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Compensatio lucri cum damno: The Decisions of the Sezioni Unite of Italian Court of Cassation

Angelo Venchiarutti*

1. Summary

Before examining the new position that the Italian Supreme Court has assumed with the recent decisions of the United Sections on *compensatio lucri cum damno*, [1] this first comment analyses the origins of the doctrine, its foundations and the traditional sphere of operation in the Italian law system. Finally, some concluding remarks will be formulated.

2. The Doctrine of the Compensatio Lucri Cum Damno

In Italy, the history of the *c.l.c.d.* doctrine is somewhat enigmatic and controversial. At the beginning of the last century some law scholars began to theorize the *c.l.c.d.*.[2]

* Professor of Private Law, Università degli studi di Trieste, email: avenchiarutti@units.it. The other comments are written by Marco Cappelletti, Research student at the University of Oxford and Junior Research Fellow elect at St John's College, Oxford; Philippe Chauviré, Agrégé des facultés de droit, Université de Lorraine; Tom Gladinez, PhD researcher and teaching assistant at the Institute for Contract Law of KU Leuven; Fernando Peña López, Professor of Private Law, Universidade da Coruña; Margarida Lima Rego, Associate Professor at Universidade Nova de Lisboa, School of Law, Research fellow at CEDIS – R&D Center in Law & Society; Sören Segger-Piening, Akademischer Rat a.Z. at the Chair for Civil Law, European Business Law, International Private and Litigation Law and Comparative Law, Julius-Maximilians-Universität Würzburg. .

1 Corte di Cassazione, Sezioni Unite, 22 May 2018, nn. 12564, 12565, 12566, 12567, in, Responsabilità civile e previdenza, 2018, 1148ff. For a comment of the decisions, among others, see M. Franzoni, La compensation lucri cum damno *secondo la Cassazione*, in *Responsabilità civile e previdenza*, 2018, p (1092); R. Pardolesi & P. Santoro, *Sul nuovo corso della* compensatio; E. Bellisario, Compensation lucri cum damno: *il responso delle Sezioni Unite*; S. Monti, *La* compensatio lucri cum damno *e il 'compromesso innovativo' delle Sezioni unite*: all the comments in *Danno e responsabilità*, 2018, pp 424, 438, 448; C. Scognamiglio, *Le Sezioni Unite e la* compensatio lucri cum damno: *un altro tassello nella costruzione del sistema della responsabilità civile e delle sue funzioni*; G. Villa, *Brevi annotazioni al confine tra* compensatio *e autonomia privata*; U. Izzo, *Quando è «giusto» il beneficio non si scomputa dal risarcimento del danno*, all of them in *La nuova giurisprudenza civile e commentata*, 2018, II, pp 1492, 1499, 1503; F. A. Magni, Le Sezioni Unite confermano il divieto di cumulo di indennizzo assicurativo e risarcimento del danno, in *Il Corriere giuridico*, 2018, p (1051); L. Nivarra, *Le Sezioni Unite restituiscono un ordine auspicabilmente definitivo al discorso sulla* compensatio lucri cum damno, in *Responsabilità civile e previdenza*, 2018, p (1160).

2 F. Leone, 'Compensatio lucri cum damno', in *Il Filangeri*, 1916, p (176), which had borrowed the expression from the German doctrine.

Since then, lively debates developed around its historical origin.[3] Even its justification within the legal order has been discussed. Given the difficulty of placing the *c.l.c.d.* among the principles of law, scholars have considered it as an operational rule. According to the founding principle of tort law, torts aim at compensating the victim for the damage resulting from an unlawful act.

Tort law has therefore the task to compensate the victim. It cannot be a source of profit for the injured party.[4]

General statutory provisions on this matter do not exist under Italian Law. Italian scholars and judges usually refer to Article 1223 of the Italian Civil Code[5] that states: *'Compensation for the damage arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay'.*

Even if the provision only foresees that the victim of an unlawful act is entitled to full compensation,[6] scholars have interpreted the rule in the sense that it prevents the victim of being undercompensated, but also precludes receiving a profit beyond the damage really suffered. The doctrine of *c.l.c.d.* avoids the injured party from being unjustifiably enriched, cumulating compensation for damage with other economic benefits that the victims obtain in connection with an unlawful act.

While the rule is clear, its precise scope is contested in scholarly writing and case law.[7] The problem revolves around this fundamental question: whether and under which conditions the economic benefits that the injured party obtains as consequence of an unlawful act can be deducted from the amount of compensation.

Italian case law showed a rather singular trend in the application of *c.l.c.d.* doctrine that is important to briefly summarize as Italian case law was not

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3 Among those who consider that the *c.l.c.d.* was not unknown to classical Roman law, see F. Leone, *Compensatio lucri cum damno*, p (205) ss; S. Solazzi *La compensazione nel diritto romano* (Jovene: Napoli 1950) p (218). Instead according to other authors, despite the Latin expression, the *c.l.c.d.* would be one of the results of the late nineteenth century Mommsen *Differenztheorie*: see recently U. Izzo, *La* compensatio lucri cum damno *come latinismo di ritorno* in *Responsabilità civile*, 2012, p (1738).

4 See already P. Cogliolo, 'voce Danni', in *Digesto*, IX (Utet: Torino 1926), p (23), and then, R. Scognamiglio, *In tema di* 'compensatio lucri cum damno', in *Il Foro italiano*, 1952, I, p c. (635); C. M. Bianca, *Diritto civile*, vol. 5 (Giuffré: Milano 1994), p (150).

5 About this topic, for all see M. Franzoni, *Il danno risarcibile*, II, in M. Franzoni, *Trattato della responsabilità civile* (Giuffré: Milano 2010), p (39). For the case law, among many judgments, see Corte di Cassazione 29 November 1994, n. 10218; 14 May 1997, n. 4237; 6 October 1997 n. 9704; 7 January 2000, n. 81, in *Juris data.*

6 In reason of Art. 2056 of the Italian Civil Code, Art. 1223 of the Italian Civil Code also applies for damage in tort.

7 Some Italian law scholars dispute the general scope of the rule of the *c.l.c.d.*: they inter alia affirmed that Italian law system does not offer sufficient grounds for that rule. On these topics, recently, see E. Bellisario, *Il problema della* compensatio lucri cum damno (Wolters Kluwer: Milano 2018), pp 1–155.

unanimous. While some Courts repeatedly stated the existence of the *c.l.c.d.* doctrine, other Courts asserted exactly the contrary. More specifically, some Courts motivated the exclusion of the application of the *c.l.c.d.* rule, while others contrasted the assertion of its existence.

A famous Italian scholar ironically wrote that case law on *c.l.c.d.* is a sort of mirage: from far you think to see it, but as soon as you approach, it vanishes in the air. As a matter of fact, case law considered the rule of *c.l.c.d.* almost never applicable.[8]

According to the traditional position, the rule operates only when an unlawful act is the 'direct and immediate' basis of compensation as well as of the other economic benefits. Therefore, the victim has the right to cumulate when damages originate out from an unlawful act, while the other benefits result from statutes or contracts. These benefits include special allowances provided for by social insurers, social security institutions, public administrations, as well as indemnities from private insurers. In other words, if the source is not the same, the *compensatio lucri cum damno* cannot operate.[9]

However, over the time, some Courts had taken a different view, excluding the possibility of cumulating damages and collateral benefits from other sources, such as private insurance or social security schemes,[10] stating that otherwise the injured party would obtain double compensation for the same damage.[11]

Lastly, the majority point of view was finally challenged by two decisions of the Third Section of the Corte di Cassazione of 2014. The Court opted for the theory of adequate causation in lieu of the legal basis criterion, and the judges denied the right of the injured person to cumulate compensation with: (1) an

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8 M. Franzoni, *La* compensatio lucri cum damno *secondo il Consiglio di Stato*, in *Danno e responsabilità*, 2018, p (163).

9 Particularly, the Italian Corte di Cassazione ruled out the possibility to detract: (a) the survivor's pension from compensation for pecuniary damage due to the victim's widow (Corte di Cassazione: 30 September 2014, n. 20448; 10 March 2014, n. 5504; 11 February 2009, n. 3357; etc.); (b) the indemnities paid by the State to the Municipality of Castellavazzo, as a consequence of the Vajont's disaster, from compensation due to the same Municipality by the tortfeasor (Corte di Cassazione, 15 April 1998, n. 3807); (c) the invalidity pension from compensation for personal injury (Corte di Cassazione, 18 November 1997, n. 11440).

10 Corte di Cassazione, 4 January 2002, n. 64: the Court excluded the right of a soldier to receive both compensation and the invalidity service pension.

11 On the basis of the principle mentioned in the text, the Court of Cassation has excluded: (a) the cumulation of compensation for the damage due to the victim of blood transfusion with the indemnity due by Law 25 February 1992, n. 210 (Corte di Cassazione, 20 Jannuary 2014, n. 991); (b) the cumulation of compensation for damage due to incapacity for work and permanent incapacity benefits (Corte di Cassazione, 13 May 2004, n. 9094); (c) the cumulation of compensation for damage due to the worker injured by the employer responsible for the accident and the income provided by the National Institute of Social Security (Corte di Cassazione, 16 November 1979, n. 5964).

indemnity deriving from a private insurance against damage[12]; (2) a social security benefit.[13]

After a series of dissenting and concurring judgments, the Third Section of the Court finally asked the United Sections to rule on the contrast regarding the application of *c.l.c.d.*,[14] with reference to the four different cases under exam.[15]

3. Four Judgments of the Sezioni Unite of the Italian Court of Cassation

As already recalled, the four cases 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 other sources and the indemnity is paid by a different subject than the tortfeasor.[16]

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

12 Corte di Cassazione, 11 June 2014, n. 13233, in *Il Foro italiano*, 2014, I, p c. (2064).

13 Corte di Cassazione, 13 June 2014, n. 13537, in *Il Foro italiano*, 2014, I, p c. (2074).

14 Please note that, according to Italian civil procedure law, a single Section of the Court of Cassation can turn to the Sezioni Unite in order to clarify a contrast existing among the different Sections: see M. Taruffo, Civil Procedure and the Path of a Civil Case, in J. S. Lena & U. Mattei (eds), *Introduction to Italian Law* (The Hague: Kluwer 2002), p (175).

15 A first request the third section (Corte di Cassazione 4 Mar. 2015, n. 4447) (order) had not received a reply from the United Sections, that had considered premature examining the matter on the scope of *c.l.c.d.* rule (Corte di Cassazione, Sezioni Unite, 30 June 2016, n. 13372). For the decisions of the Sezioni Unite of 22 May 2018, see the four orders of the Third Section of the Italian Court of Cassation (nn. 15534, 155435, 15536 and 15537 of 2017) in *Il Foro italiano*, 2017, I, c. 2242, note of R. Pardolesi.

16 With reference to the case in which the victim is entitled to receive compensation in tort and an indemnity from the same party, Italian Court of Cassation has already opted for the deduction of indemnity from compensation: Corte di Cassazione, Sez. Un., 12 Jan. 2008, n. 584, in *Giustizia civile,* 2009, I, p (2531). On the same point see more recently, Consiglio di Stato, Adunanza Plenaria, 23 Feb. 2018, no. 1, in *Danno e responsabilità*, 2018, p (163), M. Franzoni, *La* compensatio lucri cum damno *secondo il Consiglio di Stato.* An employee had been exposed to asbestos in the workplace (the Italian Ministry of Justice): the Supreme Court of the Italian administrative justice system excluded that the employee is entitled to cumulate compensation and workers' indemnity (which should both have been paid for by the same Ministry of Justice).

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'.

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 Defense 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 Defense 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 judgment, 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'.

4. The Compesatio Lucri Cum Damno Doctrine for the Sezioni Unite

In its four decisions the Sezioni Unite of the Corte di Cassazione identify the principles governing situations where, due to the same tortious event, a party receives not only damages in tort but also collateral benefits from other sources, such as private insurance or social security schemes.

All judgments contain a 'general part', common to all the decisions, and a 'special part' to each decision.

In the general part, the judges firstly recall that the Italian law usually recognizes the *c.l.c.d.* doctrine. According to the general principles of Italian tort law, victims of an unlawful act are entitle to full compensation. However, the damage must not be a source of profit. Collateral benefits that the injured party obtains as result of the tortfeasor's harmful act, should therefore be deducted from the amount of compensation in tort. The doctrine of *c.l.c.d.* avoids unjustified enrichment of the injured party.[17]

Then, the Supreme Court underlines the key principles that govern *c.l.c.d.* doctrine.

To determine whether a private or social insurance indemnity needs to be deducted from the amount of compensation in tort, the Italian Court of Cassation firstly requires that an adequate causal connection exists between the unlawful act and the indemnity. But the causal connection is only a part of the question and it is not per se sufficient to determine whether the collateral benefit connected with the unlawful act can be cumulated or need to be deducted from the compensation.[18]

17 Corte di Cassazione, Sezioni Unite 22 May 2018, n. 12564, § 3.1; n. 12565, § 5.1; n. 12566, § 4.1; n. 12567, § 5.1.

18 Corte di Cassazione, Sezioni Unite 22 May 2018, n. 12564, § 3.7; n. 12565, § 5.7; n. 12566, § 4.7; n. 12567, § 5.7. On causation, see G. De Nova, *Intorno alla* compensation lucri cum damno, in *Jus civile*, 2018, p (58).

According to the Sezioni Unite, two other key elements must be taken into account when deciding whether *compensatio lucri cum damno* should apply.

The first considers the function of the collateral benefit. In particular, it is necessary to investigate if the collateral benefit performs the same function of the compensation in tort.[19] If the sums paid by the private or social insurer are not intended to 'compensate' the injured party, this has the right to cumulate the collateral benefit and the compensation in tort. If the collateral benefit, instead, has a 'compensatory' function, the *c.l.c.d.* rule applies and the amount of the indemnity should be deducted from the amount of compensation. According to the Court, the evaluation of the function of the collateral benefit must be made taking in consideration classes of cases, where it is possible to consider the specific function of the advantage ('functional method').[20]

The second element taken into consideration by the Court concerns the need to avoid that what the victim has received as collateral benefit does not transform into an advantage for the tortfeasor. In order to hold the tortfeasor fully responsible for the consequences of his misconduct, the Court requests to ascertain, for classes of cases, the existence of a statutory mechanism (subrogation or action in recourse) through which the provider of the benefit can recoup the amounts paid to the injured party.[21]

Summing up, the Court subordinates the application of the *c.l.c.d.* doctrine to these following conditions: the first condition is accomplished when the collateral benefit performs the same function as damages in tort; the second condition requires the existence of subrogation or recourse mechanisms that allow the third party to recover the amounts paid to the injured party.

5. The Outcomes of Four Decisions

Of the four decisions taken by the *Sezioni Unite* only the first one (decision No.12564/2018) excluded the deductibility of the collateral benefit from the compensation for damages in tort.

To support its decision, the Court firstly noted that the survivor's pension to the alive spouse is a form of social security protection. Therefore, it has not a compensatory purpose. The Court highlighted that the pension constitutes the fulfilment of a specific promise made by the legal system to the worker who had contributed to his own social security position by sacrificing part of his working

19 This approach has long been indicated by Italian doctrine: among others C.M. Bianca, *Diritto civile*, p (151).

20 For a particular interpretation of this approach, see recently U. Izzo, *La giustizia del beneficio. Fra responsabilità civile e welfare del danneggiato* (ESI: Napoli 2018).

21 Corte di Cassazione, Sezioni Unite 22 May 2018, n. 12564, § 3.8; n. 12565, § 5.8; n. 12566, § 4.8; n. 12567, § 6.

income: the promise to protect surviving dependent relatives against financial hardship in the event of the worker's death.[22]

Furthermore, the Court observed that in the case of survivor's pension, a statutory right of subrogation or recourse, is absent in Italian law. On the basis of these two reasons the Corte di Cassazione ruled that the capitalized value of the survivor's pension couldn't be offset against the amount of compensation for pecuniary loss to which she was entitled in tort. Therefore the Court refused in this case the application of the *compensation lucri cum damno* doctrine.

By contrast, the Sezioni Unite concluded in the other three cases that the collateral benefits should be deducted from the compensation, as the indemnities had a purely compensatory purpose. The Court further argued that Italian law provides a subrogation mechanism through which the third party who paid the collateral benefit can recoup from the tortfeasor the sum paid to the victim.

In particular, in the second judgment (decision No. 12565/2018), the Sezioni Unite applied the test based on the mentioned two conditions.

They hold that where an accident occurs in relation to which the claimant has first-party insurance coverage for either personal injuries or property damage for which a party is liable in tort, the insurance allowance paid to the insured is to cover the same loss that is compensated by the damages. For this reason, the amount of the indemnity that the airline company (*Aerolinee Itavia S.p.A.*) has received as result of the loss of the aircraft must be deducted from damages.

Moreover, the Court recalled that Italian Civil Code (Article 1916) provides for a right of subrogation for the insurer who indemnifies the injured party in order to recover the payment from the tortfeasor. No claim was therefore possible against the Italian Ministries after the payment of the indemnity by the insurer, as it exceeded the value of the aircraft at the moment in which it was shot down.

In the third decision (No.12566/2018), the Sezioni Unite excluded the possibility of receiving both: damages and the pension for invalidity from the National Institute of Insurance for Accidents at Work, as the aim of the pension is to cover the same heads of loss that are compensated by damages. Even in this case, Article 1916 of the Italian Civil Code mitigates the risk of overlapping compensation and indemnity.

In the fourth judgment (decision No. 12567/2018), the Sezioni Unite argued that where a newborn suffers severe injuries caused by negligent doctors and consequently receives an allowance from the State for future costs of care, the function performed by the allowance overlaps with that performed by that portion of tort damages that compensate the same type of loss. Even in this case Article 1916 will be applicable.

22 Corte di Cassazione, Sezioni Unite, 22 May 2018, n. 12564, §§ 4.1.

6. Some Remarks

It is time for some concluding remarks. Italian commentators generally appreciated the efforts made by the United Sections to develop a homogeneous method for the effective and uniform application of the *c.l.c.d.* rule.[23] In fact, it can be assumed that the Court aims to resolve the matter in the most efficient way. In particular, the Court intends to provide guidelines to prevent public entities or insurance companies from paying twice for the same harm.[24]

However, the Court of Cassation's approach can be criticized from a practical and a legal point of view.

Let's first consider the criterion aimed at assessing the purpose of the benefit, because it could give rise to different and controversial outcomes. The outcome depends on how the circumstances, of each case, are valued.

Let's take two examples. The first decision excludes the deduction of the survivor's pension from the compensation of damages. The sentence relies in particular on the fact that the actual reason of that benefit '*must be identified in the previous employment relationship, in the contributions paid and in the provisions of the law*'.[25] Some scholars have not failed to underline that as the pension is paid to the widow of the worker, who did not pay anything in terms of contributions, the compensation has no social security function. Therefore, the pension should be deducted from the compensation.[26]

In some respects, the treatment of private insurance indemnities also remains controversial. According to the rules that can be inferred from the decisions of the United Sections, in the case of life insurance, the indemnity can be cumulated with compensation.[27] On the other hand, in the case of non-life insurance, the indemnity will be considered deductible from compensation.

The different regime has its own *ratio.* The main difference between life and non-life insurance is the following: the former is animated by social security purposes, while the latter is focused on the notion of accident and therefore governed by the so-called indemnity principle.

Therefore, it will not be unreasonable to treat in a different way those who have entered into a life insurance contract from those who have entered into a contract of insurance for damages. The Court explains the different treatment as follows. In the case of life insurance, the indemnity is payable in addition to the

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23 See E. Bellisario, Compensatio lucri cum damno: *il responso delle Sezioni Unite*, p (439) ss.

24 M. Franzoni, *La* compensatio lucri cum damno *secondo la Cassazione*, in *Responsabilità civile e previdenza*, 2018, p (1092).

25 Corte di Cassazione, Sezioni unite, 22 May 2018, n. 12564, § 4.1.

26 M. Ferrari, Compensatio lucri cum damno *e beneficio collaterale nella pensione di reversibilità*, in *Contratto e impresa*, 2019, p (1109).

27 See Corte di Cassazione, Sezioni unite, 22 May 2018, n. 12564, § 3.8; n. 12565, § 5.8; n. 12566, § 4.8; n. 12567, § 5.8.

compensation, because life insurance is a form of savings put in place by the insured by bearing the burden of premiums. The Court considers indemnity a real counterpart of the premiums paid.[28]

The non-life insurance, on the contrary, is based on a mutual agreement where the payment of premiums is in functional connection with the transfer of risk, not with the payment of the indemnity.[29] In fact, in the Ustica case (decision No. 12565/2018), as we have seen, the judges established that the airline company could not cumulate indemnity with the compensation.[30]

If we turn to accident insurance instead, its legal nature has always been controversial among Italian scholar.[31] Under accident insurance contracts, insurance companies, in current practice, tend to cover not only the death event, but also the case of an accident causing damage to the insured.

The most recent Italian case law has recognized a double nature of insurance policies: life insurance in case of death of the insured, no-life insurance in all other situations.[32]

In the wave of that orientation, the Third Section of the Cassation in a landmark decision of 2014 – as mentioned at the beginning – excluded the possibility of cumulating compensation with the indemnity paid as a consequence of the insured's accident.[33]

However, some scholars[34] underlined that the method of calculating the amount to be paid to the insured party in the case of an accident is a clear indication of the prevalence of the social security function over the indemnity function. It should be noted in particular that, in accident insurance policies, the insured values are life and physical integrity, whose quantification is very questionable. This explains why the capital insured in policies covering death or permanent disability, is freely chosen by the parties, taking into account the insured's spending and income capability.

According to this point of view, accident insurance is not comparable to insurance against damages, given the substantial difference in content. Therefore, cumulation of indemnity and compensation should be allowed.

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28 Corte di Cassazione, Sezioni unite, 22 May 2018, n. 12565, § 5.7.

29 Corte di Cassazione, Sezioni unite, 22 May 2018, n. 12565, § 6.4.

30 In the specific case, the airline company had collected by way of insurance indemnity a sum greater than double the value of the aircraft at the time of the accident.

31 See P. Corrias, *Il contratto di assicurazione. Profili funzionali e strutturali* (Napoli, E.S.I.) 2016, p (58).

32 Corte di Cassazione Sezioni unite, 10 April 2002, n. 5119, in *Assicurazioni*, 2002, p (105).

33 Cass.,11 June 2014, n. 13233, in *Foro italiano*, 2014, I, p c. (2064). Applying the criteria developed by the Sezioni unite, the Court some months after the decisions of 22 May 2018 did not hesitate to state that the compensation due to the victim of personal injury must be reduced by the amount received as indemnity by its own private insurer: Corte di Cassazione, 27 May 2019, n. 14358.

34 See R. Pardolesi, 'Erogazione previdenziale e danno patrimoniale da morte del familiare', in *Foro. italiano*, 2014, I. p c. (2470).

The argumentative structure of the four decisions appears questionable also for other reasons. As we have seen, the United Sections analyse the subrogation mechanism through which the provider of the benefit can recoup from the tortfeasor the sum paid to the victim.

For the Court, such a mechanism is important as it allows, on the one hand, to make sure that the victim is not over-compensated and, on the other hand, to hold the tortfeasor fully responsible for the consequences of his misconduct.

However, commentators have pointed out that, in practice, insurance companies have generally introduced a 'waiver of the right of subrogation'.[35] Through this waiver, the insurance companies give up the right of subrogation, that would have allowed to recoup from the tortfeasors, allowing in practice the cumulating of indemnity and compensation.

In these circumstances, the new approach introduced by the United Sections risks to create a situation full of pitfalls.

The Italian Court of Cassation excludes the possibility of cumulating indemnity with compensation, but given the waiver of the insurance company no subrogation against the tortfeasor will be carried out. In such circumstances, the party liable in tort will not be required to pay the provider of the collateral benefit, bringing unfair advantages to the tortfeasor.[36]

7. Putting the Italian Solutions in the European Context

To conclude it might be useful to recall that the judges of the United Sections expertly refer to the doctrinal elaborations that supported the idea of codifying European Tort law.

All the projects elaborated until now point out the need to balance between the damage and the benefit that might arise from time to time, in search of a reasonable damage assessment.

The reference to the European context must however be properly scrutinized. The Court of Cassation makes a general reference to two different documents, the *Principles of European Tort Law*[37] and the *Principles of European Law*[38] in order to support the solutions adopted.

In particular Article 10:103 of the *Principles of European Tort Law* states: '*When determining the amount of damages benefits which the injured party gains*

35 See recently, L. Lorenzani, *Clausola di rinuncia all'azione di rivalsa ex Art. 1916 c.c.*', in M. Confortini (ed.), *Clausole negoziali. Profili teorici e applicativi di clausole tipiche e a tipiche* (Torino: Utet giuridica), 2017, p (654).

36 See among the others, R. Pardolesi & P. Santoro, *Sul nuovo corso della* compensatio, p (427) ss.

37 European Group on Tort Law, Principles of European Tort Law, (Vienna-New York 2005), p 8 .

38 Study Group on a European Civil Code, *Principles of European Law: Non-Contractual Liability for Damage Caused to Another*, (Munich 2009), p 13.

through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit'.

On the other side, Article 6:103(1), book VI, of the Principles of European Law provides that: '*Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account*'.

While the first provision seems to refer precisely to the situation taken into consideration by the *c.l.c.d.*, the second appears to adopt a different approach. It is consequently questionable the reference made by the Sezioni Unite to both documents in support of its decisions.

The Court seems to pay attention to the principles followed in other legal systems in terms of *c.l.c.d.*. One of the four decisions correctly mentions an *arrêt* of the French *Cour de Cassation* in support of the interpretative solution in the sense of non-cumulation.[39]

However, a more complex situation emerges from the broader comparative analysis that we present in this issue of the European Review of Private Law, compared to the one mentioned by the Italian Court of Cassation.

In some countries, like France, the complexity arises out of the critical opinions of some scholars regarding the general orientation of the *Cour the Cassation*, aimed at excluding the possibility of cumulating compensation and insurance indemnity.[40]

In some other countries, however, case law itself is very fragmented.[41] The English comment reports that English courts and legal scholars agree that compensation payable to the victim of a tort will, as a general rule, be reduced by a sum corresponding to the benefits she has obtained as a consequence of the tort. Nevertheless, in some cases the dangers of over-compensation of the victim have been often balanced by the courts with considerations favouring the cumulation of tort damages and collateral benefits. Even here, the problems that arise are similar to those on which the Italian authors reflect. For example, why should a person who 'prudently spent [money] on premiums' to pay for her first party insurance against personal injuries see the insurance monies deducted from an award of damages? Or why should a person who, after being injured in an accident, receives an altruistic gift from a friend see her tort damages reduced because of that generosity? As a result, the default position of deductibility has several exceptions

39 See Corte di Cassazione, Sezioni unite, 22 May 2018, n. 12565, § 6.5, that mentions the *arrêt* of the *Cour de cassation* 25 avril 1975.

40 See Ph. Chauviré, *Créance de réparation et prestations versées par des tiers. Le principe de réparation intégrale à l'épreuve*, in this issue of the Review.

41 See for the situation in Portugal, M. Lima Rego, Compensatio lucri cum damno *in Portugal*, and for the situation in Spain, F. Peña López, *Interpretation of the* 'Compensatio Lucri cum Damno' *rule by the Spanish case law*, both in this issue of the Review.

in the English context, up to the point that it may be unclear what is the rule and what the exception(s).[42]

In other legal systems, like the German one, the differences that emerge in comparison with the Italian solutions appear even more evident. As the German comment put forward, the mechanism of *Legalzession* allows a very different approach to be taken.[43] The 'German' solution calls for reflection in the light of the decisions taken by the Sezioni Unite, as it appears to achieve in a more effective way the same purposes outlined by the Italian judges. That is to say: (1) to exclude that the injury can become a source of enrichment for the victim of a tort; (2) to ensure that the tortfeasor is not exempt from his obligations; (3) to prevent that the tortfeasor can take advantage from the benefits deriving from workers' contributions or from the payment of the insured's premiums.[44]

Furthermore, in the case of private insurance, the effective recovery from the tortfeasor of the sum paid as indemnity to the victim could allow insurance companies to reduce the insurance costs. This could consequently allow a containment of the level of insurance premiums.[45]

The possible transplant of such a solution in the Italian legal system would need the intervention of the legislator. Some scholars have for example, investigated the possibility of a reform of Article 1916 of the Italian Civil Code, that now foresees the subrogation only as a non-mandatory mechanism for the insurer.[46]

The introduction of a mandatory subrogation mechanism in the Italian legal system remains for the moment in the world of speculations.

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42 See M. Cappelletti, Compensatio Lucri cum Damno *in Tort Law*: *An English Perspective on the Italian Four Judgments*, in this issue of the Review.

43 See S. Segger-Piening, *Anrechnung von Drittleistungen? Vier (überraschende) italienische Entscheidungen zur Vorteilsausgleichung im Kontext des deutschen Rechts*, in this issue of the Review.

44 For a comment in the Belgian perspective, see T. gladinez, *A Belgian Perspective on the Need to Offset Private and Social Insurance Indemnities Against Compensation for Damage in Tort Law*, in this issue of the Review.

45 Corte di Cassazione, Sezioni Unite, 22 maggio 2018, n. 12565, § 6.2; for a comment, see S. Monti, *La* compensatio lucri cum damno *e il "compromesso innovativo" delle Sezioni unite*, in *Danno e responsabilità*, 2018, p (452).

46 R. Pardolesi & P. Santoro, *Sul nuovo corso della* compensatio, p (426).