Supreme Court of Justice of the Nation

Buenos Aires, September 21, 2004.

Having reviewed the record of proceedings: "Appeal against findings of fact filed by the defendant in the case: Aquino, Isacio vs. Cargo Servicios Industriales S.A.", for judgment on the admissibility thereof:

Considering:

1°) The Sixth Chamber of the National Court of Labor Appeals reaffirmed the trial court ruling declaring the unconstitutionality of Article 39, Subsection 1 of Occupational Risk Law (LRT) 24,557, and sentenced the defendant employer to pay compensation, based on the provisions of the Civil Code, for the damages caused by the industrial accident (suffered in November 1997) claimed by the plaintiff, who was an employee of the former. Among other aspects, it adjudged that the compensation provisions of the LRT applicable to the case were markedly insufficient and did not provide the full and comprehensive redress guaranteed to the worker under Article 14 bis of the Argentine Constitution and other provisions of constitutional status as stipulated in the various international instruments listed in Article 75, Subsection 22 thereof. In particular, this conclusion was reached following consideration of just the fact that compensation for loss of earnings was triple the amount provided for in the LRT in the event of loss of life. Subsequently, the lower court took the view that the worker, who was 29 years of age, was rendered fully disabled as a consequence of the industrial injury suffered when he fell from a 10-meter high tin roof, which made him incapable of performing any economic activity within his own trade or any other. Furthermore, it rejected the appeal against the conclusion reached by the trial court, ruling that it had been proven

that the worker had not been provided with the appropriate safety equipment, and that nets or other protective mechanisms had not been set up to guard against potential falls.

2°) The defendant filed a special appeal against this ruling, only insofar as the LRT has been found unconstitutional. This appeal has been incorrectly refused, as signaled by the Attorney General in the preceding opinion (Paragraph IV). Consequently, since the matter in question is under federal jurisdiction, and since all other requirements were met for the admittance of the special appeal provided for in Articles 14 and 15 of Law 48, it is deemed appropriate to uphold the complaint filed against the refusal mentioned above.

In this context, the Court shall proceed to examine the grievances expressed in relation to the invalidity of Article 39, Subsection of the LRT, which states: "The provisions of this law discharge employers from all civil liability towards their workers and their entitled successors, with the sole exception of the premises contained in Article 1072 of the Civil Code".

3°) Article 19 of the Argentine Constitution sets forth the "general principle" that "forbids 'men' from injuring the rights of a third party": the principle of *alterum non laedere.* This principle is intrinsically linked to the concept of redress". This is juxtaposed by the fact that "the liability set forth in Articles 1109 and 1113 of the Civil Code only enshrines the [above mentioned] general principle", insofar as the regulation stipulated therein with respect to "individuals and their consequent liabilities does not entrench them exclusively in private law; rather, it sets forth a general principle that governs all legal disciplines" ("Gunther vs State", Rulings:

308:1118, 1144, considering Clause 14. Also, Rulings: 308:1109).

In this respect, the case law of the Tribunal contains several examples that have expanded on the rationale of the scope of redress established in the above mentioned provisions of the Civil Code, which - as we have seen - express the above stated "general principal" contained in the Constitution. It thus needs reminding that the "value of human life cannot be appreciated through exclusively financial criteria. Such a materialistic conception must give way to a more comprehensive understanding of material and spiritual values, which are intrinsically bound together in human life, the redress of which must - at the very least - bring justice. Thus, it is not merely a question of measuring the financial capacity of victims in monetary terms, as this would create a form of justice whereby compensation is awarded based on the capital or victims of their capacity to produce economic assets through their labor. It would be baseless to assert that all sense in a person's life is exhausted beyond this factor, since expressions of spirit that cannot be measured in financial terms also form part of the vital value of human beings". Transcribed above is the *ratio decidendi* set forth as far back as August 26, 1975 (Rulings: 292:428, 435, considering Clause 16; also, Rulings 303:820, 822, considering 2; 310:2103, 2111, considering 10, and 312:1597, 1598, among et. seq.), which the passing of time and consequent living conditions have merely served to strengthen, particularly in respect of the threat to make men and women slaves to things, economic systems, production and their products (John Paul II, *Redemptor hominis*, 52).

Following this line of thought, the Court also rules, in view of this context of the Civil Code and with explicit reference to industrial injuries, that "moral damage" has been caused. Moreover, "disability must be subject to redress over and above that deemed appropriate for impairment of productive activity and moral damage, since physical wellbeing has a value to be compensated". In the case before us, it was ruled that "the near total loss of hearing suffered by the plaintiff, and the grave consequences thereof, unquestionably cause serious harm to his relational life, impacting on his social, sporting, artistic and other relationships" (Rulings: 308:1109, 1115, considering Clause 7). Hence, "the disability percentages estimated by medical experts, 'although they are important matters that must be considered', do not constitute strict guidelines that must necessarily be followed by the Court, since as well as appraising occupational concerns, it is also necessary to evaluate the consequences by which the victim is affected both individually and in his social life, thus providing a broader evaluation framework" (Rulings: 310:1826, 1828/1829, considering Clause 5). In the occupational sphere, it is also appropriate to compensate the loss of "chance" when an accident has deprived the victim of future opportunities for career progression (Rulings: 308:1109, 1117, considering Clause 9°).

These precedents implicitly, yet unmistakably, adhere to the humanist principles inserted in the Constitution, which have furnished the Court with a firm base of case law in constitutional matters. The first precedent states that "man is the axis and center of the legal system, and therefore an end in himself; 'beyond his transcendental nature', his character is inviolable,

constituting a fundamental value compared to which all other values take on an instrumental nature" ("*Campodónico de Beviacqua vs. Ministry of Health and Social Action*" Rulings: 323:3229, 3239, considering Clause 15 and quote). The second preceding is the principle that "the work of man boasts features that require that it be appreciated based on criteria that clearly go beyond mere economic market concerns, supported by the principles of cooperation, solidarity and justice [...] included in the National Constitution... This supports the obligation of the users of services, under the terms of the law, to preserve those who render them" (*S.A. de Seguros 'El Comercio de Córdoba' vs. Trust*" Rulings: 258:315, 321, considering Clause 10 and citations; also, Rulings: 304:415, 421, considering 7). The Employment Contract Regime (Law 20,744) was drafted from this perspective, prescribing that the "main goal of an employment contract is the productive and creative activity of man himself. Only afterwards shall it be understood that an exchange relationship and financial goal exists between the parties..." (Article 4).

Indeed, it has been maintained for centuries that manual labor only exists because of the man behind it: *homo per manum*.

4°) In "Province of Santa Fe vs. Nicchi", the Court ruled that "unfair" compensation was unconstitutional, since "to indemnify means [...] to discharge from all loss or damages by awarding proper compensation", which is not achieved "if the loss or damages survive in any way" (Rulings: 268:112, 114, considering clauses 4 and 5). This doctrine was proclaimed and applied in relation to the indemnification that ensued from an expropriation case,

based on Article 17 of the Argentine Constitution. Clearly, however, the same doctrine is even more relevant in the dispute before us. On the one hand, the issue at stake in this case is not the protection of material assets, which is an instrumental value according to the precedent stated in the "*Campodónico de Beviacqua*" case; rather, we are presented with a fundamental value: the protection of the physical, psychological and moral inviolability of the worker in events or situations that can be blamed on the employer. On the other hand, the Argentine Constitution demands *expressis verbis* – rather than the implicit expression in the above mentioned Article 17 - that the law shall ensure "equitable" - i.e. fair - employment conditions (Article 14 bis). Moreover, if the expropriated party is deemed to deserve such a consummate compensation award, entailing no greater sacrifice than reasons of "public utility" (Article 16 cit.), the case of the injured worker is even stronger, since it is the employer that benefits from the "discharge" from the alleged liability, having been unable to deliver on the principle of *alterum non laedere*. According to Judge Risolía, the "*Province of Santa Fe*" rule transcribed earlier in this paragraph is applicable to suits for loss and damages (which, in the case mentioned, ensue from a traffic accident), "ordering that compensation must be 'comprehensive', 'which has the same value as saying 'just'", since the *compensation* would not be consummate if the loss and damages survived in full or in part" (Rulings: 283:213, 223, considering clause 4 and citation, emphasis in the original). Similarly, Judge Argúas - in the same case - affirmed: "Argentine and foreign legal doctrine, as well as the case law of nearly all courts in the country, unanimously maintain that compensation must be 'comprehensive' or just [...] since if

this were not the case and the damage were to survive in full or in part, this compensation would fail to exist (p. 225, considering clause 8). Moreover, this Court acknowledged the application of Article 21, Subsection 2 of the American Convention on Human Rights: "No one shall be deprived of his property except upon payment of just compensation", for claims based on the right to life, thus granting these properties a scope that transcends the material sphere (O.158.XXXVII "Oharriz, Martín Javier vs. Ministry of Justice and Human Rights – Law 24,411 (Res. 111/90)", Ruling of August 26, 2003).

5°) In this context, the *thema* that requires clarification is whether Article 39, Subsection 1 of the LRT leads to an outcome compatible with the principles stated in the previous two clauses despite providing for the discharge of civil liability on the part of the employer, and thus "uprooting" the regulation stipulated in the Civil Code from the "legal discipline" of occupational accidents and illnesses (with the exception of Article 1072 of this Code, which contemplates a premise not present in this dispute). In setting forth this clarification, and given that this discharge derives from the provisions of the LRT, we must analyze the scope of the legal provision on declared total permanent disability (LRT, Article 15, Subsection 2, Second Paragraph, as per the text at the date of the accident, which shall be referred to hereinafter). Based on this provision, the judges in the case compared the regulations contained in the LRT against those of the Civil Code. For the purposes of this comparison, it is worth noting that all other provisions of the LRT - the so-called "in kind" provisions (Article 20, Subsection 1, a, b and c) - place no further civil demands upon the employer

(e.g. Rulings: 308:1109, 1116, considering clause 8). The same is true of any intention to incorporate into the benefits bundle the premises in relation to temporary industrial disability and permanent-total industrial disability (LRT, Articles 13 and 15, Subsection 1, First Paragraph).

6°) In view of the debate tabled in the case mentioned, firstly, it is unequivocal that the sole purpose of the legislation in Article 39, Subsection 1, was to establish a redress framework that was less far-reaching than that of the Civil Code. There are several reasons to justify this assertion. First of all, if the opposite position were taken, this would cause the discharge of the alleged civil liability to lack any practical sense or effect, which is at odds with the basic guidelines of legal hermeneutics (Rulings: 304: 1524, etc.), particularly so in relation to a regulation that has aroused heated debate and little else in both chambers of the National Congress in relation to the constitutionality thereof (see *Parliamentary precedents*, Buenos Aires, *La Ley*, 1996-A, pp. 465, 468, 469/470, 476/477, 481 and 505/515 "for the Chamber of Deputies"; and 555, 557/558, 562, 569/574 "for the Chamber of Senators"; also, see the minority report drafted in the former of these Chambers "idem, p. 462").

Secondly, unlike under the Civil Code, the system provided for in the LRT departs from any comprehensive interpretation of redress, as it does not recognize indemnification for damages other than that which constitutes a loss to the worker's earning capacity, thus making this a system of limited commensurability. Otherwise, the monthly "basic income" value would not be the determining factor in setting the benefit amount, particularly considering that the second part, "age of the

injured party", is applied only for the purposes of projecting this income factor forward (LRT, Article 15, Subsection 2, Second Paragraph). Other important factors also come into play. Basic income (LRT, Article 12, Subsection 1, idem): a) only takes account of the injured party's income earned through the dependency relationship, with cases of multiple employment (idem, Article 45.a) only considered within the limited scope of Decree 491/97 (Article 13); and b) even then, it does not include the full benefit received in this relationship, and instead, only includes benefits of a remunerative nature - subject to tax deduction - thus limiting earnings on account of social security withholdings (MOPRE, Law 24,241, Article 9, amended through Decree 833/97). Finally, the benefit is subject - without exception - to an upper limit of ARS 55,000 (LRT, Article 15, Subsection 2, Second Paragraph).

Therefore, the LRT - through the benefit stipulated in Article 15, Subsection 2, Second Paragraph, and the consequent discharge of liability on the part of the employer (Article 39, Subsection 1) - only compensates for material damages and, as part thereof, loss of earnings, which are assessed on a diminished basis.

7°) As such, no further study is required to find that the LRT, which excludes and fails to replace the protection offered by Articles 1109 and 1113 of the Civil Code, is not compliant with the constitutional guidelines described above, despite the statement therein that its "objectives" include "redressing the damages caused by industrial accidents and occupational illnesses" (Article 1, Subsection 2.b). In terms of protecting the psychological, physical and moral wellbeing of workers from the suppositions governed by the *alterum non laedere*

principal, it has refused to fully appreciate the rights of human beings and rejected the requirements of reparatory justice, followed by the Argentine Constitution and consequently by this Court, which must not be met a merely superficial manner (Rulings: 299:125, 126, considering 1 and citations, etc.). It is worth reiterating that the contents of considering Clause 1, settled before this Court has: first of all, the blame attributed to the employer for not having implemented the necessary safety measures; and the inadequacy of the redress provided for in LRT.

In this respect, the Tribunal asserts that there are no grounds to justify not only the abandonment, but any attenuation of the constitutional doctrine mentioned; on the contrary, the grounds set forth in this and the following clause order that this doctrine be followed to the letter.

Indeed, it is clearly the sole aim of Article 14 bis of the Argentine Constitution to grant all male and female workers special constitutional protection. The enshrining of what would come to be called the protection principle: “work in its different forms shall enjoy the protection of the laws”, and the obligation stipulating that said laws ”shall guarantee the worker: decent and equitable labor conditions” made the 1957 constitutional reform a major milestone in the evolution of our constitutional system, having enhanced the humanist grounding of the 1853-1860 text with the universalization of the reformist influences of social constitutionalism from the first half of the 20th Century. These influences were recognized by the Court early on (1938), when it ruled that several protective regulations that governed industrial relations were valid based on the fact that Argentine legislation was only following “the universal

rhythm of justice" (Rulings: 181:209, 213). This rhythm continued, as the 1957 reform transformed these legal provisions into "inexcusable" duties of Congress in the interests of "guaranteeing to the worker a set of inviolable rights" (Rulings: 252:158, 161, considering clause 3). The "exceptional significance of the economic and social relationships existing in contemporary society rendered it possible and just" that the issues included in Article 14 bis "would be intended for the most significant part of a constitutional reform" (idem, p. 163, considering 7 and citations).

According to those who made and ratified the Constitution, this regulation involved, in the words of the reporting member of the Drafting Commission, Conventioner Lavalle, an aspiration "to beat down [...] the 'man-screw' [...] and rouse the 'man-creature' who, gathered among his people, guided by freedom and on behalf of humankind, aspiring and aching, insulted and hopeful, performs his perishing duties" (*Diario de sesiones de la Convención Nacional Constituyente 1957,* Buenos Aires, Imprenta del Congreso de la Nación, 1958, Vol. II, p. 1061).

8°) The constitutional directive of Article 14 bis, which has now been in place for 47 years, has been strengthened and extended through the special protection of all workers recognized in international instruments on human rights, which have had constitutional status since 1994 (Argentine Constitution, Article 75, Subsection 22). The International Covenant on Economic, Social and Cultural Rights (ICESCR) is conclusive on this matter, of which Article 7 sets forth: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in

particular: [...] a.ii) A decent living for themselves and their families [...]; b) Safe and healthy working conditions". In addition, Article 12 refers to the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health", of which Subsection 2 establishes: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for [...]: b) The improvement of all aspects of industrial hygiene [...]; c) The prevention and treatment of [...] occupational diseases". The above mentioned Article 7.b of the ICESCR implies that, once the States have established appropriate legislation in matters of industrial health and hygiene, one of the most crucial aspects is the redress to which injured parties are entitled (Craven, Matthew, *The International Covenant on Economic*, Social and Cultural Rights, Oxford, Clarendom, 1998, p. 242).

Beyond this list of international regulations with constitutional status, other regulations relate specifically to the protection of women in the workplace provided for in the Convention on the Elimination of all Forms of Discrimination against Women. These provisions go further than those concerning discrimination against men in the workplace; for example, Article 11 establishes the "safeguarding of the function of reproduction" (Subsection 1.f.), and obligates the state to provide "special protection to women during pregnancy in types of work proved to be harmful to them" (Subsection 2.d.). The rights of children in the workplace are also provided special protection both in Article 32 of the Convention on the Rights of the Child and, in more general terms, in Article 19 of the American Convention on Human Rights.

On this point, it is worth stressing the activities of the Committee on Economic, Social and Cultural Rights, which is the body authorized to interpret the ICESCR at the international level, and to act under the effective terms thereof, as per the terms of Article 75, Subsection 22 of the Argentine Constitution. This activity highlights how important it is that the ICESCR recognizes the right of protection of workers who are victims of industrial accidents. For example, the body was not slow to censure the 1992 *New Zealand Accident Rehabilitation and Compensation Insurance Act*, which burdened workers afflicted by an accident with a portion of the costs of medical treatment (Commissioner Simma, Summary record of the 25th meeting: *New Zealand. 22/12/1993*, E/C.12/ 1993/SR. 25, Paragraph 17). In turn, the Guidelines on the Form and Content of Reports to be Submitted by States Parties, produced by said Committee, require States to take account of the legal, administrative or other provisions that prescribe minimum industrial health and safety conditions, and provide data on the number, frequency and nature of accidents (specifically fatal accidents) within the last five and ten years, comparing these with current data (HRI/GEN/2, 4-14-2000, Paragraph 16.a and b). In addition, the above mentioned international body has issued various warnings and recommendations to countries where industrial safety laws are not adequately met, and where high levels of industrial accidents occur in the private and public sector as a result (See Concluding observations on the third report of Poland, E/C.12/Add.26, 6-16-1998). In terms of Argentina, the Committee has expressed concerns regarding the "privatization of labor inspections," and the fact that "conditions in workplaces [...] frequently fail

to meet established standards". As such, it urges the government to "improve the effectiveness of its measures in the area of safety and hygiene in the workplace [...], to increase its efforts to improve all aspects of environmental and industrial hygiene and safety, as well as to ensure that the control and inspection of industrial hygiene and safety are carried out by public authorities" (*Concluding observations of the second periodic report of the Republic of Argentina*, 1-12-1999, E/C.12/1/Add.38, Paragraphs 22 and 37). The Committee had already warned Argentina, in its *Observations* approved on December 8, 1994, that "hygiene and safety in the workplace are frequently below established standards", and urged the government "to analyze the reasons for the lack of effectiveness of its initiatives in the area of safety and hygiene in the workplace and to make greater efforts to improve all aspects of environmental and industrial hygiene and safety" (E/C.12/1994/ 14, Paragraphs 18 and 21).

From a different perspective, the aforementioned protection principle contained in Article 14 is particularly coherent with one of the three obligations that, according to the Committee of Economic, Social and Cultural Rights, the ISESCR imposes on the State in relation to all human rights: the obligation to "protect", which requires the State to "adopt measures to ensure that companies or individuals" do not deprive people of their above mentioned rights (see *General Comment No. 12. The Right to Adequate Food (Article 11), 1999; No. 13. The Right to Education (Article 13), 1999; No. 14. The Right to the Highest Attainable Standard of Health (Article 12), 2000, and No. 15. The Right to Water (Articles 11 and 12)*, 2002, HRI/GEN/1/Rev.6, p. 73, Par. 15; p. 89, Par. 50; p. 104, Par. 35, and; p. 123, Par. 23/24-, respectively).

In the same vein, we must also take into account the countless precedents recorded in International Human Rights Law regarding the "positive obligations" of States "to guarantee the exercise and enjoyment of rights by individuals with respect to the power of the State, and also with respect to actions by private third parties" (see, for example: Inter-American Court of Human Rights, *Judicial Status and Human Rights of the Child, Advisory Opinion OC-17/2002, 8-28-2002, 2002 Annual Report of the Inter-American Court of Human Rights,* San José, 2003, pp. 461/462, Par. 87 and citations).

Moreover, with regards to persons with disabilities, which includes victims of industrial injuries, the ICESCR "clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact" on these individuals. "The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all of them", particularly when the area of employment is "one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities" (Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with Disabilities*, 1994, HRI/GEN/1/Rev.6 pp. 30, Par. 9; and 33).

9°) In short, the two considerations above establish that, where legal regulations are established for

the protection of workers injured in the workplace, Congress has a duty to grant the *alterum non laedere* principle the scope that it merits, and to avoid setting restrictions that involve any "alteration" of the rights recognized by the Argentine Constitution (Article 28). By doing so, the legislative function would also conform to the principles adhered to by international jurisdictions of human rights. Below, we cite one of the recent judgments from the Inter-American Court of Human Rights, which reiterates the case law of the Court in stating that, when it is not possible to resume the situation in place prior to the violation of the right for which redress is necessary, "just compensation" shall be awarded. Redresses, "as their name suggests, are measures that tend to remove the effects of violations committed. Their nature and amount depend on the damage caused both on a pecuniary and on a non-pecuniary level" and cannot involve "impoverishment of the victim" (*Bamaca Velázquez vs. Guatemala*. Redresses, Judgment of 2-22-2002, C Series No. 91, *2002 Annual Report of the Inter-American Court of Human Rights*, San José, 2003, pp. 107/108, Paragraphs. 40/41 and citations).

10°) Approaching the matter from another angle, it is a well-known fact that the LRT, by excluding the redress procedure contained in the Civil Code, removed this age-old institution for matters of industrial accidents and illnesses (Ruling 123:379), an institution that subsequent bodies of law have acted to maintain, as is true of Law 9699 regarding industrial accidents, passed in 1915 (Article 17).

Nevertheless, this legislative retrogression in the field of protection - as we can legitimately call it in view of the statements above - places the LRT in serious

conflict with one of the founding principles of International Human Rights Law in general, and particularly the ICESCR. Indeed, this latter instrument is grounded on the principle of progression, according to which, each State Party "undertakes to take steps [...] with a view to achieving progressively the full realization of the rights recognized in the present Covenant" (Article 2.1.). This regulation "must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question". Two consequences ensue from the above mentioned Article 2.1. First of all, States must move "as expeditiously and effectively as possible" towards this goal; and secondly, and this is particularly decisive in the *sub lite*, "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources" (Committee of Economic, Social and Cultural Rights. *General Comment No. 3, The nature of States parties' obligations, Paragraph 1 of Article 2 of the Covenant*, 1990, HRI/GEN/1/Rev.6, p. 18, par. 9; also: *General Comment No. 15*, cit., p. 122, par. 19, and, particularly on labor matters: *Draft General Comment on the right to work (Article 6) of the* International Covenant on Economic, Social and Cultural Rights, submitted by Phillipe Texier, Committee Member, E/C12.2003/7, p. 14, par. 23).

Moreover, there is a "strong presumption" that these retrogressive measures are incompatible with the Convention (Committee on Economic, Social and Cultural

Rights, General Comment No. 14 and 15, cit., p. 103, par. 32; and p. 122, par. 19, respectively), particularly since the purpose of the ICESCR is the "the continuous improvement of living conditions", as stated in Article 11.1.

The aforementioned mentioned "progression principle", also referenced in the American Convention on Human Rights (Article 26) in relation to economic social rights, has also been adopted by the constitutional courts of several countries. In this respect, despite maintaining that Article 13.2.c of the ICESCR has no direct effect on domestic jurisdiction, the Belgian Court of Arbitration ruled: "this provision, however, precludes Belgium, once the Covenant has entered into force [...] from adopting measures against the goal of the progressive establishment of equal access to higher education..." (*Arrêt No. 33792*, 5-7-1992, IV, B.4.3; also: *Arrêt No. 40/94*, 5-19-1994, IV, B.2.3). It is this guideline that is followed by the Committee on Economic, Social and Cultural Rights to censure increases in university tuition fees, for example, given that Article 13 of the ICESCR urges the opposite action; which is to say, the progressive introduction of free higher education (*Concluding observations of the third periodic report of Germany*, 2-12-1998, E/C.12/1/Add.29, Par. 22).

Similarly, the Constitutional Court of Portugal has ruled that "from the moment a State performs (totally or partially) the duties imposed by its Constitution for the implementation of a social right, its observance of the Constitution no longer consists (or no longer solely consists) of a positive obligation, and it instead becomes (or also becomes) a negative obligation. The State, which was bound to act in order to satisfy this social right,

becomes bound to abstain from acting against the implementation of the social right" (*Acórdão No. 39/84*, 11-4-1984, italics are the author's own; also: Gomes Canotilho, José Joaquim, *Direito Constitucional e Teoria da Constitução*, Coimbra, Almedina, 4th. ed., p. 469 and the doctrine cited therein, regarding the "prohibition of social retrogression" principle, or the "prohibition of reactionary evolution" principle).

The French Constitutional Court has also ruled, in reference to objectives of a constitutional value, that even in cases where the legislature or Government must determine, based on their respective competences, the forms in which these objectives are realized - for which purpose the former may amend, add to or repeal previously proclaimed legislative provisions - this is only possible insofar as the legal guarantees of the constitutional principles that these provisions were intended to implement are not removed (*Décision No.* 94-359 DC of 1-19-1995, *Recueil des décisions du Conseil Constitutionnel 1995*, Paris, Dalloz, pp. 177/178, par. 8). This is an example of the ratchet-like jurisprudence (a wedge that stops something from sliding backwards), which prohibits retrogression, but not progression.

In this context, we reference the words of the aforementioned reporting member of the 1957 Constituent Assembly Drafting Committee regarding the purpose of the draft, and ultimately ratified, Article 14 bis. Conventioner Lavalle, as quoted by Piero Calamandrei, maintained that "a government wanting to distance itself from the social reforms program would be acting against the Constitution, which not only guarantees that we will not go backwards, but also ensures that we will keep moving

forward", even when this "could displease someone who wants to stay solidly firm" (*Diario de sesiones*..., cit., Vol. II, p. 1060).

11°) The exclusion and discharge under discussion, as set forth in the 1995 Law, also serve to mortify the definitive foundations of the human rights established more than half a century ago in the Universal Declaration of Human Rights: the dignity of the human person, which does not derive from the recognition or grace of powers and authorities, but rather is "intrinsic" or "inherent" to all human persons (Preamble, First Paragraph, and Article 1; also, ICESCR , Preamble, First Paragraph; International Covenant on Civil and Political Rights, idem and Article 10.1, and; American Convention on Human Rights, Preamble, Second Paragraph and Articles 5.2 and 11.1, and other instruments with constitutional status). Thus, as both the foundation and source of the above mentioned rights, these rights "derive from" the inherent dignity of the human person, according to the ICESCR (Preamble, Second Paragraph; likewise: International Covenant on Civil and Political Rights, Preamble, Second Paragraph. See also: American Convention on Human Rights, Preamble, Second Paragraph). This latter continental instrument is conclusive in the matter: none of its provisions can be interpreted as "precluding other rights or guarantees that are inherent in the human personality [...]" (Article 19.c); and the American Declaration of the Rights and Duties of Man is also decisive in this regard: "Whereas: The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation

of circumstances that will permit him to achieve spiritual and material progress and attain happiness...” (First Paragraph).

As we will see in the following clause, the protection of human dignity inserted in the 1853-1860 text of the Constitution has received particular emphasis in issues of workers’ rights in Article 14 bis: the law guarantees “decent” working conditions. The decent working conditions mentioned in the ICESCR can only be those that respect the fundamental rights of the human person and the rights of workers, including “respect of the physical and moral wellbeing of the worker in the performance of his activities” (see *Draft General Comment on the right to work (article 6)*..., cit., p. 5, par. 8).

If we consider the fact that any impairment of the psychological, physical and moral wellbeing of the worker, prohibited under the *alterum non laedere* principle, must only be compensated under the terms indicated (Clause 6 above), Article 39, Subsection 1 of the LRT constitutes an affront to human dignity, as it involves a desire to reify or materialize the person by considering him as no more than a factor of production, or an object of the labor market. It is forgotten that the person is the master of the market, which can only be viable if the implementation of the person’s rights are respected (cf. Case V.967.XXXVIII “Vizzoti, Carlos Alberto vs. Amsa S.A. re: Dismissal”, judgment of September 14, 2004, considering Clause 11). The expression “labor market”, which is used more than once in the Message from the Executive to accompany the draft LRT (*Premises...*, cit., pp. 408 and 409), appears to ignore the pertinent observation of Pius XI when he talked of the “so-called” labor market: *in*

mercatu quem dicunt laboris (*Quadragesimo anno*, 36, 408). Indeed, this Court ruled out the possibility that the industrial regulation of the time could be included in the stipulations on commerce and traffic contained in Article 67, Subsection 12 of the Argentine Constitution - now Article 75, Subsection 13 - based on this consideration that "work is not a good".

Therefore, as well as insisting on the aforementioned precedent arising from the "*Campodónico de Beviacqua*" case, the Tribunal should remember that the dignity of the human person is the fulcrum around which the organization of basic constitutional rights revolves (Rulings: 314:424, 441/442, considering clause 8), and it must pay heed to Article 22 of the Universal Declaration of Human Rights, which states that everyone has the right to realization of the economic and social rights "indispensable for his dignity and the free development of his personality". Thus, in accordance with the case law of the Court, it cannot be deemed inappropriate to brand the damages as the "frustration of the full development of life" (Rulings: 315:2834, 2848, considering Clause 12).

12°) Furthermore, the provisions of the LRT are inconsistent with another landmark principle of the Argentine Constitution and International Human Rights Law: social justice, which we stress as being particularly relevant in the area of employment law on the grounds that it was established in the Preamble to the Constitution of the International Labor Organization at the beginning of last century as a means to securing world peace, and as an end in itself. A number of other international instruments, such as the Preambles to the Charter of the Organization of American States and the American Convention on Human Rights, have continued to proclaim and adhere to this

principal, which is also set forth in Article 34 of the Charter referenced (in accordance with the Buenos Aires Protocol).

However, it is not necessary to ground the right to social justice in the above mentioned premises - as this Court clarified in the landmark "*Berçaitz*" case - since it has been provided for in the Argentine Constitution since it was first drafted, as it states the realization of "general wellbeing" as its predominant objective (Rulings: 289:430, 436). Moreover, not only does the above precedent from 1974 state that social justice is "justice in its most complete form"; it also states that its content: "consists of the intersubjective activity of members of the community and the resources thereof being organized with a view to ensuring that all of its members share in the material and spiritual goods of society"; it is this justice through which "wellbeing" is obtained or achieved, or rather, "the living conditions in which it is possible for the human person to develop in keeping with his sublime dignity" (*idem*; also: Rulings: 293:26, 27, considering clause 3).

It is worthy of note that this type of justice inspired the drafting and ratification of the aforementioned Article 14 bis, as made clear by the 1957 reformers (Conventioners Jaureguiberry, - reporter of the Drafting Commission office - Peña, Palacios, Schaposnik, Pozzio and Miró, *Diario de sesiones*..., cit., Vol. II, pp. 1221, 1253, 1262 y 1267, 1293 and 1344, respectively), and as mentioned in due course by this Court (Rulings: 246:345, 349, considering Clause 7, and 250:46, 48, considering Clause 2).

Moreover, the so-called "new progress clause", inserted into the Argentine Constitution in 1994, is

testimony to the renewed momentum provided by those who drafted the Constitution in the interests of social justice, particularly if we refer to the terms in which Article 75, Subsection 19 was framed, under which it is the responsibility of the Congress to establish provisions for "human development" and "economic progress with social justice". Furthermore, it is no coincidence that, in the MERCOSUR integration process, participating states have accepted "economic development with social justice" in the organization's Social and Labor Declaration, (considering clauses, first paragraph).

This human development and economic progress with social justice is picked up by the Declaration on the Right to Development, adopted by the General Assembly of the United Nations General Assembly on December 4, 1986 (Resolution 41/128, italics added): "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the *fair distribution of the benefits* resulting therefrom" (Article 3), particularly since they also have a responsibility to guarantee "*the fair distribution of income*" and carry out appropriate economic and social reforms with a view to "eradicating all social injustices" (Article 8.1). On this point, it would be remiss not to quote the European Court of Human Rights: "Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature" (*James et al*, Ruling of 2-21-1986, A Series No. 98, Paragraph 47).

It is a question, then, of recognizing that "Law has irrefutably evolved from the historical point of view

by encompassing new values. Hence, jurisdictionalize social justice...", in the words of the concurring opinion of Judge Antônio A. Cançado Trindade of the Inter-American Court of Human Rights, (*Provisional Measures in the Community of Paz de San José de Apartadó Case*, Order of the Court of 6-18-2002, Annual Report of the International Court of Human Rights 2002, San José, 2003, p. 242, Par. 10 and citations).

At the same time, it should also be recognized that, by discharging the employer's civil liability for damages suffered by the worker, the LRT has not sought to implement social justice in the terms in which the concept has previously been conceptualized. In fact, it has taken the opposite approach by aggravating the inequality of parties which is a regular feature of industrial relationships (Rulings: 181: 209, 213/214; 239:80, 83 and 306:1059, 1064, considering clause 8) and, consequently, by establishing an invalid "legal preference" to the detriment of social justice (doctrine of Rulings: 264: 185, 187, considering Clause 6). In parallel, it locks in the legislative inobservance of the requirement to provide regulations aimed at ensuring "wholesome conditions of work and freedom from oppression", as attested by this Court in "*Roldán vs. Borrás*", citing the Ruling in *West Coast Hotel Co. v. Parrish* of the Supreme Court of the United States of America (Rulings: 250:46, 49, considering Clause 3; likewise, in terms of the state regulation of wages: Rulings: 246:345, 348/349, considering Clauses 6 and 7). On this point, there are two aspects worthy of note. First of all, the aforementioned domestic precedent from 1961 challenged the constitutionality of the obligation then imposed on employers to pay their employees a specific

monthly amount for each minor or unemployed child in their care; and secondly, this Court rejected this challenge, asserting that "the benchmark basis of the solution rests on the obligatory principles of social justice (Rulings: 181:209; 246:345, et. seq.) and the measured evaluation of the ethical demands and social-economic conditions of the collective to which it is applied" (p. 50, considering Clause 4). The requirement for the "justice of labor organization" set forth in "*Roldán*" would also establish grounds for this Court to reject other challenges in relation to various employee benefits imposed on employers (e.g. Rulings: 251:21, 34, considering Clause 3), specifically when the observance of this principle "also applies to contemporary enterprises" (Rulings: 254:152, 155, considering Clause 3).

13°) In the face of this wealth of constitutional objections, we refer once again to the Message from the Executive and the actions of the legislatures of both chambers of Congress in defense of Article 39, Subsection 1, both of which provide different reasons for supporting the bill: "establish conditions to ensure that financing sets forth reasonable and foreseeable costs", to prevent "out-of-control situations that can lead to appraisals that depart from technical criteria" and the "unequal treatment of two people in the same situation", to ensure a "flexible response to the needs of an injured worker without generating a financial hardship for his employer", and to stop "the practice of companies paying a lot and injured parties collecting little", to name but a few examples (*Premises*..., cit., pp. 409, 410 and 516). It was also stated that, after "the reform of the Civil Code, with the incorporation of the blame and causation theories in Article 1113, doctrine and case law serve to develop civil

action in the issue of comprehensive redress, which has been distorted in recent years to become what is now known as the "suing culture" (*idem*, p. 509).

This Court is left in no doubt that it is fair and reasonable for legislation to provide for the range of interests and prospects that jeopardize industrial relationships for reasons of accident or illness, in terms that give a balanced consideration to the interests of all interested parties compromised by such a situation. Nor is it in any doubt that the solution to these issues must come from a broader outlook that takes into account general welfare.

However, this comes with the obligatory condition that the means chosen to achieve such goals and balances must be compatible with the principles, values and human rights that the Constitution orders be respected, protected and implemented by all State institutions.

Even if legislation had been guided by the pursuit of general welfare, we would have to assert that this is a "concept that refers to the conditions of social life that allow members of society to reach the highest level of personal development", whose main aim is "the organization of society in a manner that [...] preserves and promotes the full realization of the rights of the individual" (Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Articles 13 and 29 of the American Convention on Human Rights*, Advisory Opinion OC-5/85, 11-13-1985, Series A No. 5, para. 66). Moreover, it should be added that subordinated work denotes "a situation which numerous members of society are destined to be in at some time" (Rulings: 305:2040, 2044, considering Clause 4).

In any case, "the idea that the general welfare pursued through Article 67, Subsection 16 [of the Argentine Constitution - now Article 75, Subsection 18] is a goal whose implementation justifies the encumbrance of human rights, is false and must be rejected [...] The reality, which is coherent with the country's regulations and legal conscience, is quite different. In other words, development and progress are not incompatible with the strict observance" of Article 28 of the Argentine Constitution (Rulings: 247:646, 659, considering Clause 22), which establishes that "the principles, guarantees and rights" established therein "may not be affected by the laws governing its exercise".

Moreover, one of the strong grounds of the "*Mata vs Ferretería Francesa*" case - which also ruled in respect of a law protected by the first paragraph of Article 14 bis - is fully applicable to the present case: "given the reasonability of the obligations [...] the principle reigns whereby the fulfillment of industrial obligations is not dependent on the success of the company (Rulings: 189:234; 234:161; 240:30 et. seq.), as the continuation of this success cannot be made, in law, to depend on the survival of an unfair system of arbitrary dismissals (Rulings: 252:158, 163/164, considering Clause 10).

If the system prior to that of the LRT had demonstrated a "failure to provide comprehensive and timely redress to persons suffering from the consequences of an accident", as asserted in the aforementioned Message from the Executive (*Premises*..., cit., p. 408), it is also true that its replacement, which was supposed to improve redress in terms of promptness, constituted a frank retrogression of this comprehensive nature in the shape of Article 39, Subsection 1.

14°) Since its very beginnings, this Court has set forth that laws are susceptible to having their constitutionality challenged "when they are unreasonable, or rather, when the means of arbitration are not appropriate to the goals they aim to achieve, or when they clearly enshrine an iniquity" (Rulings: 299: 428, 430, considering Clause 5 and numerous citations).

In view of the foregoing, this Court deems Article 39, Subsection 1 of the LRT to be unconstitutional, as it discharges the employer from all civil liability under the provisions of Article 15, Subsection 2, Second Paragraph. This conclusion shall be rendered null and void in the event of the Court ruling in light of other principles, values and precepts of the Argentine Constitution.

Finally, we issue two notes of caution. First of all, the winding up of this action does not imply the censure of all legal provisions that restrict reparations for damages, including the LRT. This judgment is grounded on the fact that, regardless of the leeway allowed under the Argentine Constitution with regard to these limitations, it is unthinkable that - in view of the applicability of the aforementioned principle contained in Article 19 of the Argentine Constitution: *alterum non laedere*, - they could serve to legitimately prevent the worker, protected under the Constitution, from claiming fair compensation from his employer for the damages caused by an industrial accident or illness.

Secondly, the solution reached does not foresee the frustration of the noble aims of the automatic and prompt granting of benefits pursued by the LRT. Indeed, the fact that it is constitutionally baseless for the aforementioned benefits of the LRT to discharge the employer from any

civil liability (Article 39, Subsection 1) clearly does not relieve Industrial Risk Insurers from having to meet their obligations contracted under the above Law. As such, not only does this judgment leave the stated objectives of the legislature intact, it also allows the employer to seek protection under his insurance policy.

Therefore, in concordance with the opinion of the Attorney General, it is hereby resolved: that the complaint be received, that the refused special appeal be declared admissible, and that the judgment appealed be confirmed in relation to the grievance tested, with costs awarded to the appellant (Article 68 of the Code of Civil and Commercial Procedure). It is ordered that the deposit (p. 1) be returned, and that the complaint be added to the lead dossier, notified and returned. ENRIQUE SANTIAGO PETRACCHI AUGUSTO CESAR BELLUSCIO (see Opinion) - ANTONIO BOGGIANO (see Opinion) - JUAN CARLOS MAQUEDA (see Opinion) - E. RAUL ZAFFARONI - ELENA I. HIGHTON de NOLASCO (see Opinion).

SAMPLE DOCUMENT

OPIN-//-

-//-ION OF DEPUTY PRESIDENT AUGUSTO CESAR BELLUSCIO AND MINISTER OF THE COURT JUAN CARLOS MAQUEDA

Considering:

1°) Whereas the Sixth Chamber of the National Court of Labor Appeals reaffirmed the trial court ruling which, following a declaration of the unconstitutionality of Article 39, Subsection 1 of Occupational Risk Law (LRT) 24,557, sentenced the defendant - the employer of the worker claiming - to pay compensation, grounded in the Civil Code, for damages caused by an industrial accident (occurred in November 1997) based on the Civil Code.

In short, and among other aspects, it was adjudged that the compensation provisions of the LRT applicable in the case were markedly insufficient and did not lead to the redress that should have been guaranteed to the worker under Article 14 bis of the Argentine Constitution and other constitutionally enshrined provisions stipulated in the various international instruments contained in Article 75, Subsection 22 thereof. The lower court, on the other hand, took the view that the worker, who was 29 years of age, was rendered fully disabled as a consequence of the industrial injury suffered when he fell from a 10-meter high tin roof, and was thus prevented from realizing any economic activity within his own trade or any other. Furthermore, it rejected the appeal against the conclusion reached by the trial court, ruling that it had been proven that the worker had not been provided with the appropriate safety equipment, and that nets or other protective mechanisms had not been set up to guard against potential falls.

2°) The defendant filed a special appeal against this ruling, only insofar as the above mentioned Law has

been found unconstitutional, which has incorrectly been denied, as signaled by the Attorney General in the preceding legal opinion (paragraph IV). Consequently, since the matter in question is under federal jurisdiction, and all other premises for admittance provided for in Articles 14 and 15 of Law 48 are met, it is deemed that the complaint filed as a result of the aforementioned refusal should be upheld.

In this context, the Court shall proceed to examine the grievances in relation to the invalidity of Article 39, Subsection 1 of the LRT, which states: "The provisions of this law discharge employers from all civil liability for their workers and their successors in title, with the sole exception of the premises contained in Article 1072 of the Civil Code"

3°) This Court, in Ruling: 325:11, gave account of the circumstances that preceded the approval of Law 24,557 and the context in which Article 39 thereof was inserted (considering Clauses 4 and 5). At this point, it was stated that the legislature, in exercise of the prerogatives granted thereto under the Constitution, decided to replace a system that had proven reasonable in previous years under varying circumstances with another system that it deemed to be adequate at the given time. According to the will of the legislature, the objective of this new system was to replace the obligations in the event of an accident, since "the protected legal interest [in the system] is the physical and psychological compensation of the dependent worker", from which perspective, "it is ordered that priority be definitively awarded to the redress of damages" (considering Clause 6).

Although it was not proven in the above case that the enforcement of the LRT had led to any adjournment or

frustration of the right to compensation for physical and psychological damages, or to rehabilitation (considering clause 11), the Court accepted that the limitations on full redress provided for in special systems of liability would be susceptible to constitutional challenge if any substantial impairment of the guarantee cited by the interested party were proven to exist (doctrine in Rulings: 108:240; 139:20; 188:120; 189:306, 391; 250:131; 256:474; 258:202, et. seq.; and Rulings: 325:11, 25, considering Clauses 16 and 17). This latter consideration implies that, if the assumption for disqualification contained in the special regulation were to be true, the facts would have to be adjudged in light of regulations that express general principles in the matter of liability.

4°) To determine whether such an impairment occurred, it is first of all necessary to examine the scope of the constitutional rights involved in this case, and secondly to analyze whether the damage caused by the contingency in question can be properly repaired under the provisions of the LRT. In this sense, we must carry out a reasonability test on the basis that the LRT provides for a special system of liability subject to the limitations on the discretion of the legislature (doctrine in Rulings: 325:11, 25, considering Clauses 16 and 17).

Specifically, it is necessary to clarify, by applying measurable guidelines, whether it can be demonstrated from the constitutional regulations and principles in question whether the damage caused manifestly and intolerably exceeds the coverage framework that can reasonably be understood to be within the scope of the special system. On the one hand, we know that the LRT provides some advantages to the injured party over a common

law regime (broad premises of liability, limited exonerating circumstances, automaticity of benefits, etc.), which must be taken into consideration and, if appropriate, identified in order to draw the best possible comparison between eventual compensation amounts. On the other hand, the margin of discretion involved in fee-setting should not to be forgone.

In this context, we can deem as applicable the doctrine of this Court that establishes that laws are susceptible to having their constitutionality challenged "when they are unreasonable, or rather, when the means of arbitration are not appropriate to the goals they aim to achieve, or when they clearly enshrine a manifest iniquity" (Rulings: 299: 428, 430, considering Clause 5 and numerous citations).

5°) In view of the arguments emanating from the decisions of both courts, and the grievances submitted in this regard, the issue specifically in question is whether, in the case under study, Article 39, Subsection 1 of the LRT - which has uprooted the regulation stipulated in the Civil Code (with the exception of Article 1072 thereof, which contemplates a premise not present in this dispute) as the expression of the *alterum non laedere* principle from the "legal discipline" of industrial accidents and illnesses - leads to an outcome that is compatible with said principle and with the "decent and fair working conditions" that must be guaranteed to the worker under Article 14 bis of the Constitution.

6°) In respect of the relevant part of Article 19 of the Argentine Constitution, this Court has stated that the "general principle" that "forbids 'men' from injuring the rights of a third party" is intrinsically linked to the concept of redress". It has also stated that, although the

regulation stipulated in the Civil Code lacks any exclusive or excluding nature in terms of people and their responsibilities, it does express a general principle that governs all legal disciplines (doctrine in Rulings: 308:1118, considering Clause 14).

In this respect, the case law of the Court contains several examples that have expanded on the rationale of the scope of redress established in the above mentioned provisions of the Civil Code. As such, the "value of human life cannot be appreciated solely on the basis of exclusively material criteria, nor is it a question of merely measuring the economic capacity of the victim in monetary terms, which would create a form of justice whereby compensation is awarded based on the capital of victims or their capacity to produce economic assets through their work, on the basis that spiritual expression also constitutes a vital value of human beings". (Rulings: 303:820, 822, considering Clause 2 and citation; criteria reiterated in Rulings: 310:2103 and 312:1597, et. seq.).

This Court has also indicated within the context of the Civil Code, and this time in reference to industrial injuries, that "disability must be subject to redress over and above that deemed appropriate for the impairment of productive activity and moral damages, since physical wellbeing has a compensatory value". In the past, it has rejected rulings that have established risible and meaningless values in relation to recoverable damage by demonstrating not only the repercussions of its industrial consequences, but also of their effects at a moral, social and spiritual level (Rulings: 314:729, 731, considering Clause 4; 316:1949, 1950, considering Clause 4, et. seq.).

In short, the above demonstrates that it is

appropriate to grant the *alterum non laedere* principle the scope that it merits, and to avoid setting restrictions that involve any "alteration" of the rights recognized by the Argentine Constitution (Article 28).

7°) In terms of industrial rights, these notions are complemented by Article 14 bis of the Argentine Constitution, of which the sole aim is to grant special constitutional protection to all male and female workers. The enshrining of what would come to be called the protection principle: "work in its different forms shall enjoy the protection of the laws", and the obligation stipulating that said laws "shall guarantee the worker: decent and equitable labor conditions", this precept became a major milestone in the evolution of our constitutional system, having enhanced the humanistic grounding of the 1853-1860 text with the universalization of the reformist influences of social constitutionalism from the first half of the 20th Century.

The constitutional directive of this regulation has been strengthened and extended by the recognition of the right to protection of all workers in international instruments on human rights, which have boasted constitutional status since 1994 (Argentine Constitution, Article 75, Subsection 22). The International Covenant on Economic, Social and Cultural Rights (ICESCR) is conclusive on this matter, Article 7 of which sets forth: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: [...] a.ii) A decent living for themselves and their families [...]; b) Safe and healthy working conditions". In addition, Article 12 concerns the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health",

of which Subsection 2 establishes: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for [...]: b) The improvement of all aspects of industrial hygiene [...]; c) The prevention and treatment of [...] occupational diseases".

Beyond this list of international regulations with constitutional status, other regulations relate specifically to the protection of women in the workplace contained in the Convention on the Elimination of all Forms of Discrimination against Women. These provisions go further than those concerning discrimination against men in the work place; for example, Article 11 establishes the "safeguarding of the function of reproduction" (Subsection 1.f.), and obligates the state to provide "special protection to women during pregnancy in types of work proved to be harmful to them" (Subsection 2.d.). The rights of children in the workplace are also provided special protection both in Article 32 of the Convention on the Rights of the Child and, in more general terms, in Article 19 of the American Convention on Human Rights.

8°) In the case under study, both courts ruled that the obligation to adequately repair the grave damage caused to the worker due to facts or situations for which the employer is to blame, is well-founded.

As indicated in the opinion of the Attorney General (point III, first paragraph), it is an irrefutable fact that the claimant was 29 years of age at the time of the accident, and that he suffered a serious injury by falling ten meters from the tin roof where he was working, under the instructions of his employer, to install a sheet membrane, with no safety measures provided, and no

protective netting or other mechanisms to prevent his fall.

In arriving at the judgment rendered, account was taken of the conclusions of the medical experts, who reported that the plaintiff suffered the following injuries: "V1 cranial nerve injury caused by paralysis of the right-side lateral rectus muscle, which in turn led to convergent strabismus and consequent loss of vision in one eye (42% of total disability), neurological sequelae, left-side femoral facial syndrome, sensory disorders on the face and left side, cerebellar disorders on the same side, blocked facial nerve, lateral oculomotor nerve and soft palate disorders (40% of total disability), mixed bilateral hearing loss (6.8%), and scarring, tinnitus, functional repercussions of finger joint injuries, trigger finger and dental injuries (1.5%)". Furthermore, the worker suffered "sequelae of psycho-organic syndrome with clear signs of moderate-degree reactive depression, resulting in 30% disability". Therefore, and on account of the worker being deemed unable to undertaking any activity, the court of appeals tribunal equated the sequelae suffered to 100% disability, which was higher than that established in the trial court (cf. p. 642 of lead dossier).

On close reading, the case records imply that, based on various guidelines for the application of common law regulations, the appropriate compensation amount payable to the worker for the loss of earnings suffered due to his condition, from the moment the injury was suffered to retirement age, would exceed ARS 209,000. This amount is three times the figure arrived at by applying the guidelines of the LRT (according to the text in force on the accident date, referred to hereinafter) intended to determine the cash benefit payable, regardless of the testing of other claims in relation to the welfare payments

already made by industrial risk insurers in the aftermath of the accident. This test - which could include certain comparative advantages of the LRT in the case - was carried out in point 4 of pp. 642/643, with no specific challenges presented in the special appeal.

Each of these appraisals of *de facto* and common law matters are not up for review before this Court on the account that - regardless of their relevance - they have not been subject to any specific and reasoned review that proves any supposition of arbitrariness.

9°) Consequently, it shall be deemed as proven in the records that the range of damages caused to the victim have a sufficient causal relationship in respect of the accident for which the claim is made, and that these damages have not been sufficiently repaired through the provisions of the LRT, resulting in the frustration of the fundamental objective of compensation for damages to the physical and psychological wellbeing of the worker.

This stated insufficiency highlights a feature of these provisions - even when the resultant fee is not deemed to be at odds with the aforementioned constitutional principles - that draws particular attention to the possibility of other workers or their successors in title experience similar injuries to those presented in this case.

Specifically, the LRT does not provide compensation for damages other than those that represent a loss of a worker's earning capacity, which is a particularly limitative system. Otherwise, the monthly "basic income" value would not have been the determining factor in setting the benefit amount, particularly considering that the second part, "age of the injured party", was applied only

for the purposes of projecting this income factor forward (LRT, Article 15, Subsection 2, Second Paragraph, according to the text in effect in November 1997). Other important factors also come into play. Basic income (LRT, Article 12, Subsection 1, idem): a) has only taken account of the injured party's income earned through the dependency relationship, with cases of multiple employment (idem, Article 45.a) only considered within the limited scope of Decree 491/97 (Article 13); and b) even then, does not include the full benefit received in this relationship, and instead, only includes benefits of a remunerative nature - subject to tax deduction - thus limiting earnings on account of social security withholdings (MOPRE, Law 24,241, Article 9, amended through Decree 833/97). Finally, the benefit was subject, without exception, to an upper limit - according to the applicable legislation - of ARS 55,000 (LRT, Article 15, Subsection 2, Second Paragraph).

10°) Approaching the matter from another angle, it is a well-known fact that the LRT, by having excluded the redress procedure contained in the Civil Code (with the exception of the provisions of Article 1072), removed this age-old institution for matters of industrial accidents and illnesses (Judgment 123:379), an institution that subsequent bodies of law have acted to maintain, as is true of Law 9699 regarding accidents, passed in 1915 (Article 17). Although this exclusion is not deemed to be founded on a censurable principle, this is, in fact, the case - as mentioned in the clauses above - insofar as the alienation of the general principal governed by this instrument is alleged and proven to constitute a substantial impairment of the right to appropriate redress.

This Court deems it fair and reasonable for legislation to provide for the range of interests and

prospects that jeopardize industrial relationships for reasons of accident or illness, in terms that give a balanced consideration to the interests of all interested parties compromised by such a situation. However, this comes with the obligatory condition that the means chosen to achieve such objectives and balances must be compatible with the principles, values and human rights that the Constitution orders be respected, protected and implemented, which did not occur in this case (cf. Articles 28 and 75, Subsection 22, Argentine Constitution).

11°) In view of the foregoing, this Court deems Article 39, Subsection 1 of the LRT to be unconstitutional in the case under study, as it discharges the employer from all civil liability. This conclusion shall be rendered null and void in the event of the Court ruling in light of other principles, values and precepts of the Argentine Constitution.

Nevertheless, we issue two notes of caution. First of all, the winding up of this action clearly does not imply the censure of all legal provisions that restrict redress for damages, including the LRT. This ruling is founded on the basis that, regardless of the leeway allowed under the Argentine Constitution with regard to these limitations, it is unthinkable that they could serve to legitimately prevent the worker, in all cases, from claiming fair compensation from his employer for the damage caused by an industrial accident or illness.

Secondly, the solution reached does not foresee the frustration of the noble aims of the automatic and prompt granting of benefits pursued by the LRT. Indeed, the fact that it is constitutional baseless, under certain premises, for the aforementioned benefits of the LRT to discharge the

employer from any civil liability (Article 39, Subsection 1) does not relieve Industrial Risk Insurers from having to meet their obligations contracted under the above Law.

Therefore, in concordance with the opinion of the Attorney General, the complaint is hereby upheld, the special appeal is declared admissible, and the judgment appealed is confirmed in relation to the grievance tested, with costs awarded to the appellant (Article 68 of the Code of Civil and Commercial Procedure). It is ordered that the deposit on p. 1 be returned, and that the complaint be added to the lead dossier, notified and returned. AUGUSTO CESAR BELLUSCIO - JUAN CARLOS MAQUEDA.

SAMPLE DOCUMENT

OPIN-//-

-//-ION OF THE MINISTER OF THE COURT ANTONIO BOGGIANO

Considering:

1°) Whereas the Sixth Chamber of the National Court of Labor Appeals reaffirmed the trial court ruling which, declared the unconstitutionality of Article 39, Subsection 1 of Occupational Risk Law (LRT) 24,557 and upheld the compensation payment claimed on the basis of Article 1113 of the Civil Code.

2°) The defendant filed a special appeal against the sentence, which was denied, as indicated by the Attorney General in his opinion earlier. The matter in question is under federal jurisdiction, and since all other requirements for the admittance of the extraordinary resource provided for in Articles 14 and 15 of Law 48 are met, it is deemed that the complaint filed should be upheld.

3°) Essentially, the issues brought to the attention of the Court are analogous to those debated and resolved in the "Gorosito" case recorded in Rulings 325:11, which underlined that it cannot be predicated on abstract that the precept challenged in the case under study inevitably leads to the award of diminished redress to the detriment of rights enshrined in the Constitution (considering clause 18).

4°) For the reasons outlined in considering Clauses 8 to 11 of the opinion of judges Belluscio and Maqueda, which are shared by the undersigned, it must be concluded that fixed-rates compensation leads to the suppression and denaturing of the right intended to be guaranteed.

Therefore, in concordance with the opinion of the Attorney General, the complaint is hereby upheld, the special appeal is declared admissible, and the judgment

appealed is confirmed in relation to the grievance tested. Costs are awarded to the appellant (Art. 68 of the Code of Civil and Commercial Procedure). It is ordered that the deposit on p. 1 be returned, and that the complaint be added to the lead dossier, notified and returned. ANTONIO BOGGIANO.

SAMPLE DOCUMENT

OPIN-//-

-//-ION OF THE MINISTER OF THE COURT ELENA I. HIGHTON de NOLASCO

Considering:

1°) Whereas the Sixth Chamber of the National Court of Labor Appeals reaffirmed the trial court ruling declaring the unconstitutionality of Article 39, Subsection 1 of Occupational Risk Law (LRT) 24,557, and sentenced the defendant employer to pay compensation, grounded in the Civil Code, for damages caused by an industrial accident suffered by the plaintiff in November 1997. The defendant filed a special appeal against this decision, the denial of which gave rise to the present complaint.

2°) The special appeal is formally admissible, as stated in the opinion of the Attorney General, since the matter in question is under federal jurisdiction, and all other premises for its admittance under Articles 14 and 15 of Law 48 are met.

3°) In the judgment appealed, the lower court indicated that Article 39, Subsection 1 of Law 24,557 negatively discriminates by excluding the possibility for the injured party and his successors in title, in the case of an industrial accident, to resort to the avenue provided for in Article 1113 of the Civil Code, whereas an ordinary citizen in a similar situation is able to take legal action. It ruled that the provisions of this regulation cause grave injury to the rights and guarantees contained in the Argentine Constitution, as well as the fundamental principles of industrial law. Citing several examples from doctrine and case law to support its case, it concluded that this discrimination is in violation of Articles 14 bis, 16, 17, 19, 23, 75 Subsections 19 and 23, of the Argentine Constitution and of several conventions that also

have constitutional status, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and ILO Convention No. 111. It deemed that the theoretical reasons provided as a basis for this discrimination are lacking in substance, compared to the above mentioned higher-order regulations that provide a strong protective framework for the worker, which is obviated entirely by the legal system challenged. It also stated that the existence of a legal universe that excludes parties from the right to compensation for injury caused to their health by the unlawful behavior of other citizens is incompatible with the regulatory bundle contained in the Constitution. It added that this exclusion is made even more serious by the fact that victims are considered purely in the role of workers, whose sole capital is their health, with no other way of living than providing their labor capabilities to others. The lower court stressed that, in addition to being unconstitutional, the system is also unfair, since the economic foresight of redress comes at the cost of those whose wealth has already been undermined as a result of their incapacity to work. It stressed that, not only does the limitation set forth in Article 39 of the Law on Labor Risks lead to a lack of financial parity; it also cancels out the right of injured parties to obtain redress for damages, even when caused by the unlawful behavior of their employer. As such the regulation clashes with the constitutional guarantees of equality before the law, ownership and free access to justice. The tribunal also considered that, in order to be constitutionally valid, fixed-rate systems must be adopted based on reasonable guidelines, and noted that it was evident from the fact of the employer expressing grievances in relation to the judgment that the application of this system is

unreasonable in a case such as this, where the plaintiff - injured at 29 years of age - was left with full industrial disability, since the compensation awarded as redress for loss of earnings amounted only to three times that which the Law on Labor Risks provides for the loss of life of a worker. Finally, it understood the need to declare the unconstitutionality of the Law in the *sub lite* on account of the gross violation of the equality principle by a system that forces the worker to merely endure this state of abandonment, whereas a third party or persons that do not have a subordinate relationship with the defendant would be allowed to claim for the comprehensive redress of damages.

4°) In this context, it is necessary to examine the grievances expressed in relation to the declaration of unconstitutionality of Article 39, Subsection 1 of Law 24,557, which states: "The provisions of this law discharge employers from all civil liability for their workers and their successors in title, with the sole exception of the premises contained in Article 1072 of the Civil Code"

5°) Article 19 of the National Constitution governs the different aspects of personal freedom in such a broad and complete way that Joaquín V. González has claimed that few constitutions have grasped this concept quite as accurately as Argentina's, both from the perspective of the private lives of its residents, "...the sphere of personal independence, where the power of the law does not reach" and "that which considers the individual as a member of the community, as an active participant in the sphere of law" ("Manual de la Constitución Argentina", Angel Estrada y Cía. Editores, No. 95, pp. 116/117).

It is in this sphere, where the actions of

individuals are governed by the regulations issued by the State, that the precept prohibiting injury to third party rights is established.

6°) The principle of *alterum non laedere* is a constitutional rule with a broad scope, which this Court has ruled as being intrinsically linked to the concept of redress for damages caused and, although it constitutes the basis for the regulations set forth in the Civil Code with respect to individuals and their consequent liabilities, it does not entrench these exclusively in private law; but rather sets forth a general principle that governs all legal disciplines" (Rulings: 308:1118; 315:780, 1731, 1892, et. seq.).

7°) The legal regulation of this precept must conform to the provisions of Article 28 of the Constitution since, as has been stated repeatedly since this Court was founded, the rights and guarantees enshrined in the Argentine Constitution are not absolute, and their exercise is subject to the laws by which they are governed, provided these are reasonable, that they comply with the objective for which they were established, and that they do not breed arbitrariness (Rulings 300:381, 700, et. seq.). The interpretation of laws must also give full effect to the intentions of the legislature by reckoning the entirety of the precepts contained therein to make them consistent with all other legislation and the principles and guarantees contained in the Argentine Constitution (Rulings: 297:142; 299:93; 316:562, et. seq.).

8°) From this perspective, the regulation challenged can only be tested within the overriding framework of its provisions, which link the right to legal action for the total redress of damages to the victim's capacity as worker, this ensuring that those persons who

hold this capacity are excluded - *ab initio* - from the general system established in the Civil Code.

9°) Article 14 bis of the Argentine Constitution has granted all workers special constitutional protection. The enshrining of what would come to be called the protection principle: "work in its different forms shall enjoy the protection of the laws", and the obligation stipulating that said laws "shall guarantee the worker: decent and equitable labor conditions" made this principle a positive milestone of the 1853-1860 text with the universalization of the reformist influences of social constitutionalism from the first half of the 20th Century.

The constitutional directive of Article 14 Bis has been strengthened and extended through the special protection of all workers recognized in international instruments, which are enshrined in Article 75, Subsection 22 of the Constitution. This is confirmed in the International Covenant on Economic, Social and Cultural Rights, which declares that the States Parties recognize the right of everyone to enjoy just and favorable working conditions that ensure - among other things - fair wages with equal pay, and access to the highest attainable standard of physical and mental health, leading to improved environmental and workplace health, and the prevention and treatment of diseases, including professional care and medical services in the event of disease (Articles 7 and 12). Moreover, the American Convention on Human Rights (San José Pact) guards against discrimination in the enjoyment of human rights, and defends the rights to life, physical and moral wellbeing, access to justice and legal protection (Articles 1, 2, 3, 4, 5, 15); whereas the Universal Declaration of Human Rights also offers protection against

all kinds of discrimination, and guarantees equality before the law in the enjoyment of rights and access to justice (Articles 1, 2, 7, 8).

10°) This tribunal has considered the harmony that must exist between the constitutional precept that prohibits the causing of damage to third parties - which gives rise to the obligation to redress injured parties - and the principles granting strong constitutional protection to workers, in its examination of the *raison d'être* of the scope of redress established in the regulations of the Civil Code. In this respect, it has indicated that "disability must be subject to redress over and above that deemed appropriate for impairment of productive activity and moral damage, since physical wellbeing has a compensable value" (Rulings 308:1109). On other occasions, it has rejected rulings that have set forth risible and meaningless values in relation to recoverable damage by demonstrating not only their repercussions on the area of labor, but also their effects at a moral, social and spiritual level (Rulings: 314:729, 731, considering Clause 4; 316:1949, et. seq.).

In short, the above demonstrates that the *alterum non laedere* principle should be granted the scope that it merits, and that no restrictions should be implemented that involve any "alteration" of the rights recognized by the Argentine Constitution (Article 28).

11°) The Law on Labor Risks, which prohibits legal action from being filed to determine the true existence and extent of damages suffered by workers, and provides that employers are discharged from any civil liability, irreconcilably severs the right to comprehensive redress from the principles enshrined in the Constitution. This conceptual restriction frustrates the basic purpose of

compensation for damages caused to the physical and psychological wellbeing of the worker, since the Law challenged only provides indemnification for damages representing a loss of earning capacity, resulting in a particularly limitative system.

12°) It is a well-known fact that the Law on Labor Risks, by having excluded the reparatory proceeding contained in the Civil Code - with the exception of the provisions of Article 1072 - removed this age-old institution for matters of industrial accidents and illnesses (Judgment 123:379), an institution that subsequent bodies of law have acted to maintain, as is true of Law 9699, passed in 1915.

This exclusion is censurable insofar as it implies the abandonment of the constitutional precepts for the protection of workers, who - for no other reason than being employed as workers - are prevented from accessing justice to secure the protection of their rights which, paradoxically, are expressly and specially recognized in the Constitution and the conventions enshrined therein.

13°) This discrimination is not supported to any reasonable degree by the text of the Constitution, since equal treatment before the law - which is not exempt from reasonable distinctions, according to the case law of the Tribunal - prohibits any negative distinction of anyone whose capacity to work is affected by injury, which would deprive them of the instruments that other residents have access to in similar circumstances. The above conclusion is reached in view of the lack of any logical or normative relationship between the status of worker and the refusal of access to justice for the purposes of enforcing the general provisions provided for in the Civil Code, the

replacement of which - a fixed-rate system of indemnification - does not provide adequate compensation and has not been freely adopted by the victim, with no appraisal afforded as to its potential competitive advantages.

14°) Moreover, the discharge of employer liability enshrined in this legal system serves to distort the industrial relationship in a clear departure from the constitutional guidelines intended to protect, rather than abandon, workers. This is an inexcusable condition of employment, which must be provided in decent working conditions that guarantee the strict compliance of safety regulations, as well regulations relating to each activity in general. Prevention measures aimed at protecting the health and physical wellbeing of the worker are legitimate demands for the rendering of services, which can no longer be conceived as such without the adequate preservation of the dignity inherent to the human person.

15°) In this sense, the regulations under study highlight a retrogression from the humanist conception that extols the intrinsic nature of work as personal expression, as enshrined - among other documents - in the Universal Declaration of Human Rights (Article 23).

In this context, discharging employers from their responsibility for industrial injuries is presented as a suitable way of evading the fulfillment of the constitutional and legal rights to keep safe, hygienic and decent working conditions, since taking out a legal insurance policy would secure impunity against blame or any unscrupulousness that could lead to damage being caused. As such, a system constructed over several years based on extensive historical experience, and which holds the employer responsible for working conditions under his

employment as a way of ensuring that the universally recognized rights of workers, has been dismantled.

16°) To discharge an originator of damages from the consequences of his unlawful actions is contrary to the constitutional regulations at stake and the general principles of law, and this defect is not overcome through the automatic allocation of a cash benefit to the victim, which is, furthermore, disassociated from the facts of the injury. Thus, by discharging the employer from the consequences of his actions, the legal system established realizes no greater or higher objectives than mere economic consideration.

17°) However, the comparison between the regulation challenged and the higher-order legislation in which it is inserted - giving rise to an ineptitude to regulate in conformance with the guidelines set forth in Article 28 - does not result in the censure of the entire system that limits the redress of damages, nor does it lead us to disclaim the potential usefulness of the system of automaticity and promptness system for accessing the benefits granted under the Law on Labor Risks. The unconstitutionality proven in the *sub lite* arises from the incompatibility between the regulation that prohibits workers from accessing justice to obtain comprehensive redress for damages suffered, and the constitutional precepts that protect the right to do just that. The imbalance shown in the *sub lite* resulted in the manifest inadequacy of the redress generated from fixed-rate indemnification in comparison with the extent that comprehensive redress demands based on the circumstances of the case.

In terms of the issues examined, Article 39,

Subsection 1 of Law 24,557 affects the constitutional guarantees recognized in Articles 14 bis, 16, 17, 19 and 28 of the Argentine Constitution and the conventions incorporated in Article 75, Subsection 22, insofar as the conditions required for the regulation to be declared unconstitutional are met in this *ultimo ratio* of the legal system.

Therefore, and in concordance with the opinion of the Attorney General, the complaint is hereby upheld, the extraordinary appeal is declared as admissible and the judgment appealed is confirmed, with costs awarded. It is ordered that the deposit on p. 1 be returned, and that the complaint be added to the lead dossier, notified and returned. ELENA I. HIGHTON de NOLASCO.

SAMPLE DOCUMENT

Supreme Court of Justice of the Nation

Appeal against findings of fact filed by **Cargo Servicios Industriales S.A.**, herein represented by Dr. **Hernán Alberto Cachés**.
Originating court: **Sixth Chamber of the National Court of Labor Appeals**
Previous processing courts: **28th National Labor District Court**