Unofficial English Translation of the Judgment of the Court

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| Downer c. Procureure générale du Québec | 2019 QCCA 1893 |

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| **COURT OF APPEAL** | |
| CANADA | |
| PROVINCE OF QUEBEC | |
| REGISTRY OF MONTREAL | |
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| No.: 500-09-028317-196 | |
| (760-17-004897-172) | |
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| MINUTES OF HEARING | |
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| DATE: November 8, 2019 | |
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| PANEL: THE HONOURABLE | ALLAN R. HILTON, J.A. |
|  | CLAUDINE ROY, J.A. |
|  | GENEVIÈVE COTNAM, J.A. |

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| APPELLANTS | COUNSEL |
| Vanessa Downer  WELLINGTON DOWNER  WELLINGTON DOWNER, in his capacity as liquidator of the succession of Carole Marie Yolande Downer (née Debien) | Mtre PATRYCJA NOWAKOWSKA  *(Gravenor Beck)*  Mtre Adam Eidelmann  *(Eidelmann Avocat Inc.)*  Absent |
| RESPONDENT | COUNSEL |
| ATTORNEY GENERAL OF QUEBEC | Mtre ALEXANDRA HODDER  *(Bernard, Roy (Justice-Québec))* |
| IMPLEADED PARTY | COUNSEL |
| Société de l'assurance automobile du Québec | Mtre Édith-Geneviève Giasson  Mtre MÉLANIE LÉTOURNEAU  (*Boisvert Gauthier*)  Absent |

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| On appeal from a judgment rendered on April 5, 2019, by the Honourable Guylène Beaugé of the Superior Court, District of Beauharnois. |

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| NATURE OF APPEAL: | **Application to dismiss an action for punitive damages allowed by the Superior Court - Automobile accident.** |

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| Court clerk: Élisabeth Lepage | Courtroom: Pierre-Basile-Mignault |

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| HEARING |

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| 9:33 a.m. | Commencement of hearing.  Continuation of hearing of November 6, 2019. The parties were excused from attending Court.  **PER CURIAM:** Judgment – page 4.  End of hearing. |
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| Élisabeth Lepage, Court Clerk |

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| JUDGMENT |

1. The appellants appeal from a judgment rendered on April 5, 2019, by the Honourable Guylène Beaugé of the Superior Court, District of Beauharnois, which allowed the respondent’s application to dismiss, thereby rejecting their originating application.
2. The appellants were victims of a motor vehicle accident that they attribute to the fact that a driver was going the wrong direction on the highway because of inadequate road and traffic signs and signals. They were compensated by the Société de l’assurance automobile du Québec under the *Automobile Insurance Act*[[1]](#footnote-1) (“*AIA*”)). They blame the Ministère des Transports, de la Mobilité durable et de l’Électrification des transports (“MTQ”) for its negligence in installing and maintaining a road and traffic sign that it knew was unsuitable and dangerous. They claim $4 million in punitive damages for the infringement of their right to life and security of the person guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*[[2]](#footnote-2) (the “*Charter*”).
3. At first instance, the judge found that the compensation regime in the *AIA* prevented the appellants from seeking punitive damages under the *Charter*. She also rejected the argument that s. 83.57 *AIA* does not respect the appellants’ *Charter* right to life and security of the person.
4. The appellants raise three issues in appeal:
5. Does the *AIA* apply to a situation of risk to public safety created by the state?
6. If the *AIA* applies to such a situation, does the prohibition it contains against compensatory damages extend to actions in punitive damages against the state based on the *Canadian Charter*, or can the two regimes be reconciled?
7. If the *AIA*’s compensatory regime cannot be reconciled with the *Charter’*s punitive regime, thereby preventing the enforcement of *Charter* rights, does s. 83.57 of the *AIA* pass the proportional balancing test or is reading down the appropriate approach?
8. At the stage of an application to dismiss, the only real question is whether the appellants’ application is unfounded in law, even if the facts alleged may be true (art. 168 C.C.P.).
9. We find that this is the case.
10. First, there is no doubt that s. 83.57 of the *AIA* prohibits the victim of a motor vehicle accident from suing the person responsible for the accident for punitive damages. This legislative provision states that compensation under the act stands in lieu of “all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice / tous les droits et recours en raison d‘un préjudice corporel et nulle action à ce sujet n’est reçue devant un tribunal”.[[3]](#footnote-3)
11. The appellants argue, however, that s. 83.57 of the *AIA* cannot prohibit a claim for a remedy under s. 24. (1) of the *Charter*. After outlining the facts at the basis of their claim, they simply allege that they have the right to a remedy under the *Charter*:

31. The Plaintiffs are nonetheless asking the Court to sanction the MTQ and award punitive damages to sanction, under section 24 (1) of the Canadian Charter of Rights and Freedoms, the reckless disregard, incompetence or lack of care of the MRQ and the resulting violation of Plaintiff’s right to life and security of the person, as provided for by section 7 of the Charter.

1. Before arguing that they are entitled to a remedy under s. 24(1) of the *Charter*, the appellants must establish that they were victims of an infringement of a right guaranteed under s. 7 of the *Charter*:

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| **Legal rights**  7. **[life, liberty and security of person]** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. | **Garanties juridiques**  7. **[vie, liberté et sécutité]** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale |

1. Therefore, they must establish[[4]](#footnote-4) not only that the MTQ’s negligence (1) violated their right to life or security of the person, but also that (2) this violation was contrary to a principle of fundamental justice. [[5]](#footnote-5)
2. As the Supreme Court stated in *Carter*: [[6]](#footnote-6)

[71] Section 7 does not promise that the state will never interfere with a person’s life, liberty or security of the person — laws do this all the time — but rather that the state will not do so in a way that violates the principles of fundamental justice.

(Emphasis added.)

1. As Iacobucci J. affirmed, “Correspondingly, if no principle of fundamental justice is contravened, s. 7 is not violated and there is no need to consider whether there has been a deprivation of life, liberty or security of the person”.[[7]](#footnote-7)
2. The notion of “principle of fundamental justice” refers to:
3. A legal principle,
4. about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and
5. that is identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[[8]](#footnote-8)
6. The appellants were required to identify the principle of fundamental justice at issue and allege the facts supporting the argument that it was not respected. However, in their proceedings, the appellants invoke no violation by the respondent of any principle of fundamental justice whatsoever. In their notice to the Attorney General of Quebec, they simply allege that the MTQ violated certain provisions in the *Highway Safety Code*[[9]](#footnote-9) respecting road and traffic signs and signals. At the hearing, they added that the failure to promptly correct the inadequate signage was arbitrary conduct tantamount to the violation of a principle of fundamental justice. These allegations do not meet the criteria established in *Malmo-Levine* set out above.
7. In reality, the appellants are trying to circumvent the effect of s. 83.57 of the *AIA* by invoking s. 7 of the *Charter* to claim damages because of what they consider to have been gross fault committed by the MTQ. Accepting this reasoning would be tantamount to creating a parallel state liability system based on the *Charter*. It would also recognize an autonomous right to the protection of life and security of the person that completely ignores the principle of fundamental justice inherent in s. 7 of the *Charter*.
8. In such circumstances, the appellants would never be able to meet their burden of proof. The remedy sought under s. 24(1) of the *Charter* is clearly unfounded in law.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal;
2. **THE WHOLE** with legal costs.

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|  | ALLAN R. HILTON, J.A. |

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|  | CLAUDINE ROY, J.A. |

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|  | GENEVIÈVE COTNAM, J.A. |

1. *Automobile Insurance Act*, CQLR, c. A-25. [↑](#footnote-ref-1)
2. Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, U.K., c. 11; R.S.C. (1985), Appendix II, No. 44. [↑](#footnote-ref-2)
3. *De Montigny v. Brossard (Succession)*, [2010] 3 S.C.R. 64; *Béliveau St-Jacques v. Fédérations des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, regarding an action for punitive damages under the *Charter of human rights and freedoms*, CQLR, c. C-12. [↑](#footnote-ref-3)
4. The burden of proof lies on the appellants: *Malmo-Levine*; *R v*. *Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at para. 97. [↑](#footnote-ref-4)
5. *Pearlman* *v*. *Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 881; *R. v*. *Beare*, [1988] 2 S.C.R. 387 at 401; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville, Que.: Yvon Blais, 2014) at 1154; Margot Young, “The Other Section 7” in Errol Mendes & Stéphane Beaulac (eds.), *Canadian Charter of Rights and Freedoms,* 5th ed. (Markham, Ont.: Lexis Nexis, 2013) at 656; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2019) at 70. [↑](#footnote-ref-5)
6. *Carter* *v.* *Canada (Attorney General),* [2015] 1 S.C.R. 331, 2015 SCC 5. [↑](#footnote-ref-6)
7. *Pearlman* *v*. *Manitoba Law Society Judicial Committee*, [1991] 2 R.C.S. 869 at 881. [↑](#footnote-ref-7)
8. *R. v*. *Malmo-Levine* [2003] 3 S.C.R. 571, 2003 SCC 74 at para. 113. [↑](#footnote-ref-8)
9. CQLR, c. 24.2, ss. 289 and 294. [↑](#footnote-ref-9)