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**MORAL DAMAGES, INDEMNIFICATION AND PUNITIVE DAMAGES FOR THE
NEGLIGENCE OF A LODGING SERVICE PROVIDER
(DAÑO MORAL, INDEMNIZACIÓN Y DAÑOS PUNITIVOS POR LA NEGLIGENCIA DE UN
PRESTADOR DEL SERVICIO DE HOSPEDAJE)**

CASE: *Amparo Directo 30/2013*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: February 26, 2014

KEY WORDS: right to damages, right to a fair indemnification, reparation of damages, rights to equality and non-discrimination, moral damages, fault-based liability, wrongful act, causal link, quantification of indemnification, punitive damages.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo 30/2013*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of February 26, 2014, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2022-02/AD%2030-2013.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo Directo 30/2013*, Mexico.

SUMMARY OF AMPARO DIRECTO 30/2013

BACKGROUND: A young man died of electrocution when his kayak tipped over and he fell into the water of a hotel's artificial lake that was negligently electrified. His parents sued the company that owned the hotel and Admivac (the hotel manager), for an indemnification for moral damages, damages and losses arising from civil liability and the court expenses generated by the lawsuit. A trial judge determined the parents did not have standing to sue for damages and losses derived from the civil liability causing the death of their son, ordered Admivac to pay the parents an indemnification of 8 million pesos for moral damages and acquitted the other company because its liability was not proven. Admivac and the victim's parents filed appeals. The appellate chamber decided to modify the decision, ordering Admivac to pay the parents an indemnification in the amount of 1 million pesos. The parents and Admivac filed *amparos directos* against said ruling, over which the Mexico's Supreme Court of Justice (this Court) asserted jurisdiction.

ISSUE PRESENTED TO THE COURT: Whether article 1916 of Mexico City's Civil Code is discriminatory, since the last paragraph provides that when determining the amount of the indemnification or compensation for moral damages, the economic situation of the victims must be considered; and whether the amount of the indemnification established in the appeal was lawful.

HOLDING: The amparo was granted, essentially, for the following reasons. It was concluded that article 1916 of the Mexico City Civil Code is unconstitutional if it is construed to mean that the amount of the compensation for non-pecuniary [extrapatrimonial] consequences arising from the moral damages depends on the economic condition of the victim. It was determined that it is justified to assess this circumstance when determining the reparation of the pecuniary consequences. It was also determined that, given the serious impact on the rights of victims, the high degree of liability of Admivac and its significant financial capacity, the quantum of the indemnification must be equally severe. For the foregoing, the *amparo* was granted to the affected parties in order for the appellate chamber to overturn the challenged decision and issue

a new one in which, in accordance with the guidelines of this ruling, it orders Admivac to pay the parents of the young man an indemnification for moral damages in the amount of \$30,259,200.00 pesos.

VOTE: The First Chamber decided unanimously by five votes of justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena, and Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring opinion.)

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=153595>

EXTRACT OF THE *AMPARO DIRECTO* 30/2013

- p.1 Mexico City. The First Chamber of Mexico's the Supreme Court of Justice (this Court), in session of February 26, 2014, issues the following decision.

BACKGROUND

- p.7 On September 15, 2010, during the celebrations of the bicentennial of Mexico's independence, a young man invited a group of friends (among them, ASGM and his girlfriend) to join the celebrations at the Mayan Palace hotel in Acapulco.

On September 16, 2010, ASGM and his girlfriend boarded a kayak. While in the boat, they decided to rest in front of some artificial rocks, when turning, the kayak tipped over and both fell into the water, which was electrified. While trying to help them, a friend also fell into the water. With the help of a friend only ASGM's girlfriend managed to get back on the kayak.

- p.7-8 Several guests alerted the hotel staff, asking them to turn off the electricity of the artificial lake. After 20 or 25 minutes, a hotel employee finally disconnected the lake's electrical power, which indicates inexcusable negligence, as the electricity was controlled from the lakeshore.

- p.8 With the electricity turned off they managed to get ASGM out of the lake. First aid (resuscitation) was provided by hotel guests who claimed to be cardiologists. During the transfer to the hospital, paramedics established that he had died.

- p.2 By writ filed on February 21, 2011, ASGM's parents brought an ordinary civil suit against Company 1 and Admivac, a stock corporation with variable capital (hereinafter Admivac) for the following claims: (i) indemnification for moral damages, for the death of their son; (ii) derived from the strict liability of the defendant, the damages and losses generated as a result of the transfer of their deceased son to the State of Mexico, as well as the funeral and exhumation expenses, which come to the sum of \$77,798 pesos; and (iii) court expenses.

On August 9, 2012, a final decision was issued which determined: (i) in relation to civil liability, the lack of standing of the plaintiffs to file a claim for losses and damages resulting from the civil liability causing the death of their son, preserving their rights so they may assert them properly; (ii) in relation to the moral damages, Admivac was ordered to pay the plaintiffs an indemnification for moral damages in the amount of 8 million pesos; and (iii) Company 1 was exonerated of the payment of the indemnification for moral damages, since its responsibility for injuring the plaintiff's rights was not proven, and no special order was made on court expenses.

- p.3 Admivac and ASGM's parents both filed appeals. On November 28, 2012, the appellate chamber decided to modify the challenged decision to order Admivac to pay the plaintiffs an indemnification for moral damages in the amount of 1 million pesos.

ASGM's parents and Admivac both filed *amparo directo* lawsuits. The *amparo* lawsuits were sent to a Collegiate Circuit Court.

- p.3-4 On March 1, 2013, ASGM's parents requested that the cases be referred to this Court.

By decision of May 29, 2013, this Court determined to exercise its authority to assert jurisdiction over the *amparos directos*.

STUDY OF THE MERITS

- p.38 The concept of moral damages and the type of liability that occurs in this case directly affect the quantification of the indemnification for moral damages and consequently the constitutionality of article 1916 of Mexico City's Civil Code (the Code).

Under these conditions, in order to determine the constitutionality of article 1916 of the Code and whether the amount of compensation established by the appellate chamber was lawful, the following will be explained: (I) the general framework of the right to reparation of the damages; (II) what is moral damage; (III) that in this case Admivac was found liable, which gives rise to the reparation of moral damages to ASGM's parents; and (IV) the amount of the indemnification.

I. General framework of the right to reparation of damages.

p.38-39 According to the theory of civil liability, the one who causes harm to another is obligated to repair it, in accordance with the provisions of article 1910 of the Code. This harm may be caused by a breach of contract or by the violation of the generic duty of every person not to harm another. The first case is known as contractual liability and the second as non-contractual liability. In turn, non-contractual liability can be fault-based or strict.

p.39 Reparation of property or material damage is usually pursued through a civil suit for wrongful acts. However, there are other types of non-pecuniary impacts that have also been granted the right to reparation. This type of injury has been called moral damages.

II. Moral damages.

p.42 Moral damages are determined by the non-pecuniary [extrapatrimonial] nature of the impact, which may be the injury of a right or a simple non-pecuniary asset or interest. Thus, it is appropriate to define moral damages as the injury to a non-pecuniary (or spiritual) right or interest that is the premise of a personal right.

p.43 The conceptualization of moral damages centers its object and content on the non-pecuniary or spiritual interests that may be affected. In this regard, anguish, affliction, humiliation, suffering, or pain constitute damages to morale in so far as they are impacts to non-pecuniary interests.

p.44 As for the types of moral damages according to the interest affected, it can be argued that moral damage is a genus which in turn is divided into three species, namely: (i) damage to honor; (ii) aesthetic damage; and (iii) damage to feelings.

p.45 Damages to feelings, or to the affective part of moral property, as referred to in legal theory, hurt an individual's affections. This kind of moral damage is regulated in article 1916 of the Code. As will be seen, in this case ASGM's parents sued for the reparation of that type of moral damages.

A. Consequences of moral damages

The conceptualization of moral damage outlined above makes it possible to distinguish between harm in the broad sense (injury to a right or a non-pecuniary [extrapatrimonial]

interest) and harm in the strict sense (its consequences). Thus, the affected interest would be one thing and the consequences that the impact produces another.

- p.46 It is correct to qualify moral damage as the impact on a right or interest of a non-pecuniary nature, which can produce both non-pecuniary [extrapatrimonial] and pecuniary consequences.
- p.46–47 Moral damages have two types of projections: present and future. In all of them, the judge must assess not only the current damages, but also the future ones. Therefore, in addition to the economic or extra-economic nature of the consequences derived from moral damage in the broad sense, these can also be distinguished according to the moment at which they materialize.
- p.49 However, while in this case it was determined as settled that the victims did not have the standing to sue for pecuniary liability, it must be specified that the action for reparation of moral damages can be filed autonomously from the actions claiming pecuniary damages. This follows from a teleological interpretation of article 1916 of the Code.

III. In this case, Admivac was found liable, which gives rise to the reparation of the moral damages suffered by ASGM's parents

- p.50 Although it was established that moral damages can be claimed autonomously from injuries to patrimonial rights or interests, in order for them to be claimed, the existence of civil liability must be proven. Thus, in this case, it must be determined what type of liability is proven, taking into account the elements that compose it.
- In this case, it is argued that the type of relationship that was generated between the victims and the company was contractual in nature, and therefore ASGM used the hotel facilities at his own risk, since this is clear from the lodging contract and the hotel regulations where the company is exonerated from any liability for the use of its facilities. However, the type of liability that is proven in this case goes beyond the contractual scope.
- p.53-54 Speaking of consent generically, it can be argued that through this it is possible to authorize or consent to situations in which the legal system leaves the injured assets or rights freely waivable by the holder. However, consent cannot be given for the interference in or harm

to rights that cannot be waived by the holder; in this respect article 6 of the Code provides that the will of individuals is not a release from the observance of the law, nor does it alter or modify it. Only private rights that do not directly affect the public interest may be waived when the waiver does not affect the rights of third parties.

p.54 Thus, even if the guest accepts the risks inherent in the use of the hotel facilities, but it is determined that the harmful event occurred due to the negligence or carelessness of the hotel, a non-contractual liability exists, since such damages cannot be accepted through a services contract between the hotel and the guest, as they are legal assets not waivable by the holder, such as health, physical integrity and in this case life itself.

p.56 Now, the difference between fault-based and strict liability is that the latter does not have to show the subjective element of the conduct, that is, the fault or negligence of the defendant.

In this case we have fault-based liability, as it is relevant whether the company has fulfilled its duties of care derived from both public order norms and from the provision of the services it offers. It was the series of negligent acts that led to ASGM's death.

p.56-57 Indeed, it was not the artificial lake, or that there was a water pump in it, or the use of the kayak that, operating under normal conditions, led to ASGM's death. If the company had fulfilled its duties, such as if it had given maintenance to the water pump, the artificial lake would never have been electrified, thus avoiding ASGM's death. As will be seen below, the harmful act and the negligent conduct of the company are duly proven, and there is a causal link between such conduct and the harmful event.

p.57 To prove the fault-based liability of Admivac, the general elements that accompany the evidencing of that liability must be analyzed, namely: 1) Unlawful act or omission, 2) Damage caused, and 3) Causal link between the act and the damage.

1. Wrongful act

p.57-58 As a necessary assumption for non-contractual liability for moral damages to exist, article 1916 of the Code establishes that there must be an act or omission. Thus, the negligent

conduct of the person obligated to indemnify and the production of damages as a result of this behavior appear as requirements of fault-based non-contractual civil liability.

p.58 Acts or omissions are only a source of liability when they are unlawful. Therefore, not just any act or omission that causes damage will give rise to liability; the other elements of liability must also be present.

p.59 Unlawfulness may arise from two different sources: (i) that the person responsible has failed to comply with a generic duty of care that the provision of the service requires; or (ii) that the responsible person was obligated to act in accordance with some norm and failed to do so.

In this case, the service provided by Admivac is regulated by the General Tourism Law and the Federal Consumer Protection Law.

p. 72-75 From the facts, it follows that Admivac engaged in a series of unlawful acts, which gave rise to the damage, such as: 1) poor maintenance of the facilities and omission of security measures in their use; 2) failure to have trained personnel; and 3) the conduct of the company during the contingency.

p.75-76 In conclusion, it can be deduced from the established facts that Admivac failed to comply with the regulations that were applicable to it due to the nature of the service provided and that it was also negligent.

2. Damages

p.76 In order for liability to exist, damages must occur in addition to unlawful conduct. Damages must be certain. That is to say, their existence can be ascertained qualitatively, even if their amount cannot be exactly determined. Purely possible or hypothetical damages are not suitable to generate compensatory consequences.

p.79 In the matter analyzed here, the physical integrity of ASGM was illegitimately harmed, therefore, we have a case in which the moral damage suffered by the parents can be presumed from the harmful act. Once the relationship of kinship has been proven, it can be presumed that there are moral damages, in respect of the closest relatives of the

deceased, such as parents, spouses, common law partners, co-workers, children, siblings and grandparents.

p.80 In addition to the aforementioned presumption, the moral damages were directly proven, since the content of the expert opinions rendered demonstrated that ASGM's parents show psychological impacts derived from the death of their son. Therefore, the damage to their affections and feelings has been fully proven.

3. Causal Link

p.80-81 Finally, it is necessary to demonstrate the causal link between the defendant's conduct and the harm caused to the plaintiff. This means that the damage experienced must be a consequence of the conduct of the agent. Otherwise, a person who has nothing to do with the damage caused could be held liable.

In this case, the damage consisted of the impact on the feelings of the plaintiffs derived from the death of their son, which occurred because the lake he fell into was electrified due to the negligence of the company, consisting of not giving maintenance to the pump that caused the lake to be electrified.

IV. The amount of compensation derived from moral damages

p.87 This case must start from the right to receive a "fair indemnification" in order to determine the due compensation in the case of damages caused to the feelings of individuals. This means that the reparation must meet the standards established by that right.

Through compensation, fundamental objectives in terms of social retribution are achieved. Firstly, by imposing on the person responsible the obligation to pay an indemnification, the victim obtains the satisfaction of seeing his or her desire for justice fulfilled. Thus, through the compensation, the victim can verify that the damages caused to him or her also have adverse consequences for the person responsible.

Furthermore, compensation has a deterrent effect on harmful behavior, which will prevent future wrongful conduct. This measure fulfils a twofold function: people will avoid causing harm in order to avoid having to pay an indemnification and it will be economically convenient to cover all the costs necessary to avoid causing harm to other people.

p.87-88 This facet of the right to damages is known in the legal theory as "punitive damages" and it is part of the right to a "fair indemnification". Indeed, by means of compensation, the law punishes persons who act unlawfully and rewards those who comply with the law. This reinforces the victims' conviction that the legal system is fair and that their decision to act legally was useful.

p.91 Therefore, the amount of the indemnification to be fixed as compensation for the damages suffered by the victim must be sufficient to compensate for such damages and to reproach the misconduct of the person responsible.

p.94 In the quantification of moral damages, the following factors must be weighed, which in turn can be classified according to their level of intensity, among minor, medium or high. These modalities will make it possible to establish the *quantum* of compensation.

p.94-97 With regard to the victim, the following must be considered:

A) The qualitative aspect of the damage or moral damage strictly speaking: i) the type of right or interest injured, ii) the existence of the damage and its level of severity.

B) The patrimonial or quantitative aspect derived from the moral damage: i) the accrued expenses derived from the moral damage; and (ii) the expenses to accrue.

p.97-99 With regard to the persons responsible, consideration must be given to: (i) the degree of responsibility; and (ii) their economic situation.

p.100 It should be noted that the above-mentioned quantification elements, as well as their intensity qualifiers, are merely indicative. The judge, when weighing each of them, can note relevant particular circumstances. Their enunciation is simply intended to guide the actions of judges, starting from the function and purpose of the right to reparation for moral damages, but this does not mean that these parameters constitute an objective or exhaustive basis in the determination of the compensatory *quantum*.

A. Constitutionality of article 1916 of the Mexico City's Civil Code

p.100-101 The affected party considers that article 1916 is unconstitutional because by establishing the economic capacity of the victims as one of the parameters for determining the amount

of the indemnification derived from moral damages, people are discriminated against based on their social situation.

p.105 Because article 1 of the Constitution protects social status, there is a suspicion that any distinction based on this classification is discriminatory, so its rationale must be particularly rigorous and carry great weight.

First, it should be clarified that article 1916 refers to the fact that the economic situation of the victim should only be taken to calculate the amount of the indemnification, so this factor has no influence when determining the existence of moral damages, which is to say, the existence of injuries to the affections or feelings of the victims.

1. Test of equality with respect to the weighing of the economic situation to determine the compensation of the non-pecuniary [extrapatrimonial] consequences derived from the moral damage

p.108 Although the weighing of the economic situation of the victims could be considered to pursue a constitutionally compelling purpose, which is to satisfy the right to a fair indemnification, the measure is not suitable for achieving that end.

The distinction set out above is not linked to the constitutionally compelling purpose. The social condition of the victim does not affect, increase or decrease the pain suffered.

p.109 In this regard, this interpretation of the normative portion "economic condition" must be rejected as violating the principle of equality and non-discrimination. The economic status of victims should not be weighed in determining the amount of compensation for non-pecuniary [extrapatrimonial] consequences arising from moral damage.

2. Weighing of the victim's economic situation in order to determine compensation for pecuniary consequences

Article 1916 of the Code can be interpreted as constitutional, if and only if it is interpreted that the economic situation of the victim may be weighed in order to determine the indemnification corresponding to the pecuniary consequences derived from the moral damages.

p.109-110 The normative provision thus interpreted does not even distinguish between groups of people. In fact, the weighing of social status, as computable data when assessing the pecuniary loss caused by the moral damage, does not distribute rights according to classes of people. On the contrary, it aims to discover the real dimension of the damages. It is not a question of subverting the guarantee of equality but of gauging, with an equitable criterion, the real impact that the damage has on the subjective profile of the victim, for which the weighing of these aspects cannot be dispensed with.

p.110 Therefore, it is not necessary to perform the equality test to determine the constitutionality of article 1916 of the Code since, under this understanding, the article does not even differentiate between classes of people.

B. Study of this case

p.112 In this case, the appellate chamber assessed the victim's financial situation to quantify the pain suffered by ASGM's parents, i.e., to determine the non-pecuniary [extrapatrimonial] consequences of the moral damage. This is contrary to article 1 of the Constitution, since it is not linked to the purpose of the fair indemnification pursued by the institution of moral damage.

Therefore, the chamber's interpretation and application of article 1916 of the Code violated the right to equality and non-discrimination of those affected. Under these conditions, the concept of infringement is justified, and the Amparo must therefore be granted so that the determination of compensation for non-pecuniary [extrapatrimonial] consequences does not take into account their economic situation. In this way, the amount of the indemnification must be adjusted to the real impact that ASGM's parents suffered in their feelings.

1. Determination of the amount of compensation derived from the moral damages of ASGM's parents.

p.123 A serious impact on the qualitative aspects of the moral damage was determined with respect to the victim, which is to say that high ranking rights were injured. On the other hand, the present and future disbursement for the payment of the recommended

psychological therapies in the amount of \$259,200.00 pesos, was estimated as pecuniary consequences derived from the damages suffered.

- p.123-124 It was established that the responsible party's degree of liability was serious, since it put at risk the life and physical integrity not only of ASGM, but potentially of all its guests; a high degree of negligence was proven; and the high social relevance of the activities carried out by the company was justified. Furthermore, it is considered that Admivac benefits financially from the activities which, having been negligently carried out, led to the death of the young man, and that this company has a high economic capacity.
- p.124 In this regard, given the serious impact on the rights of the victims, the high degree of liability of Admivac and its high economic capacity, the *quantum* of the indemnification must be equally severe.

DECISION

Given the basis of the concepts of infringement studied, the federal protection requested by the affected parties is granted, so that the appellate chamber overturns the challenged decision, and issues another one in which, in accordance with the guidelines set forth herein, it orders Admivac to pay the parents of ASGM an indemnification for moral damage in the amount of \$30,259,200.00 pesos.