

BELGIUM

Pr Dr Isabelle DURANT
UCLouvain, Louvain-la-Neuve
www.uclouvain.be

BELGIAN SUPREME COURT
Cour de cassation/Hof van Cassatie
14 December 2017, C.16.0296.N
<http://jure.juridat.just.fgov.be/>

General Framework:

The Loss of a Chance Theory and the Active Role
of the Judge

Facts of the case (1)

- Decision taken by a Municipality and a Province: renovation **permit refused**.
- Case brought **before the Council of State**: the refusal was illegal.
- Renovation permit **finally obtained** by the claimant.

Facts of the case (2)

- The claimant **has suffered damage** (in particular, loss of rental income).
- The claimant asked its lawyer to sue the Municipality and the Province to obtaining damages (assessed up to **€ 1,358,111.76**).
- The lawyer did not initiate the proceedings within due time.
- The claim for damages was declared **time-barred**.

The proceedings

- The claimant initiated proceedings for damages **against its lawyer**.
- ***What did the victim claim from its lawyer?***
Damages **up to the exact amount** expected from the Municipality and the Province (**€ 1,358,111.76**).

Decision of the Court of Appeal

Both the first instance judges and the Court of Appeal **rejected the claim** introduced **against the lawyer**:

1. The **burden of proof** rests on the shoulders of the victim.
2. The victim did not prove **with certainty** that its damage would not have occurred in the absence of the faulty conduct of the lawyer.

3. Obiter dictum

Decision of the Court of Appeal

3. *Obiter dictum*

It should have been possible to award damages **at the best** for the **loss of a chance**.

But :

- the victim did not seek damages for compensating a lost chance
- and the subject matter would have been modified.

Decision of the Supreme Court

1. The subject matter = the **actual result** the claimant intends to obtain.
2. A trial judge who grants compensation for the loss of a chance although the claim brought before him aims to obtain compensation for a lost advantage **does not change the subject matter** of the claim.
3. The trial judge is entitled to do so **ensuring protection of the rights of defence.**

Comments (1)

- *Principle of procedural law*, known under the name of **principle of party disposition**.
- Strictly applied, this principle should apparently have led to the consequence that the judge may not allow damages for compensating a lost chance when the claimant seeks damages to compensate its loss.

Comments (2)

- The new case law is surprising at first glance because the Supreme Court said for many years that the lost chance is an autonomous damage.
- *How could we then explain the new case law?* A number of explanations were forwarded. For instance, the idea that the compensation of the lost chance **is always implied** in a claim for compensation of a final damage.

Comments (3)

- The Supreme Court carries on the development of its case law on the *active role of the trial judge*.
- There are **limitations in place** to ensure the protection of certain fundamental rights. *Rights of defence* have to be respected.