

Four Judgments of the Sezioni Unite of the Italian Court of Cassation on the *compensatio lucri cum damno*

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In certain cases, an unlawful act or a breach of contract, apart from disadvantageous consequences, could confer economic benefit on the injured party. For determining the compensation, in such cases it is necessary to take account not only of harms suffered by the victim, but also the advantages that he or she has possibly achieved. Generally, the law scholars expressed that need with the elaboration of the '*compensatio lucri cum damno*' doctrine (from now also '*c.l.c.d.*').

On 22 May 2018, in order to clarify a contrast existing among the different Sections, the Sezioni Unite of the Italian Court of Cassation provided a meticulous discussion of the foundations and the rules of this doctrine.¹ The Court put particular emphasis in clarifying whether collateral benefits obtained by the injured party in connection with an unlawful act needs to be deducted from the amount obtained as compensation of the tortious act.

Let's start with the facts taken into consideration by the Court.

The four cases (nn. 12564, 12565, 12566 and 12567) present all the same features: the victim of an unlawful act is entitled to an indemnity that is based on a legal ground that is different from the right to compensation in tort. This happens in the cases where the victim benefits from a social security system, or is privately insured.

In Case A (decision no. 12564/2018), a car driver killed a pedestrian in order to avoid the collision with another vehicle, driven by F.M. The victim's widow filed an action for damages against F.M. The Tribunal and the Court of Appeal of Rome both rejected the widow's claim. The two decisions are based on the follows key elements: (1) the woman enjoyed a higher income than that of the late husband; (2) in any case, after the husband's death she was entitled to a survivor's pension (granted by the Istituto nazionale della previdenza sociale), that excluded the existence of material damages. The widow appealed to the Court of Cassation. As on this matter the previous case law of the Court was not unanimous, the judges of the third Section of the Court decided to submit the question to the United Sections of the Court. The judges formulated the question as follows: '*if from the amount of compensation awarded for the death of a family member, must be deducted the survivor's pension received by the survivor as a result of the death of the relative*'.

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1 Corte di Cassazione, Sezioni Unite, 22 May 2018, nn. 12564, 12565, 12566, 12567, in *Responsabilità civile e previdenza*, 2018, p 1148ff.

In Case B (decision no. 12565/2018), on 27 June 1980, a McDonnell Douglas DC-9 passenger jet (Itavia Flight 870) en route from Bologna to Palermo, was hit and crashed into the Tyrrhenian Sea between the islands of Ponza and Ustica, killing all 81 people on board. The Italian Court has held liable two Italian Ministries for the disaster and the mass murder. The Court based its ruling on three arguments. First, ‘most probably’ a missile had brought down the airplane. Second, because of specific regulations, Italian Ministries of Defence and of Infrastructure had the obligations to ensure security in the skies and to prevent access by unauthorized or enemy aircraft. Third, as at the time of the disaster, the plane proceeded on the assigned route and there was the simultaneous movement of other planes along the same route, the Ministries of Defence and Transport should have adopted ‘the conduct imposed on them by the specific legal obligations’, which would have avoided the event.

Therefore, the airline company sued both Ministries to get compensation for the damage arising out of the shooting down of its airplane and for the consequent withdrawal of its license to fly. At the same time, the airline company collected an insurance indemnity for the loss of the aircraft. Even in this case, the Third Section of the Corte di Cassazione submitted to the Sezioni Unite a similar question: *‘if the Ministries had to pay the entire amount of compensation for the damage occurred, or if the indemnity paid by the insurance company for the loss of the airplane should be deducted’*.

In Case C (decision no. 12566/2018), a worker was injured in a road accident. The accident was qualified as a ‘commuting accident’. For this reason, the injured party had the right to receive a permanent invalidity pension (according to the Italian Worker’s Compensation System). The Tribunal awarded compensation for damages and the pension. The Court of Appeal partially annulled the precedent judgement, and deducted from the amount of compensation the indemnity that the injured party has received from the worker’s compensation system. As in the previous cases, the Third Section of the Corte di Cassazione submitted to the Sezioni Unite a question on the applicability of the *compensatio lucri cum damno*. In particular, the judges wondered *‘if the value of the invalidity pension recognized by the Italian Worker’s Compensation System, as a consequence of the permanent invalidity caused by the road accident, should be deducted from the amount due to the plaintiff as compensation for the injuries suffered’*.

In Case D (decision no. 12567/2018), a newborn suffered a severe hypoxia as consequence of the negligent delay of the medical team in the execution of a caesarean section at the time of birth. Due to intra partum hypoxia, the child suffered very serious and permanent physical damages, consisting of a tetraplegia. The parents of the child sued the hospital and the doctors for damages. The first instance and the appellate Courts held the liability of the hospital and of the doctors and awarded the victim compensation for pecuniary and non-pecuniary damages. At the same time, because of the permanent biological damage suffered, the minor had the right to receive an accompanying allowance provided by the National Institute of Social Security (according to Law no. 18/1980). Similarly, to

the previous cases, the Third Section submitted to the United Sections the following question: ‘*if in the assessment of damages related to the care costs that an invalid person will be forced to sustain all life long, the accompanying allowance – provided by the National Institute of Social Security – should be deducted*’.

With the four decisions that we comment here, the United Sections of the Court of Cassation have clarified the main issues raised in the matter of *compensatio lucri cum damno* (*c.l.c.d.*), developing some innovative ideas.

After recalling that Italian law generally recognizes the *c.l.c.d.* doctrine, the judges of the United Sections have analysed the key issues that concern the scope of *c.l.c.d.* doctrine.

The Italian Court of Cassation firstly requires that an adequate causal link exists between the unlawful act and the indemnity. Two elements must be taken into account when deciding whether *compensatio lucri cum damno* can apply.

First, it is necessary to verify the function of the compensation, on the one hand, and the indemnity, on the otherhand. If the indemnity has the same justifying cause as the compensation, the *c.l.c.d.* will apply. The *compensatio lucri cum damno doctrine* will on the contrary not apply in all cases where the justification of the indemnity is different from the one of the compensation for the tortious action.

Secondly, *c.l.c.d.* cannot benefit the wrongdoer, allowing him to compensate a lower sum because the victim has obtained other benefits from a third party. The United Sections take into consideration the existence of specific legislative mechanism under which the third party who paid the indemnity to the victim can sue the injurer within the limits of the sums paid out. These mechanisms of subrogation, recourse or recovery are known to the Italian legal system. The *c.l.c.d.* can apply only if the injurer may still be held liable to the third party, who paid the victim.

Of the four decisions taken by the Sezioni Unite only the first one (decision no.12564/2018) excluded the deductibility from the compensation for damages in tort of the collateral benefit that the injured party was entitled to receive. To support its decision, the Court argued that the survivor’s pension is a form of social security protection, that doesn’t have a compensatory purpose.

In the other three decisions (nn. 12565, 12566 and 12567 of 2018), the Sezioni Unite hold that from the amount of compensation the amount of the indemnity had to be deducted. In these three decisions, the Court noted that, in each case, the indemnities had a purely compensatory purpose. In the *Ustica* case the Court further recalled that Italian Civil Code (Article 1916) provides that the insurer, who has extended indemnity to an insured under a policy of insurance, becomes entitled to exercise the rights that the insured has against a third party who caused or contributed to the loss sustained by the insured to the extent of the paid indemnity. Even in the other two cases the Court found that Italian law, either in the Civil Code or in special legislation, provides for subrogation by which the provider of the collateral benefit in question can recoup the sums paid from the party liable in tort.

