. *Groleau*, [1956] R.P. 324. This interpretation by the Superior Court judges is probably not a misinterpretation, in fact, given the statement of Casey, J., in *Driver* v. *Coca-Cola Limited*, [1960] B.R. 313, at p. 327, denying that he had, in *Green* v. *Elmhurst Dairy Limited*, allowed damages for the shortening of life, but, see the interpretation of Owen, J., of the words of Casey, J., in the former's decision in *Lévesque* v. *Malinosky*, [1956] B.R. 351, at p. 362: "While the formal judgment (in *Green* v. *Elmhurst Dairy Limited*) uses the term 'loss of enjoyment of life', the term 'shortening of life expectancy' used in the notes of Mr. Justice Casey correctly describes the claim which was made."

[77] *Flint* v. *Lovell*, [1935] 1 K.B. 354; *Rose* v. *Ford*, [1937] A.C. 826, [1937] 3 All E.R. 359; *Benham* v. *Gambling*, [1941] A.C. 157, [1941] 1 All E.R. 7; *Oliver* v. *Ashman*, [1961] 3 All E.R. 323, [1962] 2 Q.B. 210; *Wise* v. *Kaye*, [1962] 1 All E.R. 257, [1962] 1 Q.B. 638; and *Naylor* v. *Yorkshire Electricity Board*, [1966] 3 All E.R. 327, [1967] 1 Q.B. 244.

[78] [1937] A.C. 826, [1937] 3 All E.R. 359.

[79] [1937] A.C. 826, at p. 839.

value, so that its impairment is something for which damages should be given.[80]

It is clear that the test must be an objective one [81] and, although one might disagree with the rather rigid method adopted by the House of Lords for making this objective assessment, it is apparent that, contrary to the position taken by the Supreme Court of Canada in *Driver* v. *Coca-Cola Limited*,[82] the lack of awareness of the victim is totally irrelevant in determining whether damage of this type has or has not been suffered.[83] The damage occurs *ipso facto* at the time of the accident and it is irrelevant whether the victim dies immediately, lives for less than a year but dies before he can take the action, or lives so that he may take the action himself. His death is only relevant insofar as its occurrence before the trial allows the judge to determine his life expectancy more accurately.[84]

The consciousness of the victim is, on the other hand, very relevant to the assessment of damages for the loss of enjoyment of life, for it is the sad perspective of seeing a shortened life marked by physical and mental anguish, filled with recurring infirmities and punctuated by pain, which is compensated under this head. It is these damages which the Supreme Court might justifiably have not awarded in the *Driver* v. *Coca-Cola Limited* case since Beverly Driver would have had to be conscious of *these* damages for them even to exist. It should be kept in mind, when assessing these damages, that they should be considered together with those damages awarded for pain and suffering since, to some extent, they do overlap.[85]

IV. Conclusion.

All damages, whether material or moral, which can be evaluated in pecuniary terms and which should, as a result, be awarded to the victim himself, should by virtue of their patrimonial nature be transmissible to his heirs. The fact that the heirs may not have

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[80] *Ibid.*, at pp. 847-848.

[81] *Benham* v. *Gambling*, [1941] A.C. 157, at p. 166, *per* Viscount Simon, L.C.

[82] [1961] S.C.R. 201.

[83] *Oliver* v. *Ashman*, [1961] 3 All E.R. 323, [1962] 2 Q.B. 210; *Wise* v. *Kaye*, [1962] 1 All E.R. 257, [1962] 1 Q.B. 638. This is also the position of Cartwright, J., as he then was, dissenting in the case of *Driver* v. *Coca-Cola Limited*, at pp. 216-217.

[84] *Rose* v. *Ford*, [1937] A.C. 839, at p. 846, *per* Lord Wright, and at p. 856, *per* Lord Roche.

[85] *Lockwood* v. *Canadian Steel Sales Limited*, [1956] C.S. 426.

suffered the more personalized damages themselves does not change the effect of the artifice created by the law, namely, the patrimony or estate, and it is by virtue of the heirs' relationship to this artifice that they are in the position to collect these damages. Nor does the fact that they have not personally suffered the damages imply that these damages, if awarded, are necessarily punitive, for punitive damages are distinguished by their lack of relationship to the real damage which has been caused by the faulty act and not by their lack of relationship to the person who is claiming them.