Non-pecuniary damages in the age of personality rights
A search for a fair and reasonable framework comparing the German and Italian legal system

Allieva Perfezionanda
Sabine Wünsch

Anno Accademico 2008 - 2009
To Gudrun Unverferth
# Table of contents

**Introduction**  
4

**Part One: Hints from the Germany legal system**  
9

**A. Recoverable costs**  
9

**I. Introduction**  
9

**II. § 253 BGB**  
11

**III. The protected interests**  
12

1. Body and health  
   a. Injury to the body  
   b. Injury to health  
   c. Death  
   d. Mental suffering  
      Mental suffering of the primary victim  
      Shock Damages to third persons  
2. Freedom  
3. Sexual self-determination  
4. Other statutory provisions  
5. Allgemeines Persönlickeitsrecht  

**B. Assessment of non-pecuniary damages**  
28

**I. Function of non-pecuniary damages**  
28

**II. Cases of the “destruction of the personality”**  
30

**III. Schmerzensgeldtabellen**  
31

**Part Two: Italian lessons in non-pecuniary damages compensation**  
34

**A. Recoverable losses**  
34

**I. Introduction**  
34

1. The general tort clause, Article 2043 c.c.  
2. “Danno ingiusto”  
3. The requirement of Art. 2059 c.c. „Determined by the law“  

**II. Damage to health – the concept of „danno biologico“**  
47

1. Introduction  
2. Cases with no loss of income, elderly people, housewives, children
3. Traditional reading of Art. 2059 c.c. 51
4. Definition of „danno biologico“ 55
5. The development of the concept of danno biologico in case law 56

III. Damages to other fundamental rights than health 61
1. Secondary victims 62
2. Privacy and personal identity 65
3. The so called danno esistenziale 67

IV. Period of confusion resulting from the lack of a legal basis 72
V. The 2003 landmark decisions of the Corte di Cassazione 75

VI. Period of confusion despite existing legal basis 80
1. The problem of how to identify the new category 81
2. The unclear requirements for the recoverability of danno alla personalità 85
3. Danno esistenziale in the courts after the 2003 twin decisions 88

VII. The landmark decisions of 11.11.2008 of the Corte di Cassazione 90
1. The so-called tipicità of Art. 2059 c.c. 91
2. The „ingiustizia costituzionalmente qualificata” 93
3. The seriousness of the offence 95
   a. The criterion of the “seriousness of the offence” 95
   b. Bagatellschäden 96
   c. Conclusion 97
4. The bindiness of the 2008 decisions on the Giudice di Pace 98

5. Other clarifications emanating from Cass. 26972-26975/2008 100
   a. Danno morale soggettivo 100
   b. Danno tanatologico 100
   c. Non-pecuniary damages as an all-comprehensive unity 100
   d. Non-pecuniary losses under contract law 101

   a. Recoverability of non-pecuniary losses under contract law 102
   b. Danno tanatologico 103

VIII. Summary 104

B. Assessment of non-pecuniary damages 107

I. The normative basis 107

II. The Function of non-pecuniary damages 108

III. Different types of non-pecuniary damages 112

1. Damage to health 113
   a. Excursus on terminology - danno biologico and danno alla salute 114
   b. The contribution of forensic medicine 117
      b.1 The traditional concentration on the capacity to work 118
      b.2 The new medical evaluation concentrated on the damage to health 119
   c. Excursus on terminology - micromacropatologie and macropermanenti 123
   d. The evaluation by the judge 124
      d.1 Metodo genovese 125
Part One: Centrality of fundamental rights in tort law development

1. The single fundamental rights that have been the motor for the development

2. The entanglement of rights: a “Trojan horse theory of rights”
   a. Examples of German “Trojan horse cases”
   b. Examples of Italian “Trojan horse cases”
   c. Conclusion

II. The central issues in the development and changes in the characteristics of the analysed legal systems

1. The situation in 1942

2. The major issues in the development
   a. Damage to health as such
   b. Death within a short time after the injury
   c. Los of life per se
      c.1. Loss of life as iure sucessionis of the relatives
      c.2. Loss of life as iure propio of the relatives
   d. Personality rights
   d.1. Similar prerequisites of recoverability
   d.2. Different focal applications
   d.3. Some final considerations concerning the recoverability in cases concerning personality rights

B. Assessment of damages

Final remarks

Bibliography
Introduction

The system of non-pecuniary damages has gone through extreme development in the last hundred and fifty years. From a head of damages of minor practical relevance and very limited application for punitive scopes it has now become one of the central issues of tort law and a important tool for compensation.

Two main reasons may be individuated for the growing importance of the compensation of non-economical losses. The first is the post industrial revolution state of the world which is characterised by an increase in number and severity of traffic and work accidents. Even more efficient, but also more dangerous machines are today a part of every ones life. Later it was the fast growing improvement in medicine which let to new and more efficient possibilities to cure deceases and at the same time catapulted health law in the center of tort law. On one hand the possibility of an more effective cure leads to liability in case of failure and on the other hand patients today are more aware of their rights and thus more likely to sue the medical institutions and their doctors. Another field of modern industrial revolution is the fast developing computer technology. Indeed the significance of computer applications in daily life of every person is growing so fast that the development of adequate legal tools can hardly keep path. Thus the forthcoming developments in the field of non-pecuniary damages will probably concern to a great

1 Comandé outlines several historical, social-cultural and economical reasons for the fact that the compensation of damage to the person has been at the centre of attention in Western societies in the last century. Cf. G. Comandé, Towards a global model for adjudicating personal injury damages: bridging Europe and the United States (2005) Temple International & Comparative Law Journal, 241-349, 244. See also: G. Brüggemeier, Common Principles of Tort Law, a pre-statement of law (London, The British Institute of International and Comparative Law, 2004), v.; With respect to the last centuries development in the area of damage to the person in Italy see: F. D. Busnelli, Il danno biologico : dal "diritto vivente" al "diritto vigente", (Torino: Giappichelli, 2001). G. Comandé, Risarcimento del danno alla persona e alternative istituzionali, Studio di diritto comparato (Torino: Giappichelli, 1999) pp. 3-52.

extend health law and IT law.\textsuperscript{3} The present study focuses, however, not on these issues but rather on the second aspect which has caused a radical explosion of the role of non-pecuniary damages in the last decades.

This second reason is the change in the conception of the person. In the framework of tort law the person was traditionally “measured” by it’s capability to produce income. The development after World War II has put as well in Germany as in Italy the value of the person as such at the basis of compensation.

In consequence the area of recoverable losses has expanded steadily. More and more losses are deemed recoverable and the awarded sums show an upward trend.\textsuperscript{4} This development is closely related to the growing importance attributed to the protection of fundamental rights.\textsuperscript{5} To safeguard the values inherent to the person is not any more seen

\textsuperscript{3} Patients rights are a central issue in today’s legal discussion. The task is not only to find an adequate protection of patients in case of medical failures, but also to find a rightly balanced framework for the application of software in the elaboration of Patients data. One might think for example of the Electronic health care record whichs introduction is discussed in many states at the moment. One one hand it is a great blessing for the patients because it promotes efficient health care on the other hand it exposes personal data on an uncalculable risk of abuse, for instance by insurance or pharmaceutical companies and employers.


\textsuperscript{5} The issue of the exact delimitation between “human rights”, “fundamental rights”, “constitutional rights” and “inviolable rights” will not be treated with in detail in this study. It will be dealt with, however, in Part Two, Italy because in the Italian legal system the question which rights gain tort law protection as inviolable rights “diritti inviolabili” had a particular relevance in the discussion on recoverable interests. To my understanding the range of rights included by the concepts narrows down in the sequence in which the notions are stated above. “Human Rights” would thus be the broadest category including metaphysical concepts. “Fundamental rights” have a concrete legal protection, provided for not only by written norms, but also by case law. “Constitutional rights” are protected by a constitution. “Inviolable rights” might be defined in a broader and in a narrower way. For the Italian discussion on recoverable losses, inviolable right should according to my opinion be interpreted as those constitutional rights which require protection through tort law. For more details, see Part Two.

C. Mak uses the terminology of ‘fundamental rights’ to refer “to all rights that form part of national Constitutions and international human rights treaties, as well as rights as rights that have derived therefrom.” C. Mak, Fundamental Rights in European Contract Law: A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England (The Hague: Kluwer International, 2008) 6-7. For a definition of “fundamental right” from a comparative perspective see: C. Mak, Fundamental Rights, cit. 17 et seq.

See also: G. Palombella, From Human Rights to Fundamental Rights. Consequences of a conceptual distinction EUI Working Paper LAW No. 2006/34, available at: http://ssrn.com/abstract=963754 who defines human rights as moral visions and fundamental rights as “…those which are assigned a meta-normative role in a legal order and an ultimate value in the corresponding social and ethical context.”

as an exclusive task of public law. Private law, in particular tort law, is used to guarantee the free development of the personality in its various aspects and human dignity and its protection has become the fundamental principle of tort law.\(^6\)

The present study analyses the developments in the compensation of non-pecuniary damages in the German and Italian systems of tort law.\(^7\) The two systems have been chosen because they faced the challenges of the last decades in different ways – the German approach seems rather cautious and slowly compared to the Italian visionary, more flexible one. One focus of the study is the investigation whether or not the differences among the two legal systems are merely apparent. The answer to this question is of interest for further harmonisation of law within the European Union.\(^8\)

The present study is divided in three parts. Part One contains a rather descriptive analysis of the state-of-art of recoverable non-pecuniary losses under the German legal system (Chapter A) and, in the Chapter B, of different aspects of the assessment of non-pecuniary damages. Based on the study of the German legal system, Part Two investigates the evolution of the Italian legal system with regard to recoverability and


\(^7\) For a more general study (not only focussing on non-pecuniary losses) on the compensation for damage to the person in Italy and Germany see: G. Bender, Personenschaden und Schadensbegriff, Rechtsvergleichende Untersuchung zur neueren Entwicklung des Personenschadensrechts in Italien (Baden-Baden: Nomos, 1993).

assessment of non-pecuniary damages. The comparative Part Three is intended to summarise the most important aspects of the study of the German and Italian legal system and wants to point out were both might profit from the experiences of the other.

The chapters on recoverable losses will give an overview of the normative scheme to then highlight the most important developments in cases law. One central theme accompanying the whole analysis is the question which impact fundamental rights and more general the principles of human rights had on the recent development of tort law.\(^9\)

In order to concentrate on the issues which have been most influenced by principles of human rights protection, the study will not deal with all aspects of compensation for damages. Regarding liability one may distinguish, as above all the German authors do, between the two questions “Is liability given (and of whom)?” (the so called Haftungsbegründung) and if the first question is answered in an affirmative way: “What are the consequences?” in other words, is there a recoverable loss? If yes, in which way it has to be restored? Has a compensation to be paid? How much? (all this concerns the so called Haftungsausfüllung).\(^10\)

The present study focuses on the second problem, that means the types and measuring of losses and their compensation. For my investigation I will presume that liability is given. This leaves out of the analyses questions as whether the duty to compensate results out of a contractual relationship or out of tort, as well as issues of fault, negligence and strict liability. Those issues will be dealt with only insofar as they are relevant, in particular for the assessment of damages. However, as the systems of compensation of non-pecuniary damages have been developed mainly in the framework of torts,\(^11\) the analysis and examples given have their focus also on tort.

---


\(^10\) K. Vieweg, Schadensersatzrecht, cit., 365-404, 373; G. Brüggemeier, Haftungsrecht, cit., who distinguishes between injury (Haftungsgrund) and damage (Haftungsausfüllung), 5, 545.

\(^11\) As we will see in more detail later, the recoverability of non-pecuniary damages has its historical roots in tort law, not to say in “private penal” law. Further developments have as well in Germany as in Italy had there starting point in tort law to than see the emerged rules be applied also in contract law or strict liability. See for instance the recent Italian cases Cass. 26792-26795/2008 which explicitly state that the principles elaborated with regard to the Art. 2043 and 2059 c.c. (tort law norms) should find application also in contract law.
recoverability of pecuniary losses matters only marginally for the present research. The study will instead concentrate on compensation of non-pecuniary losses and the way in which this type of damages is assessed by the different systems. A central role plays herein the damage to health as health is the first fundamental right for which the necessity to grant protection also by means of tort law was recognised. This protection has then been extended to other fundamental rights. In the third part the so-called “Trojan horse” theory will be used to investigate the entanglements of rights and the phenomenon to use one fundamental right as a “Trojan horse” in order to actually grant protection to another right.

In the second chapters respectively the system of assessment of damages will be analysed. That means, once recoverability has be affirmed, the question is, what kind of restoration is be owed and which method is applied by the judges to assess damages which by their nature are difficult, if not impossible to estimate precisely.

The language used for the present analysis is English in the way it is used has common language for communication on an international level. That means that notions in English which do have a certain technical meaning in common law systems, are, when not otherwise stated, not used in the technical way. They should be read as referring to a more general meaning.12

---

12 For a comparative analysis of the notion “non-pecuniary loss” and related notions used to refer to losses “different from lost earnings or material damages” see: G. Comandé, Towards a global model, cit., 246 et seq.
Part One: Hints from the Germany legal system

A. Recoverable costs

I. Introduction

The central norms of the German law of compensation are §§ 249-254 BGB. Once liability is established, these provisions determine to what extent compensation has to be paid. These rules are located in the first part of the second book of the BGB “Law of obligations” (“Recht der Schuldverhältnisse”), which contains the common rules for all types of obligations.\(^{13}\) Thus, they are applicable to the entirety of private law obligations, in particular to all types of liability.

Regarding non-pecuniary losses, which are of interest here, the two basic sections are §§ 249 and 253 BGB.

§ 249 BGB is the central norm for the compensation of losses and establishes the principles of full reparation (Totalreparation) and restoration in kind (Naturalrestitution).\(^{14}\) It reads:


\(^{14}\) See in more detail in the following. See also: K. Vieweg, Schadensersatzrecht, cit., 374-381; G. Brüggemeier, Haftungsrecht, cit., 562 et seq., 564. In the Italian legal system this classical approach of civil liability has lost relevance. See: C. Castronovo, La nuova responsabilità civile, 3rd ed. (Milano: Giuffrè, 2006) 797 et seq.
§ 249 Art und Umfang des Schadensersatzes

(1) Wer zum Schadensersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatz verpflichtende Umstand nicht eingetreten wäre.

(2) Ist wegen Verletzung einer Person oder wegen Beschädigung einer Sache Schadensersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlichen Geldbetrag verlangen. Bei der Beschädigung einer Sache schließt der nach Satz 1 erforderliche Geldbetrag die Umsatzsteuer nur mit ein, wenn und soweit sie tatsächlich angefallen ist.

According to the first section of this provision, restoration in kind for non-pecuniary loss may be claimed without any restriction. Examples of possible restoration in kind are the revocation or the correction of a defamatory statement. The claim for restoration in kind generally has only a limited relevance in practice. However, case law regarding the Allgemeines Persönlichkeitsrecht has, as we will see in more detail later, confirmed the Naturalrestitution as one of the fundamental principles of German compensation law.

15 The translation of the BGB by the Langenscheidt Translation Service, available online at the German Federal Ministry of Justice website: http://bundesrecht.juris.de/.
On the contrary, monetary compensation for non-pecuniary losses can only be claimed in limited cases. In fact, the first section of § 253 BGB establishes the following:

§ 253 Immaterieller Schaden

(1) Wegen eines Schadens, der nicht Vermögensschaden ist, kann Entschädigung in Geld nur in den durch das Gesetz bestimmten Fällen gefordert werden.

§ 253 BGB Intangible damage

(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law.

In the following section, I wish to give an overview of the statutory provisions which explicitly provide for the compensation of non-pecuniary losses.

II. § 253 BGB

By far the most important provision relating to the compensation of non-pecuniary losses is § 253 (2) BGB which establishes:

§ 253 Immaterieller Schaden

(2) Ist wegen einer Verletzung des Körpers, der Gesundheit, der Freiheit oder der sexuellen Selbstbestimmung Schadensersatz zu leisten, kann auch wegen des Schadens, der nicht Vermögensschaden ist, eine billige Entschädigung in Geld gefordert werden.

§ 253 Intangible damage

(2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.

This second section of § 253 BGB has only been introduced recently through the reform of compensation law in 2002. Previously, § 847 BGB, which was abrogated by the

---

19 Note, however, that restoration in kind might also take place through the payment of money, for instance, for the costs of eliminating defamatory graffiti. H. Heinrichs, § 253, cit., para. 3.
reform, had almost the same content. The moving of this provision has significantly increased its range of application. The former § 847 BGB was part of the chapter of the BGB dealing with tort law and thus only applicable in this limited framework. The new § 253 (2) BGB is placed in the general part of the Law of obligations and thus universally applicable. In particular, compensation for non-pecuniary loss may also be claimed when the liability is based on contract or strict liability and not only in cases of fault. A similar development is envisaged by the Italian Supreme Court in its decisions 26792-26975/2008 where it states that the principles inspiring the recent developments in case law concerning non-pecuniary damages should lead in consequence also to a recoverability of this type of damages under contract.

III. The protected interests

According to § 253 (2) BGB compensation for non-pecuniary loss may be claimed in cases of an injury to body, health, freedom or sexual self-determination. Investigating the individual protected interests, it has to be borne in mind that this provision deals with the concrete content of a duty to compensate (Haftungsausfüllung). The duty itself, that is to say liability (Haftungsgrund), has to be established before § 253 BGB can be applied. Consequently, the question whether one of the named interests is infringed, has to be answered with regard to the liability norm.

1. Body and health

Recoverable loss includes non-pecuniary losses in cases of bodily harm and the impairment of health. Whether a bodily harm or an impairment of health is given, has to be established by an interpretation of § 823 (1) BGB. This norm establishes liability in cases of fault. Until the reform which transferred the provision on non-pecuniary damages from § 847 BGB to the new § 253 (2) BGB, damages for pain and suffering

---

21 H. Heinrichs, § 253, cit., para. 5.
22 However, as later will be pointed out, the argumentation of the Corte di Cassazione can not entirely convince. See Part Two A 5 d. and 6 a.
could therefore only be claimed in cases of fault. Therefore, it was natural that the former § 847 BGB would be interpreted in the same way as § 823 (1) BGB. Under the current system, § 253 (2) BGB is also applicable to other hypothesis of liability, namely in cases of strict liability and contract. However, the explicit aim of the legislator was the broader application of the provision, not a new interpretation of the concepts of the protected interests. That means that the interpretation of the notions of „bodily harm“ and „impairment of health“ in § 253 (2) BGB follows the interpretation of the same notions under § 823 (1) BGB.

a. Injury to the body

Compensation for bodily harm is awarded in the case of an interference with the integrity of the body. The disturbance of the external or structural integrity of the body is meant which does not always also constitute damage to health („health“ is here understood in a narrow sense as sickness, illness, see definition below under 1. b). Thus, also causing a mere change in external appearance, for example through the cutting of the hair, might constitute an injury to the body.

In its decision of 09.11.1993 the BGH affirmed for the concrete case the bodily harm in consequence of the destruction of frozen sperma. The Court motivates this decision in the core with functional union between the body and its separated parts in cases in which those parts are planned to be reused or reimplanted in order to fulfil functions of the body. The construction the Court uses as legal basis for this statement is coheren
in itself but nonetheless not entirely convincing. The functional argument is mixed with arguments of protection of fundamental rights, in particular of the right of self-determination and the Allgemeines Persönlichkeitsrecht. In its central part the decision reads as follows:

“...The provisions of § 823 I BGB protect the body as the basis of human personality. In view of modern medical possibilities and in respect of the body as object of the protected right, a person’s right for self-determination, emanating from his right of personality, acquires additional significance. ...Where, with the consent of the person affected, parts of a body are taken out in order later on to be re-implanted as a means of preserving or improving bodily functions, the legal opinion that § 823 I BGB comprehensively protects corporeal integrity in order to guarantee a person's right to self-determination will lead to the following result. In view of the protective purpose of this paragraph, these extracted parts continue to form a functional unity with the remaining body even during their separation from it. It therefore seems necessary to classify the damage to or destruction of such extracted body parts as a physical injury in the sense of §§ 823 I, 847 BGB. The result is different where, according to the wishes of the person concerned, the separated parts of his body are not intended to be used or re-integrated at a later stage.”

It is questionable if the right to bodily integrity is really the injured right in this case. The plaintiff has not lost the capacity to procreate through the destruction of the sperma. Rather his sterility resulted from an operation undergone with his consent. It seems artificial to claim that the function to procreate of the plaintiff’s body has perceived has long as the frozen sperma was intact. Through the destruction of the sperma the plaintiff has indeed lost the possibility to have own children, but this is not a question of the health of the plaintiff, but rather concerns personality rights, in particular family rights. German courts – different from the Italian case law – do so far deny the

30 For a description of the concept of the Allgemeines Persönlichkeitsrecht see below.
31 Translation by Irene Snook available on the website of the German Law Archive: http://www.iuscomp.org/gla/.
32 So also: A. Laufs and E. Reiling, Schmerzensgeld, cit., 775-776. G. Brüggemeier agrees with the result found by the Court saying, that the recoverability is given for the damage per se and it would make no difference whether to qualify it as a damage of health or of personality rights. See: G. Brüggemeier, Haftungsrecht, cit., 239 and 577 footnote 176.
recoverability of non-pecuniary damages in cases in which interests of family planning are concerned.\textsuperscript{33}

This case is a first example for some of the problems which will accompany the present study: the entanglement of protected rights. On one side the protection of fundamental rights leads necessarily to an extension of recoverability to new situations of infringements of interest. On the other side, with fundamental rights at hand is it impossible to draw absolut limits. In other words, a balance has to be found between the requirement of the certainty and transparency of the law and the necessity of flexibility of the case law in the solution of cases which concern an infringement of fundamental rights or interests protected by a Constitution.\textsuperscript{34}

A special set of cases are the so called wrongful pregnancy cases.\textsuperscript{35} German courts also affirm an injury to the body in cases of unwanted pregnancy, for instance due to the failed sterilisation of the woman\textsuperscript{36} or the man.\textsuperscript{37} Even though pregnancy is a normal physiological process, whenever it occurs against the will of the woman, it is an unauthorised interference with the integrity of her body and, therefore, according to German case law, an injury to the body.\textsuperscript{38}

\textsuperscript{33} The core argument to deny recoverability of non-pecuniary damages in cases of an infringement of family planning as part of the Allgemeines Persönlichkeitsrecht is that the recognition of such a right would to much extend the limits that by the legislator for the liability under tort. See: BGH 18.01.1983 - VI ZR 114/81 (1983) NJW 1371, 1373; OLG Frankfurt a. M. 25.06.1992 - 3 U 121/91 NJW 1992, 2388, 2389; OLG Karlsruhe 19. 10. 1978 - 4 U 3/77, NJW 1979, 599-601; A. Laufs and E. Reiling, Schmerzensgeld, cit., 776. Under Italian legal system the infringement of family rights might, under certain prerequisites lead to the obligation to compensate non-pecuniary damages. See for instance Cass. 8827 and 8828/2003(see for more details Part II A V).


\textsuperscript{35} Also known as “wrongful conception”, this terminology refers to cases involving pregnancy as a result of failed sterilisation. See Black’s Law Dictionary (8th edn, St. Paul: Thomson West, 2004), wrongful-pregnancy action, consulted on Westlaw International (10.03.2008). See also: G. Brüggemeier, Haftungsrecht, cit., 225, footnote 159.

\textsuperscript{36} BGH, 18.03.1980, VI ZR 247/78, NJW 1980, 1452-1456, 1453; BGH, 19.06.1984, VI ZR 76/83, NJW 1984, 2625-2627.


Also this case law raises similar doubts as the frozen sperma case.\footnote{For a critical analysis see: G. Brüggemeier, \textit{Haftungsrecht}, cit., 229-230.} The actual issue at stake is normally that the pregnant woman did not wish to have a child. Accordingly, she does not complain as much about the pregnancy itself, but about the consequence of having to decide whether to give birth to an unwanted child or undergo an abortion. In other words, medical negligence forces her into a situation where she has to take exactly the kind of decision she wanted to avoid by undergoing sterilisation in the first place.

Having pointed this out, the issue takes the shape of a violation of the right to self-determination, rather than an injury to the body. \footnote{See also G. Brüggemeier, \textit{Haftungsrecht}, cit., 229 who adds that otherwise one would have to come to the abstruse result that in every case of unwanted pregnancy the man injures the body of the woman.} It is also true that the courts, when deciding on claims for maintenance costs in wrongful pregnancy cases (and granting them), refer to frustrated family planning. \footnote{BVerfG 12.11.1997, 1 BvR 479/92 and 1 BvR 307/94, NJW 1998, 519-523; BGH, 18.03.1980, VI ZR 247/78, NJW 1980, 1452-1456, 1453; BGH, 18.03.1980, VI ZR 105/78, NJW 1980, 1450-1452; BGH, 19.06.1984, VI ZR 76/83, NJW 1984, 2625-2627; See also: G. Brüggemeier, Haftungsrecht, cit., 226-228 who gives a summary of the development in case law and also further references.} As has been mentioned with regard to the frozen sperm case, this legal classification would, however, not lead to any compensation of non-pecuniary damages under German law. \footnote{See the above cited decisions BGH 18.01.1983 - VI ZR 114/81, OLG Frankfurt a. M. 25.06.1992 - 3 U 121/91, OLG Karlsruhe 19. 10. 1978.} The crucial point is that constitutional considerations forbid consideration of the fact that having a child is damage. \footnote{BVerfG 28.05.1993, 2 BvF 2/90 and 4, 5/92, NJW 1993, 1751-1779, 1764.} In the case of a severely injured child, the BGH explicitly stated that a claim for pain and suffering based on the mere fact of having such a child would be alien to the German legal order. \footnote{BGH, 18.03.1980, VI ZR 247/78, NJW 1980, 1452-1456, 1453; BGH, 19.06.1984, VI ZR 76/83, NJW 1984, 2625-2627. See also G. Brüggemeier, Haftungsrecht, cit., 234.}

In light of these considerations, the qualification of the unwanted pregnancy as an injury to the body seems to be carried by the wish to compensate at least „something“ to the involuntary mother. This „something“ consists of the pain and suffering related to the pregnancy itself. \footnote{BGH, 18.03.1980, VI ZR 247/78, NJW 1980, 1452-1456, 1453; BGH, 19.06.1984, VI ZR 76/83, NJW 1984, 2625-2627.} If the woman decides not to have the child, the physical and psychological pain caused by the legal abortion would also be recoverable. \footnote{OLG Braunschweig, 11.09.1979, 2 W 82/79, NJW 1980, 643.}
However, in practice, claims for damages in cases of failed sterilisation become less relevant, firstly because the errors in treatment are rare, and secondly because the patients are generally sufficiently informed about the risks involved, which excludes medical liability.47

In this context, wrongful birth cases might also be mentioned. These are cases in which a doctor did not carry out an abortion successfully or failed to advise the parents about the risk of having a child born with severe health defects and, therefore, the mother did not have an abortion which she would have opted for in the case of a correct diagnosis.48 In these types of cases, the BGH has allowed the claim for non-pecuniary damages for the pregnancy itself, insofar as the pain and suffering exceeded that normally connected with a pregnancy which takes a natural course without complications.49

---

48 G. Brüggemeier, Haftungsrecht, cit., 230.
49 BGH 18.01.1983, VI ZR 114/81, NJW 1983, 1371-1374, 1373; BGH 27.11.1984, VI ZR 43/83, NJW 1985, 671-674, 673. However, the central issue in these cases is, as in the wrongful pregnancy cases, the liability for maintenance costs. That means economical losses which are not at centre of the present study. It is, however, interesting to note that the extend of recoverable damages and especially the presuppositions fo claim such damages have changed various times recently. This went hand in hand with the changes in criminal law regarding the abortion – first restrictive, than, after the unification less restrictive due to the fact that East German law allowed abortions in a broader range of situations. Than the Constitutional Court intervened, and restored a more restrictive legal situation. The doctor is only liable if the failed abortion would have been legal (rechtsmäßig), its not enough that the abortion would remain unpunished (nicht strafbar). In this context it is also important to mention, that German law forbids a distinction between a health born child and one born with health problems. The risk that a child will be born with severely health problems therefore does not constitute a situation which legalises an abortion. For more details to this type of cases see the cited article of G. Müller and BGH 18.6.2002. If the prospect to have a handicapped child leads to serious health problems of the mother, for instance thoughts of suicide or depression, then an abortion might be legal because of the health risk for the mother (not the one of the child). For further details to the wrongful birth/wrongful pregnancy cases in general, see the cited cases and: BGH 18.06.2002, VI ZR 136/01, NJW 2002, 2636-2639 with the commentary articles of C. Wagner, Das behinderte Kind als Schaden? (2002) NJW 3379-3381 and G. Müller, Unterhalt für ein Kind als Schaden (2003) NJW 697-706; G. Brüggemeier, Haftungsrecht, cit., 230-235; E. Deutsch, Das behindert geborene Kind als Anspruchsberechtigter (2003) NJW 26-28; A. Laufs, Schädliche Geburten – und kein Ende (1998) NJW 796-798; A. Spickhoff, Die Entwicklung des Arztrechts 2006/2007 (2007) NJW 1628-1638, 1633, 1634.
**b. Injury to health**

The impairment of health, different to injury to the body, refers instead to the internal integrity and occurs in case of an interference which provokes a negative change in the physical, psychological and mental functions of the human body.\(^{50}\)

In addition, the omission to improve a physical condition, might, under certain circumstances, constitute an injury to health.\(^{51}\) What is implied here, above all, are cases of medical negligence in which causality will often be a problematic issue.\(^{52}\)

As the integrity of the body and the integrity of health are protected in the same measure, a strict distinction between both interests is not essential.\(^{53}\) Moreover, the border between the two is often vague. Consequently, some authors follow the given definitions, but without drawing a distinction between injury to the body and injury to health.\(^{54}\)

An injury to the body and/or health has been affirmed in cases of infection,\(^{55}\) for instance with HIV, even if it had not yet developed into AIDS.\(^{56}\)

---


\(^{52}\) G. Brüggemeier, Haftungsrecht, *cit.*, 254 with examples.


\(^{54}\) For example: H. Thomas, § 823, cit., para. 4; H. Kötz and G. Wagner, *Deliktsrecht*, cit., 58, para. 136.

\(^{55}\) J. Hager, *Das Recht der unerlaubten Handlungen*, cit., 819-875, 827.

c. Death

In terms of recoverable non-pecuniary damages, the death of a person is not seen as the worst case of an injury to the body and health. That means that, in principle, there is no compensation for the victims own loss of life as damage *per se* which goes into the estate.\(^{57}\)

Third persons might claim damages for pecuniary losses, such as funeral expenses, maintenance or damages due to the loss of services (§§ 844-846 BGB). However, German law, so far, does not grant those persons bereavement damages due to the fact that they lost a close person as such.\(^{58}\) Third persons might have a right to compensation for non-pecuniary losses when the event caused an injury to their own health.\(^{59}\)

If the death is not immediate, non-pecuniary damages can be claimed for the injury which subsequently leads to the death of the victim.\(^{60}\) This issue arises in fatal traffic accident cases especially in which the victim survived for a limited time, which can range from only a few minutes up to several weeks, without regaining consciousness or indeed waking only momentarily. How much time passed between the infliction of the injury and actual death and whether the victim was conscious or not are factors which influence the amount of damages awarded.\(^{61}\)

However, this claim is excluded when in an overall view of the injuring event the death is so to the fore that the injury does not present itself as a distinguishable immaterial loss.\(^{62}\) Any other result would undermine the choice of the legislator to not include life in the list of protected interests under § 253 II BGB (ex § 847 BGB).\(^{63}\) However, some


\(^{58}\) U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 114.


\(^{60}\) H. Heinrichs, § 253, cit., para. 16; U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 114.

\(^{61}\) H. Heinrichs, § 253, cit., para. 16; U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 114.


\(^{63}\) OLG Düsseldorf, 11.03.1996, 1 U 52/95, NJW 1997, 806-807, 806.
authors demand a review of this choice as it is not coherent anymore with the recent developments in the German system of compensation of non-pecuniary damages.\textsuperscript{64}

The claim for non-pecuniary damages goes in these cases on to the heirs. Until 1990 this was the case only, when the claim was already brought to court (ex. § 847 II BGB). The reasoning on the basis of the provision which established that only pending claims could be inherited was that the right to claim non-pecuniary damages was seen as of strict personal nature.\textsuperscript{65} At the time of the writers of the BGB the cases which could lead to a claim for non-pecuniary damages happened above all in the circle of family and acquaintances.\textsuperscript{66} The heirs should not be able to make a claim which the deceased would not have wanted to proceed.\textsuperscript{67}

With the technical revolution the number of accidents grew and in the majority of cases non-pecuniary losses were caused by a person alien to the victim. In cases in which the victim died short after the injuring event it was likely that the deceased would have wanted to claim. That’s why ex. § 847 II BGB was did not anymore keep with the time and was finally abolished.\textsuperscript{68}

\textit{d. Mental suffering}

With regard to mental suffering connected to personal injury cases, two issues may be distinguished. The first are the psychological reactions of the primary victim and the second, those of third persons, such as bystanders or relatives.

\textsuperscript{64} G. Brüggemeier, Haftungsrecht, \textit{cit.}, 578ss, with further references. An overview of the arguments is given in H. Kötz and G. Wagner, \textit{Deliktsrecht}, \textit{cit.}, 286 who at the end, however, favour not changing the state the of law of damages, 286, para. 739.

\textsuperscript{65} M. Notthoff, Schmerzensgeldbemessung im Falle alsbaldigen Versterbens des Geschädigten (2003) \textit{r+s} 309-314, 310.

\textsuperscript{66} M. Notthoff, Schmerzensgeldbemessung, \textit{cit.}, 310.

\textsuperscript{67} M. Notthoff, Schmerzensgeldbemessung, \textit{cit.}, 310.

Mental suffering of the primary victim

Negative consequences of the injury to the psyche of the primary victim are recoverable when they take the shape of a medically recognisable illness.\(^{69}\) Psychological reactions which do not amount to an illness themselves maybe taken into account in the assessment of damages when they go hand-in-hand with a physical injury. On the other hand, they are not recoverable as such. For instance, no compensation can be claimed for the fear suffered in a life-threatening situation when it came to a safe end.\(^{70}\)

In an *obiter dictum*, the BGH stated that under German law, non-pecuniary damages could not be paid to parents for emotional stress caused by the fact of having a serious disabled child.\(^{71}\)

Shock Damages to third persons

A separate group of cases are those regarding the psychological reactions of third persons to the injury or death of the primary victim. In principle, the possibility for third persons to claim damages is reduced to pecuniary losses (§§ 844-846 BGB). Compensation for non-pecuniary losses is, in principle, excluded for secondary victims.\(^{72}\) German courts have developed strict conditions under which a claim is nonetheless possible.

Since not even the primary victim can claim compensation for mere emotional stress, it follows that the mental trauma of a secondary victim must also reach the degree of a medically recognisable illness in order to be recoverable.\(^{73}\) However, for the secondary victim the requirements are even stricter. Mere medical relevance is not sufficient to

---

\(^{69}\) U. Magnus and J. Fedtke, *Non-Pecuniary Loss*, cit., 110. BGH 12.11.1985, VI ZR 103/84, NJW 1986, 777-779, 778. BGH 30.05.1995, VI ZR 68/94, MJW 1995, 2412-2413 In this case, the court affirmed the right to claim compensation for mental distress. Non-pecuniary damages had been claimed by a 44 year old woman for the emotional stress she suffered because her pregnancy was diagnosed very late by the doctor. She suffered depression caused by the fear that the child might be born seriously ill because of her age and the fact that she had taken medication in the early stage of the (then undiscovered) pregnancy.

\(^{70}\) In these cases, G. Brüggemeier affirms a *sui generis* injury to health which should be recoverable. One of his arguments is that the physical-emotional strain might go far beyond that suffered in cases of physical injuries. See G. Brüggemeier, *Haftungsrecht*, cit., 259.

\(^{71}\) BGH 18.01.1983, VI ZR 114/81, NJW 1983, 1371-1374, 1373.


affirm a recoverable injury to health in these cases. Serious injury to the health of a third person must occur objectively and the psychological reaction must go far beyond the normal reactions to similar situations. Thus, reactions such as sleeplessness, depression, and convulsive weeping, even when treated with psychiatric drugs are not sufficient; they are part of the so-called ills of life (allgemeines Lebensrisiko).

The second requirement is that there must be a close relationship between the primary and secondary victim. This is above all a problem of accountability, thus a political choice. Under this aspect it is necessary to place clear limits on the claim. It would go definitely too far to compensate any psychological reaction caused to a third person by a tort. Extreme examples are those cases of tragic news reported by the media. The liability of the tortfeasor cannot be extended to a TV viewer who might have a serious mental or even physical reaction to what he or she sees. Thus, under German law, bystanders can not claim damages for the mental distress suffered as the witness of a tragic accident.

Consequently, the limit clearly has to be set to somebody close to the primary victim. According to German case law, only close relatives are entitled to compensation. That refers above all to parents, children and spouses, but also to fiancés or life-partners.

81 BGH 22.05.2007, VI ZR 17/06, NJW 2007, 2764-2766.
82 BGH 22.05.2007, VI ZR 17/06, NJW 2007, 2764-2766. In this case, two police officers witnessed a tragic car accident. They suffered serious mental distress as they were unable to help the victims. However, the court dismissed the claim for compensation of non-pecuniary damages on the reason of non-accountability. The court defined the losses suffered as part of the general ills of life.
83 U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 111.
84 OLG Stuttgart 21.07.1988, 14 U 3/88, NJW-RR, 1989, 477 in this case, however, no compensation was granted to the daughter for the psychological reactions she suffered as a consequence of her mother’s death as the suffering did not go beyond what is normal in similar situations.
85 LG Lüneburg 30.05.95, 5 O 510/93, DTZ 1995, 376-377 In this case, a woman who had seen her husband shot at the East German border in 1966 finally got compensation (10.000 DM) for the grave
2. Freedom

The mention of freedom as a protected interest under § 253 II BGB refers above all to physical freedom. The typical cases are those concerning claims against a public institution, for instance for an illicit imprisonment. Compensation also has to be granted to a person who was unlawfully placed in a psychiatric institution.

3. Sexual self-determination

The infringement of one’s right to sexual self-determination by assault or sexual misconduct leads to the obligation to compensate immaterial losses.

Ex § 847 BGB explicitly protected the sexual self-determination of women only. This gender specification has been eliminated with the reform of 2002. Thus, under § 253 II BGB men and children are now also protected.

If a person was deceitfully induced to have a sexual relationship, he or she cannot claim damages. The LG Freiburg had to decide on this matter in a case where a woman could not have children. She and her husband therefore decided to contract another woman to carry a child for them. The three of them decided that the child should be conceived naturally, thus the man had sexual intercourse with the surrogate mother who subsequently fell pregnant. However, after the birth the surrogate mother kept the child and the couple had no legal remedy to take it from her. The man claimed for non-pecuniary damages on the ground that he had been deceitfully induced to have sexual intercourse. However, the court dismissed his claim.

mental distress she suffered. This case is also interesting due to the aspect that the court held that the claim was not statute-barred because of the plaintiff’s impossibility to pursue the claim.

U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 111.


BGH 122, 268

LG Marburg, NJW 1996, 216, Regarding the compulsory isolation of a person infected with the HIV who was committed to a mental institution against his will: ECHR, Judgment of 25.01.2005 – 56529/00, Enhorn v. Sweden., Herz/Deutschland NJW 2004, 2209, Storck/Deutschland NJW 2006, 1577.

4. Other statutory provisions

Beside § 253 II BGB only a few other norms provide for compensation of non-pecuniary damages. Within the BGB these are provisions introduced in the Civil Code long after the entry into force of the BGB as consequence of European directives, as § 611 a, 2 BGB and § 651f BGB.\textsuperscript{91}

The first gives the right to compensation of non-pecuniary losses in case of gender based discrimination in the field of employment law (for instance in occasion of the establishment or ending of a contract of employment, of promotions or when issuing instructions). This section was introduced in the BGB implementing the Equal Treatment Directive of 1976.\textsuperscript{92}

The implementation of the Package Travel Directive of 1990\textsuperscript{93} led to the introduction of § 651f in the German Civil Code which foresees compensation of non-pecuniary loss for ruined holidays.

Outside of the BGB, the § 97 II UrhG\textsuperscript{94} gives the right to an e reasonable compensation in money ("Entschädigung in Geld ...wenn und soweit es der Billigkeit entspricht") for non-pecuniary loss in cases of an infringement of a copy right. In cases of wrongful imprisonment § 7 III StrEG\textsuperscript{95} establishes an indemnisation of 11 Euros per day for non-pecuniary loss suffered. Furthermore § 40 III SeemannsG\textsuperscript{96} regulates the so called "Hungergeld", the right of the seamans to compensation for suffered hunger.

\textsuperscript{91} Originally the BGB provided in § 1300 for compensation of non-pecuniary damages to be paid by a man to a woman when he had sexual intercourse with her under the pretense of an offer of marriage which was later withdrawn. In its decision of 08.12.1992 the AG Münster, 50 C 628/92, dismisses a claim for 1000 DM (500 Euro) arguing that the so called Kranzgeld (wreath money) is not any more in line with the changed moral standards and would therefore violate the principle of equal treatment (Art. 3 GG). See also: BVerfG 5. 2. 1993 - 1 BvR 39/93, BVerfGE 32, 296 decision of 26.01.1972 - 1 BvL 3/71. Consequently the norm was abolished by the Gesetz zur Neuordnung des Eheschließungs-rechts (Reform of the Law of marriage) of 04.05.1998, BGBl. I, 833.


\textsuperscript{94} Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz; Copyright Act) of 09.09.1965, BGBl. I, p. 1273.

\textsuperscript{95} Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen vom 8. März 1971 (Act on Compensation for Prosecution Measures (BGBl. I S. 157).

\textsuperscript{96} Seemannsgesetz (Maritime Act) of 26.07.1957, BGBl. I, p. 713.
5. Allgemeines Persönlichkeitsrecht

The most important development within the German legal system regarding the compensation of non-pecuniary damages was surely the elaboration of the concept of the Allgemeines Persönlichkeitsrecht (general right of personality).

In a long line of cases, German judges have first recognised the existence of such a right, which finds its basis in Articles 1 and 2 Grundgesetz (German Constitution, hereinafter *GG*97), and then concretised the presuppositions for the recoverability of non-economic loss.98 After fifty years of case law, the allgemeines Persönlichkeitsrecht presents itself as a comprehensive right to the respect and development of the personality.99

First it was argued that the recoverability of the Allgemeines Persönlichkeitsrecht follows a analogous application of § 847 BGB, today, however, it is consolidated case law, that the recoverability derives from the protection of Art. 1 and 2 GG and that it finds collocation in § 823 I BGB („other right“) to be read in the light of the mentioned constitutional provisions.100

Individualised in this way, the Allgemeines Persönlichkeitsrecht is protected, not only against state authority, but also in the private sphere.101 If the general right of

---

97 The English text of the German Constitution can be found at [http://www.jurisprudentia.de/jurisprudentia.html](http://www.jurisprudentia.de/jurisprudentia.html).

98 BGH 25.05.1954 - I ZR 211/53, Leserbrief/Schacht, BGHZ 13, 334 et seq., (1954) *NJW*, 1404 et seq., This was the first decision in which the Bundesgerichtshof (German Supreme Court, hereinafter *BGH*) affirmed the allgemeines Persönlichkeitsrecht, BGH, 14.02.1958 – I ZR 151/56, Herrenreiter, BGHZ 26, 349 et seq., (1958) *NJW*, 827 et seq.; (1958) *JZ*, 558 et seq.; this was the first case in which compensation for non-pecuniary damages for injury to the allgemeines Persönlichkeitsrecht has been granted. BVerfG 14 February 1973 – 1 BvR 112/65, Soraya, (1973) *NJW*, 1221 et seq., In this decision, the Constitutional Court affirms the allgemeines Persönlichkeitsrecht as part of german private law, 1224; BVerfG 05.06.1973 - 1 BvR 536/72, Lebach, BVerfGE 35, 202 et seq., (1973) *NJW*, 1226 et seq.; BVerfG 15.12.1999 – 1 BvR 653/96, Caroline von Monaco, (2000) *NJW*, 1021 et seq.; the full text of these decisions in English can be found on the website of the Institute of Global Law, London at [http://www.ucl.ac.uk/laws/global_law/german-cases/tort-law/index.shtml?tort_13](http://www.ucl.ac.uk/laws/global_law/german-cases/tort-law/index.shtml?tort_13), or on the website of the German Law Archive of Oxford University at [http://www.iuscomp.org/gla/](http://www.iuscomp.org/gla/) (both last accessed on 15th February 2006).

99 H. Thomas, § 823, cit., para. 175, 176.; U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 120 et seq.; J. Hager, Das Recht der unerlaubten Handlungen, cit., 820, 835-848.

100 BVerfG 08.03.2000 – 1 BvR 1127/96 (2000) *NJW* 2187 – 2189, 2187.

101 H. Thomas, § 823, cit., para 176.
personality is infringed by a tortious act, non-pecuniary damages can be claimed under two presuppositions: the infringement must be qualified as serious,\(^\text{102}\) and there must not be any other possibility of restoration.\(^\text{103}\) The question of whether the infringement is serious has to be answered by a comprehensive evaluation of all the circumstances of the case. The nature and the extent of the invasion, as well as aspects of fault and the motives of the tortfeasor, have to be taken into consideration.\(^\text{104}\) The recoverability of non-pecuniary damages in cases of violation of the allgemeines Persönlichkeitrechts has not been included in the new § 253 II BGB. It is qualified as a protection sui generis.\(^\text{105}\)

The majority of the cases in which compensation is awarded for the infringement of the Allgemeines Persönlichkeitrechts deal with the unauthorised use, or publication of pictures or information of a person. If the victim is a public person, the amount of damages awarded can be as high as tens of thousands of Euros.\(^\text{106}\) However, there are some cases in which the infringement of other aspects of the personality has led to compensation.

One example can be found in cases where insulting statements led to an obligation to compensate for non-pecuniary harm. The Bundesverfassungsgericht (German Constitutional Court, hereinafter BVerfG) decided the case of a Greek woman who was insulted by an acquaintance as a „fat, ugly Greek whore“\(^\text{107}\). In the first instance, damages in the amount of €1000 were granted. The Court of Appeal reversed the decision saying that there was no „serious“ infringement and criticised the claimant for

\(^{102}\) H. Thomas, § 823, cit., para 200; U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 121.

\(^{103}\) This is a consequence of the priority given by the German legal system to the reparation in kind, §§ 249 I and 253 I BGB. BVerfG 14 February 1973 – 1 BvR 112/65, (1973) NJW, 1221 et seq., 1221; U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 121; K. Vieweg, Grundsätze der Totalreparatur und der Naturalrestitution, in: J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Eckpfeiler des Zivilrechts (Berlin: Sellier – de Gruyter, 2005) 374 et seq., 380; H. Heinrichs, § 249, cit., para. 2; H. Heinrichs, § 253, cit., para. 3; H. Thomas, § 823, cit., para. 200.


\(^{105}\) G. Brüggemeier, Haftungsrecht, cit., 582.


\(^{107}\) BVerfG 04.03.2004 – 1 BvR 2098/01, (2004) NJW, 2371-2373.
not having sought another form of reparation, namely, that she had not demanded an apology from the offender. The BVerfG declared the decision of the Court of Appeal unconstitutional. The BVerfG held that the gravity of the infringement was indicated by the content of the statement made by the offender. The words used expressed deep contempt. Furthermore, the Constitutional Court stated that an apology has to be the initiative of the offender. To oblige the victim to ask for it could lead to a further humiliation.

In another case, monetary reparation for the infringement of the allgemeines Persönlichkeitsrecht was granted to a female applicant for a job because she was discriminated against on the basis of her gender. Fair compensation was settled in the amount of one month’s salary.\(^\text{108}\)

Humiliating treatment at the hands of police officers may constitute a tortious act violating the general personality right of the victim. One famous case is the „Hamburger Kessel“ case\(^\text{109}\) which deals with police action during a demonstration against a nuclear power plant. The demonstrators were surrounded by the police and they had to wait clustered together for several hours. Afterwards, they were transported to several police stations where they remained for several more hours. During the whole period of time they were never sufficiently informed about what would happen to them. Furthermore, there were inadequate hygienic conditions, and there was no adequate supply of water and food. The Trial Court found that their rights to liberty and the „allgemeines Persönlichkeitsrecht“ were violated and granted compensation in the amount of €100 to each claimant.\(^\text{110}\)


B. Assessment of non-pecuniary damages

In the cases which have been described so far, the central question posed asks whether there is a violation of a right which leads to the obligation to compensate. Once this has been answered in an affirmative way, the next problem concerns the calculation of the amount of non-pecuniary damages. This brings us to the second type of case in which fundamental rights arguments have contributed to the development of the German case law in the field of non-pecuniary damages.

I. Function of non-pecuniary damages

The guiding principles for the assessment of the amount of non-pecuniary damages in personal injury cases were established by the German Supreme Court in the decision of 6th July 1955. The Court decided that all circumstances of the case should be taken into account when assessing the amount of damages. This includes firstly the degree and duration of the injury and the pain suffered. Furthermore, however, also the degree of blameworthiness of the person who is liable, the circumstances which have caused the tortuous behaviour and the financial circumstances of both parties, in particular the question of whether the tortfeasor has insurance to cover damages can as well be taken into account.

However, the damages are assessed as one global sum. Although the decision has to point out the circumstances that influenced the amount awarded, the judge may not attribute separate amounts for different heads of damages. Traditionally, there has been neither a distinction between damages for harm to health per se (comparable to the Italian figure of dannio biologico), and damages for pain and suffering. Only recently, the damage per se to the physical or mental integrity of a person is receiving attention as an autonomous category of losses.

---

112 U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 113.
The second important point that the German Supreme Court pronounced in its decision of 1955 is the role of non-pecuniary damages in personal injury cases. According to the Court, these kinds of damages are intended to make good, and in this way they have a dual function (Doppelfunktion). In this regard BGH 06.07.1955 states:

“Damages for pain and suffering according to § 847 BGB are not ordinary damages, but a concept sui generis with a dual function: They are meant to provide the injured party with adequate compensation for that kind of damage, for those handicaps which are not of a pecuniary nature and at the same time they are meant to take into account that the tortfeasor owes the victim satisfaction for what he has done to him.”

Accordingly one purpose of non-pecuniary damages is to compensate the victim for those damages that are not of an economic nature (Ausgleichsfunktion). The money may allow to the victim to buy other „pleasures“ in compensation for those which he or she cannot enjoy anymore due to the loss suffered. At the same time, however, the damages are meant to grant the victim to a certain extend satisfaction (Genugtuung). Insofar the Court underlines also that there is a function of making good which refers to the fact that the injurious act has created a certain personal relationship between the tortfeasor and the victim and that the tortfeasor has made life more difficult for the claimant and the damages shall help, in the limit of the possible, to make it easier again.

It has to be mentioned, however, that the Genugtuungsfunktion has less practical relevance, the assessment of non-pecuniary damages is mainly based on the Ausgleichsfunktion. After the reform of compensation law in 2002 and the consequent recoverability of non-pecuniary losses also under contract and no-fault situations, it has been questioned whether or not the Genugtuungsfunktion had lost relevance at all. An

---

114 BGH, 06.07.1955, I.3: „Der Anspruch auf Schmerzensgeld nach § 847 BGB ist kein gewöhnlicher Schadensersatzanspruch sondern ein Anspruch eigener Art mit einer doppelten Funktion: Er soll dem Geschädigten einen angemessenen Ausgleich für diejenigen Schäden bieten, die nicht vermögensrechtlicher Art sind, und zugleich dem Gedanken Rechnung tragen, dass der Schädiger dem Geschädigten Genugtuung schuldet für das, was er ihm angetan hat."

115 U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 112.


interesting field of applications are, however, the cases involving an unfair behaviour of insurance companies during the liquidation.\textsuperscript{118} In LG Aachen 23.02.2002, for instance, the court increased the award by 15.000 Euro because the insurance company had delayed the liquidation even though the obligation to compensate was evident.\textsuperscript{119}

II. Cases of the “destruction of the personality”

The quoted 1955 decision of the BGH is till today the leading case for the assessment of non-pecuniary damages. However, there are some types of cases in which the application of the guidelines laid out by the BGH decision did not led to satisfying results.

The most significant examples are the cases of serious brain injury. In those cases, the victim has almost or completely no sensations. Therefore compensation for „pain and suffering“ does not seem suitable. Thus he cannot profit from the two above mentioned functions of the Schmerzensgeld. The victim is not able to enjoy substitute pleasures or to feel satisfaction. The case law had developed a third function of the Schmerzensgeld, the so called function of symbolic atonement (zeichenhafte Sühnefunktion).\textsuperscript{120} The amount of the compensation in this case was measured on the other hand in order to be felt by the tortfeaser as a real sacrifice but as the compensatory and satisfactory function could not be served, the amount would not reach the sums normally granted to severely injured victims.\textsuperscript{121} Indeed, usually only a nominal sum was granted as compensation to such victims.\textsuperscript{122}


\textsuperscript{120} BGH 16.2.1993, VI ZR 29/92, NJW 1993, 1531-1532, 1531.

\textsuperscript{121} BGH 16.2.1993, VI ZR 29/92, NJW 1993, 1531-1532, 1531.

\textsuperscript{122} U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 113 et seq.; L. Jaeger and J. Luckey, Schmerzensgeld 2003, cit., 104 et seq., 104.
But in 1992, the Supreme Court overruled the previous case law and said that full compensation was required.\textsuperscript{123} The Court stated that the destruction of the personality („Zerstörung der Persönlichkeit“) is as such recoverable loss and established that these kinds of cases require an evaluation independent from the perception of pain and suffering.

The Court emphasised the high value that Article 1 and 2 \textit{GG} attribute to human dignity. The Court went on to state that, in the light of this constitutional values, it would be a contradiction to consider the loss of the faculties of sensation and perception, caused by the tortfeasor, as a condition which diminishes the damages.\textsuperscript{124}

It is important to note that, even thought the Court states more than once, that the destruction of personality is a recoverable loss as such, it does so only on the basis of the primary damage to health.\textsuperscript{125} Consequently the Court discusses the issue as a problem of assessment of damages and not of recoverability.\textsuperscript{126} The basis for liability are, indeed, §§ 823, 847 BGB under the aspect of a damage to health. In other words, the decision deals not with a further development of the \textit{Allgemeines Persönlichkeitsrecht}.

Some authors claim that the Court in this case of 13.10.1992 has defined a new function, the „\textit{Würdefunktion}“\textsuperscript{127}, which is destined to guarantee human dignity. This notion, however, is not often adopted by the judges.

\textbf{III. Schmerzensgeldtabellen}

In the daily praxis of assessment of non-pecuniary damages the so called \textit{Schmerzensgeldtabellen} have become an indispensible tool.\textsuperscript{128} These “tables of non-
pecuniary damages” are systematic collections of case law which table court decisions indicating the injury suffered, the amount awarded and the criteria which the court has taken into account in the evaluation.\textsuperscript{129} The different Schmerzensgeldtabellen are all born out of a private initiative, there does not exist any official collection. That means that they do not have any binding force. Nonetheless, a survey among judges has demonstrated that 95 \% of them uses the Schmerzensgeldtabellen when deciding on non-pecuniary damages.\textsuperscript{130} This success is to explain with the continuity and actuality of the Schmerzensgeldtabellen, the most important one, of which the German Automobilclub ADAC is the editor, was first published in 1957 and is now at its 27\textsuperscript{th} edition.\textsuperscript{131} They provide the judge with a comprehensive overview of the case law, made available in an easily consultable form. Thus the Schmerzensgeldtabellen are not only a tool for a better, faster functioning of the judicial system, but contribute also to guarantee equal treatment and transparency of court decisions. Of course, as the BGH has pointed out, the Schmerzensgeldtabellen can not limit the judge in its discretion, however, he will have to motivate precisely whenever he wants to diverge from decisions in similar cases.\textsuperscript{132}


\textsuperscript{129} The most known Schmerzensgeldtabelle is the one published by the German Automobilclub ADAC: S. Hacks, A. Ring and P. Böhm, Schmerzensgeldbeträge, 27 edn. (Bonn: DAV, 2009). See also: R. Lieberwirth, Das Schmerzensgeld (Heidelberg: Verlag Recht und Wissenschaft, 1960). This was one of the first Schmerzensgeldtabellen which had several later editions. More recently, in 2003 the following book was first published, which in difference to the ADAC-Tabellen tables the cases by injury and not by amounts awarded: L. Jaeger and J. Luckey, Schmerzensgeld (Münster: ZAP, 2003), by now: 5th edn. (2009) Interestingly the authors are two judges who in the forword express explicitly their desire to contribute to an development versus higher awards of non-pecuniary damages. Other Schmerzensgeldtabellen: A. Slizyk, Beck`sche Schmerzensgeld-Tabelle: von Kopf bis Fuss (München: Beck, 1994); E. Schneider and J. Biebrach, Schmerzensgeld: Grundlagen, Rechtsprechung, medizinische Begriffe, Mustertexte (Berlin: Herne, 1994). While the former examples are all comprehensive schemes, covering different cases of non-pecuniary damages, the following are published by lawyers and concern only their respective field of interest: H. G. Schulze and P. Stüpler-Birk, Schmerzensgeldhöhe in Presse- und Medienprozessen (München: C.H. Beck, 1992); W. Hempfing, Ärztliche Fehler – Schmerzensgeld-Tabellen (München: C. Heymanns, 1989).


\textsuperscript{131} G. Hacks, A. Ring and P. Böhm, Schmerzensgeldbeträge, 27 edn. (Bonn: DAV, 2009).

Until now we have gathered an overview of the German legal system. We have discovered that it is characterised by a clear normative basis for the recoverability of non-pecuniary damages that has experienced a careful adaptation through case law in order to better protect personality rights. Also with regard to the assessment of non-pecuniary damages the German legal system has developed a solid practice based on the principles elaborated in case law. Taking the hints from the German legal system as a starting point, the following part will investigate the evolution of the Italian legal system concerning the compensation of non-pecuniary damages.
Part Two: Italian lessons in non-pecuniary damages compensation

A. Recoverable losses

I. Introduction

The Italian norm that regulates the compensation of non-pecuniary damages is Article 2059 c.c. It reads as follows:

Art. 2059 Danni non patrimoniali
Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge.

Art. 2059 non-pecuniary damages
Non-pecuniary damages shall be awarded only in cases provided for by law. 133

At first glance, this provision is identical to the German equivalent § 253 (1) BGB (ex § 847 BGB). Indeed, the German model has served as example for the Italian legislator. 134 However, on examination of both norms and their application, we are provided with evidence supporting the fact that a transplantation of a norm from one system to another does not necessarily lead to the same legal situation. 135

In the last century, both German and Italian tort law faced similar challenges. The assessment of non-pecuniary damages had to be adapted to new developments in society. Specifically, those developments included, on the one hand, the new types and

---


increased number of personal injuries arising from technological developments and, on the other hand, the growing perception of the values inherent to the person and indeed of the personality itself as interests which demand protection, not only against state authority, but also in private relations.

With that said however, even though the social evolution witnessed both in Germany and Italy has been similar, the interpretation of § 253 (1) BGB and Art. 2059 c.c., in response to the challenges of modern tort law, has produced different theories and schemes for the compensation of non-pecuniary damages under German and Italian law.

Indeed, from examining the case law of both countries, one would hardly imagine that the central legal provisions for compensation of non-pecuniary damages in Germany and Italy are almost identical in their wording.

The case law evolution of compensation for non-pecuniary damages under the German legal system has had two main issues - a more extensive interpretation of § 847 BGB (now § 253 Abs. 2 BGB) and the development of a new concept, the restrictive Allgemeines Persönlichkeitsrecht, which refers to personality rights.

The Italian evolution, on the contrary is contradistinguished by the elaboration of the concept of dannno biologico and the search for its definitive normative collocation. This concept has been developed in order to guarantee the comprehensive compensation of damage to health per se and has subsequently pathed the way for other new types of recoverable damages.

Thus, the German and Italian legal systems have evolved in the area of non-pecuniary damages in different ways. Nevertheless, when comparing which losses are deemed recoverable at the status quo, the diverse ways of development have in fact lead to comparable results. In other words, in both systems more or less the same types of losses are deemed recoverable, even though the motivation given for the recoverability of a certain kind of loss differs significantly.
One reason for the divergent development, between Art. 2059 c.c. and its German equivalent § 253 (1) BGB, is the varied legal contexts in which the norms are embedded.

1. The general tort clause, Article 2043 c.c.

The first contextual difference between Art. 2059 c.c. and § 253 (1) BGB derives from the general tort clause of the system and how the norm on non-pecuniary damages is related to it.

As seen before, the German § 823 (1) elects explicitly live, body, health, freedom and property as the interests protected by tort law. It is therefore a restrictive norm. Even though, some room for interpretation is given by the fact that the enumerative list contained in paragraph 1 concludes with the inclusion of “other rights”, which are, however, interpreted as including only absolute rights, meaning those rights which have an *erga omnes* effect.\(^\text{136}\) Furthermore, paragraph 2 of § 823 BGB extends the protection to damage caused by the violation of a statute that is intended to protect another person.\(^\text{137}\)

Contrary to this, the Italian legislator has opted for a more open formulation of the general tort clause, which is Art. 2043 c.c.

**Art. 2043 Risarcimento per fatto illecito**

*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.*

**Art. 2043 Compensation for unlawful acts**

Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.\(^\text{138}\)

---

\(^\text{136}\) H. Thomas, § 823, cit., para. 4.

\(^\text{137}\) Meant are not only norms contained in criminal or civil laws, but also for instance police or administrative regulations. For more details see: H. Thomas, § 823, cit., 1245, para. 140.

This provision does not enumerate the protected interests and thus leaves much more (indeed required) room for interpretation compared to § 823 BGB. The determination of protected interests is linked to the interpretation of the notion *danno ingiusto* (unjustified injury). This fact that the general tort clause contains a limitation regarding the what protected interests distinguishes the Italian provision from the French one.\(^{139}\)

The French Code Civil, by which the Italian *Codice Civile* is inspired, includes in its Art. 1382 a complete open tort norm which contains no limits to the types of protected interests.\(^{140}\) The Italian general tort clause differs, however, also from the German one, seen that the limit provided by the requirement of an unjustified injury is less restrictive than the enumeration of protected interests in § 823 I BGB.

Another significant difference between the German and Italian systems can be identified by the relationship the general tort clause has with the provision on non-pecuniary damages. In the German system, the relationship is a clearly defined one, the application of § 253 BGB follows the application of § 823 BGB. Only when the conditions for liability of § 823 BGB are met (*Haftungsgrund*), can § 249 et seq. BGB (*Haftungsausfüllung*) find application in determining which types of losses are recoverable. Thus, in terms of protected interests, § 823 BGB serves as a kind of pre-selection of recoverable losses.

In Italy, as we will see in more detail below, the relationship between the general tort clause and the provision on non-pecuniary damages was for a long time, until the Supreme Court decisions 26972-26975/2008\(^{141}\), object of discussion. Specifically, the issue contemplated the question whether Art. 2059 c.c. was an autonomous provision or whether, for its application, the prerequisites of Art. 2043 c.c. had to be met. The mentioned November 2008 decisions have confirmed the second alternative.

\(^{139}\) C. Castronovo, *La nuova responsabilità civile*, cit., 3-41.

\(^{140}\) Art. 1382 Code Civil: *Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.* (Every act whatever of man which causes damage to another obliges him by whose fault the damage occurred to repair it. Translation by T. Weir, translator of: K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3\(^{rd}\) ed. (Oxford: Oxford University Press, 1998) p. 615

\(^{141}\) Cass. SS.UU. 11.11.2008, n. 26972-26975 the decisions will be analysed in detail below.
One reason for this uncertainty until the clear word of the Supreme Court in 2008 is that in the Italian legal system – in difference to the German one - there is no clear distinction between *Haftungsgrund* and *Haftungsausfüllung*.

While § 823 BGB applies exclusively to the conditions of liability, and § 249 BGB et seq. apply to the determination of the recoverability of pecuniary and non-pecuniary loss, the Italian Art. 2043 c.c. has to fulfil both tasks – to provide the conditions for both liability and recoverability. And the status of Art. 2059 c.c. was, as has been mentioned ever since 1942 until the Supreme Court decisions of 2008 very controversial. Indeed, Art. 2059 c.c. is the Article of Italian private law which has witnessed the most radical changes relating to its interpretation since the entry into force of the *Codice civile*, moving from a very limited application in relation to the granting of non-pecuniary damages, which were initially only awarded in the case of crime, surviving claims for its abolition, and being now the safeguard of constitutional rights in Italian private law. This shifting development will be dealt with in more detail presently.

The analysis here follows an over-all chronological approach since the legal development itself can be divided into different stages and is marked by several landmark decisions.\(^{142}\) The first stage is that after the entry into force of the Codice civile in 1942; the second covers the seventies until the eighties and is marked by the development of the concept of “danno biologico” and the landmark decision Corte Cost. 184/1986. This is followed by the period of the application of the theoretical foundations of “danno biologico” to rights other than the right to health.

Of specific importance were Cass. 8827 and 8828/2003, outstanding decisions which opened the doors to a more focused discussion contemplating which constitutional rights deserved protection by tort law i.e. the violation of which rights should lead to compensatory relief. This question was answered in an authoritative way by Cass. 26792-26975/2008 which cleared several aspects of the discussion and, in particular, the gives clear indications on how to individuate recoverable rights when constitutionally protected interests are involved.

---

The same four decisions of November 2008 have introduced a new era which is now marked by a search for the correct application of the instruments in the hands of the judges, granted to them by the Supreme Court in the mentioned decisions. A particular focus here aims to individuate the new methods of assessment of damages.

The following parts describe the evolution of the system of compensation of non-pecuniary damages in Italy until the November 2008 decisions Cass. 26792-26975/2008 which have laid a new fundament. The understanding of the historical process is important as it there were the “new statute” \(^{143}\) has its roots and essence which have allowed the Supreme Court to provide the Italian legal system with a comprehensive framework for the compensation of non-pecuniary losses.

Seen the significant impact of the interpretation of the general tort clause, Art. 2043 c.c. on the determination of recoverable non-pecuniary losses under Italian law, the development of the theories relating to the interpretation of the notion *danno ingiusto* shall now be traced.

2. “Danno ingiusto”

The concept of *danno ingiusto* distinguishes the two components of *non iure* and *contra ius* \(^{144}\). The first refers to the condition that the behaviour which caused the loss is not justified by the legal system. Situations of legal justification are self-defence (*legittima difesa*) and state of emergency (*stato di necessità*) as established by Articles 2044 and 2045 c.c. \(^{145}\)

---


The second component of *danno ingiusto* concerns the selection of protected interests. *Contra ius* refers to the injury of a subjective interest which is recognized and guaranteed by the legal system.\(^{146}\)

Over the last decades, the definition of “*danno ingiusto*” as been expanded step by step in order to include more interests in its scope of protection.

Until the 1960s the determination of protected interests was linked to a formal qualification, the so-called *diritti soggettivi assoluti* (absolute subjective rights).\(^{147}\) That meant that the rights of an individual which have an *erga omnes* effect fell under the notion of *danno ingiusto*, thus excluding from protection other legal positions, in particular the so called *diritti soggettivi relativi* (relative subjective rights), which have an effect only between the parties of a given obligatory relationship.\(^{148}\) The latter where initially viewed as sufficiently protected by the provisions on contractual liability.

However, this opinion changed and the protection under Art. 2043 c.c. was slowly extended.\(^{149}\)

The first to be included in the protection of Art. 2043 c.c. were the relative subjective rights. In the famous *Meroni* case the *Corte di Cassazione* held, indeed, that Art. 2043 c.c. protects all subjective rights without distinction between relative and absolute


\(^{147}\) U. Breccia et al., *Diritto Privato, Parte Seconda*, cit., p. 580.


\(^{149}\) Cass. 17.11.1981, n. 6103 regarding the possibility to ask damages also in case of a mere factual power over a thing, *danno ingiusto* does not require property or another absolute right. Cass. 13.01.1996, n. 251 regarding the right of the creditor to claim damages against the third purchaser. Cass. 13.01.1993, n. 343 claim of a third party against a financial institute which as granted a credit to a businessman which was potentially insolvent. Cases where the question of *danno ingiusto* was answered negative: Cass. 15.03.1985. n. 2018, case of an agreement between societies, editors and salesmen regarding the assignments of establishments for the selling of newspapers. An individual who has not obtained an assignment can not claim damages because there is no immediate and direct violation of a subjective right. Cass. 08.07.1994, n. 6363 the costs for giving birth to and raising a child in case of a failed abortion are not unjustified damages; Cass. 11.02.1998, n. 1421 in case that a woman decides to undertake an abortion and as consequence she loses the capacity to have chidles, the husband and the other child of the woman can not claim damages because they have no subjective right, but at most a factual interest to have a bigger family.

subjective rights. This case involved the death of a professional football player, Meroni, who was killed in a traffic accident. According to the court the loss suffered by “Torino calcio”, the football club with whom Meroni held his contract, fell under the notion of *danno ingiusto*.  

Later, the protection of Art. 2043 c.c. was extended to other legal positions attributing to them the quality of a proper right. One example can be taken from Cass. 2765/1982. In this case, a painter had signed a painting without verifying if it was indeed his work. The painting was sold and subsequently the painter denied paternity. The court held the painter responsible for the damages caused to the buyer, qualifying his interests as the right to integrity of the property.

The last category of interests to be enveloped by the protection of *danno ingiusto* was the so-called *interessi legittimi* (legitimate interests), a notion referring to the interests of the individual in relation to public administration. These types of interests are not proper rights in the sense of the Italian notion of *diritto soggettivo*, because the individual does not have a right to a certain outcome of an administrative procedure. He has, instead, a guaranteed position that grants the possibility to influence the correct exercise of administrative power.

---


There exists a long line of case law regarding the civil liability of the public administration and the distinction between *diritto soggettivo assoluto* and *interesse legittimo*, which is not only important for the qualification of *danno ingiusto* but also for the decision whether the jurisdiction is of the civil or the administrative courts. See for example: Cass. 25.03.1988, n. 2579; Cass. 14.01.1992, n. 367; Cass. 05.03.1993, n. 2667; Cass. 22.07.1993, n. 8181; Cass. 26.04.1994, n. 3963; Cass. 15.11.1994, n. 9593; Cass. 16.12.1994, n. 10800; Cass. 11.02.1995, n. 1540; Cass. 18.05.1995, n. 5477; Cass. 09.06.1995, n. 6542; Cass. 10.02.1996, n. 1030; Cass. 06.10.1997, 9700; Cass. 03.02.1998, n. 1096; Corte cost. 08.05.1998, n. 165; Cass. 13.05.1998, n. 4825; Cass. 10.03.1999, n. 113; Cass. 27.04.1999, n. 4191; Cass. 25.05.1999, n. 291; Cass. 27.05.1999, n. 311; Cass. 05.04.2000, n. 4197; Cass. 14.06.2000, n. 8101; Cass. 04.11.2000, n. 14432.
In the German legal system, the issue is explicitly dealt with in § 839 BGB, which establishes the tort liability of public servants, and Art. 34 GG according to which the state or the public entity is responsible for the misconduct of their employees. However, contrary to Italian law, under German law, the issue is not one of recoverable damages but of Haftungsbegründung, meaning the civil liability of public entities. In such a case, the recoverable damages are governed by the general provisions of § 249 BGB et seq.

In dealing with a case, where an interesse legittimo was at stake (specifically concerning the suitability of the plaintiff’s property for construction purposes), the Corte di Cassazione in 1999 overruled completely the former restrictive interpretation of Article 2043 c.c. and rewrote the definition of danno ingiusto. Since that decision, the formal qualification of the injured interest does not anymore play a role for its protection under the notion of danno ingiusto.

Rather, what is important is whether the injured interest is legally relevant. To this end, the court stated that it is impossible to single out a priori the interests worthy of

---


protection, therefore it is the duty of the judges to select the safeguarded interests a posteriori balancing the involved interests.\textsuperscript{158} On one side, we can identify the interest which drove one party, the one who caused the damage, to behave in a certain way and on the other side, the interest of the other party that has been affected as a consequence of the action.\textsuperscript{159} According to the court, the comparative evaluation shall not be left absolutely to the discretion of the judges, but instead has to follow a detailed analysis of the written law to determine the intensity with which the legal system protects the interest which has been affected. Thus, the judge shall establish whether the fair balance between the interests has been disrupted and needs to be re-established through compensation.

The cited case, Cass. 500/1999, has also given Art. 2043 c.c. a new status under a further aspect. At the time of the entry into force of the Italian Civil Code, in 1942, the function of tort was seen, as already stated, as pursuing primarily punitive purposes. Given that, Article 2043 c.c. was seen as a secondary norm which established a punishment, i.e. the payment of damages, in cases involving the violation of a primary norm which contained prohibitions.\textsuperscript{160} That assumption strongly linked civil liability to criminal law.\textsuperscript{161} Indeed, concepts stemming from criminal law, such as the notion of fault and causation played, and continue to play a significant role in determining the civil liability.\textsuperscript{162}

In Cass. 500/1999 the Supreme Court gave up that traditional reading.\textsuperscript{163} According to the court the focal point of Art. 2043 c.c. is the concept of “danno ingiusto” and thus the issue is whether the damage is “contra ius” and “non iure” and not the blameworthiness of the behaviour which caused the damage, the latter being a problem of liability and fault.\textsuperscript{164} That means that Art. 2043 c.c. is not a secondary norm which provides civil punishment, by means of the obligation to pay damages, in consequence of the breach of duties established by a primary norm. Rather it is itself a primary norm which

\textsuperscript{158} For a critical discussion of this new conception of danno ingiusto and its further application see: C. Castronovo, La nuova responsabilità civile, cit., 199 et seq, 206;
\textsuperscript{159} U. Breccia et al., Diritto Privato, Parte Seconda, cit., pp. 566, 579.
\textsuperscript{160} Cass. 22.07.1999, n. 500, Foro it., 1999, I, 2487, para. 4.
\textsuperscript{161} U. Breccia et al., Diritto Privato, Parte Seconda, cit., p. 564;
\textsuperscript{162} C. Castronovo, La nuova responsabilità civile, cit., 199 – 271, 209 et seq; U. Breccia et al., Diritto Privato, Parte Seconda, cit., p. 564;
\textsuperscript{163} Cass. 500/1999, para. 8.
\textsuperscript{164} Cass. 500/1999, para. 8.
provides for the reparation of losses suffered by one subject due to the non justified activity of another. In other words, the *Corte di Cassazione* affirms the shift of the function of tort law from “punishment” to compensation.

In 2008 the notion of „*danno ingiusto*“ gained a new importance for the question of recoverability of non-pecuniary damages. As we have seen, Cass. 500/1999 was the final point in a continuous development towards an ever broader interpretation of that notion. In November 2008, on the contrary, the Corte Cassazione referred to the element of *danno ingiusto* in order to limit the recoverable damages. Indeed, in the landmark decisions 26792-26795, which will be described in more detail below, the *Cassazione* introduced the notion of “*ingiustizia costituzionalmente qualificata*” stating that the selection of interests which are protected under tort law includes only specific inviolable rights which necessarily endue this kind of minimum protection.  

3. The requirement of Art. 2059 c.c. „Determined by the law“

It has been stated earlier, that one of the reasons for which the apparently similar provisions of Art. 2059 c.c. and § 253 I BGB found in fact very different application is the legal context in which they are embedded. The first aspect of the legal context we have looked on were the respective general tort clauses (Art. 2043 c.c. and § 823 I BGB) with the illustrated differences.

A second, even more significant difference of the closer legal context of Article 2059 c.c. in respect to the one of to the German § 253 (1) BGB is that in Italy there does not exist a provision similar to § 253 (2) BGB (ex § 847 BGB). This norm contains a list of protected interests which deserve, in the case of an infringement, the compensation of non-pecuniary losses; these are the integrity of the body, health, freedom and sexual self-determination. While § 823 BGB does recognise the foundation of liability (*Haftungsbegründung*), § 253 (2) BGB concerns the consequences of liability (*Haftungsaufüllung*), specifying the protected interests. In this way, the German Civil Code directly “determines by law” the recoverability of non-pecuniary losses for some

---

166 Cass. 11.11.2008, n. 26972-26975, points 2.9. et seq. of the decision. For more details and references see below.
of the most frequent cases in which this type of loss occurs, particularly for the injury to body and health.\textsuperscript{167}

On the contrary, the Italian Civil Code does not contain such a comprehensive provision which explicitly determines the cases in which non-pecuniary losses are recoverable. The only provision of the Italian legal system with practical relevance, which at the time of the entry into force of the \textit{Codice civile} provided explicitly for the compensation of non-pecuniary damages, was 185 c.p. (\textit{Codice penale}, Criminal Code), which allows for recoverability in cases involving crimes.\textsuperscript{168}

Thus, from the outset the type of limitation for the recoverability of non-pecuniary damages is completely different in Germany and Italy. While the German system focuses on the protected interests, in the Italian system the emphasis was given to the intensiveness of the offence.

As has already been stated, the choice of the Italian legislator of 1942 was determined by the traditional understanding of the punitive function of tort law and the intention to limit the area of application of non-pecuniary damages.\textsuperscript{169} The close link between Art. 2059 c.c. and 185 c.p. underlined the perception of the obligation to pay non-pecuniary damages as a punitive instrument.\textsuperscript{170} However, this opinion has now been overcome and today the central function of tort law is seen to be the compensatory one.\textsuperscript{171}

When confronted with the question whether a certain type of non-pecuniary loss is recoverable, the German and the Italian lawyers have to answer in two steps. The first question is whether the injured interest, for instance health, is protected by the norms of liability and the second is whether the concrete damage, for instance the pain and loss of

\textsuperscript{167} For the distinction between injury to the body and to the health, which is merely a doctrinal one, see Part One A.
\textsuperscript{168} Article 185 c.p.: ‘Every crime requires restitution according to the civil law rules [\textit{c.c.} 2043 ff.].’ – ‘\textit{Ogni reato obbliga alle restituzioni, a norma delle leggi civili [\textit{c.c.} 2043 ss.]}.’
\textsuperscript{169} U. Breccia et al., \textit{Diritto Privato, Parte Seconda}, cit., p. 563. See for details to the legislative process and comparative remarks: C. Castronovo, \textit{La nuova responsabilità civile}, cit., 199 et seq. 36 et seq.
\textsuperscript{170} U. Breccia et al., \textit{Diritto Privato, Parte Seconda}, cit., p. 612.
enjoyment of life, falls under the scope of protection of the norms relating to non-pecuniary damages.

The German lawyer has for both steps a list provided for by the Civil code at hand, which enumerates the protected interests. The Italian legal practitioner, however, the Italian Civil code not providing such lists, has to rely to a greater extent on interpretational tools and is, in contemplating the second step, confronted with the limit “only in cases determined by law” which until recently constricted him to consider the protection afforded only to those instances related to criminal acts.172

In the last century however, both systems have observed social developments which have faced legal practitioners with the need to extend the protection of tort law to new emerging interests, in particular to the values protected by the constitution.

In achieving this goal in Germany, the issue at stake was the expansion of the list of protected interests. In Italy, on the other hand, the challenge has been more complex. Established interpretational structures, above all the boundaries of the criminal orientation and the definition of non-pecuniary damages as comprising exclusively subjective moral damages, had to be overcome and new confines to be set so as to avoid a floodgate situation leading to limitless recoverability of non-pecuniary damages.

While the German way has been quite linear, marked by a cautious but continuous opening to the protection of new interest (in particular with regard to the *Allgemeines Persönlichkeitsrecht*), the Italian development has taken a rather winding path. The most important stages of it shall be outlined in the following. 173

II. Damage to health – the concept of „danno biologico“

1. Introduction

The driving force for changes in Italian tort law was the issue of damage to health. Within the above outlined set of Articles, 2043, 2059 *c.c.* and 185 *c.p.*, compensation for non-pecuniary losses connected to personal injury faced three main obstacles.

The first was that the assessment of damages under Art. 2043 *c.c.* was mainly based on the estimation of the loss of income. 174 The second barrier was the rigid link between Art. 2059 *c.c.* and Art. 185 *c.p.* and the third restriction to deal with was the traditional reading of Art. 2059 *c.c.* that identified its field of application with only *danno morale soggettivo* (subjective moral damage) 175, excluding other types of non-pecuniary damages.

Indeed, under Art. 2043 *c.c.*, damage to health was recoverable only when and insofar as it had an impact on the economical situation of the victim. In other words, the health of the victim was only taken into consideration as an economic value, i.e. that of earning an income. The focal point was not the damage to health itself, but more the entire or partial incapacity to work caused by the injury. 176 Consequently, the parameter for awarding personal injury damages where earnings.

At first sight, it might not seem arbitrary to measure the damages under Article 2043 *c.c.* by the diminished possibility to earn an income since the provision refers to

---

173 For a detailed documentation of the stages of the development in the area of damage to the person until 2001 see: F. D. Busnelli, *Il danno biologico*, cit. For the role of which the Constitutional Court played in this development: G. Comandé, *Il danno alla persona e la Corte Cost.*, cit., 125-159.
175 This concept will be explained in more detail below.
pecuniary losses and the loss of income is included in those losses. Also under the German system, in cases of damage to health, loss of income would be one of the criteria in establishing the compensation to be awarded under the head of pecuniary damages. However, to understand the particular problem of the Italian system, one has to realise that compensation under 2043 c.c. was, under certain circumstances, the only possible way to obtain any compensation for personal injury. The reason for this was the strict interpretation of Article 2059 c.c. foreseeing recoverability for non-pecuniary losses only when the damage was caused by a crime and indeed restricting the award to certain types of non-pecuniary damages, the so called subjective moral damages (*danno morale soggettivo*). While under German law the recoverability of non-pecuniary damages in personal injury cases is explicitly foreseen by § 253 (2) BGB (ex § 847 BGB), a similar provision is non existent in the Italian legal system. This in fact seems to be the crucial point in understanding the Italian development. Article 2059 c.c. and the effects its restrictive nature has in obtaining compensation for non-pecuniary loss under its traditional interpretation will be illustrated in more detail below. For the present analyse of Article 2043 c.c., the significant conclusion is that due to the limitedness of recoverability under Article 2059 c.c., compensation under Article 2043 c.c. had to be interpreted in principle to compensate all damages caused by a personal injury, that is to say both pecuniary and non-pecuniary aspects. Besides that, Article 2059 c.c. served only for punishment.\(^{178}\)

2. Cases with no loss of income, elderly people, housewives, children

The link between recoverability of damage to health and loss of income turned out to be problematic in cases where a personal injury did not result in a diminution of earnings.\(^{179}\)

---


\(^{179}\) For a complete overview of the different problematics, see F. D. Busnelli, *Il danno biologico*, cit., 25-34. Interesting in so far also the references of Comandé in G. Comandé, *Towards a global model*, cit., 252 et seq. to the UK system. The Law Reform Commission revising the English law for non-economic damages came to the conclusion that an “Abolition of [non-economic damages] may be thought to discriminate unfairly against those, such as the unemployed, who do not suffer any, or any substantial, pecuniary loss as a result of personal injury”. The Commissions document of 1999 is available on [http://lawcom.gov.uk/docs/lc257.pdf](http://lawcom.gov.uk/docs/lc257.pdf).

For the French perspective see S. Galand-Carval, France, in: W.V.H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective*, Tort and Insurance Law, Vol. 2 (Wien, New York:
For example, elderly or retired people would be completely excluded from the scope of compensation. As an extreme example, we can look to the decision of the *Tribunale Firenze*, 1967.\(^{180}\) This case involved a retired trader who sought compensation for physical harm suffered. Deciding, in an abstract way, whether a person, not employed at the moment of the injury and who, in all probability, would not work again in the future (for example elderly people), may claim compensation for a physical harm, the court affirmed that as far as this question is concerned, there “might exist persons without any value” (“possono esistere uomini senza alcun valore”). In other words, if the injury does not diminish the capacity to work, no compensation can be claimed, regardless of the seriousness of the injury. However, in the concrete case some compensation was granted on the basis that his capacity to conserve his wealth was diminished.\(^{181}\)

Other categories of persons which remained *a priori* without compensation for personal injuries due to the lack of an evident influence on their capacity to produce income included housewives, children and unemployed people. In these instances, fictitious incomes have been applied to the case, often leading to unsatisfactory and discriminatory results.

Cases concerning personal injuries to children which, considering their age, had not yet entered the workforce were even more problematic. To individuate their fictitious future income a hypothesis had to be made based on an assumption of the profession they would have assumed later in life if the injury had not occurred. The usual practice was to suppose that they would have entered the same profession as their parents and, especially, that they would not leave their social milieu.

\(^{180}\) Trib. Firenze, 05.01.1967 (1969) *Arch. resp. civ.* 130.
\(^{181}\) The description of the case follow the one given by F. D. Busnelli, *Il danno biologico*, cit., 27.

---

Springer, 2001), pp. 87-108 who states: “…it has been a decisive step to admit that the loss suffered by the victim of a personal injury is not limited to the negative consequences of the accident on his working capacity”, p. 87).

The particular effects of tort reforms on the named group of persons are analysed by P. H. Rubin and J. Shepherd, The Demographics of Tort Reform: Winners and Losers, available at: [http://ssrn.com/abstract=967712](http://ssrn.com/abstract=967712) who stated that “…tort reform may not affect all segments of society equally. …because women, children, the elderly, disadvantaged minorities, and the poor have, on average, relatively lower incomes, more of their total damage awards are in the form of noneconomic damages. Thus, caps on noneconomic damages are likely to reduce compensation to these groups disproportionately.”
A famous example is the so called *Gennarino* case in which the court stated that the son of an unskilled labourer would work also as an unskilled labourer when he reached working age.\(^{182}\) Consequently, the harm caused to a child of an unskilled worker would be „valued“ less than that of a child born to a person with a higher income.\(^{183}\) This result was destined for heavy criticism not only because of its discriminating effect, but also in view of the fact that the presumption that children would follow their parents in choosing their profession did not anymore comply with the social reality after World War II.

In some cases the courts made an assumption regarding the future profession of the child by analysing its habits and hobbies. This, however, did not lead to less arbitrary results than that made based on the profession of the parents. In one case, for instance, the court attributed to a girl the income of a primary school teacher based on the fact that she had began middle school education at a time when this was not yet obligatory (before 1962).\(^{184}\)

Furthermore, a person with earnings could remain without compensation whenever the injury did not influence his working ability and thus did not result in a loss of income. This could, for instance, be the case for a person whose employment duties consisted in writing or answering phone calls in a call centre who loses his leg.

Even in situations where the capacity to produce income had been reduced, and thus compensation could be granted, equitable results did not necessarily follow. For instance, the compensation awarded may not correspond to the seriousness of the injury or, it could be the case that two employees with the same kind of injury, but different work activities, would be awarded different amount of damages.

---


The above outlined examples illustrate some of the critical issues which arose due to the fact that the compensation for damage to health was linked to the capacity to produce income.

The modern conception of the person however was opposed to the perception of the body as a mere production of earnings tool. The ingenious invention of the Italian system with which this link was definitively overcome was the concept of *danno biologico*. Moreover, *danno biologico* has also freed damage to health from the restrictions of Article 2059 c.c. For this reason, before analysing in more detail the concept of *danno biologico*, it is appropriate to have an overview of the traditional reading of Article 2059 c.c. and the connected.

3. Traditional reading of Art. 2059 c.c.

Article 2059 c.c. establishes that non-pecuniary damages are recoverable in cases determined by law. As previously stated, the only provision with practical relevance which explicitly foresaw the compensation of non-pecuniary damages in 1942 was Article 185 c.p. In other words, whenever a tortious behaviour which caused physical and/or mental harm could not be qualified as a crime, then the victim could not claim any damages for pain and suffering.

Furthermore, even when the prerequisites of Art. 185 c.p. were satisfied, there was only very limited compensation because of the restrictive interpretation of the notion of Art. 2059 c.c. which only allowed compensation for pain and suffering understood as subjective moral damages (*danno morale soggettivo*).

*Danno morale soggettivo* refers to a temporary mental disorder of the victim, such as pain, psychological suffering or alterations of the emotional state.\(^{185}\)

---

\(^{185}\) F. D. Busnelli, *Il danno biologico*, cit., 9; U. Breccia et al., *Diritto Privato, Parte Seconda*, cit., p. 616. In Cass. 26972-26975/2008 the Supreme Court gives an storica overview of the development concerning Art. 2059 c.c. There it defines danno morale soggettivo as “a contingent suffering, a temporary mental disturbance” (“sofferenza contingente, turbamento dell’animo transeunte”), point A.2. of the decisions. Furthermore, however, the Supreme court overcomes this definition. It declares that this concept, which has been applied for long time by the courts has no fundament in the legal provisions. In point A.2.10. the Court states “neither Art. 2059 c.c. nor Art. 185 c.p. speak of moral damage and even less the declare such that such a loss would be relevant only if transitory”. In consequence the Court declares that “danno morale” is not autonomous category of damages but rather describes one possible typ of non-pecuniary
excluded other non-pecuniary losses, in particular the actual (objective) damage to health *per se*.

Until the middle of the last century, this result did not contradict the general feeling of justice commonly shared in society (soziales Rechtsempfinden, coscienza sociale/senso di giustizia). Economic loss was seen as far more serious, and, therefore, more worthy of compensation than non-economic loss. Moreover, more importance was given to the goal of deterrence. In other words, the focus was on the qualification of the behaviour of the wrongdoer and not on the harm caused to the victim. Only where the conduct was considered serious enough to be qualified as a crime, a supplemental monetary amount “for punishment” was allowed.

Over the last century respect for the values of the person *per se*, independent of economic aspects, has gained more and more importance. Evidence of this can be taken from the large number of signed international and European instruments relating to human rights. The most important are the Universal Declaration on Human Rights, the European Convention on Human Rights and its five Protocols and also the more recent Charter of Fundamental Rights of the European Union.

---

186 For a concise exemplary list of what kind of non-pecuniary loss the social conscience required to be recoverable: G. Comandé, La verità, vi prego, sul danno esistenziale (2008) Guida al dir., fasc. 47, 18 with case law examples.


188 A. De Cupis speaks of the compensatory justice which allows to attribute an economic value to personal rights even thought they do not constitute economic values as such. Furthermore he underlines that it would be against the conscience (of the society) not to compensate damages to the physical integrity. A. De Cupis, Il valore economico della persona umana (1956) Riv. Trim. dir. Proc. Civ. 1264 et seq. See also F. D. Busnelli, *Il danno biologico*, cit., 4; E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit.

189 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10.12.1948.


Furthermore the new Constitutions of European countries underlined the pre-eminent position given to the protection of fundamental rights. For example, the German *Grundgesetz* has as its central provision Art. 1 which declares in its first paragraph that human dignity is inviolable, followed by a catalogue of fundamental rights. Also, the Italian Constitution, which entered into force in 1948, guarantees a comprehensive protection of fundamental rights.¹⁹⁴

The central provision of the *Costituzione italiana* is Article 2, which provides:

---


¹⁹⁴ The literal Italian translation of ‘fundamental right’ is ‘diritto fondamentale’. However, this notion is seldom used in legislation and legal literature. For instance, it is only found once in the Italian Constitution (in Art. 32). More frequently used is the expression ‘diritto inviolabile’ (inviolable right). However, both terms are commonly used in Italian literature as synonyms, without attributing a different meaning to each of the expressions. (Despite this common use, specific Articles may be found which deal with the different meanings and nature of both notions. One argument is that a ‘fundamental right’ is always inviolable, because its modification would mean the breaking of the constitutional order, however, on the contrary, an ‘inviolable right’ is not always fundamental. For this differentiation, see G. Palombella, *L’autorità dei diritti* (Bari: Laterza, 2002) at 11-13, who points out that the notion of ‘fundamental right’ is a normative notion, while ‘inviolable’ (or ‘human’, in the equivalent sense as is used by the author) is a political one. See also P. Barile, *Diritti dell’uomo e libertà fondamentali* (Bologna: Il Mulino 1994), at 54, and his theory of the *nocciolo* (core) of the fundamental constitutional rights, which should be their only inviolable part.)

As third synonym to both “inviolable right” and “fundamental right” the notion “constitutional right” might be added. It has been said that all constitutional rights are “fundamental” as they have a legal value which guarantees their essential content. In other words, the fundamental character of a right is derived from its constitutional recognition. (A. Pace, *La garanzia dei diritti fondamentali nell’ordinamento costituzionale italiano: il ruolo del legislatore e dei giudici “comuni”* (1989) *Riv. trim. dir. e proc. civ.*, 685-704 at 685.) Furthermore rights are deemed “inviolable” insofar as they are inherent to the person and cannot be modified by the ordinary legislator, the constitutional legislator, or the communitarian legislator. (E. Navarretta, *Bilanciamento di interessi costituzionali e regole civilistiche* (1998) *Riv. critica dir. priv.*, 625-657 at 627.) Although the Italian Constitution only explicitly provides for limited constitutional revision with regard to the republican form of the State (Art. 139 *Cost.*), the Constitutional Court has stated that, in addition, the principles belonging to the supreme values on which the Italian Constitution is founded cannot be subject to constitutional amendment. (*Corte cost.*, 29 Dec. 1988, n. 1146, (1989) I Foro it., 609 with commentary by A. Pizzorusso.)
Art. 2 Cost.

La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.

Art. 2 Const.

The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed and expects that the fundamental duties of political, economic and social solidarity be fulfilled.  

The concept of human rights was already known prior to the writing of the modern European Constitutions, although the concept was principally discussed as a philosophical issue. As a concrete right it had relevance only in relation to the governing authorities or as rights of certain classes, like the right to honour of a nobleman.

However, fundamental rights have increasingly been perceived as concrete and absolute rights belonging to every individual. Consequently, more and more remedies have been introduced to protect these values, not only in relation to public authorities, but also in the field of private law. On European level the Council of Europe with its European Court on Human Rights is a particular institution guaranteeing the protection of human rights. On national level, the safeguarders of fundamental rights are, in Germany and Italy the Constitutional Courts.

With regard to substantial private law, tort law has become progressively individualised as an instrument for the protection of fundamental rights. Its attention has switched from the wrongdoer to the victim. The focus of tort law has shifted from the objective of deterrence to the goal of full compensation for the loss suffered. As a consequence of

---

this new focus on the values of the person, the results attainable under the traditional interpretation of the tort clauses in the Italian Civil Code became unsatisfactory.

The lack of protection was first felt with regard to the health of the victim. In order to overcome the limited possibilities to recover damages under Art. 2043 c.c. and 2059 c.c. in cases of personal injury, the remedy of *danno biologico* was developed.\(^\text{198}\)

4. Definition of „danno biologico“

The first legal provision which contained a definition of *danno biologico* was Article 5, 3 Law 57 of 5 March 2001 which has since been substituted by Articles 138 and 139 of the new Insurance code.\(^\text{199}\)

Art. 5, 3 of L. 57/2001 defined *danno biologico* as an “injury of the person’s mental-physical integrity which is possible to be confirmed by forensic-medical verification.” This damage is “recoverable independently from its impact on the capacity of the victim to produce income”.\(^\text{200}\)

The definition generally given to „danno biologico“ is that it is a specific type of injury which is different from subjective moral damage and pecuniary damage and which manifests itself in a certain type of event, that is the disablement of the physical or mental integrity of the injured person.\(^\text{201}\) This harm is recoverable also if it does not

\(^{198}\) For details, see among the vast literature: F. D. Busnelli, *Il danno biologico*, cit.; G. Alpa, *Il danno biologico. Percorso di un’idea* (Padova: Cedam, 2003); C. Castronovo, *Danno biologico. Un itinerario di diritto giurisprudenziale* (Milano: Giuffrè, 1998); M. Bargagna and F.D. Busnelli (eds.), *La valutazione del danno alla salute* (4th edn, Padova: Cedam, 2001); G. Comandé, Towards a global model, cit. \(^{199}\) L. 57 of 05.02.2001, *Disposizioni in materia di apertura e regolazione dei mercati*, G.U. 22.03.2001, n. 66. See Part B for more details on the Art. 138 and 139 of the *Codice delle assicurazioni private*, D. Lgs. 07.09.2005, n. 209, G.U. 13.10.2005, n. 239. Some precedent legislative acts use already the notion of danno biologico, underlining, however, that this happens only in the attendance of a general definition (Art. 13 D.Lgs. 23.02.2000 n. 38, G.U. 01.03.2000, n. 50) respectively a reform (Art. 3 D. L. 28.03.2000, n. 70, G.U. 29.03.2000, n. 73) with regard to the concept of *danno biologico*. Note, that, as we will see in more detail later, the evolution had long before, more precisely in the seventies of the 19\(^{th}\) century, started in the case law. \(^{200}\) Art. 5, 3 L. 57/2001: “…per danno biologico si intende la lesione all'integrità psicofisica della persona, suscettibile di accertamento medico-legale. Il danno biologico è risarcibile indipendentemente dalla sua incidenza sulla capacità di produzione di reddito del danneggiato.” For the definition given in Article 138 and 139 of the Insurance code, which is more detailed, in so far as some aspects which are mainly relevant for the assessment have been added to the definition given in L. 57/2001, see Part Two B. \(^{201}\) Definition confirmed by *Corte cost.*., 14.07.1986, n. 184 (1986) I Foro it., 2053.
have any impact on the earning capacity independently from its economic relevance and the qualification of the tortious behaviour as a crime.\textsuperscript{202}

In other words, under the concept of \textit{danno biologico} the damage to health \textit{per se} is recoverable.\textsuperscript{203} It is a damage different from \textit{danno morale soggettivo} which refers to the subjective feelings of pain, while \textit{danno biologico} refers to the objective impairment of the health condition.

Damage to health is not always connected to actual pain, nor is the suffered pain always relative to the gravity of the harm.\textsuperscript{204} For instance, the loss of a limb, an organ or a physiological function might involve rather minor pains compared to the seriousness of such a type of injury. Furthermore, the pain felt might differ according to the physical and psychical condition or predisposition of the victim. Now, both aspects can be taken into account separately – the degree of the objective impairment as \textit{danno biologico} and the measure of the subjective pain as \textit{danno morale}.\textsuperscript{205}

Moreover, the definition distinguishes \textit{danno biologico} from pecuniary loss. The damage to health can be connected to, or have as a consequence, an economic loss, which has to be compensated separately - for instance the costs of medical care or loss of income - but it does not coincide with this. This statement of clarification made by the cited definition was important in order to sever the link between compensation of damage to health and loss of income.

5. The development of the concept of \textit{danno biologico} in case law

At the beginning, courts and scholars developed different lines of argumentation in order to provide a legal basis for the concept of \textit{danno biologico}. Some collocated this

\begin{footnotesize}
\footnotesize
\textsuperscript{203} See Busnelli who speaks of “\textit{danno che consegue alla lesione dell’integrità fisica in sé per sé considerata}” F. D. Busnelli, \textit{Il danno biologico}, cit., 5.
\textsuperscript{204} See also the discussion of comatose victims, which under German law until 1992 would only get a symbolic compensation, due to the fact that they could not feel pain, See Part One, B.
\textsuperscript{205} However, the compensation under different heads of damages might result in overcompensation. This problem will be dealt with in more detail in Part Two, B.
\end{footnotesize}
type of damage under Article 2043 c.c., others under Article 2059 c.c.. However, regardless of this particular element of reasoning, all participants to the debate had the protection of the fundamental right to health, protected by Article 32 of the Italian Constitution, as their central focal point.

Article 32 Cost. reads as follows:

**Art. 32 Cost.**

La Repubblica tutela la salute come fondamentale diritto dell'individuo e interesse della collettività, e garantisce cure gratuite agli indigenti. Nessuno può essere obbligato a un determinato trattamento sanitario se non per disposizione di legge. La legge non può in nessun caso violare i limiti imposti dal rispetto della persona umana.

**Art. 32 Const.**

The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any given health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person.

The Corte di Cassazione, already in 1973, in proceedings to determine jurisdiction, affirmed the constitutional right to health as a right of the individual, invocable in litigation between private parties.206

However, the first case in the field of tort law in which the horizontal effect of Art. 32 Cost. played a role arose a year later in the Tribunale di Genova in 1974.207 It concerned the victim of a traffic accident who, inter alia, claimed non-pecuniary damages for a temporary disability, resulting in a reduction of his physical integrity by 50%, and for a permanent disability of 3%.208

---


208 In the Italian legal system, similar to the French system, the assessment of damages is based on an evaluation of the physical and/or mental injury by medical experts. This is expressed in a percentage. The higher the percentage of the disability, the higher the amount of damages awarded. The method of assessment of damages will be analysed in more detail in Part B. See also: M. Bargagna and F.D. Busnelli
The court of Genoa came to the conclusion that even though non-pecuniary damages were being claimed in this specific case, Article 2043 c.c. had to be applied and affirmed an obligation to compensate under this provision. In the rationale for its decision, it states:

„...insofar as the right to health and the right to bodily integrity are concerned, these are guaranteed by the Constitution itself, where it states, in Article 32, that health “is a fundamental right of the individual”. Consequently, there can be no doubt that this right is directly and entirely applicable in the area of civil law.„²⁰⁹

This was the first decision in which damage to health had been compensated as such, even though, the court, at this point, did not converse in terms of danno biologico as described above. This notion was in fact introduced to the case law by the Corte costituzionale, decision number 88 of 1979.²¹⁰ That case concerned a claim for non-pecuniary damages for suffered bodily harm by two victims who were shot at by the defendant.

For the first time the Constitutional Court affirmed danno biologico as an independent category of damages and abandoned the restrictive interpretation which linked Article 2059 c.c. to moral damages. It held that damage to health per se is recoverable alongside pecuniary losses and pain and suffering. In particular the Court stated:

„The expression “non-pecuniary damage” adopted by the legislator [in Article 2059 c.c.] is wide and general; it refers to any damage which can be negatively distinguished...

²⁰⁹ Trib. Genova, 25 May 1974 (1975) Giur. it., 54, 69: ‘...per il diritto alla salute e all’integrità fisica la norma che la tutela è contenuta addirittura nella Costituzione la quale all’articolo 32 afferma appunto che la salute “è un fondamentale diritto dell’individuo”. E di conseguenza non possono esservi altre questioni sulla piena e diretta tutelabilità di questo diritto anche nell’ambito del diritto civile.’

from a pecuniary damage which is characterised by its economic character...[the right to health] is protected by Article 32 of the Constitution, not only as an interest of the community, but also, and above all, as a fundamental right of the individual, thus it takes the shape of a primary and absolute right, which fully operates also in relationships between private parties. This is without any doubt a subjective right which is directly guaranteed by the Constitution and thus the violation of this right constitutes a tort and, consequently, an obligation to compensate."  

However, the decision of the Corte costituzionale based the obligation to compensate on Article 2059 c.c. and left the link to Art. 185 c.p. untouched seeing that, in the concrete case, the tortfeasor had been previously convicted under criminal law and therefore Art. 185 c.p. was applicable. Thus the case gave no reason to decide on the issue. Consequently, the compensation for danno biologico was still linked to the qualification of the tortious behaviour as a crime after Cost. 88/1979.

The Corte di Cassazione explicitly conformed to the decision of the Corte costituzionale in Cass. 3675/1981. The Supreme Court affirmed in this decision the recoverability of damages to health per se independent of its impact on the capacity to produce income. Furthermore, it refers explicitly to the issue regarding the limitation of recoverability under Art. 2059 c.c. due to the link to Art. 185 c.p. However, the court did not decide the issue since in the concrete case the involved tortious behaviour could in fact be qualified as a crime.

The question had to wait for a solution until 1986 when the Corte costituzionale dealt, in 184/1986, with the problem of the constitutionality of Art. 2059 c.c. insofar as it

---

211 Corte cost. 88/1979, Considerato in diritto, 2: ‘L’espressione “danno non patrimoniale”, adottata dal legislatore, è ampia e generale e tale da riferirsi, senza ombra di dubbio, a qualsiasi pregiudizio che si contrapponga, in via negativa, a quello patrimoniale, caratterizzato dalla economicità dell’interesse leso. [...] [il diritto alla salute] è tutelato dall’art. 32 Costituzione non solo come interesse della collettività, ma anche e soprattutto come diritto fondamentale dell’individuo, sicché si configura come un diritto primario ed assoluto, pienamente operante anche nei rapporti tra privati. Esso certamente è da ricomprendersi tra le posizioni soggettive direttamente tutelate dalla Costituzione e non sembra dubbia la sussistenza dell’illecito, con conseguente obbligo della riparazione, in caso di violazione del diritto stesso.’


foresees the recoverability of non-pecuniary damages in cases of personal injury only in cases of crime.\textsuperscript{214}

In the initial case, which originated the decision of the Constitutional court, the connection of Art. 2059 c.c. and Art. 185 c.p. was a relevant obstacle to recoverability because the physical harm for which compensation was claimed, was caused by a traffic accident and the behaviour of the tortfeasor was not qualified as a crime.

The Corte costituzionale, however, did not declare unconstitutional Art. 2059 c.c. but relocated the recoverability of \textit{danno biologico} to Article 2043 c.c. The reasoning of the Court stemmed from two main arguments:

Firstly, the Court confirmed its previous decisions, stating that the fundamental right to health protected by Article 32 of the Italian Constitution operates fully in private relations and therefore any infringement of this right has to be compensated \textit{per se}, independent from possible moral or pecuniary damage.

Secondly, as to the collocation under the rule contained in Article 2043 c.c., the Court argued that it is possible to evaluate \textit{danno biologico} by objective criteria. Contrary to pain and suffering, for which the actual extent of the harm depends on the subjective sensations of the victim, the damage to health \textit{per se} is medically ascertainable in an objective manner. The Court argued that Article 2059 c.c. was only applicable to subjective moral damage, and not to the objective \textit{danno biologico}. With regard to this point, the Court overruled the previous decision number 88/1979.

The Corte costituzionale further stated that the fact that subjective moral damage is regulated by Article 2059 c.c., and thus is excluded from Article 2043 c.c., does not lead to the conclusion that Article 2043 c.c. only provides for pecuniary damages.\textsuperscript{215} On the


\textsuperscript{215} See also Corte cost. 27 Oct. 1994, n. 372 (1994) I Foro it., 3297.
contrary, Article 2043 c.c. as a general tort clause is applicable whenever the damage can be quantified objectively in a monetary sum, even through a *fictio.*

The theory of *danno biologico* is by now an established part of the Italian tort system. In 2000 it was even foreseen to insert a new Article 2056bis in the Codice civile which would firmly establish the recoverability of *danno biologico.* This, however, was not realised and thus the home for *danno biologico* remained, for a further three years, Art. 2043 c.c. The discussion on whether it finds its legal basis in Article 2043 c.c. or Article 2059 c.c. was then reopened with the decisions of the *Corte di Cassazione* and the *Corte di Costituzione* in the summer of 2003.

In these decisions, which will be illustrated in the following analysis, the courts extended the protection of fundamental rights through instruments of tort law by applying the constitutional approach of *danno biologico* to the compensation of other inviolable rights. In doing so, it relocated the concept of *danno biologico* to Article 2059 c.c. as a type of non-pecuniary damage.

### III. Damages to other fundamental rights than health

As mentioned, damage to health, and the fact that the possibility to recover damages in personal injury cases was understood as insufficient, has been the vehicle for modifications of Italian tort law. However, the limitations of Art. 2043 c.c. and 2059 c.c. have also been discussed with regard to recoverability in cases of infringement of other fundamental rights. The important cases of 2003 have marked a new milestone in this area. Nonetheless, even before 2003, recoverability in cases of infringement of fundamental rights, other than health, was being discussed. Following are some case law examples which have been at the center of this discussion.

---

219 As proposed already by E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 795.
1. Secondary victims

Identification can be made here of a group of cases which are related to damage to health. In these cases the primary victim suffered a personal injury but the claim for damages was taken by a relative for an infringement of his own right, other than right to health (in case of mental damage suffered by the relative, the loss would fall under the category of *danno biologico*).

While the constitutional anchor for *danno biologico* is Art. 32 Cost., protecting the right to health, the losses concerned in the following case law examples are qualified as infringements of the family rights guaranteed by Art. 29 and 30 Cost., in combination with the general constitutional clause of fundamental rights protection, Art. 2 Cost.

In *Cass. 6607/1986* an erred medical treatment had caused damage to a woman’s genitals and consequently she could no longer have sexual intercourse. Among other damages, the husband claimed damages *iure proprio* for the fact that he could no longer have sexual contact with his wife. The lower instance court had dismissed the claim on the basis of the remoteness of the damage.

However, the *Corte di Cassazione*, making reference also to Article 8 (1) ECHR, held that Articles 2 and 29 of the Constitution, which refer to family rights, had been violated. Insofar as the medical error had made it impossible for the husband to have sexual intercourse with his wife, it had, according to the Court, directly damaged the right of the husband to free development of his personality within the realm of the family.

---


221 Art. 2 Cost. is the central provision of the Italian Constitution guaranteeing the inviolable rights, for the wording and more details, see above. Art. 29 Cost. reads: 'The republic recognises the rights of the family as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within the legally defined limits for the protection of the unity of the family.' ('*La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull’uguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell’unità familiare.*')

222 This reasoning has been confirmed by Cass. 26972-26975/2008, see point A.3.4.2 of the decisions even though that seems not in line with the core arguments that the Cassazione made in the other parts of the amended November 2008 decisions, in particular the requirement of the seriousness of the offence. Of course the effect on the couples sexual life is one aspect to take into consideration in the assessment of the compensation of the wife. A own recoverable damage of the husband seems, however, not conceivable.
In a next step, the Supreme court was faced with the question under which premises such a damage would be recoverable. Referring to the above described decisions, Cost. 88/1979 and Cost. 184/1986, it equated the personality right damaged in the concrete case with the right to health. According to the Court, the possibility of the husband to live and develop within the family had been diminished. This diminishment was viewed by the Court as comparable to the disablement of the physical and/or psychical integrity in personal injury cases. Consequently the Court affirmed the recoverability of this infringement, of the family right under Art. 2043 c.c., specifying that the loss is not a non-pecuniary one in the sense of Art. 2059 c.c. nor a pecuniary one, but must be nonetheless compensated as a *danno biologico* under the provision Art. 2043 c.c.

Already in this 1986 case, we can identify all the issues, which after 2003, became the predominant features in the discussion on Italian tort law. On the one hand we can identify the will to grant more extensive protection to fundamental rights in relationships between private parties and the intent to use tort law as an instrument to guarantee this protection. On the other hand, the question of defining the limits of this protection is emanating.

As the example of case *Cass. 6607/1986* shows, there is a very wide range of infringements which could be considered as harm to the constitutionally protected right of free development of one’s personality. Basically, every limitation of the possibility of a person to choose and do what he/she wants to do could be construed as a possible infringement. The question is whether compensation should be awarded every time someone has intentionally caused such a limitation. Under the current framework of the Italian legal system this question has to be answered negatively. This issue will be dealt with in more detail following the description of the 2003 cases which established the basis for the tort law protection of constitutionally protected interest. It might already be stated, however, that this protection can not include every negative alteration of one’s possibility to develop his/her personality.

The decision, *Cass. 6607/1986*, can be further criticised. The motivation given for the recoverability of the suffered loss under Art. 2043 c.c. is not convincing because it equates the damage to the personality right to *danno biologico*. Doing so the Court omits the main characteristic of the latter, i.e. that *danno biologico* is objectively
ascertainable. The possibility to measure the disablement of the physical or mental integrity of a person by objective criteria was the central argument to allow the compensation of this type of loss under Art. 2043 c.c. even though it is not a pecuniary damage. At the scientific status quo, this possibility of an objective measure is not given with regard to losses suffered by the infringement of personality rights. Such a type of loss is not objectively ascertainable as long as it does not itself amount to a damage to health. Cost. 184/1986 argues that *danno biologico* is recoverable under Art. 2043 c.c. even though it is not a pecuniary damage, because it is measurable in an objective way. Cass. 6607/1986 does not provide a similar motivation for the damage compensated in the concrete case.

In *Cass.*, 8305/1996 the Court affirmed the recoverability of damages of the relatives of a victim harmed in a traffic accident who subsequently fell into a coma. The Court, decided that the loss suffered by the claimants was a foreseeable consequence of the tortfeasor’s conduct. As in *Cass.* 6607/1986 the Court drew a parallel with the *danno biologico* cases and viewed as injured the family rights of the victim’s wife and children which are protected by Art. 29 and 30 Cost. Concretising the infringed family rights, the Court outlined the wife’s right to a regular matrimonial relationship deriving from Art. 143 c.c. and the children’s right to a healthy physical and psychological growing environment deriving from Art. 147 c.c. As in Cass. 6607/1986, the Court based the obligation to compensate on Art. 2043 c.c. without further motivation.

In wrongful birth cases as well the courts motivates the recoverability of losses suffered by the part of the parents with a violation of Art. 29 and 30 of the Constitution which guarantee family rights. In *Cass.* 6735/2002 the Court granted damages to the father of a child who was born handicapped. It based its decision on a constitutional

---

224 Art. 143 c.c. lays down the rights and obligations of the spouses.
225 Art. 147 c.c. lays down the obligations of the spouses in relation to the children.
interpretation of the Articles on the law of abortion and Art. 143, 147, 261, 279 c.c. that determine the relationship between a husband and wife and between parents and their children. In these types cases, the right of the self-determination of the mother, protected by Art. 32 par. 2 and 13 Cost., also plays a role, since a wrong diagnosis does not allow the mother to be able to meet an decision on whether to abort or not.

2. Privacy and personal identity

Another group of „pre-2003“ cases in which a violation of a constitutional right, other than health, had lead to an award of compensation for non-pecuniary damages are those concerning the non consented use or publication of information, photos, names or likeness of persons.

In Tribunale di Verona, 26 February 1996 the picture of a catholic priest had been used without his consent on a leaflet for an electoral campaign. The priest claimed, that by using his picture he was construed by public opinion as keeping close ties to the ideas of that specific political party, which in reality was not the case.

The Court held that the claimant’s right to personal identity had been infringed. It stated that this right falls under the scope of Article 2 Cost. and has been singled out in case law as an interest worthy of legal protection. According to the court, the damages deriving from the infringement of the right to personal identity were of a pecuniary nature because even though they concern one’s personality, they have impact on the person’s intellectual, political, social, religious, ideological and professional property. Thus, the Court viewed Art. 2043 c.c. as and held that the infringement resulted in an

---

obligation to provide equitable compensation according to Art. 1226 and 2056 c.c. which the court established in the amount of 15,000 EUR (30 Mio. Lire). 230

This decision is another example of the problems which the Italian courts had to face due to the limitations of Art. 2059 c.c. The Tribunale di Verona referred explicitly to the difficulty which arose in these types of cases, specifically, in qualifying the tortious behaviour as a crime in order to grant dannò morale according to Art. 2059 c.c. 231 In fact, the court sought to

“overcome the equation: infringement of an economic interest = pecuniary damage. Instead the concept of patrimony should be reformulated in a way that it includes not only economic elements but also the totality of utilities, advantages and conveniences which do not have a market value, but nonetheless can find an economic evaluation according to the social conscience of the moment.” 232

The losses which fall under this broader concept of pecuniary damage are also referred to as damages resulting from an infringement of the “vita di relazione”. Literally “relationship life”, one could describe this as the loss of quality of life, seen in its various relationships with and within society.

Even though the Tribunale di Verona does not refer to dannò biologico, the decision is a further example of how the courts tried to apply the reasoning of the concept of dannò biologico to other types of losses, other than the damage to health, in order to compensate losses under Art. 2043 c.c. which could not be recovered under Art. 2059

---

230 Art. 1226 c.c. states “If damages cannot be proved in their exact amount, they are quitably liquidated by the court.” (“Se il danno non può essere provato nel suo preciso ammontare, è liquidato dal giudice con valutazione equitativa.”) Translation by M. Beltramo, G. E. Longo and J. H. Merryman, The Italian Civil Code and ancillary legislation, cit. According to Art. 2056 c.c., Art. 1226 c.c. is applicable in tort.

231 Note however, that offences against one’s honour or reputation are crimes under the prerequisites of Art. 594 et seq. of the criminal code. Thus, in case of violation the dannò morale is recoverable according to Art. 2059 c.c. in combination with Art. 185 c.p. See also Cass. 6 Apr. 1993, n. 4109 (1994) I Foro it., 2217 in this case the Court reveals the decision of the lower court in the part were it grants non-pecuniary damages because it had awarded those damages without motivation, in particular it had given no reasons that the tortious behaviour could be qualified as a crime.

232 P. 1442: “…superare l’equazione: lesione di un interesse patrimoniale = dannò patrimoniale, riformulando il concetto di patrimonio non solo nei suoi elementi economici, ma anche in un complesso di utilità, vantaggi, comodità, che non sono economicamente quantificabili sul mercato, ma possono ugualmente trovare valutazione economica secondo la coscienza sociale tipica del momento.” It is interesting to note that the “social conscience of the moment” is referred to also in Cass. 26972-26975/2008 which will be illustrated in detail below.
But the critic already made in reference to Cass. 6607/1986 applies also in this case. Indeed the court does not deal at all with whether or not the infringement of the “vita di relazione” is in actual fact measurable by objective criteria, this being, as already has been pointed out above, the key characteristic for which damage to health per se has been qualified as recoverable under Art. 2043 c.c.

Another case, worthy of mention here, dealt with the protection of a minor’s image. It concerned a child who was unable to wear any kind of clothing because of a particular type of allergy and who, for this reason, was subjected to severe harassment by the mass media. The Court assessed non-pecuniary loss for the “damage to social life due to the considerable limitation of movement and the resulting diminution in the outlook for self-affirmation in human society, both in an educational ambit and outside the family context in general”.

3. The so called *danno esistenziale*

In the nineties, the tendency to apply the concept of *danno biologico* in order to render possible the recoverability of damages for infringements of constitutional rights, other than health, culminated in the formulation of the theory of *danno esistenziale* (literally: “existential damage”).

---


It is difficult to individualise a concise definition of this concept. This difficulty is probably due to the open nature of the concept, which could be summarised in the following way: under *danno esistenziale* every kind of non-pecuniary loss caused by an infringement of any right whatsoever of a person should be recoverable. In the historical overview, which Cass. 26972-26975/2008 give of the development of the theory of *danno esistenziale*, it states that the loss could consist according to this theory in the alteration of aspects of life, regarding relationships (*alterazione della vita di relazione*), the loss of the quality of life (*perdita della qualità della vita*), or the infringement of the

---

235 An attempt of a concise definition by one of the scholars who favor the theory of the recoverability of danno esistenziale can be found in G. Christandl, *La risarcibilità del danno esistenziale*, cit., 244-246. In the landmark decisions Cass. 26792-26795/2008 (see more details below) referring also to the decision of submission to the Joint divisions Cass, 4712/2008, the Supreme Court summarises the theory of danno esistenziale developed by scholars as "...the possibility to perceive danno esistenziale a an autonomous head of damages – understood,... as a non-pecuniary loss different from danno biologico, in absence of a damage to the physical-mental integrity and from the so called danno morale soggettivo, since it does not concern the inner sphere of feelings, but the sphere of the non income producing doing of the subject..." ("...la configurabilità, come autonoma categoria, del danno esistenziale – inteso, ... come pregudizio non patrimoniale, distinto dal danno biologico, in assenza di lesione dell'integrità psico-fisica, e dal c.d. danno morale soggettivo, in quanto non attiene alla sfera interiore del sentire, ma alla sfera del fare aredittuale del soggetto...", point A.1. of the decisions). Some paragraphs later in the same decisions the Supreme Court summarises what has been said in case law with regard to the definition of danno esistenziale, referring to some decisions which “…retained it admissible to perceive a tertium genus of non-pecuniary loss defined “esistenziale”: this loss would consist in every detriment of the activities of self-fulfillment of the human person (such as the violation of the family peace or of the enjoyment of a healthy environment) and it would differ from both, from the danno biologico because it does not require a damage in corpore and from the danno morale because it would not constitute a mere subjective internal alteration of feelings.” ("…hanno ritenuto ammissibile la configurabilità di un tertium genus di danno non patrimoniale, definito “esistenziale”: tale danno consisterebbe in qualsiasi compromissione delle attività realizzatrici della persona umana (quali la lesione della serenità familiare o del godimento di un ambiente salubre), e si distinguerrebbe sia dal danno biologico, perché non presuppone l’esistenza di una lesione in corpore, sia da quello morale, perché non costituirebbe un mero patema d’ animo interiore di tipo soggettivo.") See also point A.3.1 of the decisions 26972-26975/2008 for more details to the development of the theory of *danno esistenziale*. See also: E. Navarretta, Danni non patrimoniali: il compimento della drittewirkung, cit., p. 81.
existential dimension of the person (compromissione della dimensione esistenziale della persona).\textsuperscript{236}

Examples of case law evidencing the granting of an award of non-pecuniary damages according to the theory of danno esistenziale include compensation for the harm suffered as a consequence of, an erroneous haircut\textsuperscript{237}, the loss of a pet\textsuperscript{238}, a delayed flight take-off on Christmas Day\textsuperscript{239}, the break of the shoeheel of a bride’s shoe\textsuperscript{240}, receiving illegitimate fines\textsuperscript{241}, the delivery of bad service by the public post office\textsuperscript{242} or an untimely activation of telephone services\textsuperscript{243}.

These are all examples of decisions by the first instance judges, Giudici di Pace (Justice of the Peace).\textsuperscript{244} There are, however, also some decisions of the Corte di Cassazione which favour, to a certain extent, the theory of the recoverability of the so called “danno esistenziale”.\textsuperscript{245} It were, indeed, also these decisions and the need for clarification

\textsuperscript{236} Point A.3.1. of the decisions.
\textsuperscript{239} Giudice di Pace di Milano, 23.07.2002 (2003) Danno e resp., 301 with commentary by M. Della Casa, “Bianco Natale ... ma in aeroporto”: la tutela del passeggero tra danno esistenziale e rimedi sinallagonalici (2003) I Foro it., 210. In the case the claimant had to wait for a long time at the airport because of an interruption of the activity of the airport due to atmospheric precipitations. The GdP granted danno esistenziale for the violation of the legitimate expectation to join the family.
\textsuperscript{240} Giudice di Pace di Palermo, 17.05.2004, n. 4859
\textsuperscript{242} GdP di Avellino, 06.05.2001 available on: http://www.studiocelentano.it/dannoesistenziale/ In the case a law firm had to send a document by registered mail within a set deadline. The letter was send back by the post office with the notice that the addressee had been moved to another address. This was, however, not the fact. In the end the lawyers brought the letter personally to the addressee and thus kept the deadline. Beside the economical loss (in particular the travel costs) the Giudice di Pace granted also non-pecuniary damages for the stress and anxiety (namely of not keeping the deadline and the consequences of this) suffered by the lawyers due to the disservice. The Giudice di Pace assessed the damages in the amount of the value of one week of relaxing winter-sports holidays.
evidenced by them which, in 2007, caused the Third Section of the Supreme Court to suspend a process and to ask the president of the Court to assign to the Sezione Unite, the joint sitting of the divisions, several questions with regard to the recoverability of *danno esistenziale.*

There are some keywords usually used to describe the concept of *danno esistenziale*, these are the verbs *fare* (to do) and *essere* (to be) and the notion of “*attività realizzatrici*” (activities of self-fulfilment). According to the theory of *danno esistenziale*, a recoverable damage exists when a tortious behaviour causes changes to other person’s way of being. For example, when the victim is unable to do things, which he or she was able to do before or when he or she is forced to do things which he did do previously. In both contexts, “to do” is understood in the broadest way possible, it includes every doing which does not produce earnings (the so called “*fare
areddittuale and “fare non reddittuale”\footnote{Cass. 24.03.2006, n. 6572 (2006) I Foro it., 1344 for references to the many commentaries, see above.} and every forced renouncement.\footnote{P. Cendon, Voci del verbo fare, para. 1.} Furthermore, it refers to every negative change relating to the subject and his or hers affiliation with the external world – family, friends, objects, school, work, habits, creativity, spare time, environment, and so on.\footnote{In a critical analysis Navarretta asks whether not such a reducing of the human being only to his or her acts would not be itself in contrast with human dignity. See: E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 797.}

\textit{Danno esistenziale} includes an alteration of daily life and a modification of the activities of self-fulfilment, without considering whether those changes are only momentary or definitive.\footnote{P. Cendon, Voci del verbo fare, para. 1.} The fact that the notion of “\textit{attività realizzatrici}” was already used in Cost. 184/1986\footnote{Cost. 184/1986, para. 18.} is alleged in support of the theory of \textit{danno esistenziale}.\footnote{P. Cendon, Voci del verbo fare, cit., para. 1, where the author cites the \textit{memoria dell'andriana}, refering to judge R. Dell’Andro who wrote down Cost. 184/1986.} However, Cost. 184/1986 speaks of the activities of self-fulfilment in the strict context of the recoverability of damage to health. The argument served to underline the fact that the damage to health was not only to be compensated insofar as it influenced the victim’s capacity to produce income, but also in relation to the aspect of negative non economic consequences for the victim’s life.

The broad concept of \textit{danno esistenziale} which includes every aspect of human life as long as it is not of economical character, determined on one hand its failing and on the other hand its success. Its failing in that a claim for compensation for any negative impact on a person’s existence lacks legal basis. In fact, this is in clear contradiction with the basic principles of Italian tort law. Consequently, in 2008 the Supreme Court denied explicitly the status as an autonomous category of recoverable damages to the \textit{danno esistenziale}.\footnote{Cass. 26972, 26973, 26974 and 26975/2008, in particolar point A.3.3 and A.3.14 of the decisions.}

Nevertheless, measured by quotations in case law and scholarly writing, the concept of \textit{danno esistenziale} has had considerable success and, as we will see later, witnessed a real revival after the decisions of 2003. The reason for this was that the development in society, in particular the greater focus on the values of the person, demanded, indeed,
the protection of fundamental rights by tort law. However, only the right to health had been provided with the sound legal basis that is *danno biologico*. That led to the consequence, that often in case law or legal writings dealing with the issue of the recoverability of infringements of other fundamental rights than health, the terminology “*danno esistenziale*” was used.\(^{256}\) The fathers of this concept never failed to claim this fact as a confirmation of their theory. That had the further consequence that those who opposed such a broad category of *danno esistenziale* wrote entire manuals to prove that the theory had no legal foundations.\(^{257}\) A vicious circle which according to my opinion has granted to the theory of *danno esistenziale* a fare greater attention than it deserved and by this has drawn the focus of the Italian legal practitioners away from the actual problems at hand. Finally, hopefully, the decisions Cass. 26972-29675/2008 put an end to this confusion.

The basic problem in the Italian debate is that there exists no comprehensive and overall accepted concept for the protection of fundamental rights in private law. In the German legal system this is encompassed in the concept of *Allgemeines Persönlichkeitsrecht*, which provides the legal foundation for the recoverability of damages in cases concerning the infringement of fundamental rights and is both, restrictive, meaning that it is opposed to an all-comprehensive-application in the style of *danno esistenziale*, but still flexible enough to allow for new developments in society and thus capable of permitting the protection of new types of recoverable damages. With the decisions of 2003 and 2008, which will be examined shortly, the *Corte di Cassazione* has adopted an approach which is similar to the German *Allgemeines Persönlichkeitsrecht*.

### IV. Period of confusion resulting from the lack of a legal basis

In the years after the establishment of the concept of *danno biologico* and the invention of *danno esistenziale*, the two ideas have often been applied by courts – above all trial courts - in an unclear way showing a tendency to confuse the two concepts.\(^{258}\)

---

\(^{256}\) Infact the notion itself could in fact be quite appropriate to describe the damage caused by an infringement of fundamental rights (See: E. Navarretta, *Il danno alla persona tra solidarietà e tolleranza*, cit., 789). The dilemma is that the it is likely to be always confused with an unlimited recoverability.


\(^{258}\) Navarretta calls it “a season [of the damage to the person] of remarkable internal contradictions”: E. Navarretta, *Il danno alla persona tra solidarietà e tolleranza*, cit., 789.
One clear example of this can be taken from the Tribunale di Venezia, 10 September 2002. In this case the court had to deal with the claim of pecuniary and non-pecuniary damages of the parents of a child born after an unsuccessful sterilisation. The doctor who carried out the sterilisation was held responsible on the basis of contractual liability (Art. 1223 c.c. et seq.).

With regard to the non-pecuniary damages claimed by the woman, the court held that, even though pregnancy is a normal physiological process, it constitutes a personal injury where it has been caused against the will of the woman. According to the court, the basis for this stemmed from the fact that the personality right includes the protection against every unauthorised interference with one’s physical integrity. Further, it argued that although a responsible and conscious procreation enjoys constitutional protection (Articles 2 and 13 Cost.), sterilisation has to be seen as a form of exercising one’s freedom of self-determination.

The court continued in affirming the recoverability of danno biologico, ascertainable in this case for the medically established depression suffered during the pregnancy, the birth itself and subsequent seven years.

The Court defines danno biologico, however, in a broad and unclear way, confusing its proper definition with formulations used normally to describe danno esistenziale:

„Danno biologico has to be understood as the injury of the psycho-physical integrity of the person and it extends to all negative effects which have an impact on the primary right to health which is considered as an inviolable right of the person in the richness of life and of the realisation of one’s own moral, intellectual and cultural personality which manifests itself as an obstacle to the activities with which the human person expresses himself and this is an independent and prior effect in relation to economic losses or loss of income which consists in the disablement of the psycho-physical integrity.“

---


260 ‘Infatti per danno biologico deve intendersi la lesione all’integrità psico-fisica della persona e si estende a tutti gli effetti negativi incidenti sul bene primario della salute in sé considerata quale diritto
The references to the right to health as an inviolable right and to the “disablement of the psycho-physical integrity”, which is different from economic losses, are taken from the definition of *danno biologico*. But the formulation of “the realisation of one’s own moral, intellectual and cultural personality” along with “activities with which the human person expresses himself” stem clearly from the concept of *danno esistenziale*.

The court, primarily, deduced in detail a damage to constitutional rights, other than the right to health, – i.e. self determination and personality rights. Afterwards, it assessed the damage under the head of *danno biologico*, extending the definition of this notion. Only at this point did the court refer also to the medically established depression.

For the concrete assessment of damages, the court applied a scheme which determines certain sums according to different degrees of injury, awarding, under the head of *danno biologico*, 8244.11 EUR.\(^\text{261}\) However, it emerges clearly from the motivation that what the Court actual wants to compensate is the infringement of the constitutionally protected personality rights, in particular the right to self determination.

Subsequently, the court liquidates the *danno morale*. It refers, again, to the infringement of the psychical health of the woman and to the violation of her right to self determination and the freedom to choose to have a child or not. According to the court, these harms impacted negatively on the woman’s perception of herself, of the couple and of the family. Therefore, the court awarded a further 20,000 EUR under the head of *danno morale*. Contrary to *danno biologico*, this head is assessed not by objective criteria or schemes, but with regard to equity.

The Court did not define clearly the different heads of assessed non-pecuniary damages. Furthermore, it took into account the same negative consequences of the damaging

---

\(^{261}\) As will be explained in more detail infra, for the assessment the *danno biologico* is expressed in percentage of disablement. Simplified, this is the worsening of the status of the physical integrity compared before and after the event which caused the damage. In the given case the court the disablement differed according to the medical expertise between 7.5 and 20 % for different periods of time.
event under different heads of damages thus leading to a double recovery and therefore to overcompensation.

It is interesting to note that the court gave no further motivation concerning the liability for the non-pecuniary damages. It affirmed contractual liability and gave detailed reasoning explaining why this included the claimed pecuniary damages. However, contractual liability does not *per se* include the recoverability of non-pecuniary damages under Italian law.\(^{262}\) To this end, the prerequisites of Art. 2059 c.c. have to be met or, specifically for the recovery of *danno biologico*, those prerequisites provided by Art. 2043 c.c., which is the provision where this concept was collocated at the time of the decision, must be satisfied. This lack of specification of the applied norm is quite typical for Italian trial court decisions.\(^{263}\) It also demonstrates the self-evidence which the trial courts have attributed to the recoverability of non-pecuniary damages. The only problem for the court seemed to be in proving that the claimed damages constituted a *danno biologico* or a *danno morale*. However, as the decision of the Trib. Venezia shows, often those definitions have been applied imprecisely or in order to accommodate the particular case at hand.

Thus, the intervention of the Supreme Court and the Constitutional Court to give more certainty was more than welcomed.

**V. The 2003 landmark decisions of the Corte di Cassazione**

Decisions number 8827 and 8828 of 31.05.2003 of the *Corte di Cassazione* mark, after the elaboration of the concept of *danno biologico*, the second important turning point in Italian tort law.\(^{264}\) The interpretation of those decisions and the ensuing development of

---

\(^{262}\) Note, however, that Cass. 26972-26975/2008 favor recoverability of non-pecuniary damages also under contract law. For more details, see below.


\(^{264}\) Cass. 31 May 2003, n. 8827 and 8828 in: (2003), *Danno e resp.*, 816, with commentaries by F.D. Busnelli, *Chiaroscuri d’estate. La Corte di cassazione e il danno alla persona; l.c. 826-829; G. Ponzanelli,*
the revised reading of Art. 2059 c.c. introduced by them, is, have been until the November 2008 decisions, the most important issue in the Italian tort law debate. Cass. 8827 and 8828/2003 resulted in the link between Art. 2059 c.c. and Art. 185 c.p. finally being severed. The Court held that Art. 2059 c.c. had to be interpreted as also protecting constitutional rights. Previous to these cases, already Cass. 7283/2003 had opened the gateway towards this interpretation.\textsuperscript{265}

The decisions of May 2003 deal with the question of compensating the relatives of a primary victim. In Cass. 8827/2003 the parents of a child born seriously injured due to a medical failure claimed damages, while Cass. 8828/2003 dealt with the claims of the relatives of a man killed in a car accident.

The crucial question in both cases was whether the relatives of the primary victim could claim \textit{iure proprio} non-pecuniary damage other than subjective moral damages (pain and suffering) and \textit{danno biologico}.

In neither of the cases had the relatives claimed damage to their own health, so theoretically they had no basis for a claim \textit{iure proprio} to \textit{danno biologico}. The respective Courts of Appeal of Bologna (case 8827) and Brescia (case 8828) based the

\textsuperscript{265} Only that in this decision the \textit{Cassazione} speaks of the necessity that the full compensation includes also the reparation of losses suffered with regard to the values inherent to the person protected by Art. 2 Cost. (point 2.1.2. of the decision). However, in this case no such right was at stake. Instead the decision states that for the compensation of a \textit{danno biologico} it is not necessary that the tortfeasor has been condemned by a criminal court. The Court held that for the application of Art. 2059 c.c. and 185 c.p. a presumed that qualification of the behaviour as a crime is sufficient. See Cass., 12.05.2003, n. 7283, in (2003) \textit{Danno e resp.}, 713 with a commentary by G. Ponzanelli, Danno non patrimoniale: responsabilità presunta e nuova posizione del giudice civile; in (2003) \textit{Corr. Giur.}, 2003, 1463 with a commentary by Rolfi, L’illecito civile ed il danno morale: spostamento o crollo del limes? See also \textit{Corte cost.} 11.07.2003, n. 233 (2003) \textit{Danno e resp.}, 939 (fore more details, see below). See also: Trib. Genova, ord. 14.01.2003 (2003) \textit{Danno e resp.}, 771 with commentaries by G. Comandé, La rincorsa della giurisprudenza e la (in)costituzionalità dell’art. 2059 c.c. and L. La Battaglia, La storia infinita dell’art. 2059 c.c.: quale via per le nuove esigenze di tutela?
compensation of non-pecuniary damages on mixed definitions of *danno morale soggettivo, danno biologico e danno esistenziale.* They used expressions such as “*[danno] ulteriore di natura esistenziale*”\(^\text{266}\) o “*danno biologico iure proprio sotto il profilo del danno esistenziale*”\(^\text{267}\)

The *Corte di Cassazione* finally took this occasion to give a clear basic judgement on the recoverability of non-pecuniary damages under Italian law and particularly on the interpretation of Article 2059 c.c.

In both cases the Court granted non-pecuniary damages for the loss of amenities of life suffered by the claimants as a consequence of injury or death to their relatives. In doing so, the so-called „twin decisions“ 8827 and 8828/2003 follow, in their relevant parts, the same line of reasoning to overcome the obstacles to compensation set by the traditional understanding of Article 2059 c.c.\(^\text{268}\) Therefore the can be illustrated together.

Firstly, the Court abandoned the restrictive interpretation that links the notion of non-pecuniary damages provided for by Article 2059 c.c. to *danno morale soggettivo* only. It stated that in the current Italian legal system, the Constitution has a prominent position, Article 2 of which acknowledges and guarantees the inviolable rights of the individual. Therefore, non-pecuniary damages must be understood as a broad category, which includes compensation for damages ensuing from the infringement of a fundamental value inherent to the individual.\(^\text{269}\)

Secondly, the Court dealt with the Article 2059 c.c. requirement of a statutory provision that provides compensation for non-pecuniary damages. As previously stated, the only relevant provision in the Italian system which would satisfy this is Article 185 c.p., which provides for the compensation of non-pecuniary losses in criminal cases.

\(^{266}\) Cass. 8827/2003, “Svolgimento del processo” para. 2.

\(^{267}\) Cass. 8828/2003, “Fatto”.

\(^{268}\) The relevant part is in decision number 8827 part 4, in particular 4.3 and in decision number 8828 part 3, in particular 3.1.3 – 3.1.6.

\(^{269}\) Cass. 8828/2003, 3.1.3. See also: E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 792.
The interpretation, that moral damages should only be recoverable in cases of crime, a prerequisite emanating certainly from the preparatory works of the legislator of 1942, was, according to the Court, not anymore in conformity with the current legal order as it manifests itself, taking into consideration the case law developments and legal writings after the entry into force of the Civil Code and, especially, the Constitution. To support this argument, the Court gave examples of various legislative provisions which entered into force after the Civil Code that stipulated for the recoverability of non-pecuniary damages in cases without criminal relevance. Those provisions are namely: Art. 2 L. 117/1988 which refers to the compensation of damages, including non-pecuniary damages, in cases of a limitation on liberty caused by a wrongful exercise of judicial power, Art. 29, 9 L. 675/1996 referring to the gathering of personal data, Art. 44 D. Lgs. 286/1998 which establishes in para. 7 the right to claim non-pecuniary damages against private or public entities in cases of discrimination based on racist, ethnical or religious reasons and L. 89/2001, Article 2 of the so-called Legge Pinto establishes the right to compensation for pecuniary and non-pecuniary damages in cases of a violation of the right to receive a judgment within a reasonable time, stemming from Article 6 (1) ECHR.

Once the court had established that the ratio of Art. 2059 c.c. could not anymore be seen in the compensation of non-pecuniary damages in cases of crime, a problem remained with the wording of the Article itself, which stated that recoverability was granted in “cases determined by law” only. In the „twin decisions“, the Corte di Cassazione overcomes this limitation with a twofold constitutional argument.

270 Cass. 8828/2003, 3.1.4. For the legal writing which proposed the different reading, see for instance: E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 793, 794.
276 The law has been implemented as a reaction of the numerous convictions of Italy by the EctHR due to the overlength of proceedings. For more details: C. Mak, M. D. Sanchez-Galera and S. Wünsch, The Italian Report, cit., Part 3 § 2 D.
277 See also Cass. 26972-26975/2008 point A.2.1.d.
The first argument is that Article 2059 c.c has to be read in light of the Italian Constitution. The constitutional interpretation makes the limitation of Article 2059 c.c. inapplicable whenever the harm has occurred to an interest protected by the Constitution. According to the Court, the very minimum protection which the Constitution affords to the person consists of the possibility to obtain compensation in cases where a violation of a constitutionally protected interest has occurred. This minimum protection cannot be subject to any restrictions as this would result in a denial of protection for the cases excluded by the restrictions.\(^{278}\)

Additionally, the Court argued that the Constitution recognises the values which are inherent to the person. This recognition demands protection. That is why the Articles of the Constitution implicitly take the shape of statutory provisions for non-pecuniary damages through Article 2059 c.c.\(^{279}\)

In summary, through its revolutionary decisions in 2003, what the *Corte di Cassazione* did was to extend the recoverability of non-pecuniary damages to new types of losses. Before, compensation could only be claimed for pain and suffering or harm to health (*danno biologico*). After the decisions however, it was clear that also the infringement of other types of constitutionally protected interests may lead to compensation.

The *Corte costituzionale* affirmed the decisions of the *Corte di Cassazione* in decision number 233 of 2003, in which it expressed *obiter* its appreciation for the new approach, and especially for the new „constitutionally-oriented interpretation of Article 2059 c.c.“.\(^{280}\)

\(^{278}\) Cass. 8828/2003, 3.1.5.

\(^{279}\) Cass. 8828/2003, 3.1.5.

\(^{280}\) Corte cost. 11.07.2003, n. 233 (2003) *Danno e resp.*, 939, with commentaries by M. Bona, Il danno esistenziale bussa alla porta e la Corte costituzionale apre (verso il ‘nuovo’ Art. 2059 c.c.); G. Cricento, Una diversa lettura dell’Art. 2059 c.c.; G. Ponzanelli, La Corte costituzionale si allinea con la Corte di Cassazione; A. Procida Mirabelli di Lauro, Il sistema di responsabilità civile dopo la sentenza della Corte costituzionale n. 233/03. For a description of the decisions in English, see also the Italian Report by E. Bargelli, in H. Koziol and B.C. Steininger (eds.) *European Tort Law 2004* (New York, Wien: Springer, 2005), at 266 et seq. The case itself did not deal directly with the issue of what kind of damages are recoverable. In short, the Court was asked to decide on the presumed unconstitutionality of Article 2059, which had previously been interpreted as preventing the assessment of non-pecuniary damages for the relatives of the primary victim, who was either killed or severely injured because of a car accident, when the defendants’ liability in tort is merely presumed under Article 2054 c.c. The second paragraph of the Article at issue states that when two cars crash into each other, the two drivers are equally liable in tort, until one of them has proof to the contrary. This presumption, of course, has no relevance in respect of the criminal liability of the defendant. But again, according to the traditional interpretation of Article 2059
In both cases, 8827 and 8828 of 2003, the interests at stake were the enjoyment of, and free development within, the family. According to the Court, the protection of the family in Articles 2, 29 and 30 of the Italian Constitution, comprises the interest of the sanctity of the sphere of affection and reciprocal solidarity within the family circle, and the inviolability of the free and complete performance of the activities realised by the human being within the circle of this peculiar social formation constituted by the family.\footnote{8827/2003, 4.3.}

It has been said that the German legal system does not grant non-pecuniary damages in similar cases. In comparison to Cass. 8827/2003 see in particular BGH, 18.03.1980, were the court denies the parents of a child which has been born seriously injured the right to claim non-pecuniary damages for the mental stress caused by the fact to have a disabled child, as long as this stress does not amount to a own damage to health of the parents.\footnote{VI ZR 247/78, (1980) NJW 1452–1456. See Part One A III 1 a.}

**VI. Period of confusion despite existing legal basis**

The “twin decisions” of 2003 were unanimously welcomed by scholars.\footnote{See the already above cited commentaries: F.D. Busnelli, Chiaroscuri d’estate. La Corte di cassazione e il danno alla persona; G. Ponzanelli, Ricomposizione dell’universo non patrimoniale: le scelte della Corte di cassazione, A. Procida Mirabelli di Lauro, L’art. 2059 va in paradiso, M. Franzoni, Il danno non patrimoniale, il danno morale: una svolta per il danno alla persona; P. Cendon, Anche se gli amanti si perdono l’amore non si perderà; E. Bargelli, Danno non patrimoniale ed interpretazione costituzionalmente orientata dell’art. 2059 c.c.} However, the interpretation went in two opposite directions: the exponents of *danno esistenziale* initially expressed their disappointment that their theory had not been explicitly affirmed by the court. However, in the following months they did not delay in

\[\text{c.c., non-pecuniary damages should be only assessed when the conduct of the tortfeasor amounts to a crime, given the connection between 2059 c.c. and Article 185. Thus, the presumption of liability posed by Article 2054 c.c., which produces its effect only in tort, might not suffice to assess non-pecuniary damages. This might constitute a violation of the general principle of equality, posed by Article 3 Cost. The Constitutional Court upheld the claim for unconstitutionality, stating that the connection between 2059 c.c. and 185 c.p. does not require the conduct of the tortfeasor to amount to a concrete crime, rather, it only has to correspond to an abstract offence. Hence, in the scope of assessing non-pecuniary damages under Article 2059 c.c., the presumption of liability under Article 2054 is enough to ascertain the subjective element of the tort. See also Cass. 7283/2003 cit.}\]

\[\text{281 Cass. 8828/2003, 3.1.6, to which is made reference in 8827/2003, 4.3.}\]

\[\text{282 VI ZR 247/78, (1980) NJW 1452-1456. See Part One A III 1 a.}\]

\[\text{283 See the already above cited commentaries: F.D. Busnelli, Chiaroscuri d’estate. La Corte di cassazione e il danno alla persona; G. Ponzanelli, Ricomposizione dell’universo non patrimoniale: le scelte della Corte di cassazione, A. Procida Mirabelli di Lauro, L’art. 2059 va in paradiso, M. Franzoni, Il danno non patrimoniale, il danno morale: una svolta per il danno alla persona; P. Cendon, Anche se gli amanti si perdono l’amore non si perderà; E. Bargelli, Danno non patrimoniale ed interpretazione costituzionalmente orientata dell’art. 2059 c.c.}\]
promoting the identity of the new recoverable damages as \textit{danno esistenziale}.\textsuperscript{284} The opponents of the so-called \textit{danno esistenziale}, on the other hand, vigorously denied the new recoverable losses being identified in this way.\textsuperscript{285} This debate continued until the \textit{Corte di Cassazione} clarified the issue in November 2008.\textsuperscript{286}

1. The problem of how to identify the new category

The divergent interpretation was catalysed by two facts. The first, that no terminology had been attributed to identify the new type of recoverable damages. It could be argued that it was not necessary to attribute a name since the \textit{Cassazione} explicitly specified that:

\begin{quote}
\textit{“It does not seem useful to cut out specific figures of damages in the framework of this general category [of non-pecuniary damages] labelling them in different ways”}.\textsuperscript{287}
\end{quote}

Here, it is evident that the Supreme court is in favour of the liquidation of damages in a global lump sum, without distinction between the various heads of damages, which later, in the November 2008 decision is stated definitively as the principle for awarding non–pecuniary damages.

To attribute a name to the new type of damages declared recoverable in 2003 could be construed as support for liquidation under different heads of damages. However, the naming of different types of damages and the liquidation in a global sum, in fact, do not contradict themselves.

Simply identifying a type of recoverable damage does not consequently lead to its liquidation as a separate head of damage. But the risk that it could be understood and applied by the (lower) courts in this way, probably withheld Italian scholars from attributing a short title to the new recoverable damage.

\textsuperscript{287} Cass. 8828/2003, 3.1.4.3. \textit{“Non sembra tuttavia proficuo ritagliare all’interno di tale generale categoria [di danno non patrimoniale] specifiche figure di danno, etichettandole in vario modo”}.\textsuperscript{286}
Such a keyword is, however, necessary to simplify the scientific discussion and is also useful in the writing of court decisions. This has been proven by the fact that in the absence of an appropriate short name for the “damage deriving from the infringement of a constitutionally protected interest”, the only available, all encompassing notion, i.e. that of *danno esistenziale*, was applied since also this concept refers to the recoverability of damages to fundamental rights of the person.

As mentioned before, this lead to a revival of the theory of *danno esistenziale*. But it lead also to much confusion, because mostly, when *danno esistenziale* was invoked, it was not what was actually intended or, worse, it was not clear what was actually meant.

The *Cassazione* did not affirm the theory of *danno esistenziale* in 8827 and 8828/2003, nor did it explicitly deny it. Rather, it allowed for the concretisation of the requirements under which the infringement of a (which) fundamental right should be recoverable open. However, from the motivation of the decisions, it has emerged that the Court did not establish the recoverability of damages in cases of any negative alteration of a constitutional interest. Instead, it provided for the protection, by tort law, of specific inviolable rights when and only when those have been violated in their essential content. This reading has indeed been confirmed by the later Supreme court’s „quadruplet decisions“ of 2008. A timely attribution of a name to this new type (not “head” or “category”) could surely have helped to focus the discussion on the significant issue at hand, that is, the mentioned concretisation of the requirements for compensation of non-pecuniary damages in cases of violation of a constitutionally protected interest.

Even in the November 2008 decisions, the Supreme Court continues to use different names for different types of non-pecuniary damages, underlining on more than one occasion that these names are applied for mere descriptive purposes.288 This illustrates, that also the *Corte di Cassazione* recognises the advantages, if not the necessity, of naming types of non-pecuniary damages in discussing their recoverability.

---

In the following, the notion of “danno alla personalità” will be the short term used to refer to the “damage caused by the infringement of a constitutionally protected interest” as defined by Cass. 8827 and 8828/2003 and further concretised by Cass. 26972-26975/2008. Particularly, it will be used to distinguish this type of damage from that encompassed by the broad definition of *danno esistenziale*. The term seems appropriate in relation to the kind of interests that are at stake. However, it should be underlined that the notion itself is, so far, not commonly used in Italy.\(^{289}\)

There is a tendency in Italy to apply the notion of “*danno esistenziale*” or of “a kind of existential loss” (*pregiudizi del tipo esistenziale*) to the new types of recoverable losses, underlining that this is only for descriptive purposes and that that which is actually being referred to is that defined by Cass. 8827, 8828/2003 and 26972-26975/2008.\(^{290}\) This practise, however, carries a high risk that there will arise confusion between the old and the new understanding of *danno esistenziale*. It seems also incorrect to attribute

\(^{289}\) In fact, within the Italian legal system the notion of *Danno alla personalità* could at first sights cause an association with the notion of “*diritti della personalità*” (personality rights). Within the Italian legal system this notion is traditionally connected to a certain legal concept which is stricter than what today is generally understood under personality rights, which could be also refered to as the fundamental rights/values inherent to the person. The category of “*diritti della personalità*” has been developed in Italian law out of a proprietary concept which was focused on the protection of certain attributes of the person (for instance name, image) from economical exploitation. See: Artt. 5 – 10 c.c.; G. Alpa e G. Resta, Le persone fisiche e i diritti della personalità, in: R. Sacco (ed.) *Trattato di Diritto Civile* (Torino: UTET, 2006); D. Messinetti, Diritti della personalità, in: *Enciclopedia del diritto*, XXXIII (Milano: Giuffrè, 1983); P. Rescigno, Diritti della personalità, in *Enciclopedia giuridica Treccani* (Roma: Istituto della Enciclopedia Italiana, 1989) That means that the focus was to protect the *diritti della personalità* from an exploitation on the market, while the new form of protection under tort law, as specified in Cass. 8827, 8828/2003 and 26972-26975/2008, puts at the center the protection of the values inherent to the person as such from any kind of infringement, not only from economical exploitation. The obligation to compensation is not linked to the fact whether the tortfeasor aimed to take an economical advantage or not. This background of the concept of the *diritti della personalità* seems, however, not in contrast with the proposal to attribute the name of *danno alla personalità* to the new types of recoverable damages. There is firstly the obvious argument of the wording – “danno alla personalità” has not to be read as “danno ai diritti della personalità”.

More importantly, secondly, however, all cited scholars see the *diritti alla personalità* as a catory open to new developments. See in particular Messinetti who critizes the proprietary character of the concept and favours an autonomous concept of personality rights, not linked to aspects of economical utilisation (Messinetti, Diritti della personalità, cit., p. 356).

A third argument is that in the area of labour law and compensation of non-pecuniary damages the concept of the personalità of the employee – seen as a whole and not only with respect to economical exploitation – plays since long a central role. See Art. 2087 c.c.; For a overview: M. Pedrazzoli, Tutela della persona e aggressioni alla sfera psichica del lavoratore (2007) *RTDPC*, 1119-1157.

\(^{290}\) Cass, 26972-26975/2008; See also: E. Navarretta, Danni non patrimoniali: il compimento della drittwirkung, cit.

Another aspect which suggests the appropriateness of attributing a new name to the new recoverable damage, as is proposed here “*danno alla personalità*”, is to assist in describing the non-pecuniary losses recoverable under the new constitutional reading of the tort norms of the Italian Civil code. This is in fact a very interesting aspect of the development of the Italian legal system, particularly so for other legal systems, and is likely to play a significant role in the further harmonisation of civil law within Europe. The export of the Italian experience under the auspices of *danno esistenziale* would result in the export of an ambiguous concept with no clear definition. Such an endeavour, by reason of the vagueness of the concept *danno esistenziale*, would certainly be less successful. The export under the name of “*danno alla personalità*” is more likely to have a significant impact since all Italian scholars agree on the recoverability of *danno alla personalità*, i.e. the loss caused by the infringement of a constitutionaly protected interest. This consensus of all Italian courts and scholars could amount to the ingredient of success in its transplantation to other legal cultures.

Beyond this, there is still dissent on the concrete determination of the protected interests and so there is ongoing discussion on whether the broader *danno esistenziale* should be recoverable. These issues should not be confused even more by an ambiguous application of the notion of *danno esistenziale*.

The second argument in support of the use of *danno alla personalità* in exporting the Italian development and its potential success in other systes relates to the closeness of that short title with similar issues being discussed in other legal systems, for instance the German *Allgemeines Persönlichkeitsrecht*. The fact that the word *personalità* is similar to its translation in other languages - *personality, personalité, Persönlichkeit, personalidad* – makes it easier for foreign legal practitioners and scholars to understand the concept behind the name.
2. The unclear requirements for the recoverability of *danno alla personalità*

The Italian legal discussion in the area of tort law after the twin decisions of 2003 primarily focused on the delineation of correct presuppositions to be satisfied in order to affirm recoverability of non-pecuniary losses in cases which dealt with an infringement of a fundamental right.

As mentioned, the *Cassazione* had provided only general principles, without setting down material principles for the concrete individualisation of recoverable damages. However, it clarified some basic points which served as starting point for the development subsequent to the decisions 8827 and 8828/2003.

The first was the so-called bipolarity (*bipolarità*) of Articles 2043 c.c. and 2059 c.c., categorising pecuniary damages under Art. 2043 c.c., leaving Art. 2059 c.c. providing the recoverability of non-pecuniary damages.\(^{292}\)

This clarification was necessary because, as we have already seen, until the 2003 decisions, a part of non economic interests was placed under the protection of Art. 2043 c.c., namely the damage to health, in order to avoid the limitations of Art. 2059 c.c. To motivate the categorisation of *danno biologico* under Art. 2043 c.c., it was stated that Art. 2043 c.c. not only refers to economic interests, but that it includes all damages which are measurable by objective criteria, while Art. 2059 c.c. would refer exclusively to the *danno morale soggettivo*.

That theory has definitively been overcome. Under the principle of *bipolarità* Art. 2043 c.c. provides for pecuniary damages and Art. 2059 c.c. for all types of non-pecuniary damages. Consequently, the equalisation of non-pecuniary damages with *danno morale soggettivo* has been abandoned.

Furthermore, with Cass. 8827 and 8828/2003, the restrictive reading of Art. 2059 c.c. in combination with Art. 185 c.p. has been made redundant. Thus the recoverability of

non-pecuniary damages is not linked anymore to the qualification of the tortious behaviour has a crime.

Finally, the main outcome of the 2003 decisions is that non economic losses deriving from an infringement of a constitutionally protected interest is in principle recoverable under Art. 2059 c.c.

A proper interpretation of the decisions 8827 and 8828 of 2003 should compel the conclusion that not every personal interest is to be compensated in tort. In particular, the Italian Constitution does not contain any norm which explicitly affirms a general principle of recoverability of non-pecuniary damages where there has occurred a violation of a constitutionally protected interest. Moreover, the protection by tort law should comprise the “inviolable rights” to which the desicions refer and not include simply any violation of any interest named in the Constitution.

Article 2 of the Italian Constitution guarantees „inviolable human rights“ („diritti inviolabili dell'uomo“). The specification of inviolability expresses a judgment of value, which refers to the closeness of the protected personal interests to the primary and essential core of the human being. That core can be identified with the concept of human dignity and the right to the free development of the personality.293

Hence, on one hand, not every personal interest, even if explicitly protected by the Constitution, assumes an inviolable status.294 On the other hand, the character of Art. 2 Cost. as an open norm permits it to include, under constitutionally protected rights, those which are not explicitly mentioned in the Constitution at all.295

Finally, it emerges from the ratio of Cass. 8827 and 8828/2003 when placed in the context of the Italian legal system, that not every violation of an inviolable

293 Navarretta, ‘Danni non patrimoniali’, pp. 64 et seq.
295 Navarretta, ‘Danni non patrimoniali’, p., See Barbera who states that through Art. 2 and 3 Cost. the rank of a constitutional right might be attributed to those “fundamental” and “natural” rights, which find no explicit anchor in the wording of the Constitution; A. Barbera, Art. 2, in: G. Branca (a cura di) Commentario della Costituzione (Bologna: Zanichelli, 1975) 50-122, 66.
A constitutional right is to be compensated. Only those violations which are so serious as to touch the „inviolable sphere“ of the right involved are to be protected.296

Recoverability is justified, if, in the concrete manifestation of the specific case and particularly regarding the seriousness of the specific violation, the inviolable core of human dignity has been harmed.297

In the four decisions of November 2008 the Supreme court confirmed this reading of Cass. 8827 and 8828/2003.

However, in the discussion following the twin decisions of 2003, the exponents of danno esistenziale favoured an open interpretation, affirming the recoverability of damages in the case of any negative alteration of a persons life. As previously mentioned, this theory indeed saw a revival in the years between 2003 until 2008 for two reason. Firstly, because Cass. 8827 and 8828/2003 did not explicitly set limitations for the recoverability of non-pecuniary damages in cases of an infringement of a fundamental right. Secondly, because the expression “danno esistenziale” was broadly applied in legal discussion and case law, even by the opponents of the concept, in the absence of a proper keyword in order to refer in short to the new type of recoverable damages, which here is referred to as “danno alla personalità”.

This confusion about the presuppositions for the recoverability of danno alla personalità has in fact produced new case law of danno esistenziale, mostly pronounced by the Giudici di Pace (Justices of Peace, hereinafter GdP).298

---

296 Navarretta, ‘Danni non patrimoniali’, pp. 64 et seq.
298 The institution of Giudice di Pace exists only since 1991 in the Italian legal system, it has been introduced with L. 21.11.1991, n. 374, Istituzione del Giudice di Pace, (1991) G. U. 27.11.1991, n. 278. Note that in cases in which the amount in dispute is not superior to 1.100 EUR, the Giudice di Pace decides on equity. See Art. 113, 2 c.p.c.
3. *Danno esistenziale* in the courts after the 2003 twin decisions

In the following, two case law examples in which *danno esistenziale* has been granted will be described.

A group of cases, leading to much discussion, were those dealing with the blackout, which on 28.09.2003 left the whole of Italy without electricity. In some parts of Southern Italy it took up to 24 hours to restore to working order the electricity. On the wave of the opinion that claimed that the Supreme court decisions of May of the same year had confirmed the theory of *danno esistenziale*, many claims have been brought forward against ENEL, the Italian energy services monopoly.

In *Giudice di Pace* of Casoria 13.07.2005, n. 2781\(^{299}\), a man living in a small town near Naples, sued ENEL claiming the non-pecuniary damages suffered as a result of the interruption of energy. He claimed that the negligent conduct of ENEL prevented him from enjoying all, or at least a large proportion, of the activities of rest, recreation and amusement that constitute the normal expectation of everyone. He argued that the interruption of electricity constituted a negative modification of this moment in his life in that his normal activities (Sunday meal with friends and relatives, television, cinema etc.) were altered. The Judge granted non-pecuniary damages in the amount of 225 EUR. Referring to the 2003 decisions of the *Cassazione*, the Judge held that

„the disappointment of not being able to enjoy ordinary Sunday activities of amusement and recreation and to instead be forced to pass Sunday waiting for the restoration of electrical energy, constitutes a violation of the rights of the individual protected under Article 2 Cost. (…). The infringement of the individual’s personality must be protected under Article 2 Cost. (…) every time the conduct of the wrongdoer results in the detriment of the personality as a whole.“

The number of claims brought before the Justices of the Peace in the context of the blackout exceeded 90,000.\(^{300}\)


\(^{300}\) Number taken from the homepage of ENEL, [http://www.enel.it/azienda/sostenibilita/stakeholder/collettivita/contr_imp/](http://www.enel.it/azienda/sostenibilita/stakeholder/collettivita/contr_imp/). ENEL states there: “Blackout of September 28, 2003: more than 90,000 proceedings are pending. Most of the requests come from private individuals, essentially in Apulia, Calabria, Campania, and Basilicata. The average sum requested
The decision *Giudice di Pace di Napoli* 27.03.2006\(^{301}\) concerned an inhabitant of Naples who sued the Italian football federation (*Figc*, *Federazione Italiana Gioco Calcio*). The claimant had a passion for football and was a big fan of the Naples’ Soccer team. He regularly attended the football games in the stadium or watched them on television. According to the *GdP*, the *Figc* had wrongfully not admitted Naples’ soccer team to the league B, forcing the team to partake in the lower C league. This caused a non-pecuniary loss to the claimant since he could not enjoy high quality soccer and was instead, according to the decision, forced to attend football games which were not reputable for the society and the city [of Naples]. Furthermore, he was deprived of the emotion to combat for promotion into league A.

The *GdP* did in fact deal, in the reasoning of the decision, with the issue of *danno esistenziale* stating that it cannot be understood as an unlimited concept. The Justice stipulated that *danno esistenziale* is not an instrument to be used to channel one’s intolerance and that it does not provide for the recoverability of modest and momentary losses that occur inevitably in the living together of society.

However, in the concrete case, the *GdP* did recognise that the inviolable rights of the claimant had been infringed in an appreciable way. Thus, he granted 1.000 EUR under the head of *danno esistenziale*.

Several people joined the claim (as their names are omitted in the published decision, it is not clear, how many). Referring to the motivation given with regard to the principal

\[\text{is relatively small. Almost all the plaintiffs turned to the justice of the peace, who in many cases upheld the requests. Enel Distribuzione appealed to the competent courts and the decision of the justice of the peace was overthrown. Fourteen decisions of the Court of Paola (Cosenza province) have been appealed before the Court of Cassation.}\]


claimant, the GdP granted each of them 800 EUR for dannno esistenziale. However, it does not emerge from the decision, why the judge granted them a lower amount.

VII. The landmark decisions of 11.11.2008 of the Corte di Cassazione

Five years after the landmark decisions of 2003, the Corte di Cassazione set a new milestone in the discussion about the recoverability of non-pecuniary damages. The decisions, 26972, 26973, 26974 and 26975 of 11.11.2008, pronounced by the Sezione Unite (the joint sitting of the divisions of the Supreme Court), did not only deny definitively to dannno esistenziale the status of an autonomous category of damages, but also clarified the structure of the Italian tort system.\(^{302}\) Called upon by the Third division\(^{303}\), the Supreme court, in the joint sitting of the divisions, pronounced for the

\(^{302}\) Cass. 11.11.2008, n. 26792-26795 (2008) Guida al dir., fasc. 47, 18 with commentary by G. Comandé, La verità, vi prego, sul dannno esistenziale; F. D. Busnelli, ’…e venne l’estato di San Martino’ (2008) Diritto e formazione, 825-829; (2008) Resp. e risarcimento, fasc. 11, 14 with commentaries by Rodolfi and Maritini; (2009) I Foro it. 120 with commentaries by A. Palmieri. La rifondazione del dannno non patrimoniale, all’insegna della tipicità dell’interesse leso (con qualche attenuazione) e dell’unitarietà, l.c. 123; R. Pardolesi and R. Simone, “Danno esistenziale (e sistema fragile); “die hard’”, l.c. 128; G. Ponzanelli, Sezioni unite: il “nuovo statuto” del dannno non patrimoniale, l.c. 134; E. Navarretta, Il valore della persona nei diritti inviolabili e la sostanza dei danni non patrimoniali, l.c. 139. In short time after the decisions an “instant book” has been published which collects the commentaries of many experts (scholars, judges, coroners and other practicioners) in this area. AA. VV. Il dannno non patrimoniale, Guida commentata alle decisioni delle S.U., 11 novembre 2008, nn.26972/3/4/5 (Milano: Giuffrè, 2009). The book is especially interesting because it collects not only the commentaries of experts with different professional background, but also of those of different opinions (in particular the so called “esistenzialisti” and “antiesistenzialisti”).

\(^{303}\) Cass. 25.02.2008, n. 4712 (2008) Danno e resp., 553, with commentary by G. Ponzanelli, Il dannno non patrimoniale tra lettura costituzionale e tentazioni esistenziali: la parola alle Sezioni Unite, l.c., 558; M. Bona, La saga del dannno esistenziale verso l’ultimo ciak, l.c., 562; (2008) I Foro it., 1447 with commentary by A. Palmieri, l.c. 1451; (2008) Corriere giur., 621, with commentary by Franzoni. The third division invited the Sezione Unite to answer the following eight questions:

1. Is it possible to perceive e non-pecuniary loss different as well from dannno morale as from dannno biologico, which consists nell’infringement of the non income producing doing of the victim (fare acredittuale della vittima) and which derives form a violation of constitutionally guaranteed values (lesione di valori costituzionalmente garantiti)?
2. Would it be correct to qualify the prerequisites of such a damage in the way that there has to be a serious offence of a value of a person (offesa grave ad un valore della persona) which has consequences of a serious and permanent character (carattere di gravità e permanenza delle conseguenze)?
3. Is the theory, which characterizes the non-pecuniary losses as “typical” and denies the concept of dannno esistenziale correct?
4. Is the theory correct, which holds the dannno esistenziale recoverable only in the area of contract law, in particular in the framework of work relationships or has the general principle to be affirmed according to which the dannno esistenziale finds citizenship and concrete application as well in the area of contractual as extracontractual tort (illecito contrattuale …[e] torto aquiliano).
first time on some important points, such as the limits of danno alla personalità\textsuperscript{304} and the element of “ingiustizia costituzionalmente qualificata” (constitutionally determined injustice). Moreover, the Court clarified some of the basic principles of Italian tort law which over time had become blurred by case law and scholarly writings, particularly referring to the characteristics of Art. 2043 c.c. and 2059 c.c. and the relationship between them.\textsuperscript{305}

Firstly, it confirmed the principle of bipolarity between Articles 2043 c.c. and 2059 c.c.\textsuperscript{306}, the former referring to pecuniary damages, while the latter provides the prerequisites for the recoverability of all types of non-economic losses.

1. The so-called tipicità of Art. 2059 c.c.

The Court considered furthermore the issue of whether Article 2059 c.c. has the character of an open norm or not. The hypothesis, that Article 2059 c.c., like Art. 2043 c.c., is an open norm, has been raised by some scholars in the aftermath of Cass. 8827 and 8828/2003.\textsuperscript{307} In Italy, this issue is discussed under the notions of tipicità (typicalness) and atipicità (atypicalness).\textsuperscript{308} Article 2043 c.c. follows the principle of atipicità, meaning that once the presuppositions for liability are met, all kinds of pecuniary damages are recoverable. In other words, there are no limits on the level of Haftungsausfüllung.\textsuperscript{309}

5. Is a non-pecuniary loss recoverable which inflicts health not understood as physical-mental integrity, but as feeling of wellbeing (sensazione di benessere)?
6. What should be the criteria for the assessment of danno esistenziale?
7. Does the danno tanatologico or damage of immediate death (da morte immediate) constitute a separate category of non-pecuniary damage?
8. Which are the burdens of assertion and proof to bear by who claims the compensation of danno esistenziale?

\textsuperscript{304} Note that the court does not use this term. As stated before, it is used here to refer to the new types of non-pecuniary damages recoverable after the twin decisions of 2003.
\textsuperscript{305} Because the November 2008 decisions deal in such a comprehensive way with the fundamental questions regarding the compensation of non-pecuniary damages, they have also been called “The new statute of non-pecuniary damages”: See G. Ponzanelli, Sezioni unite: il “nuovo statuto” del danno non patrimoniale. (2009) I Foro it. 134.
\textsuperscript{306} Point A.2.8. of the decisions.
\textsuperscript{307} E. Navarretta, Danni non patrimoniali: il compimento della drittewirkung, cit.
\textsuperscript{308} Point A.1 of the decisions
\textsuperscript{309} For the notions of Haftungsbegründung and Haftungsausfüllung, see Introduction.
Article 2059 c.c. is characterised by the *tipicità* of recoverable damages, meaning that once liability is given, not all, but only certain (“typical” in the sense of “predetermined”) types of non-pecuniary damages are recoverable. This limitation on the level of *Haftungsausfüllung* is derived from the fact that Art. 2059 c.c. provides that non-pecuniary damages are recoverable in cases “determined by law”.

In the scholarly discussion post 2003, it was argued that this limitation had no application anymore as a result of Cass. 8827 and 8828/2003, implying that also Art. 2059 c.c. was an open norm. Effectively, this would in consequence lead to the assumption that Article 2059 c.c. had no specific relevance to Art. 2043 c.c. and that hence it could be abolished, transforming Art. 2043 c.c. into the general clause for all types of damages, similar to the French Art. 1382 c.c. The majority of courts and scholars, however, continued to sustain that Art. 2059 c.c. after cases 8827 and 8828/2003 still imposed limits on the recoverability of non-pecuniary losses. In other words, that it retained its character of *tipicità*, which, consequently excludes the affirmation of a general category of *danno esistenziale*. This view was confirmed by the *Corte di Cassazione* 26972-26975/2008, thus, revoking the relevance of the discussion on the abolition of 2059 c.c.

In the four decisions of 11th November 2008, the Supreme Court indeed confirmed that Art. 2059 c.c. is governed by the principle of *tipicità*, and that the element “determined...

---

by law” contained therein retains its relevance. In particular, the said element has not
been abolished by the constitutional reading of Art. 2059 c.c., since that, in any case,
does not imply a general recoverability of non-pecuniary damages. Instead, non
economic losses can only be compensated in cases where this is provided for by
ordinary law or were specific inviolable rights are violated.312

2. The “ingiustizia costituzionalmente qualificata”

A further, very important, clarification made by the Corte di Cassazione is that the
presuppositions of Article 2043 c.c. have to be met in order to apply Art. 2059 c.c.313 In
other words, Article 2043 c.c. is a norm of Haftungsbegründung, providing for the
requisites for liability, while Article 2059 c.c. is exclusively a norm relating to
Haftungsausfüllung, providing for the consequences of liability with regard to non-
pecuniary damages. In this context, the element of “danno ingiusto” in Art. 2043 c.c. has gained a new
importance after it had lost relevance subsequent to Cass. 500/1999, which had
established that the distinction between diritto soggettivo (subjective right) and
interesse legittimo (legitimate interest) was not anymore relevant for the protection
under tort law.314

The Cassazione introduced the notion of “ingiustizia costituzionalmente qualificata”
stating that the selection of interests that are protected under tort law includes only
specific inviolable rights, which, necessarily, are furnished with this kind of minimum
protection.315

312 Beside Art. 185 c.p. the following provisions foresee explicity the recoverability of non-pecuniary
313 Point 2.3. of the decision.
314 For more details see Part Two A. E. Navarretta, Dikaion come Nomimon e Dikaion come Ison:
diritto civile tra principi e regole (Milano: Giuffrè, 2008) 617-633.
315 Points 2.9. et seq. of the decision. The Court has thus confirmed the interpretation of Cass. 8827,
8828/2003 as proposed in scholar’s writing. See in particular: E. Navarretta, I danni non patrimoniali
nella responsabilità extracontrattuale, cit., 17, 18. The solution shows also similarities with Art. 10:301
(1) of the European Principles of Tort Law which states: “Considering the scope of its protection (Article
This means that in cases concerning the compensation of danni alla personalità, an initial selection of protected interests must occur when determining liability, that means already on the level of Haftungsbegründung.\textsuperscript{316}

The Court underlined that distress, arising from aspects of daily life as every person lives it in the social context, such as difficulties, troubles, disappointments, anxiety or others, do not require tort law protection.\textsuperscript{317} Furthermore, criticising the case law of danni esistenziale, the Court stated that only the inviolable rights of the person that have been precisely identified fall under the ambit of tort law protection, leaving no room for “imaginary rights” such as “the right to quality of life”, “the right to well-being”, “the right to peace of mind” and “the right to be happy”.\textsuperscript{318}

On the other hand the Court specified that there is no rigid list of protected rights, in particular it does not includes only inviolable rights explicitly named in the Constitution. Rather the character of Art. 2 Cost. as an open norm permits to evaluate whether or not new interests that emerge from the social reality concern inviolable aspects of the human being and are therefore to be included in the protection.\textsuperscript{319}

\textsuperscript{316} So already E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 792. Critical on this point of the decisions 26972-26975/2008: G. Vettori, Danno non patrimoniale e diritti inviolabili, in: AA. VV., Il danno non patrimoniale, Guida commentata, cit., 527 – 544, 537 et seq.

\textsuperscript{317} Point 3.9. of the decision.

\textsuperscript{318} Point 3.9. of the decision.

\textsuperscript{319} Cass. 26972/2008 point. A.2.14: “Il catalogo dei casi in tal modo determinati non costituisce numero chiuso. La tutela non è ristretta ai casi di diritti inviolabili della persona espressamente riconosciuti dalla Costituzione nel presente momento storico, ma, in virtù dell’apertura dell’art. 2 Cost. ad un processo evolutivo, deve ritenersi consentito all’interprete rinvenire nel complessivo sistema costituzionale indici che siano idonei a valutare se nuovi interessi emersi nella realtà sociale siano, non genericamente rilevanti per l’ordinamento, ma di rango costituzionale attenendo a posizioni inviolabili della persona umana.” See: E. Navarretta, I danni non patrimoniali nella responsabilità extracontrattuale, cit., at 24-28.

3. The seriousness of the offence

a. The criterion of the “seriousness of the offence”

The Cassazione established a further criterion, to be met after liability is established, as a way of confining the recoverability of non economic losses suffered as a consequence of an infringement of fundamental rights, this criterion it individualized in the seriousness of the offence.\(^{320}\)

This principle states that in cases concerning a violation of a constitutional right, non-pecuniary damages are recoverable only in cases where there has been a serious injury. In other words, the harm suffered must exceed a certain level of seriousness in order to deserve to be taken into consideration under Art. 2059 c.c.\(^{321}\)

According to the Court, the question whether the level of seriousness has been reached, must be answered by balancing the principle of solidarity with the victim on one side and the obligation of the victim to toleration on the other side, both emanating from Art. 2 Cost.\(^{322}\) The obligation of toleration implies that every person, living in a social context is obliged to accept to endure trivial harms. In balancing solidarity and toleration, the judge has to take into account the parameters set by the social conscience in a determined moment in time.\(^{323}\) With this specification, the Court has guaranteed

---


\(^{321}\) Point 3.11. of the decision.


\(^{323}\) A detailed analysis of the necessary balancing between solidarity and tollerance gives: E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 801 et seq. who speaks of the “complex balancing required by a pluralistic society”, 808. See also: E. Navarretta, I danni non patrimoniali nella responsabilità extracontrattuale, cit., 15.

\(^{324}\) For a concise examplary list of what kind of non-pecuniary loss the social conscience required to be recoverable: G. Comandè, La verità, vi prego, cit., 18. Among others Comandè highlights that once to throw down the gauntlet was seen has an offence to be washed with blood, today this would be considered laughable; once the damage to health was an “ill of life” to compensate only in case of loss of income, a vision which in today’s society is unacceptable. Furthermore Comandè gives the example of Cass. 01.03.1910 (1910) II Giur. it., 345 were a public kiss given to a girl in a way to cause moral insult
that the compensation of non-pecuniary damages can adapt to future developments in any given society.

**b. Bagatellschäden**

The Court excludes, thus, the recoverability of Bagatellschäden, defining those minor damages, which, in Italian law are referred to as danni bagatellari, as damages which are

“*futile or ridiculous, ore even when objectively serious, still insignificant or irrelevant according to the social conscience*”\(^\text{324}\)

Criticising again the case law of danno esistenziale, the Court gave following examples of what are it deems as irrecoverable Bagatellschäden: not being permitted to scream at the stadium, not being allowed to smoke or drink alcohol, a superficial scratch of the skin, a headache caused being esposed one morning to factory emissions or the impossibility to leave the house for some hours due to road works.\(^\text{325}\)

The Corte di Cassazione has, thus, definitively denied the recoverability of danno esistenziale.

The question is, however, whether the requirement of a serious offence in establishing recoverability excludes, for instance, minor damages to health, from the compensation system. The court, in cases 26972-26975, explicitly stated that non-pecuniary damages are to be compensated under one all-inclusive head, and that no subcategories should be made. In other words, danno biologico has *a priori* no special status. Consequently, Bagatellschäden, such as the classic whiplash injury, would not be compensated. This idea is not completely alien, taking into account that, for example, during the led to the obligation to compensate damages. Another interesting example is *App. Venezia* 10.06.1898 (1898) I, 2 *Giur. it*, 693 were the Court granted damages to a person which had been dismissed unjustified for the shame the person felt to present in public. Under a nother type of motivation this kind of tortuous behaviour would lead again to compensation of non-pecuniary damages in line with the today’s social conscience.

\(^{324}\) “*futile o irrisorio, ovvero, pur essendo oggettivamente serio, ... tuttavia, secondo la coscienza sociale, insignificante o irrievante per il livello raggiunto*”. Point 3.10. of the decision.

\(^{325}\) Point 3.10. of the decision.
preparational works of the reform the law of obligations in 2002 in Germany it was initially foreseen to exclude these Bagatellschäden from recoverability. In fact this issue was explicitly debated in relation to damages to health.

The advantage of such an exclusion would be that it would free economic resources with a view to compensating more serious damages. Seeing that 90% of the injuries caused by accidents are in fact minor harms, an exclusion of their recoverability would not only free the resources for the compensation of more serious losses, it would also liberate courts and insurance companies of a considerable amount of work, which in turn would increase the time available to dedicate to the more serious cases. These are certainly considerations which, applying the balancing between solidarity and tolerance as established by the Italian Supreme Court in Cass. 26972-26975/2008, could justify the irrecoverability of Bagatellschäden to health.

In the Italian legal system, however, the recoverability of minor damages to health, the so-called micropermanenti, is foreseen by law. There is no reason to believe that the Supreme Court intended to abolish the respective Art. 139 of the Codice di Assicurazione. Furthermore the fact, that the damage to health has to be medically ascertainable in order to constitute a recoverable danno biologico constitutes already a selective filter of seriousness. Thus, the presuppositions established by the Supreme Court for recoverability should only apply to cases without legislative provision.

c. Conclusion

A correct reading of Art. 2059 c.c. would then allow for recoverability of non-pecuniary damages in cases established by law, or where such a provision does not exist, whenever the requirements established by Cass. 26972-26975/2008 are met. That permits to conclude that Bagatellschäden remain recoverable also in other cases of other types of losses than damage to health where there exists explicit legislative

---

326 The proposal was to establish by law a threshold under which damages should not be recoverable. At the end the legislator, however, deemed sufficient the practice already established by case law and saw it as more adequate to leave the issue in the hands of the judges. See BT-Ds. 14/7752 of 07.12.2001 , 6, Art. 2, para 2 b) and p. 24, 25.
328 E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 800.
provision regarding the recoverability of non-pecuniary damages, for instance Art. 185 c.p. or the other previously mentioned legislation which entered into force after 1942.

Furthermore, minor damages to health are recoverable without regard to the kind of tortious behavior which caused them. Even though the Codice di Assicurazione regulates only the compensation of damages caused by traffic accidents, the recoverability has to be extended to other possible types of culpable causation in order to avoid unequal treatment (Art. 3, 32 Cost.).\textsuperscript{329} There is no reason why the victims of personal injury caused by a traffic accident should be privileged over those persons who suffer a personal injury in consequence of another type of tortious behaviour.

The same cannot be said, however, for the other types of non-pecuniary damages, for which the recoverability is foreseen by law. As in the case of the provision by the criminal code and the T.U. Privacy, the ratio for recoverability is not – as in the case of damage to health – compensation, but rests in the nature of the behavior which caused the damage. Therefore, an infringement of the honor if not relevant under T.U. privacy or the criminal code can only lead to compensation of non-pecuniary damages under the presuppositions of Cass. 26972-26975/2008.

4. The bindingness of the 2008 decisions on the Giudice di Pace

It is interesting to note that the Court stated explicitly that the Giudice di Pace have to apply the limits to Art. 2059 c.c. set by the Court.\textsuperscript{330} The reason for this can be assumed by the fact that the theory of dannno esistenziale was quite frequently applied by these first instance judges. Even though higher courts also made reference to the notion, they rarely applied it substantially. In other words, they would not actually grant damages for bizarre types of losses, as some of the losses declared recoverable as “danno esistenziale” by the Giudice di Pace.\textsuperscript{331}

\textsuperscript{329} See: M. Rossetti, Guida pratica per il calcolo di danni, interessi e rivalutazione (Milano: IPSOA, 2006) p. 54.
\textsuperscript{330} Point 3.12. of the decision. For a recent publication which deals exhaustively with the issue Giudice di Pace and damages see: G. Comandé (ed.) Il danno nella giurisprudenza dei Giudici di Pace, Itinerari tematici e istruzioni per l’uso (Milano: Il Sole 24 Ore, 2009)
\textsuperscript{331} For examples see above Part Two A.
According to Art. 113, 2 c.p.c. (Codice di Procedure Civile, Civil Procedure Code) the Giudice di Pace are competent to decide in equity whenever the amount of the dispute does not exceed 1,100 EUR.

Since the introduction of the institution of Giudice di Pace in 1991\footnote{L. 21.11.1991, n. 374, Istituzione del Giudice di Pace, (1991) G. U. 27.11.1991, n. 278.}, the definition of “equity” has been debated. In 1999 the Supreme Court held that Justices of the Peace possessed the competence to decide freely, without taking into consideration the law concerning the case at hand, following only its intuition.\footnote{Cass. 15.10.1999, n. 716 (1999) I Giust. civ., 3243 with commentary by Martino; (1999) 42 Guida al dir., 54 with commentary by Sacchettini.} The Cassazione specified that they were only obliged to observe the constitutional provisions and those norms of Community law which prevail ordinary Italian law.

This decision was, however, overruled by the Corte costituzionale in 2004.\footnote{Corte cost. 06.07.2004, n. 206 (2007) I Foro it., 1365. Cass. 23.05.2006, n. 12147 and Cass. 16.06.2006, n. 13917 with commentary to all three decisions by P. C. Ruggieri, Il giudizio di equità necessario, i principi informatori della materia e l’appello avverso le sentenze pronunciate dal giudice di pace a norma dell’art. 113, 2° comma, c.p.c., l.c., 1367; (2004) I Giust. civ., 2537 with commentary by Giordano.} A unlimited discretion of the Giudice di Pace would, according to the Court, violate the constitutional principle of legality. Thus, Justices of the Peace must observe the positive law within the limits of the informative principles (principî informatori) of the subject matter.\footnote{Corte cost. 206/2004, para. 3.2. See C. Sganga, I percorsi dell’equità formativa dei Giudici di pace, in: G. Comandé (ed.) Il danno nella giurisprudenza dei Giudici di Pace, Itinerari tematici e istruzioni per l’uso (Milano: Il Sole 24 Ore, 2009) pp. 17 – 30.}

In the quadruplet decisions of 2008, the Corte di Cassazione points out that the constitutional reading of Art. 2059 c.c., as specified by the Court, constitutes such an informative principle of the subject of compensation of non-pecuniary damages which the Justices of the Peace consequently are bound to observe.\footnote{Point 3.12. of the decision.}
5. Other clarifications emanating from Cass. 26972-26975/2008

a. Danno morale soggettivo

The Supreme Court made some other important statements in its four decisions of November 2008. The first, concerns the definition of *danno morale soggettivo*. The Court held that this category of damages, which refers to pain and suffering as subjectively perceived harms, is not limited anymore to temporary damages. According to the Court, the duration and intensity of the harm is relevant only for the evaluation of the damages compensation, but not for its individuation.\(^ {337}\)

b. Danno tanatologico

Furthermore, the Court declared recoverable the *danno morale* of a victim who dies within a short period of time after having suffered a physical injury, but, stipulated that the victim must have been conscious during the period of time between the injury and the subsequent death.\(^ {338}\) It such extended the recoverability of the so called *danno tanatologico*. The Court declared its wish to close the gap of protection left by the former case law, which denied recoverability for the loss of life\(^ {339}\) and granted compensation for *danno biologico* only, meaning for the damage to health in cases in which the victim had survived an appreciable length of time\(^ {340}\).

c. Non-pecuniary damages as an all-comprehensive unity

A further, very significant pronouncement of the November 2008 decisions is the oneness of non-pecuniary damages, meaning that it now must be liquidated in one global sum. This point, which will be dealt with in more detail in bellow, will probably revolutionise the Italian system for liquidating non-pecuniary damages, since, until now,

\(^{337}\) Point 2.10. of the decision.

\(^{338}\) Point A.4.9 of the decisions, see also point A.3.2 of the decisions.


it was common practise to award the damages under different heads of damages.\footnote{Indeed it was also very unaspected that the Court would deal with the issue of assessment and not limit to pronounce on the recoverability. See: D. Spera, Nuovi germogli nei solchi della tabella Milanese dopo le sentenze delle Sezioni Unite 11 Novembre 2008, in: AA. VV., Il danno non patrimoniale, Guida commentata alle decisioni delle S.U., 11 novembre 2008, nn.26972/3/4/5 (Milano: Giuffrè, 2009) pp. 501 – 525.} Often, however, this lead to overcompensation because the same aspect of the injury was being compensated under different heads of damages. It was precisely this duplication of compensation that the Cassazione wanted to overcome in declaring non-pecuniary damages as on all-comprehensive category.

In this context the Supreme Court pointed out, that the names of the different types of non economic losses, such as “danno biologico” or “danno morale” have exclusively a descriptive function and do not refer to subcategories of recoverable damages.\footnote{Points 2.10., 2.13. and 3.13. of the decision.}

\textit{d. Non-pecuniary losses under contract law}

The Court dedicated eight paragraphs (point A.4 to point A.4.7) to the recoverability of non-pecuniary losses in the framework of contractual relationships. According to the prevailing opinion in both case law and scholarly writing, this type of losses could not be compensated due to the fact that the part of the Civil code on contracts does not contain a norm analogous to Art. 2059 c.c. which applies to extracontractual relationships.\footnote{Point A.4 of the decisions.} The Cassazione however stated that the new constitutional reading of the norms of the Civil code leads to the recoverability of non-pecuniary damages also in the framework of contract law.\footnote{Points A.4.1 to A.4.7 of the decisions deals with different kinds of contractual relationships. For a detailed discussion of the issue refer to F. Tescione, \textit{Il danno non patrimoniale da contratto} (Napoli: ESI, 2008)}


The November 2008 decisions of the Italian Supreme Court represent a real milestone in the development of the Italian legal system concerning the recoverability of non-pecuniary damages. Not without reason, they have been called the new statute of non-
pecuniary damages. While the 2003 decisions were important in that they confirmed the necessity of the constitutional interpretation of Art. 2059 c.c. and, thus, offered legal certainty with regard to the recoverability of losses caused by an infringement of a constitutionally protected interest, the 2008 decisions have given the judges and scholars the necessary instruments to individuate protected rights and simultaneously have set the limits necessary in order to avoid an “open floodgate” situation.

Some paragraphs of the decisions, however, seem to suffer from a perceived need to outline a comprehensive framework for the compension of non-pecuniary damages. While the most significant parts the reasoning of the Court are very precise and clear, the same cannot be said for other sections which seem to have been added “for completeness”.

\[\textit{a. Recoverability of non-pecuniary losses under contract law}\]

One example is the extension of the principle of the recoverability of non-pecuniary loss in cases of the infringement of an inviolable right to the area of contract law. This extension may indeed be a consequent step and necessary for the coherence of the Italian legal system. However, the motivation given by the Court is not entirely convincing and seems less well-thought-out in comparison to other parts of the November 2008 decisions.

The Court states that the constitutional interpretation of Art. 2059 c.c. provides confirmation that also in the area of contract law non-pecuniary damages are recoverable. The guarantee of a minimum protection of inviolable rights would necessitate the compensation non-pecuniary losses regardless of the type and source of liability – contractual or extracontractual. Only few paragraphs later the Court specifies that the compensation of non-pecuniary losses in contractual cases is based on a constitutional reading of the norms of contract law itself, in particular Art. 1218 c.c. and 1223 c.c. The link between the two affirmations – compensation of non-pecuniary damages in the area of contract law because of the constitutional reading of

346 Point A.4.1. of the decisions.
347 Point A.4.7. of the decisions.
Art. 2059 c.c. on the one hand, and the constitutional reading of the rules of contract law on the other hand – seems unclear.\footnote{348 For a first comprehensive analysis of the issue see: F. Tescione, \textit{Il danno non patrimoniale da contratto} (Napoli: ESI, 2008).}

At a certain point the Court speaks also of the “\textit{ingiustizia costituzionalmente qualificata}” as a criterion for the recoverability of non-pecuniary damages under contract law.\footnote{349 Point A.4.5. of the decisions, at the end.} As described, this notion is an elaboration by the Court itself in relation to the condition of “\textit{danno ingiusto}” set by Art. 2043 c.c.\footnote{350 For details see above point A.VII.2. and point A.} It is not clear, however, why this criterion should be applied in the contract law framework.

The intension of the Court, to avoid the accumulation of claims – under contract and under tort law – emerges clearly.\footnote{351 Point A.4.1. of the decisions, at the end.} To allow for recoverability of non-pecuniary damages is an adequate instrument in order to avoid this type of accumulation. Furthermore, as noted above, it seems reasonable to extend the recoverability of non-pecuniary damages to cases of contractual liability.\footnote{352 See the explanations to the German legal system were the same necessity was felt and has been resolved with the reform of 2002 when the norm on non-pecuniary damages was transferred in the general part of the second book “Law of obligations” of the BGB and was thus applicable not anymore only to tort, but also to contract and no-fault liability. For more details: Part One, A.II and III.} Nonetheless, a further elaboration of a sound juridical fundament seems necessary.

\textit{b. Danno tanatologico}

There is a further issue concerning the sometimes unconvincing nature of the Court’s motivations, that is, the expansion of the so-called \textit{danno tanatologico}, i.e. the recoverability of \textit{danno morale} in cases in which the victim of a personal injury has suffered consciensiously in the short period from the time when the injury occurred until death. Problems with the application of this legal rule can be foreseen. Already, the former theory, which affirmed recoverability for the damage to health in cases in which the victim had survived for “an appreciable time”, was subject to significant interpretational problems, particularly concerning the length of time required to satisfy this condition. The new holding of the Supreme Court seems to cancel all the efforts.
previously made in finding a practicable framework for a fair compensation of the *danno tanatologico*.

Up until the decision of the Court, the “appreciable time” criterion was used to distinguish between the – non recoverable – loss of life and the – recoverable – damage to health. Applying the new reading of the Court however, recoverability is given in all cases where one is consciously aware of the experience of death, even in cases where the length of survival was not long enough to cause an actual damage to health. It is not clear, however, where the new line between – non recoverable – loss of life in cases of immediate death and – recoverable – loss in cases of “experienced death” will be drawn.

On could critic the motivation given by the Court under another – however just formal, not substantial - aspect. With regard to the recoverability of *danno morale* in cases of “experienced death” the Court argued that this mental suffering of extremely high intensity must be compensated as *danno morale* in its new broader conception, even though the suffering is of limited duration.\(^{353}\) Going back some paragraphs in the decision one notes that the new broader concept of *danno morale* has, as one of its main characteristics, that it is not anymore limited to a temporary suffering.\(^{354}\) In this context the before mentioned reasoning of the Supreme Court seems not the most felicitous, because here it is precisely the extreme temporarily limitation which leads in consequence to the recoverability. Thus there is actual no link between the new broader concept of danno morale and the recoverability of danno morale in cases of “experienced death”. In reality this are two different holdings of the Court.

**VIII. Summary**

To summarise which types of non-pecuniary losses are now recoverable, after 2008, it must first be understood that the recoverability is governed by Art. 2059 c.c. which has to be read in the light of the constitution.

\(^{353}\) Point A.4.9. of the decisions, see also point A.3.2.
\(^{354}\) Point A.2.10. of the decisions where it states that the intensity and duration of the suffering is not relevant for the question of recoverability, but only for the quantification. From the context, in particular the former limitation of danno morale to cases of a temporary suffering, it emerges that the Court intended to include pain and suffering which has no clear limits in time and did not bear in mind the mental stress of particularly short duration when drawing the new concept of *danno morale*. 
Article 2059 c.c. is characterised by tipicità which means that it is not an open norm, as 2043 c.c. or 1382 of the French Civil Code which applies not only to pecuniary but also to non-pecuniary losses. This tipicità is concretised by the requirement that the cases of recoverability of non-pecuniary damages have to be "determinated by law".

Such a determination by law is firstly given in cases in which the tortious behaviour constitutes a crime for which Art. 185 c.p. establishes the recoverability of non-pecuniary damages.355

Furthermore, there are several provision which entered into force after the Codice civile of 1942 and which foresee the recoverability of non-pecuniary damages. These provisions are namely: Art. 2 L. 117/1988, n. 117 which refers to the compensation of damages, including non-pecuniary damages, in cases concerning a limitation of liberty caused by a wrongful exercise of judicial power; Art. 29, 9 L. 675/1996, now transposed in: Art. 15, par. 2 D.lg 196/2003 referring to the gathering of personal data; Art. 44, para. 7 D.Lgs. 286/1998 which establishes the right to claim non-pecuniary damages against private or public entities in cases of discrimination based on racist, ethnical or religious reasons and Article 2 L. 89/2001 which establishes the right to compensation for pecuniary and non-pecuniary damages in cases concerning a violation of the right to receive a judgment within a reasonable time, stemming from Article 6 (1) ECHR.

Besides these explicit provisions of law, non-pecuniary losses are also recoverable in cases where an infringement of an interest which is protected by the constitution arises. The possibility of recovering compensation is, however, linked to the fulfilment of the prerequisites established in Cass. 26792-2675/2008. Primarily here, there must be an infringement of a specific inviolable right which is necessarily endowed with the guarantee of minimum protection in turn requiring the reaction of tort law in the case of violation and, secondly, the offence must be sufficiently seriousness, requiring a harm

355 It is sufficient that the behaviour fullfills according to an abstract evaluation, which can be made by the civil law judge, the criteria to be qualified as a crime. See Cass., 12.05.2003, n. 7283, in (2003) Danno e resp., 713 with a commentary by G. Ponzanelli, Danno non patrimoniale: responsabilità presunta e nuova posizione del giudice civile.
which exceeds the minimum level of what every person has to tolerate living in society.\textsuperscript{356}

Non-pecuniary damage is furthermore now one all-comprehensive category without subdivision in subcategories.\textsuperscript{357} The non-pecuniary damage is a loss which stems from an infringement of an interest inherent to the person which is not of economic relevance.\textsuperscript{358}

Notions for different types of non-pecuniary damages might still be applied, but exclusively for descriptive purposes, in order to indicate in a more precise way the kind of loss suffered by the victim. Such a particular denomination is, however, not linked to an autonomous recoverability of the indicated loss. The damage must be assessed in a global sum following a comprehensive evaluation of all the aspects of the concrete case and the impact which the loss has on the life of the victim in all its facets. The following chapter will investigate more in detail the evolution of assessment of non-pecuniary damages in the Italian legal system until the decisions 26972-26975/2008.


\textsuperscript{357} For all see: G. Comandé, La verità, vi prego, cit., 18.

\textsuperscript{358} G. Comandé, La verità, vi prego, cit., 18.
B. Assessment of non-pecuniary damages

I. The normative basis

The normative bases for the calculation of compensation are Art. 1223, 1226 c.c. and Art. 2056 c.c. The first two articles are collocated in the part of the Civil Code dedicated to general contract rules, the third, in the part devoted to tort.

Art. 1223 c.c. establishes the principle of full compensation which aims at restoring the injured person to the same position as he/she would be if the injury had not occurred.\(^{359}\) This norm is generally understood in the tradition of the German *Differenztheorie* which compares the situation of the victim before and after the event which caused the loss.\(^{360}\)

The *Differenztheorie* is, however, rather adequate for the assessment of pecuniary damages. It is on the contrary less suitable in cases of non-pecuniary losses, because the personal situation of the injured person before and after the loss cannot be placed in such an abstract comparison as is possible with material situations.\(^{361}\) While a thing can decrease in value by being damaged, the same is not conceivable, considering the eminent nature of human dignity, for a human being who has suffered personal harm.\(^{362}\)

The worthiness of a person is inestimable and unchangeable. The same goes for the value of life. A person who cannot perform the same activities in the way he did prior to a harmful event might perceive his life less worthy. However, this subjective perception can not be regarded as an objective, absolute criterion by the legal system for the assessment of damages. The human being, his/her life and ability to perform or not to perform certain activities are aspects which *a priori* are not measurable in an economical way. That was also one of the main points of criticism of the traditional practise whereby damage to health was assessed on the basis of the loss of income.\(^{363}\) In the field of non-pecuniary damages, therefore, the principle of full compensation laid

\(^{360}\) C. Castronovo, *La nuova responsabilità civile*, cit., 12 et seq.
\(^{363}\) G. Gentile, ‘Danno alla persona’, *cit.*
down in Art. 1223 c.c. can only function as an ideological leitmotiv, while the concrete assessment has to take place using equitable measures.

The normative basis for this equitable assessment in the Italian legal system is Art. 1226 c.c. which provides that the judge shall award damages according to an equitable valuation in cases in which damages can not be proven in their concrete amount.

Article 2056 c.c. refers to Art. 1223 c.c. and Art. 1226 c.c. which, thus, are applicable also in tort cases.

II. The Function of non-pecuniary damages

The general function of the norms of tort law was considered in Italy, until the 1960s, to be in their punitive character. In coherence with that punitive scope, the legislator of 1942 limited the possibility to claim non-pecuniary damages to cases claims arising from crimes. Only this severe offence should give rise to a civil law reaction.

As described above, this has changed as a result of the development which placed the focus more on the victim’s loss rather than on the tortfeasors behaviour. The possibility to claim damages only in cases of crime was first recognised as unfair in cases dealing with personal injury. This led, as has previously outlined, to the development of the concept of *danno biologico*, which has been further extended to cover other types of losses.

Today, on the contrary, the main purpose of tort law rests in its compensatory function. However, the punitive function has not vanished completely and also the scope of deterrence plays a role. This is above all true in cases of infringement of a personality right.

---

In the context of emerging protected interests, for which non-pecuniary losses are deemed recoverable, the argument of the function of non-pecuniary damages seems sometimes neglected. In particular, the theory of *danno esistenziale* is an example of an incoherent development. As we have noted, the opening up of the Italian system of non-pecuniary damages has moved from the premise that the focus needed to shift from the wrongdoer to the victim. The punitive function has lost importance and the compensatory scope has become the favoured aim. Gradually, it was accepted as unfair to grant compensation only in cases where the damages had been caused by criminal behaviour and was therefore particularly worthy to be condemned. The right which drove this development was the right to health and the new orientation took shape within the concept of *danno biologico*. Indeed, this concept has been further amplified to include other rights.

The banner to promote these enlargements was the need for full compensation for the victim. However, when it comes to *danno esistenziale* the punitive function seems to have gained, once again, more influence\(^\text{369}\), even though this has never been stated explicitly. On the contrary, even the advocates of the theory of *danno esistenziale* claim, the full compensation of the victim as the main goal of this concept. However, the most typical examples of *danno esistenziale* (most typical in so far as they cannot be included under any of the other concepts of non-pecuniary damages existing in Italy and, in particular, are not recoverable according to the constitutional reading of Art. 2059 c.c. as defined by the Supreme Court) seem to have as a basis punitive and preventive scopes. Take for example the series of blackout cases, in which non-pecuniary damages were granted for instance for the loss of the possibility to enjoy the pleasures of a normal Sunday due to the electricity supply cut.\(^\text{370}\) Such a decision can only be

\(^{369}\) See G. Ponzanelli, *Attenzione: non è danno esistenziale, ma vera e propria pena privata* (2000) *Danno e Resp.*, 2000, 841-843. This article is a critical commentary to *Cass.* 07.06.2000, n. 7713 (2001) 1 *Foro it.*, 187 In this case the Court granted non-pecuniary damages for failure to pay maintenance (in addition to the maintenance itself which the defendant, in this case the father, had already refunded to the claimant, his son). The Court argued as follows: “In a “constitutionally oriented” reading of Article 2043 c.c., the pecuniary compensation of unpaid alimony does not exclude compensation of non-pecuniary damages, such as distress in daily life, which may derive from the mere fact of the non-payment. According to decision 184/1986 *Cort cost.*, in fact, the mere violation of a fundamental right of the individual, taken per se, is recoverable in tort, apart from the pecuniary and non-pecuniary damages the conduct might have caused.”

explained by an intention to punish the electricity provider company, ENEL, for a malfunction in the service.

Other cases in which the overriding scope seems to be punishment and prevention are those in which the public administration had to pay “danno esistenziale” as a consequence of incorrect behaviour. For example, in *Giudice di Pace di Bologna, 08.02.2001* Mr. M had received two penalty notices for having used a traffic lane reserved for specific types of cars. However, the fines were illegitimate as Mr. M. transported Mr. P., a disabled person, and thus he was in fact authorised to drive in this specific traffic lane. The fines were cancelled. However, Mr. M. and Mr. P. claimed for the non-pecuniary damages suffered. In particular, Mr. P. was forced to give his first declarations on the sidewalk because the police station did not have adequate access arrangements for disabled persons. The *Giudice di Pace* granted Mr. M. 174.800 Lire (87,40 EUR) for both *danno esistenziale* and pecuniary damages and awarded *danno esistenziale* to Mr P. in the sum of 300.000 Lire (150 EUR). The non-pecuniary loss was specified as the frustration and the trouble suffered by the claimants, particularly the loss of time and energy.

This decision seems clearly intended to punish the public authorities because they did not immediately cancelled the illegitimate fines. Moreover, the aggravating circumstance that Mr. P had to make his first declarations on the public sidewalk, obviously led the judge to increase the amount of compensation. Of course a public authority shall cancel a wrongful administrative act as soon as it has knowledge of all the circumstances which make the act void, and all public buildings should have adequate access for disabled persons by law. The question is, however, whether or not it is the task of tort law to guarantee this. This question might be answered in different ways. What interests us at this point of the analysis is to be aware of how some case law decisions do encompass the punishment scope under the cover of a concept (*danno*...}

---

biologico, later extended to the so called danno esistenziale) which has been originally developed to guarantee compensation. Even though the case gives no specific motivation insofar as the scope of the compensation is concerned, it emerges clearly from the context that the scope is the stimulation of a good function of the public administration rather than the compensation of Mr. P’s loss.

These examples from case law show the incoherence by which the theory of danno esistenziale is marked. This theory takes its theoretical basis from the concept of danno biologico, which, was born out of the necessity to grant compensation also in those personal injury cases that were previously excluded from compensation since the original focus of Italian tort law was on the blameworthiness of the wrongdoers action, rather than on the loss of the victim. In other words, danno biologico is a product of the development away from punishment, and towards compensation. As a consequence, it is questionable whether it was legitimate to use the concept of danno biologico to justify further categories of recoverable damages beyond the limits of Art. 2059 c.c. Those constructions, in particular the theory of danno esistenziale, have claimed their legitimacy on the basis of the established concept of danno biologico even though they had only one idea in common with danno biologico, the aim of protection of fundamental rights. But, they did not share the two other significant characteristics of danno biologico, the focus on the compensation of the victim and the possibility to ascertain the damage in an objective way.

The Italian Supreme Court put an end to that incoherent development with its landmark decisions of 2003 and 2008 salvaging the important central idea, the protection of fundamental rights. With Cass. 8827 and 8828/2003, this protection found its normative basis in Art. 2059 c.c., the result of this being that the objective ascertainability is not anymore a presupposition of recoverability (as it was in order to be covered by Art. 2043 c.c.). With this a sound legal basis was given for the extension of the theory of danno biologico to other fundamental rights. Furthermore Cass. 26972-26975/2008 have excluded the so called Bagatellschäden from recoverability. Negligible damages are not recoverable. The Corte di Cassazione did not deal with the issue of the function of damages in the 2008 cases. However, the principles expressed in these decisions have

373 Note however that the objective ascertainability remains the cornerstone in the assessment of danno biologico.
changed the expected result in cases similar to those described above, cases in which the focus is not on the compensation of the victim but on the punishment of a malfunction of the public administration or of companies that cause temporary frustration to the citizen or customer. Post 2008, if a similar claim was to come before the courts, that claim would in fact be barred from an award of compensation.

Yet, this conclusion does not mean that the punitive function of non-pecuniary damages is not, or should not, play a role in Italian tort law. On the contrary, a fault based tort system, by its nature, is to some extent punitive and preventive. Only in a no-fault system would it be imaginable to fully concentrate on compensatory aims.

The given examples were intended to illustrate that the different functions of damages should be clearly distinguished and borne in mind in discussing the various types of recoverable damages and the methods of assessment. Otherwise, the risk of perceiving one goal under the banner of the another arises, which would be contrary to the principle of the transparency of the law.

In conclusion, it can be said that in modern Italian tort law non-pecuniary damages have multiple functions.\(^\text{374}\) This includes punitive, preventive and compensatory aspects, while the focus, however is on the latter one.

### III. Different types of non-pecuniary damages

Cass. 26972-26975/2008 state clearly that non-pecuniary damages is an omni-comprehensive category and therefore shall be awarded in one lump sum without distinction of different heads of damages.

This departs completely from the common practice applied by the judges before 2008 and it can be foreseen that the discovering of a way in which to handle the assessment of non-pecuniary damages will become a significant issue in the realm of Italian tort law in the next years in.

\(^{374}\) U. Breccia et al., *Diritto Privato, Parte Seconda*, cit., p. 567.
The assessment in a lump sum is surely the best way to guarantee equitable compensation. It is important to note, however, that the award of damages in a lump sum does not prohibit the use of scheduled damage schemes and guidelines. Care must be taken, however, that this does not lead to automatism in awarding damages, an issue also highlighted in the November 2008 cases. The judge who decides in equity may indeed apply schemes, but he must also motivate his decision.

Hopefully the discussion on how to assess non-pecuniary damages after 2008 will not diminish the importance of *danno biologico*. As previously stated, this particular type of non-pecuniary loss is the only one which is suited for an objective valuation. The recognition of this is one of the greatest achievements of Italian civil law in the last century. The joint role of uniformity at the basis of compensation and the accommodation of a flexible adaptation to the actual case renders possible a guarantee of maximum justice in the assessment of non-pecuniary damages in personal injury cases.\(^\text{375}\) This concept has to be maintained in the new definition of assessment of non-pecuniary damages in Italy after 2008.

To explain this further and to lay the theoretical basis for future assessment, the state-of-art until the decisions of 2008 shall be traced. To do this, it is appropriate to distinguish the different types of non-pecuniary losses.

1. Damage to health

When, in 1986 with Cost. 184/1986 the concept of *danno biologico* was confirmed and the link between compensation in personal injury cases and loss of income had definitively been severed, new criteria for the assessment of damages had to be established. The same decision, *Cost. 184/1986*, laid the fundament for this, establishing that the compensation should guarantee a uniformity at the basis and at the same time a necessary flexibility for necessary adaptation to the actual case. In other words, the same type of injury has to be evaluated in the same way for every person. However, this

basic value has to be adapted according to the impact which the loss has on the daily life of the victim in the given case. For example, the loss of one finger must, from the outset, be evaluated in the same way, regardless of the person who suffered the injury. In particular, the finger of a rich man is not “worth” more than that of a poor man and the employment status of the victim is not to be considered either.

*a. Excursus on terminology - danno biologico and danno alla salute*

It is necessary here to give a short definition of the terms “danno biologico” and “danno alla salute”. Both terms are commonly used as synonyms in Italian case law and scholarly writing. A clear distinction, as drawn by Busnelli the “father” of both concepts, could, however, have avoided some erred developments in the Italian system of non-pecuniary damages which in particularly lead to overcompensations and indeed could aid the avoidance of this types of problems in the future.\(^{376}\)

The term “danno biologico” originally stems from the vocabulary of forensic medicine and refers to the damage to health as such.\(^{377}\) *Danno biologico* is expressed as a percentage of disablement and is the result of an objective evaluation by medical experts.\(^{378}\) That parameter is similar for similar types and levels of injury. For the legal evaluation, which is the task of the judges, that value constitutes the objective and uniform basis.

“*Danno alla salute*”, on the contrary, is a legal term. It refers to the damage to health in the complex circumstances of the concrete case. It is the result of an equitable evaluation conducted by the judge. The discretion left to the judge guarantees the flexibility of adaption of the award to the concrete case, as established by Cost. 184/1986.

\(^{376}\) For the necessity to distinguish the two concepts: F. D. Busnelli, *Il danno biologico*, cit., 103 et seq. For concrete examples of confusion, see below. 
\(^{377}\) F. D. Busnelli, *Il danno biologico*, cit., XXI.
In short, “danno biologico” is the objective damage to health, while “danno alla salute” places the objective facts under the light of the subjective circumstances of the given case.

Unfortunately, as has been mentioned, this distinction has not been upheld in legal practise. Commonly, “danno biologico” is used to refer to damage to health without distinguishing the objective basis and the measure including the subjective elements. In the introduction to his 2001 book, which traces in a comprehensive way the development of the concept of danno alla salute, Busnelli admits this reality in the introduction where he explains why he gave the book the title “Danno biologico” instead of “Danno alla salute”.379

Also the Italian legislator perceives danno biologico not anymore as pure damage to health per se, but as damage to health as seen in the context of the impact it has on the life of the victim. In this sense the Codice delle assicurazioni private of 2005380 defines, in Articles 138 and 139, danno biologico as:

“...temporary or permanent injury to the person's mental-physical integrity, ascertainable by a forensic-medical verification which has a negative impact on the daily life activities and on dynamic relating aspects of the life of the victim, independent from a possible impact on the capacity of the victim to produce income.”381

This definition is more extensive than the one offered by statute (L. 57/2001) taking into account the particular circumstances of the concrete case. The choice of the wording “dynamic relating aspects” (aspetti dinamico-relazionali) has its roots also in the substantial distinction between danno biologico and danno alla salute. It is used to distinguish the “dynamic”, meaning changing, i.e. differing from person to person, aspects of the capacity to have different kinds of relationships (with a partner, with

379 F. D. Busnelli, Il danno biologico, cit., XXI.
381 Art. 138, 2a and the in so far identical Art. 139, 2 of the Insurance Code: “...la lesione temporanea o permanente all'integrità psico-fisica della persona suscettibile di accertamento medico-legale che esprica un'incidenza negativa sulle attività quotidiane e sugli aspetti dinamico-relazionali della vita del danneggiato, indipendentemente da eventuali ripercussioni sulla sua capacità di produrre reddito.” To the application of this legal definition see also Cass. 15022/2005; Cass. 23918/2006 and lately Cass. 26972-26975/2008, point A.2.7. For the former definition in Art. 5 of L. 57 of 05.02.2001 see Part Two A.
family, friends, colleagues, …) from the “static” damage to health, which is the mere physiological damage.\textsuperscript{382}

Thus, it can be stated that “\textit{danno alla salute}” has been named, by the law, “\textit{danno biologico}”.

It may appear to be linguistic stubbornness to insist on a correct use of the terms. One might argue that also the German term “\textit{Schmerzensgeld}”, which literally refers only to the compensation for pain, is commonly applied to all types of non-pecuniary damages.\textsuperscript{383} This is an inappropriate use, which, however, has no influence on the substantial correctness of the adjudication. Different in the Italian scenario, where the same term can in fact represent different substantial contexts that may in fact lead to incorrect legal results. A concrete example is the commonly practised assessment of non-pecuniary damages under different heads. The judge would award one sum under the head of “\textit{danno biologico}” in the actual meaning of \textit{danno alla salute}, in other words the evaluation has already taken into consideration the subjective particularities of the case, in addition, under a second head of damages (“\textit{danno morale}”), compensation would be awarded for subjective consequences of the injury which are – partly or entirely – identical with those already taken into account under the first head of damages. Sometimes a third head of damages “\textit{danno esistenziale}” would be awarded granting again compensation for aspects already taken into account under the previously mentioned heads. A more correct use of the legal terminology could help to give more evidence, and consequently to avoid, such overcompensation. This will be illustrated subsequently with examples from case law.

However, it can already be mentioned here that the problem was recently dealt with by Cass. 26792-26795/2008 which will be illustrated in more detail later. In these decisions of November 2008 the Supreme Court established, indeed, that non-pecuniary damages have to be assessed in a global sum. Nonetheless the different types of damages will continue to play a role in the process of valuation. Therefore the distinction of the

\textsuperscript{382} The distinction of the static and the dynamic aspects of the \textit{danno biologico} (in the here descript sense which includes the elements of \textit{danno alla salute}) is generally applied or taken for granted. See for example: Circular of the President of the \textit{Tribunale ordinario di Milano} of 20.02.2008, \textit{Criteri orientativi per la liquidazione del nuovo danno non patrimoniale}, available on: http://www.odc.mi.it/allegati/circolari/dannobiologico.pdf

\textsuperscript{383}
different types of damages has not lost its relevance, even though the terminology used to distinguish the losses should find, in line with what has been stated by Cass. 26972-26975/2008, only a descriptive application.

In establishing new criteria for the assessment of non-pecuniary damages, following the instructions of the Supreme Court in the 2008 cases, *danno biologico* should be re-conducted to its original meaning as damage to health *per se*. In personal injury cases, the *danno biologico* should be the basis for the overall equitable evaluation by the judge. It should act as the starting point for the judge, having uniformity as its central characteristic, rather than a separate head of damages.

Before a proposal for the assessment of non-pecuniary damages in line with the new Supreme Court case law can be made, the practise of awarding non-pecuniary damages shall be illustrated in further detail.

**b. The contribution of forensic medicine**

Until now, we have dealt with the general considerations and legal foundations of the assessment of damages. The next step will be a closer look to the actual mechanisms and instruments used by practitioners.

In the framework of personal injury cases, the collaboration with forensic medicine has proved essential. The appropriate instrument used in proving harm is medical expertise. Medical experts offer the first evaluation which serves the judges as basis for the assessment of damages.

The development in case law, which has established the recoverability of the damage to health *per se* regardless of whether or not it has any consequences on the working capacity, has also influenced the work of medical experts.
Traditionally, the investigation of the medical experts was intended to investigate the loss of work capacity caused by the personal injury.\footnote{R. Domenici, Interesse medico legale delle macropermanenti, in: G. Comandé and R. Domenici (eds.), \textit{La valutazione delle macropermanenti, Profili pratici e di comparazione} (Pisa: ETS, 2005) pp. 29-33, 29.} This was consistent with the fact that the damage would be compensated only in so far as it had a negative impact on working capacity. The valuation of the damage to health expressed by the medical experts was, as the one performed by judges, concentrated on the capacity to produce income and not on the measure of the actual damage to health. With the change in perception of the concept of human dignity, which led to the conclusion that a person, through the avenue of tort law, cannot be measured by his/her capacity to produce income and that the damage to health has to be compensated in any case, the focus of forensic medicine had to simultaneously alter. It has been said that the focus of the medical evaluation has shifted from the capacity to produce income to the “capacity to live”.\footnote{R. Domenici, Interesse medico legale delle macropermanenti, cit., 29.}

Consequently, the approach and the tools of forensic experts in rendering their expertises has completely changed.\footnote{M. Bargagna, \textit{Il medico legale e la sentenza Corte Cost. 184/86, dieci anni dopo}, (1997) 62, 4 Resp. Civ., 888-891. R. Domenici, Interesse medico legale delle macropermanenti, cit., 29-33.} In former times, the scope of the expertise was an evaluation of the reduced capacity to produce income that was indicated in a percentage of the loss of “general working capacity”. That \textit{capacità lavorativa generica} was understood as the “potential capacity of the “average person” to fulfil a hypothetic, mainly manual, work requiring an average strain of energies.”\footnote{“La potenzialità nei confronti di un ipotetico lavoro, di ordinario impegno energetico e a prevalente impostazione manuale, cui possa attendere l’”uomo medio”” R. Domenici, Interesse medico legale delle macropermanenti, cit., 29.} This kind of capacity could be reduced to zero even when the injured person was still able to do specific work, for example in the case of blind persons. The schemes which tabled the injuries with the equivalent percentage of loss of the general working capacity foresaw a ceiling of 100 % and persons with an injury reaching this ceiling have happened to be defined as “persons without economical value”.\footnote{See S. Rodotà, Una sentenza classista (1971) \textit{Política del diritto}, 435-438.} This definition underlines the discriminating character of the former system.\footnote{R. Domenici, Interesse medico legale delle macropermanenti, cit., 29.}
Furthermore, this process of concentrating on the capacity to produce income was not adequate in dealing with the particularities of a concrete case. A wide range of injuries were treated similarly in so far as they fell under the same percentage of incapacity to work. This was especially true for serious injuries. Once the 100 % loss of working capacity was reached, there was no differentiation any more. In other words, under the traditional system, the assessment of damages, based on the parameter of loss of work capacity, would treat equally, a person who had lost his eyesight, a person who had lost both his eyesight and his sense of hearing, and further, a person who had lost his eyesight, sense of hearing and had suffered other multiple injuries.  

b.2 The new medical evaluation concentrated on the damage to health

As has been said, after the changes in case law which declared inapplicable the link between damage to health and capacity to work for the assessment of non-pecuniary damages, the forensic physicians consequently had to adapt their work to the new standards.

The actual damage to health had to be placed at the centre of the damage investigation. This made the evaluation much more complex. Not only in specific cases such as those involving the death of the victim after a short period of survival, or victims in a coma or regarding mere mental diseases was evaluation rendered more intricate, but also in the average personal injury forensic medicine found itself faced with new challenges. The no required a precise evaluation of the injury itself is a more complex work than the previously sufficient collocation of a certain damage to health under a scheme of incapacity to work. 

The Italian forensic medicine has, hand in hand with legal scientists, elaborated valid tools and methods to meet the new challenges.

The chosen method reverts back to the French tradition of the *calcul au point* ("estimation per point").\textsuperscript{392} This method is based on medical expertise that indicates the measure of the injury as a disability rate expressed per percentage. For example, the loss of the ring finger of the non dominating hand (meaning the left hand of a right handed person) is estimated at 5\%\textsuperscript{393}, while the loss of the thumb of the dominating hand is graded at 20\%\textsuperscript{394}. The complete loss of eyesight is classified at 85\%\textsuperscript{395} of the loss of physical integrity. As will be explained further below, those percentages are not to be understood as absolute values, rather they serve as an indicative point of reference.

According to the method of the *calcul au point*, the value of the disability rate will be multiplied with a monetary value, the so-called “point” in order to establish the compensatory sum to be awarded. The particularity of that operation is that the value of the point is not fix, instead it is influenced by different parameters, above all the disability rate and the age of the victim. This will be explained further below.

In 1992 the Italian Society of Forensic Medicine and Insurance had delegated to a group of experts the task of drawing up a scheme for the classification of personal injuries in percentages of loss of physical integrity. The “Indicative guide for the evaluation of *danno biologico*” was first published in 1996 and since then has periodically been updated.\textsuperscript{396} As required by L. 57/2001, the Italian Ministry of Health issued, in 2003, a scheme regarding personal injuries up to a disability rate of 9 \% (the so called *micropermanenti* – minor damages to health).\textsuperscript{397}


\textsuperscript{393} M. Bargagna, M. Canale, F. Consigliere, L. Palmieri and G. Umani-Ronchi, *Guida orientativa per la valutazione del danno biologico*, 2nd edn. (Milano: Giuffrè, 1998) p. 90, n. 6.e.10

\textsuperscript{394} M. Bargagna et al., *Guida orientativa per la valutazione del danno biologico*, cit., p. 90, n. 6.e.7

\textsuperscript{395} M. Bargagna et al., *Guida orientativa per la valutazione del danno biologico*, cit., p. 51, n. 4.a.


\textsuperscript{397} Ministero della salute, Decreto 03.07.2003, *Tabella delle menomazioni alla integrità psicofisica comprese tra 1 e 9 punti di invalidità*, G.U. 11.09.2003, n. 211.
The research connected with the compilation of the indicative guide brought to light the difficulties involved in developing fixed schemes for the multiple variety of personal injuries, particularly with regard to serious injuries an adequate evaluation has proofed to be complex.

A first issue highlighted by the mentioned research is that there is no possibility of being 100 % disabled. While it is possible to state that a person is 100 % incapable of working, in particular by means of the above described generic working capacity, a 100 % loss of physical integrity is not perceivable as long as a person is living. To the same conclusion the Italian Constitutional Court came already its 372/1994 decision, where it stated that death does not constitute a 100 % loss of physical integrity, rather two different legally protected rights are concerned in case of personal injury and death, which are health on the one side and life on the other.

The individual evaluation of the damage is especially complicated in cases of very severe injuries. It has been said, that an average person with little expertise could distinguish between a loss of physical integrity of 5 % and of 10 %, but even the most experienced forensic expert is faced with difficulties in correctly assigning a certain injury between 90 % and 95 %.

This is a problematic issue since the judge is dependent on the medical expertise especially in cases of severe injuries. Suffice to say that the difference of one percentage on a lower percentage range, let’s say from 7 to 8%, represents a minor worsening of the victim’s physical condition, while a change from 77 to 78 % concerns dramatic losses where in consequence also the impact of compensation would be much higher. According to the medical experts, when dealing with percentages of disablement

398 R. Domenici, Interesse medico legale delle macropermanenti, cit., 29, 30. Note, however, that this is seen different in the French system. The French barèmes include an evaluation up to 100 %. See Barème fonctionnel indicatif des incapacités en droit commun, Le Concours medical n° 25, 19.06.1982, here cited from M. Le Roy, L’évaluation du préjudice corporel, (17th edn, Paris: Juris-Classeur, 2004), Annexe III. A 100 % loss of physical integrity might be given in cases of quadriplegic, see p. 153, however, the authors of the barème themselves see the attribution of this limit very critical, see the remarks to the general principles of the barème, p. 150. Also the broadly applied Milan liquidation scheme, which will be illustrated in more detail infra, foresees a disability rate up to 100 %.


exceeding 60 - 70 \%, the correct collocation of the injury is very complicated, in particular since such serious cases typically involve multiple injuries.\textsuperscript{401}

For this reason, the above mentioned guide is an indicative one which gives an approximate orientation for the translation of the injury into a value of disablement and indeed the percentages are often indicated in ranges, such as “between X and Y \%” or “\<” or “\>” Z \%. The guide points out that the indication of a percentage of disablement can never substitute the detailed description of the injuries and their consequences on the life of the victim.\textsuperscript{402} This is especially true for more serious injuries.\textsuperscript{403}

Despite all these obstacles, the tool of the medical schedules is very useful in the assessment of damages. The indication of percentages helps to guarantee that similar cases are dealt with equally. The numeric and the descriptive estimation of the damage should go hand in hand. So even in cases in which it is difficult for the forensic expert to establish a certain percentage, it is helpful if he gives such an indication instead of referring to an exclusively descriptive evaluation only. At the end of this process, it is the judge who must decide on the actual measure of the damage. However, the more precise and concrete assistance he receives from the forensic expert the easier it will be for the judge to make an equitable award.

The merit of the concept of \textit{danno biologico} is to have pointed out that the damage to health can be evaluated in a first step by objective measures (i.e. regardless of the concrete circumstances of the case, that will be taken into account in the proceeding step). This uniformity at the base allows for the fair assessment of non-pecuniary losses in personal injury cases. Moreover, it favours comparability in cases.

This is indeed important, not only in guaranteeing equal compensation across the national territory, but also having in mind future European harmonization of compensation for non-pecuniary losses. To have the damage expressed in disablement rates makes the case law of different legal systems understandable and therefore

\textsuperscript{401} M. Bargagna et al., cit. , p. L I macropermenti
\textsuperscript{402} M. Bargagna et al., cit. , p. XLII “uso della guida”.
comparable. Where the evaluation procedure is completely left to the discretion of the courts, the judges, who are not medical experts, will be incapable of comparing their cases at hand with precedents from other courts, led aside from other legal systems. On the contrary, the uniformity at the basis guaranteed by schemes elaborated by medical experts and indicating the *danno biologico* translated in a certain percentage of disablement allows also non medical experts to compare different cases. It has to be stressed that, of course, such numbers resulting from schemes can not be taken as absolute and that this should not lead to a standardisation of compensation ending in automatism.

In particular does the indication of a disablement rate not free the medical expert from its obligation of a detailed description of the injury and its impact on the life of the victim, that are necessary in order to guarantee that the judge has an accurate understanding of the damage and to give him all required parameters for the adaption of the award to the circumstances of the actual case.

We have thus seen, that indication of a number which expresses the percentage of loss of physical integrity guarantees uniformity at the base. The up-dating of the schemes, which is based on the analysis of precedents, will also contribute so that the given indication will become ever more differentiated and accurate.

c. Excursus on terminology - *micropermanenti and macropermanenti*

The Italian practise and literature distinguishes with regard to the assessment of non-pecuniary losses in personal injury cases between so called *micropermanenti* (minor permanent [damage]) and the so called *macropermanenti* (major permanent [damage]).

The first category includes damages up to a disablement rate of 9-10%. The notion *macropermanenti* is occasionally used to refer in general to more serious injuries, more
precisely, however, this category includes injuries with a disablement rate of over 60-70%

Approximately 90% of all personal injury cases concern *micropermanenti* damages and make up circa 60% of the total sum awarded as compensation for damage to health. This demonstrates the great practical relevance of the minor damages. In 2001 the Italian legislator responded to the call of insurance companies and of associations representing personal injury victims and set a legislative framework for the compensation of minor damages in personal injury cases.

*d. The evaluation by the judge*

Having first dealt with the indispensable contribution that forensic medicine offers to judges in the assessment of damages, we will now consider the juridical side of the assessment of damages.

As the medical experts, also the legal scientists, especially the judges, relying on Scholarly work, were forced to re-invent the method of evaluating damages in personal injury cases subsequent to the affirmation that the loss of capacity to work should not be the principle criteria determining estimation any longer but rather the actual damage to the health *per se*. Three approaches of certain practical relevance have been developed – the so called *metodo genovese*, the *metodo pisano* and the *metodo milanese*, deriving their names from the courts that first developed and adopted them. The “certain

---


practical relevance” referred to signifies that they have been applied for some time, and not only occasionally, by several courts all over Italy.

\[ \text{**d.1 Metodo genovese**}^{408} \]

The first approach developed to assess damage to health without reference to the income of the victim was the one developed by the Court of Genoa, the *metodo genovese*, also called the *metodo tabellare* (the table method, which is, however a confusing terminology since all methods illustrated in the following are based on schedules).

This method was still linked to a certain extend to the traditional system of assessment. It introduced the hypothetical income as basic parameter for the evaluation of the damage. Two different criteria have been applied – the average national income or the sum equivalent to three times the social pension.\(^{409}\) In order to calculate the sum for compensation, this hypothetical income was multiplied with a number corresponding to the disablement rate and a coefficient taking into account age and gender (in other words, the life expectancy) of the victim.\(^{410}\)

---


\(^{410}\) M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 15; A. Negro, *Quantum debeatur*, cit., 102-104.
Up until the nineties of the last century, the *metodo genovese* found broad application in case law and was also declared admissible by the *Corte di Cassazione*. Later, however, the Supreme Court declared the parameter of “three times social pension” as inadmissible and as of today the Genoa method of assessing damages has been made redundant by the courts.

*d.2 Metodo pisano*

With the decision of 19 March 1982 the Court of Pisa distanced itself from the genoa method and proposed its own approach aimed at a fair assessment of damages to health, detaching completely from the link to the production of income.

For the assessment of permanent damages, the Pisa method, which reverts back to the French system of the *calcul au point*, multiplies the disability rate established by medical experts with a point of a certain variable value. The judge determines the value of the point by taking as a basis the average amount liquidated in similar cases, which he may increase or decrease by up to 50% taking into account the circumstances of the concrete case. Because of this discretionary power of the judge in determining the value of the point, this method is also referred to as “the method of the elastic point”

---

In relation to temporary damages, the fixation of a daily amount to be multiplied by the disability rate is left to the discretion of the judge.

The *metodo pisano*, which was approved by the Supreme Court and soon substituted the *metodo genovese* in case law, was originally developed, however, only with reference to injuries of a disability rate up to 10%.

The main criticisms of the Pisa method were that the possibility to vary the value of the point established by precedents, by up to 50%, left too much discretionary power in the judges’ hands and that it was incompatible with the aim of equal treatment. Furthermore, it was argued that the significant differences and the inconsistency in the case law would turn the average value of the precedents into an “average of arbitrary decisions” instead of being an equitable criterion.

d.3 *Metodo milanese* 

The Court of Milan furthered the development of the Pisa method by rendering the liquidation more foreseeable. According to the *metodo milanese*, the calculation of the award of compensation remains the *calcul au point*. In other words, the value equivalent to the disability rate is multiplied with a point of variable value. That value will, however, no longer be attributed by the judge in equity. On the contrary, the value is actually predetermined, although still variable according to the disablement rate and is also influenced by the age of the victim. Due to the fact that the value of the single point is static, insofar as it is not anymore left to the discretion of the judge, but that

---

415 M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 16.  
416 M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 16.  
418 M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 16.  
419 M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 16.  
A. Negro, *Quantum debetur*, cit., 144.  
nonetheless the point takes different values, this method is also called the “method of the variable point” (*metodo del punto varialbile*).\(^{422}\)

The mathematical operation of calculating the award can be expressed in the following formula:

\[
A = DR \times VP \times AC
\]

The award (A) derives from the multiplication of the disablement rate (DR) with the variable point value pre-established for the different disability rates (VP) and the age coefficient (AC).

This mathematical approach makes it possible to construct tables for the awards. The Court of Milan regularly refers to such a schedule which has as basic parameters a loss of mental-physical integrity of 1 % loss and one year of age, the so called *tabella milanese*.\(^{423}\)

The basic value variable point in the 2008 *tabella milanese* is 1.047,22 EUR for 1% disability rate. This value increases more than proportionally with an increase in the rate of disablement. For example, for the disablement rate of 10 % the value is 1.963,53 EUR. That means, that in applying the above given formula, and an age coefficient (AC) of 1,000, which is equivalent to a 1 year old victim, the result would be the following:

For the disability rate of 1 %:

\[
A = 1 \times 1.047,22 \text{ EUR} \times 1,000 = 1.047,00 \text{ EUR}\]

\(^{422}\) M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 17.


\(^{424}\) Note that the result is usually rounded.
For the disability rate of 10%:

\[ A = 10 \times 1.963,53 \times 1,000 = 19.635,00 \text{ EUR} \]

In other words, in the case of a 10% loss of mental-physical integrity, the award is more than ten times the sum awarded for 1% disability rate. To exemplify further, the award liquidated for a 1 year old victim with a disablement rate of 40% would be 186,535.00 EUR applying a variable point of 4.663,38, while the sum in the case of 80% disablement would be 563,821.00 EUR (variable point: 7.047,76). In other words, the 80% disabled victim would be awarded more than three times the sum awarded to the victim with 40% loss of mental-physical integrity. The reason for this more than proportional increase is the result of the above-mentioned conclusion of forensic medicine that the pain and suffering caused by an injury increase more than proportionally with the increase of the disablement.  

The determination of the value of the base point - the 1 year old victim with a disability rate of 1% - is derived, however, from the Pisa method. It takes place by a jointly decision of judges of the Court of Milan who will take into account the awards granted in former case law.

The increment of the value of the point on the contrary, follows a mathematical function, defined in collaboration with medical and statistical experts.

The assessment of the damage to health is further influenced by the age of the victim. It is commonly maintained that the award should increase the younger the victim is. The \textit{metodo milanese} applies the age coefficient (AC) that is fixed for every age. It starts with the value 1,000 for a one year old and decreases 0,005, or 0,5%, for every year of age, in other words, 10% every 20 years of age. Consequently, the age coefficient for a 30 year old victim is 0,855 and for an 80 years old victim 0,605%.

\begin{thebibliography}{9}
\bibitem{} M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 17.
\bibitem{} M. Rossetti, Dal calcolo a punto al calcolo a punto differenziato: una storia in evoluzione, cit., p. 17.
\end{thebibliography}
Applied to concrete awards this means, that in the case of damage to health, which results in a permanent damage with a disablement rate of, for example, 40%, to a 1 year old victim, 186,535.00 EUR would be awarded, while a 30 year old would be granted 159,488.00 EUR and an 80 year old would receive, according to the *tabella milanese*, 112,854.00 EUR, in other words, 73,681 EUR less than the 1 year old victim.

The values in the scheme for *danno biologico* include average evaluation of dynamic aspects insofar as they influence every person. This fact introduces, unfortunately, also in the application of the *tabella milanese*, a risk of a duplication of compensation. For the judge it will be difficult to distinguish between the average consequences of a certain kind of loss as they would be suffered by every person which is inflicted by the same kind of injury and the circumstances which are specific to that particular victim, meaning that they are not typical consequences. According to the indications of the *Tribunale di Milano*, the special dynamic aspects, particular to the concrete victim, can be taken into account by an increase up to 30%.  

According to my opinion it would be preferable to construct a scheme that refers exclusively to the damage to health *per se*, leaving the evaluation of the dynamic aspects completely at the discretion of the judge. This does not exclude the possibility to create guidelines for this part of the evaluation combining the findings of academic work and a consequent analysis of precedents in case law.

---


429 Circular of the President of the *Tribunale ordinario di Milano*, cit., p. 2.

Until the decisions of the Italian Supreme Court of November 2008 the *tabella milanese* has been the standard tool for the liquidation of *danno biologico* applied by most Italian courts, now it will have to be revised to adapt to Cass. 26972-26975/2008.\(^{431}\)

*d.4 Art. 138 and 139 of the Insurance code*\(^{432}\)

Articles 138 and 139 of the Insurance Code contain the criterions for the assessment of damage to health (both permanent and temporary) caused by a traffic accident\(^{433}\). The first mentioned Article regulates the assessment of damages in cases in which the disability rate, resulting from the evaluation of the medical expert, exceeds 10 %, while Article 139 refers to the so-called *microlesioni* (minor damages to health).

The method used is that of the *tabella milanese*, specifically the so-called variable point, meaning that the award to be granted is influenced by the rate of disablement, the value of the point (varying according to the different rates of disablement) and the age of the victim.

For the so-called *macrolesioni* (disablement rate of 10 or more percent) the monetary value is also influenced by the impact the injury will have on the life of the victim. The law speaks of the “*incidenza della menomazione sugli aspetti dinamico-relazionali della vita del danneggiato*” (the “impact of the injury on the dynamic-relational aspects of the harmed person’s life”).\(^{434}\) This can be compared to the average dynamic aspects mentioned in the context of the *tabella milanese*.

---

\(^{431}\) D. Spera, Nuovi germogli nei solchi della tabella Milanese dopo le sentenze delle Sezioni Unite 11 Novembre 2008, in: AA. VV., *Il danno non patrimoniale, Guida commentata alle decisioni delle S.U., 11 novembre 2008, nn.26972/3/4/5* (Milano: Giuffrè, 2009) pp. 501 – 525. The 22.05.2009 the Osservatorio per la giustizia civile di Milano has comunicated new schemes which take into account the criteria set by the Supreme Court. There does not exist, however, any “official” publication. The schemes are available on different websites, for instance at www.unarca.it.


\(^{433}\) As mentioned before these Articles substitute Art. 5 L. 57/2001. That article regulated only damages upto a disability rate of 9% while the Insurance Code regulates also the more serious injuries.

\(^{434}\) Art. 138, para. 2 c.
Art. 139 does not contain an equivalent provision. This is probably due to the fact that minor damages are not viewed as having typically a similar impact on the life of every person suffering from an injury falling under the same disablement rate (which might be different kinds of injuries).

With regard to the specific circumstances of a given case, meaning the impact that the injury has on the life of the victim beside the “average impact”, Art. 138 foresees that the award can be increased by up to 30%, while Art. 139 permits an increase of up to one fifth of the award. These caps have given rise to some doubts about the constitutionality of Art. 138 and Art. 139 D. Lgs. 209/2005. In any case, it is still unclear what impact the Cass. 26972-26975/2008 decisions will have on the application of Art. 138 and Art. 139 of the Insurance Code.

**e. The age criteria**

It is common practise to consider the age of the victim as a quasi-objective criterion in the evaluation process. In Italy and France, it acts as a constant parameter in the method of the *calcul au point*. The value of the point decreases with an increase in the age of the victim. Also under the German legal system it is common opinion that the compensation sum should be greater for younger victims, even though this criterion does not act as a parameter automatically influencing the evaluation process in Germany, since the assessment there is not based on the method of the *calcul au point*.

It seems preferable, however, to leave the age criteria entirely to the process of the discretionary evaluation by the judge. Even though age is at first sight an objective criterion and it might be true that statistically a younger victim will live longer, burdened with the injury, it seems discriminatory to transform that fact into a fixed

---

435 Art. 138, para. 3 and Art. 139, para. 3.
436 M. Rossetti, *Guida pratica per il calcolo di danni, interessi e rivalutazione*, cit., pp. 54-61.
437 For more details see above.
438 See also Part One B.
mathematical coefficient. To state that it is worse to have to live (statistically) with a certain disease for “only” 20 years instead of 50 disqualifies the value of the 20 years to live of the elder person. In fact, this judges the life of elder people as less valid. It puts the human being on the same level as a thing, which from the outset has less worth the older it is and therefore the damage to an old thing is of less value than the damage to a new thing. This equalisation is an offence of human dignity and an illegal discrimination.

Further consideration of this issue might actually demonstrate that the automatic decrease of the award according to an increase of the age of the victim may not be adequate in the concrete case. Firstly, a younger person might adapt more easily to a certain disablement and learn to live with it, while for an older person, it might be more difficult to adapt to the shortcoming of certain functions of the body. Elder people might not be able, in the same way as younger people would, to substitute their lost abilities with a stronger development of others. For example, a person who loses is eyesight at a young age might, with a greater facility and optimism common in younger people, learn to adapt to this condition. He or she will receive specific education for blind people and will with a greater probability find his or her way in life and thus perceive it as a different but satisfying, enjoyable life. In contrast to this, a person over a certain age might face difficulties in learning to read Braille and finding a new definition for his or her life. Therefore statistically less years of living with a handicap might in fact subjectively weight more than the many more years the younger victim has to carry the burden of a certain injury.

Age is a factor that influences the impact the injury has on the victim and therefore it has to be taken into account. In an overwhelming majority of cases the judge might come to the conclusion that the award has to be increased because of the young age of the victim and the fact that he or she will therefore statistically have to bear the

439 For a detailed study on the limits of tolerable discrimination in Civil Law (the problem could be reduced to the formulation: constitutional principles against private autonomy): J. C. Dammann, Die Grenzen zulässiger Diskriminierung im allgemeinen Zivilrecht (Berlin: Duncker&Humboldt, 2005)

440 On the problem of “statistic discrimination” that means a discrimination on the basis of statistically true assumptions: J. C. Dammann, Die Grenzen zulässiger Diskriminierung, cit. pp. 102 et. seq.

441 On the problem of discrimination as a threat to the fundations of human dignity: J. C. Dammann, Die Grenzen zulässiger Diskriminierung, cit. pp. 112 et. seq.
consequences of the injury for more years than a older victim. Yet the age should not be taken into account in an automatic way.

A further consideration might be that it is better to increase the award for younger victims than to decrease it for older persons. The result might be the same, but for the sake of respecting the human dignity of the person, it would be preferable that a judge motivates based on a concrete case concerning a younger victim that the award indeed should be increased due to the young age of the victim, rather than stating in a case concerning an older person that the award should be decreased due to the advanced age of the victim. The latter runs the risk of being translated to mean that “the older person is of less worth“, which contradicts the value of human dignity.

The reason that in Italy the award decreases with older age instead increasing with younger age, emanates from the mechanism of the *calcul au point* method, which requires a fixed basis for the creation of the scheme. This basis, as stated above, is 1 % disablement for a 1 year old. The value of the point increases according to the percentage of disablement and decreases with age. As there is no fixed year of death, there is technically no possibility to take a higher age as a basis and increase the value of the point for victims of younger age. According to the argument above, however, the age should not influence the value of the point anymore at all.

Instead, it should be accounted for within the discretionary valuation (*personalizzazione*). In this case, it should be adequately motivated by the judge, for which reason in the specific case the award has to be adapted taking into account the age of the victim. According to what has been said so far, also when dealing with the age factor in the framework of the discretionary evaluation, it is preferable to increase the amount whenever the victim is younger, rather than decreasing it in the case of a older victim.

A more appropriate way to satisfy the need to take into consideration, in the framework of the assessment of damages, the fact that a younger victim will statistically suffer for a longer period of time compared to an older victim with a similar harm, could be to grant a life annuity along with the lump sum.
Art. 2057 c.c. explicitly foresees the possibility of granting an annuity in cases of damages to the person which are of a permanent character:

**Art. 2057 Danni permanenti**

_Quando il danno alle persone ha carattere permanente la liquidazione può essere fatta dal giudice, tenuto conto delle condizioni delle parti e della natura del danno, sotto forma di una rendita vitalizia. In tal caso il giudice dispone le opportune cautele._

While in the German legal system, which does not have a provision similar to Art. 2057 c.c., it is rather common practise to award a life annuity in cases of severe injury along with the lump sum award,\(^{443}\) in Italian case law the rule of Art. 2057 c.c. is not often applied.\(^{444}\)

It must be stressed here though that the motivations provided in German case law for granting the award in a life annuity do not refer to the age factor. The cases where a life annuity is usually granted under German law are those involving permanent pain, the necessity of repeated medical interventions with uncertain success or the loss of a limb. It is stated that in such cases the interference with life is realised again and again and felt each time again very painfully.\(^{445}\)

In any case, the medical expertise should contain references to the link between the age and the impact of the injury on the life of the actual victim.

---


\(^{444}\) U. Breccia et al., _Diritto Privato, Parte Seconda_, cit., p. 620; F. D. Busnelli and G. Comandé, Non-Pecuniary Loss, cit., 136, para. 8.

\(^{445}\) S. Hacks, A. Ring and P. Böhm, Schmerzensgeldbeträge, 22 edn. (Bonn: DAV, 2004) pp. 16; BGH, 06 July 1955 – GSZ I/55, (1955) VersR, 615 et seq. More in detail to this important decision and for references to translations in English see: Part One B.
2. Non-pecuniary damages other than health

Whenever the non-pecuniary loss does not involve a damage to health, it is, at least at the state of art of science, impossible to ascertain the damage in an objective way. It is therefore even more difficult to find a uniform basis than in the case of damage to health, where at least a uniform basis can be provided in establishing the objective damage to health per se.\textsuperscript{446}

Previous to 2008, whenever a moral damage or damage to personality occurred along with \textit{danno biologico}, the judges commonly assessed the damage for the further non-pecuniary loss in a percentage of the sum awarded for \textit{danno biologico}. This practice had no legitimate basis and was since long criticised in literature.\textsuperscript{447} Cass. 26972-26975/2008 established finally that this practice had to be given up.

The following two examples of case law shall illustrate the bizarre results reached by the link of the assessment of other non-pecuniary losses than health to the award granted for \textit{danno biologico}. With the first case it is intended to show that in some court decisions neither the actual loss concerned nor the legal basis for the compensation are clear. The second case is an exemple of overcompensation due to the compensation of different head of damages.

The first example is a case decided in 2005 by the \textit{Tribunale di Genova}.\textsuperscript{448} In this case, two lawyers claimed for the damages suffered because of the abuses perpetrated by the police during the G8 meeting in Genoa in July 2001. At a certain time during the critical hours of the meeting of the heads of states, the women in question were in the so-called “yellow zone”, that means the area were access was open to everybody but public manifestations were forbidden. Even though one of the claimants wore a t-shirt of one of the groups participating in the general manifestations, at the moment in question neither of the claimants was demonstrating. Instead they stood around passively with a

\textsuperscript{447} F. D. Busnelli, Una ricerca sulle macropermanenti: perché? cit., pp. 3-8, 5.
small group of people, when, all of a sudden, several police vans arrived at high speed and stopped in front of the group. Some police officers in riot gear, the faces covered by helmets and wearing truncheons, got of the vans and without evident reason started to insult and beat the two women. Both reported physical injuries, and both needed continuous psychological assistance in order to overcome the shock suffered. The medical examination confirmed that the plaintiffs did in fact have post-traumatic stress disorder stemming from the actions of the police resulting in a permanent detriment of their bodily and mental integrity (3% and 5% respectively for each claimant).

The Tribunale di Genova held that the Italian Ministry of the Interior was liable for the incident and assessed three different heads of non-pecuniary damages: the “danno biologico” in the narrower sense, “danno morale soggettivo” and “damages for the violation of constitutionally protected rights”. It is not clear, however, which fundamental rights, respectively constitutional norms the Court considered as being violated. In the reasoning, it makes only very general references to the norms invoked by the claimants. In the part of the decision which deals with the assessment of damages it mentions the freedom of movement, the right to self determination, and the right to honour. The Court granted each of the claimants €5000 for the harm suffered due to the violation of their constitutional rights.

The Third Section of the Tribunale di Bari decided the second relevant case in 2004. Three couples claimed for compensation of pecuniary and non-pecuniary damages resulting from their children’s death, caused by the transfusion of infected blood (the children were infected with thalassemia). The award for non-pecuniary damages which the Court granted to the parents was composed of the following eight different heads of damages:

---

449 During the process it turned out that the police had been alarmed of an infraction of the “yellow zone”, that the officers were under high pressure during those days and probably the fact that one of the claimants wore a t-shirt of one of the demonstrating groups, caused a misunderstanding and the panic reaction of the police officers. But of course this could not excuse the incident.
450 “il danno biologico” in senso stretto
451 “danno da lesione di diritti costituzionalmente protetti”
452 For a critical analysis of the decision under this aspect see: S. Wünsch, La tipizzazione dei “nuovi” danni, cit.
Iure succesionis:

1) *Danno biologico*, damages for the permanent violation of the children’s bodily integrity during the time when they were still alive. The sum awarded was calculated according to the National Tables developed by the Pisa Research Group on Personal Injury Damages.

2) Pain and suffering, damages for the pain suffered by the children due to the physical injury. Damages in the same amount as those awarded for *danno biologico*.

3) *Danno esistenziale*, damages for the impairment of the possibility to enjoy all the activities which constitute the everyday life of children. Damages here amounted to half of what was awarded for *danno biologico*.

4) *Danno da perdita della vita*, damages for loss of life, which, according to the Court, has to be distinguished from the harm to health, and is recoverable on the basis of the protection guaranteed under Articles 2 and 32 of the Italian Constitution and under Article 3 of the Universal Declaration of Human Rights, 1948, which states that everyone has the right to life. The damage for the loss of life was assessed as half the amount which might have been awarded had the children survived with a total impairment of their bodily integrity.\(^{455}\)

Iure proprio:

\(^{455}\) Only five days earlier, the *Tribunale di Venezia* (Decision of 15.03.2004, (2004) Foro it. I, 2256; (2004) Danno e resp., 1210) had awarded damages *iure succesionis* for the loss of life per se in a case of an immediate death. Compensation was not given for the infringement of the right to health but for the violation of the value of human life. According to the *Tribunale di Venezia*, the death gave rise to the claim on a logical-juridical level (*piano logico-giuridico*). The court stated that to acquire the claim, there is no need for a temporary moment after the occurrence of the fact, because between the causation of the injury and the right to claim, a logical moment exists, not a temporary one. In other words, at the moment of death a hereditable claim arises. However, please note that the highest courts, *Corte costituzionale* and *Corte di Cassazione* have not held the loss of life per se to be recoverable (fundamental decision of the Constitutional Court: *Corte cost*. 372/1994; from the Supreme Court, see recently: *Cass*. 16.05.2003, n. 7632, (2003) *Danno e resp.*, 1078).
5) Damages for the shock suffered by the parents when they became aware of the infection and of the subsequent death of their children, equivalent to one third of the sum awarded under 2) (pain suffered by the children).

6) *Danno esistenziale* suffered by the parents, aimed at restoring the detriment caused to their everyday living conditions during the course of their children’s disease, for the amount of half the sum awarded under 5);

7) Damages for the pain suffered on the occasion of their children’s death, calculated as one third of the sum which might have been awarded for the pain of the children had they survived with 100% impairment of their bodily integrity.

8) *Danno esistenziale* suffered by the parents as a result of their children’s death, that is the impairment of their everyday living conditions after the loss of the company and the affection of their relatives, for the amount of half the sum awarded under 5) (pain suffered by the parents).

These excesses of case law in the assessment of non-pecuniary damages led to intransparancy (first example) and overcompensation (second example). A clarification by the Supreme Court as to how to assess correctly non-pecuniary losses was therefore more than necessary in order to provide for a solid framework.

**IV. Assessment of non-pecuniary damages after Cass. 26972-26975/2008**

In the November 2008 decisions, the Supreme court confirms the principle of full compensation (*risarcimento integrale*), underlining that this principle covers the reparation of the entire damage, but not more than that.\(^{456}\)

Furthermore, as has been stated, the Court establishes that there shall be no subdivision in different subcategories, in other words, non-pecuniary loss is an unitary category.

\(^{456}\) Point A.4.8 of the decisions.
(“categoria unitaria”). The courts might refer to different types of damages in describing the loss, but this must not lead to an assessment of different heads of damages. 457

The Supreme Court dedicates a long paragraph (point A.4.9.) to the issue of avoiding duplications of compensation. From the considerations of the Supreme Court, it is clear that even though the compensation has to be assessed in a lump sum, the judge has to take into consideration the different types of non-pecuniary damages suffered by the victim in calculating the amount of damages to be awarded.

Albeit the Court does not explicitly state so, it emerges from the structure of the mentioned paragraph that in cases were a damage to health is involved, the evaluation should take danno biologico as its starting point.

The significant points which the Court stresses is to avoid duplications are:

_Danno morale_ shall not anymore be evaluated as a percentage of the danno biologico. The common practice of the courts to assess danno morale as a percentage of one third to a half of the amount attributed to danno biologico, has thus been definitively overcome.

Furthermore, the moral damage and the damage caused by the loss of a family member (danno da perdita del rapporto parentale) should not be considered as separate losses since they effectively concern the same aspects of a non-pecuniary loss, a loss that must be evaluated in its entirety.

The Court specifies furthermore the different types of non-pecuniary losses which should not be assessed singularly insofar as they regard the dynamic aspect of danno biologico. Dynamic aspect means the adaptation of the sum awarded for the pure damage to health taking into consideration the circumstances of the actual case – also called personalizzazione of the compensation. These types of non-pecuniary losses which are aspects of the personalizzazione are, for instance, the so-called danno alla

457 Point A.4.8 of the decisions.
vita di relazione (damage which concerns aspect of the life in relationships in general, meaning not only with a partner, but also family, friends, collegues, etc.), damage to the sexual life, which previously was compensated as a separate head of damage by some courts\textsuperscript{458} and the so-called danni estetico (cosmetic damage, as for instance of scars).

In evaluating the damages suffered by the victim, the judge is not bound to certain types of non-pecuniary damage invoked by the claimant, but shall in fact verify the existence of the alleged loss independently from the name attributed to it.\textsuperscript{459}

The most significant challenge for courts and scholars in the following years will be to develop new guidelines, maybe new schemes to assist in the assessment of non-pecuniary damages according to the rules outlined by Cass. 26972-26975/2008.\textsuperscript{460}

In cases of damage to health, as has been mentioned, the starting point should remain danni biologico. It is the great achievement of the Italian legal system to have pointed out that this kind of damage is ascertainable by objective criterions.\textsuperscript{461} This awareness would be lost, if also in cases of damage to health the estimation of the award would be entirely left to criteria of equity. It seems therefore recommendable to take a monetary value, calculated with the assistance of the theory of the variable point, as the basis for the evaluation. This should refer, however, only to the damage to health per se as estimated by the medical experts. In other words the aspects of impact on the life of the victim and also the age criteria should not be considered at this step of the evaluation.

In a second step this value would be personalised and completed. Personalised with regard to the aspects of the impact the injury has on the life of the victim, completed with regard to other types of non-pecuniary damages which might have occurred.


\textsuperscript{459} Point A.4.8 of the decisions.

\textsuperscript{460} For the first elaborations after the November 2008 decisions see already: AA. VV., Il danno non patrimoniale, Guida commentata alle decisioni delle S.U., 11 novembre 2008, nn,26972/3/4/5 (Milano: Giuffrè, 2009); M. Rossetti, Il danno alla salute (Milano: Cedam, 2009)

\textsuperscript{461} F. D. Busnelli, Il danno biologico, cit., 107. E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 798.
alongside the damage to health. This second step should, according to Cass. 26972-26975/2008, be an overall evaluation without creating subcategories of damages or referring to different heads. The same is true for cases were no damage to health is involved. It is important that, nonetheless, judges indicate in detail the aspects that they have taken into account in their evaluation. Lack of a detailed motivation should consequently make the decision appealable.
Part Three: Comparative Analysis

We can note from our discussion above, analysing both the German and Italian systems of compensation for personal injuries, that the question on whether or not to compensate non-pecuniary damages is not an issue of discussion any longer. Rather, today, the main issues of debate revolve around deciding which kind of non-pecuniary losses are recoverable and consequently, the suitable criteria for their assessment.

A. Recoverable damages

I. Centrality of fundamental rights in tort law development

Both the German and the Italian legal system have seen an extension of recoverable damages in the last hundred years, particularly after World War II. The above analysis evidences a longing for a more forceful protection of fundamental rights, which further acted as a catalyst in widening the scope of recoverable damages. Above all, the principle of the inviolability of human dignity is at the basis of the elaboration of new types of recoverable non-pecuniary losses. But the study has also shown, that different fundamental rights played the central role in the development of tort law in the German system and in the Italian one.

1. The single fundamental rights that have been the motor for the development

If we wish to mark out the fundamental right, in each of the analysed systems, which has had the most influence on tort law in the respective disciplines, in Italy we would certainly conclude this to be the constitutional right to health (Art. 32 Cost.) whereas in Germany the Allgemeines Persönlichkeitsrecht, as elaborated by case law, has had the most significant impact on this area of the law.

The reason for this different pivots around which the systems have evolved, emanates, as we have seen, from the wording of the tort law provisions regulating the

462 G. Comandé, Doing Away with Inequality, cit., 4.
compensation of non-pecuniary damages. While the German § 253 II BGB (ex § 847 BGB) explicitly provides for the compensation of non-pecuniary losses in cases of personal injury, the same is not true for the Italian Art. 2059 c.c. Thus, the German system provided, ever since the entry into force of the BGB in 1900, a basis for the protection, through tort law, of the fundamental right to health, frequently impaired upon by tortious infringement. In Italy this protection was granted only in a very limited way, i.e. in cases of injuries caused by a crime, and therefore the need for a more satisfying protection of health was the eminent problem and the issue from which all further evolution stemmed.

With this said however, it must be noted that also in Germany damage to health was, and indeed still is, at the centre of controversial discussions regarding the recoverability of damages for personal injury. For instance, one might refer to cases in which the victim died within a short period of time after sustaining the injury and the questions these cases give rise to i.e. whether and under which conditions the harm suffered, between the event causing the injury and death, can be translated into recoverable damages. Thus, we must be mindful that whenever one states that in Germany damage to health played a less central role, it is in reference to the fact that in this system the definition of new types of recoverable damages did not occur with damage to health as focal, but rather the Allgemeines Persönlichkeitsrecht.

In Italy, where on the contrary the basis for compensation in cases of personal injury was granted in a very limited way, the definition of new types of recoverable damages evolved with the right to health at the centre of the discussion.

In both systems, however, the protection of health and personality rights plays an equivalent important role. Indeed, the evolution of tort law is based, in both legal systems, on the principles of the values inherent to the person. In other words, it is inspired by the protection of the person and his/her personality as a whole. While the fundamental right printed on the banners of the reforms might indeed differ, the development often concerns not only that single right.
2. The entanglement of rights: a “Trojan horse theory of rights”

This entanglement of different rights has both, positive and negative, effects. The positive effect is the better and more complete protection of the most eminent values of the individual. This result is reached by the fact that once a measure is elaborated under the banner to safeguard a certain fundamental right, it will usually light the way for the protection of other fundamental rights.

A negative aspect, however, is the diminishment of transparency in the legal system. The risk is that under the untouchable banner of “fundamental rights” vague concepts with an unsound legal basis are hidden. Such a result would violate the rule of law and in particular the principle of legal certainty.

Nonetheless it is also true that it is often impossible to make a clear distinction between different fundamental rights affected by a certain tortiously caused damage. A personal injury regards not only the right to health, but is likely to affect for example the right to develop one’s own personality or family rights. Again, family rights and the right to develop one’s own personality are intertwined. Being aware of the complexity of human dignity, which cannot be strictly separated into single rights, legislative and judicative pronouncements must still strive to be clear and well motivated, especially with regard to the particular aspect of the whole entity, that is, which fundamental right/s is/are actually concerned.

I would like to recall some particulars from the German and Italian movements towards their expansions of recoverable rights. In doing so I would like to conclude, firstly, how indeed different fundamental rights are interweaved and, secondly, that in some cases the proposed solution is motivated by the required protection of a certain right (for instance the right to health or personality rights) but that at times there is also an ulterior motive at play, i.e. to somehow bypass legal conditions (for example, legislation or case law) which obstacle to motivate the solution with the protection of the right which is actually in the centre of the problem. We could call those cases the “Trojan horse cases”. This picture might be to negative, but it illustrates well what is meant. This will be explained further in the following examples.
In illustrating this thesis the first example with regards to the German legal system are cases concerning comatose victims. Until the Supreme Court decision of 1992, a victim who had lost the capacity of perception, and thus was not aware of his/her injuries and could feel neither pain nor suffering, was compensated only a symbolic sum. In the mentioned decision however, the Supreme Court overruled the previous case law, granting to the victim, who had sustained a severe brain injury, substantial compensation rather than only a symbolic, small sum.

As we have seen, this problem arose because under the German legal system, as opposed to the Italian way, the damage to health was not recoverable as such, but only in so far as it caused actual pain and suffering to the victim (“felt” moral damage). Consequently, the most severe type of personal injury to health, such as that suffered by comatose victims was not recoverable under the umbrella of damage to health. In consequence, in order to motivate the above descript decision, the Supreme Court indentified the recoverable damage as the „destruction of the personality“ („Zerstörung der Persönlichkeit“).

The practical outcome of the Supreme Court case is very positive in that it has opened the doors of protection for those victims, who previously would have received only a nominal sum. In the concrete case, this wider protection has been based on the principle of the inviolability of the personality. Thus, in this concrete case the previously mentioned entanglement of different rights, here the right to health and general personality rights, of which health, however, is an undeniable aspect, has led to a constructive solution.

It would have been, however, a more transparent solution to base the decision on the recoverability of the damage to health per se. In our analysis this is a first lesson which

---

For more details see above, Part One B,
464 The BGH states that the Right on one’s own body is a part of the Allgemeines Persönlichkeitsrecht for which protection is explicitly provided for by law [in difference to the Allgemeines Persönlichkeitsrecht, which has no explicit legal basis so far]. According to the Court § 823 I BGB protects the body as basis of the personality. BGH 09.11.1993, NJW 1994, 127, 128 (frozen sperm case).
the German system could learn from the Italian one. The affirmation of the recoverability of health as such in equivalence to the Italian concept of dannobilogico would indeed provide an adequate solution for the cases of comatose victims also under the German legal system.

A consequent application of the principles of fundamental rights protection as shaped since last century requires the affirmation of the recoverability of the damage to health as such. For the Italian legal system this has been specifically recognised by the Italian Supreme and Constitutional Courts. In Germany the question of recoverability of damage to health as such or “per se” is only recently discussed. Nonetheless, regarding the German situation, any other solution, particularly one linking recoverability with perceived pain and suffering, is not anymore in line, on one hand, with the principles elaborated by case law and, on the other hand, with the concrete rulings of the courts in personal injury cases.

In cases were the capacity to perceive pain and suffering is not questioned – in other words, contrary to cases concerning comatose victims – this capacity would be taken as given by the courts. The court practise compensates damage to health making waste use of schemes structured by types of injuries (the so called Schmerzensgeldtabellen). The plaintiffs’ description of the individual pain and suffering, in principle, does not serve as a basis of recoverability. There is no doubt that German judges commonly see the recoverability as given once the prerequisites for liability are fulfilled and the damage to health as such is demonstrated. The consequences the harm has had on the life of the victim, for example, the pain suffered, the forced alterations of the life of the victim and other circumstances of the concrete case are taken into account in order to establish the award to be granted. However, they do not have regard to the question of recoverability. This reflects exactly the Italian solution of dannobiologico and its personalisation. It is thus possible to affirm, that German courts already compensate the damage to health per se, event though they to not state so explicitly.

465 The recoverability of the damage to health per se under the German system is also favoured by G. Brüggemeier, Haftungsrecht, cit., 578. Dealing with BGH 13.10.1992 also Castronovo and v. Bar argue that the concepts of Schmerzensgeld and dannobiologico do infact coincide: C. Castronovo, La nuova responsabilità civile, cit., 199 et seq, 56, 57; C. v. Bar, Gemeineuropäisches Deliktsrecht, Bd. 2, Schaden und Schadensersatz (C. H. Beck, 1999) 573.


467 See G. Brüggemeier, Haftungsrecht, cit., 577-578.

468 C. v. Bar, Gemeineuropäisches Deliktsrecht, cit., 572.
Other German case law examples of entanglement of protected rights are the frozen sperm case of 1993\textsuperscript{469} and the wrongful birth cases. In the first case the issue at hand was actually a problem of personality rights. In consequence of the destruction of his frozen sperm the plaintiff was deprived of his possibility to self-determination and development of his on personality by procreation. Under this aspect, however, German law does not foresee the possibility to compensate non-pecuniary damages. Consequently, the BGH argued that in the concrete case, due to the functional union between the body of the plaintiff and his frozen sperm, damage to health was given and therefore granted compensation for non-pecuniary damages.

Also in the wrongful birth cases the infringement of personality rights, in particular the woman’s right to self-determination, is compensated under the cover of damage to health.\textsuperscript{470}

\textit{b. Examples of Italian “Trojan horse cases”}

In Italy it was also the damage to health which served the role of a “Trojan horse”. As seen in the case law examples given in Part Two, once the recoverability of damage to health, that is \textit{danno biologico}, was affirmed by the courts, a number of other types of non-pecuniary losses, based on claims of violations of other fundamental rights (or sometimes mere interests) than the right to health, were in fact deemed recoverable under the banner of \textit{danno biologico}.

The decisions of the Corte di Cassazione number 8827 and 8828 of 2003 resolved this problem in definitively declaring explicitly recoverable non-pecuniary losses caused by an infringement of constitutional rights other than the right to health.\textsuperscript{471} Thus, today, there is now no need any more to use for the compensation of such losses the “cover” of the damage to health. In other words damage to health is not called anymore to include (as a Trojan horse) the protection of other losses.

\textsuperscript{469} BGH 09.11.1993, VI ZR 62/93 in (1994) NJW 127-128, for more details see Part One, A I 1 a.
\textsuperscript{470} For more details see Part One, A I 1 a.
\textsuperscript{471} See above Part Two A V.
Subsequently, the dilemma moved from one of compensation under a false name, to the risk of overcompensation caused by the reparation of the same loss under different heads of damages.

Ultimately, in 2008, the Corte di Cassazione (mentioned decisions 26972-26975) resolved this issue in that it established that damages for non-pecuniary losses must be assessed in a global sum as a result of an overall evaluation. However, now, the Italian difficulty has reverted back, once again, to one of transparency. A global compensation sum risks confusion as to which concrete losses are actually being compensated, which is likely to be more apparent if the assessment is made under different heads of damages.472

The way out of this vicious circle has to be the clear and detailed motivation of case law decisions on the part of the judge. Overall compensation cannot and should not, under any circumstances, go hand in hand with an automatic assessment of damages. On the contrary, because of the anonymity of the global sum, the considerations taken into account in the evaluation must be delineated in even more detail. The same is true referring to the motivation required with respect to the types of losses compensated in the concrete case.

c. Conclusion

Thus we can conclude that the driving forces behind the evolution in the area of non-pecuniary damages in Germany and Italy over the last sixty years have been, in both systems, the principles of the protection of fundamental rights and human dignity. In the German system, the Allgemeines Persönlichkeitsrecht acted as the draught horse, while in the latter this role was attributed to the right to health.

472 The analysis of the Italian legal system has shown, however, that an assessment of different heads of damages does not always go hand in hand with transparency regarding the compensated losses. See for instance the above illustrated case Tribunale di Genova, 9 May 2005, n. 2295 (2006) Danno e resp., 197 and the critics on the non transparancy of the ruling: S. Wünsch, La tipizzazione dei “nuovi” danni, cit.
We have also seen that with fundamental rights at stake it is often difficult to delineate exactly the concerned right. It has to be the responsibility of the judges to guarantee a maximum of transparency providing detailed and clear motivations of their decisions.

II. The central issues in the development and changes in the characteristics of the analysed legal systems

As a next step I would like to point out the most important changes in the German and Italian legal systems regarding the recoverability of non-pecuniary damages in the respective legal structures in the last sixty years. The new types of recoverable damages and the changes that can be noted in comparing the two systems, for example, which system takes a stricter approach and which takes a wider one in granting compensation for non-pecuniary loss, are issues to be tackled here.

1. The situation in 1942

One could affirm that the Italian legislator in elaborating the Italian Civil code, that which entered into force in 1942, opted for a “half-German” solution.\(^{473}\) Similar to § 253 BGB, the Italian legislator introduced Art. 2059 c.c., both provisions stating that non-pecuniary losses are only recoverable in cases provided for by law. However the Italian legislator did not implement a provision analogous to § 847 BGB (now § 253 II BGB), that within the German BGB provides for the recoverability of some of the most important kinds of non-pecuniary losses: “most important” referring to frequency of occurrence and the relevance of the interests concerned.

The interests protected in this way by German tort law are namely, the integrity of the body, health, freedom and sexual self-determination. In the Italian legal system on the contrary, no similar provision is found in the *Codice civile*. In addition, the only other provision that provided for the compensation of non-pecuniary losses, outside the scope of the Civil Code, was Art. 185 of the Criminal Code, regulating the obligation to pay compensation for non-pecuniary losses in cases of crime.

\(^{473}\) C. Castronovo, *La nuova responsabilità civile*, cit., 6 et seq.
Thus, taking the year 1942 as the starting point of our last comparative survey, we can conclude that at that point in time the Italian legal system was stricter than the German one; the latter allowing for compensation for non-pecuniary damages in a broader range of cases.

In the subsequent decades however, both systems evolved, widening their scope of protection and consequently the types of non-pecuniary losses awardable, in comparison to those recoverable back in 1942. 474

2. The major issues in the development

   a. Damage to health as such

   From today’s point of view, the less problematic evolution regards the recoverability of damage to health as such. In spite of all the back and forth in case law and legal discussion of the last decades, the Italian dannno biologico is today an established and coherent concept. Furthermore, as has been demonstrated earlier, also in Germany the damage to health is de facto recoverable as such. 475

   Thus the status quo today in both systems is comparable. Damage to health per se is recoverable to in both systems, regardless of the diverse theories at the basis and the different historical evolution of the systems.

   b. Death within a short time after the injury

   The situation differs in Germany and Italy on investigation of cases in which the victim dies within a short period of time after the initial injury. In my opinion, this issue has not been satisfactorily resolved as yet in neither of the two systems.

474 There have been some types of non-pecuniary losses that have been deemed recoverable once but are not anymore, as in Italy the earlier mentioned harm caused by a public kiss or in Germany the harm caused to the betrayed fiancée, recoverable according to the former § 1300 BGB.
475 C. Castronovo, La nuova responsabilità civile, cit., 56 et seq., C. v. Bar, Gemeineuropäisches Deliktsrecht, cit., 572
In neither of the two studied legal systems the occurrence of death is as such a recoverable harm of the primary victim. The question is thus, whether another type of recoverable loss, in particular damage to health, is given. One could state that death is necessarily preceded by a personal injury. This argument, however, would in consequence lead to the recoverability for the occurrence of death, because even a instantaneous death would be preceded, even though only for a logical second, by a personal injury. The German and Italian legal systems have chosen different solutions for this issue.

According to the German legal system, the non-pecuniary loss of the primary victim (for the damages of secondary victims, see below) is recoverable as damage to health only if the injury presents itself as a distinguishable loss in reference to the death and if the victim was capable of perceiving pain. The non-pecuniary loss of an unconscious victim, under the same pre-requisite that injury and death are two distinguishable losses, is not recoverable as damage to health, but, as seen previously, as harm caused by the destruction of the personality.

That means in conclusion that the German legal is very restrictive with regard to the recoverability of non-pecuniary loss of the primary victim in cases of death within a limited time after the injury. In particular, the fear or anguish of death is not recoverable as long as it cannot be qualified as a distinguishable injury.

In the Italian legal system, the decisions Cass. 26972-26975/2008 dealt explicitly with of non-pecuniary damages in cases of death of the victim within a short time after the primary injury. Similar to the German solution, the Supreme Court stated that damage to health (danno biologico) is only recoverable where the „short period of time“ within which the death of the victim occurred after the primary injury amounts to an appreciable length of time. If the duration of survival is considered too short,

---

476 For a more detailed discussion of this problem see the following chapter c.
477 BGH 12.05.1998, VI ZR 182-97, NJW 1998, 2741-2743, 2743 – The Court granted 15,000 EUR for an unconscious victim who died within an hour after the injury which caused the death. As outlined before, the distinction between damage to health and damage consisting in the ‘destruction of the personality‘ seems artificial and should be overcome.
478 Point A.4.9 of the decisions, see also point A.3.2 of the decisions. For more details, see also above, Part Two.
according to the Court the suffering of the victim could not “transform into damage to health” (“non suscettibile di degenerare in danno biologico”).

This argument is comparable to the German solution, which stipulates that the damage to health is compensated only if it constitutes a “distinguishable loss”. With regard to the damage to health, therefore, the German and Italian systems give similar answers – both compensate this type of loss in cases concerning survival of the victim for a period of time after the incident according to the prerequisite that the length of the survival was substantial, permitting a distinction between damage to health and death. The German system makes a distinction between cases where the victim was unconscious and those concerning conscious victims; however, this does not alter the statement that in both systems this kind of loss is recoverable.

The analysed systems, however, do provide different solutions for cases in which the victim survived for such a short period of time that no actual damage to health materialised. The German legal system grants no compensation to the primary victim in these circumstances. The Italian decisions Cass. 26792-26975/2008, taking a different approach, established that in these types of cases the *danno morale*, in its new, broader definition, has to be compensated.479 In concrete the Court established, that compensation hast to be granted for the agony suffered by the unconscious victim, even in cases where the duration of survival is not long enough to allow for a medically ascertainable pathology.

The Italian Supreme Court motivated this finding by arguing that such a very intensive harm cannot be left uncompensated, even though it is endured for a short time. Considering the individual fate of the single victim, one is likely to agree with this reasoning of the court. Taking, however, a more distant, objective approach it seems difficult to place the proposed solution within a general, valid legal framework.

Whether the victim was in agony, and, in the affirmative case, the exact extent of his/her suffering will not, in the vast majority of cases, be provable. Already the former criterion of “appreciable duration of survival”, applied in order to distinguish between

---

479 Point A.4.9 of the decisions, see also point A.3.2 of the decisions. For more details, see also above, Part Two.
recoverable and non-recoverable damages, was very vague, but with this new extension of the recoverability of losses suffered immediately before death, the Italian Supreme Court has given up any tangible criterion.

This endangers legal certainty and gives rise to the fear that there will be no equal treatment of similar cases. This is so particularly since it will even be difficult to establish when “similar cases” arise, seeing that the concrete facts of the cases, especially with regard to the harm suffered, will have to be left to assumption.

While the recoverability of *danno morale* goes, according to my opinion, too far, the solutions adopted by the German and the Italian legal system with regard to the recoverability of the damage to health in cases of death within a short period of time after the initial injury seem, in principle, satisfying. It might be questioned, however, whether they still fit in the respective systems of compensation of non-pecuniary damages or whether the only coherent solution would not be, as a consequence of the evolution in both systems in the last decades, in particular with regard to the increasing role of tort law as a protection tool of fundamental rights, to declare the loss of life as such as recoverable.

c. loss of life *per se*

Considering the recoverability of the loss of life *per se*, opens the way to controversial arguments. Presently the loss of life *per se* is not a recoverable type of loss neither in the German nor the Italian legal system.\(^{480}\)

In advocating the recoverability of the loss of life *per se*, one could argue that it is unjustifiable to declare the compensation of non-pecuniary damages as essential in order to adequately protect fundamental rights and at the same time to deny this protection to the highest value possible, the life as such.\(^{481}\) The fact that a tortfeasor in

\(^{480}\) U. Magnus and J. Fedtke, Non-Pecuniary Loss, cit., 114; F. D. Busnelli and G. Comandé, Non-Pecuniary Loss, cit., 143; *Corte cost.* 27 Oct. 1994, n. 372 (1994) I Foro it., 3297 (That decision states in particular that loss of life is not protected under Art. 32 of the Italian Constitution which guarantees the right to health.)

\(^{481}\) G. Brüggemeier, Haftungsrecht, *cit.*, 579.
terms of civil liability is better off killing a person than just injuring him or her seems an outcome which is hardly sustainable.  

To affirm the loss of life as a recoverable loss, however, would raise the following new set of doubts.

c.1. loss of life as iure sucessionis of the relatives

The first question is whether the right to claim damages in these cases would arise in the person of the victim him/herself to be claimed by the heirs iure sucessionis or whether it is a right iure proprio of close relatives.

With regard to the actual result it might make no difference whether the loss suffered by the victim, in cases where the victim survived for a short period of time after the injury, gives way to a claim of the victim which passes to the bereaved relatives on death or if the claim arises as a proper right of the latter. It is, however, important to make clear, whose loss – that of the victim or that of the bereaved – shall be compensated and what would be the function of the compensation in either case.

When we envisage the recoverability of the loss of life as a consequent further development of the concepts which affirm the recoverability of non-pecuniary damages as such, we would have to configurate the loss as being that of the victim.


483 See G. Brüggemeier, Haftungsrecht, cit., 579.

484 In this context it is also important to bear the special character of the right to claim non-pecuniary damages in mind. Precisely because it involves very personal aspects, the decision, whether to claim damages should be left in principle to the victim. In line with under the German legal system ex § 847 BGB established in its second paragraph, which was abolished in 1990, that the right to claim non-pecuniary damages could be transferred or inherited only when it was recognised by contract or pending in court. This provision was intended to assure that the heirs would not bring forward a claim which the victim itself would not have persued. However, the provision was abolished by law of 14.3.1990 (BGBl 1990, I 478) in order to avoid the “race against death” (“Wettlauf mit dem Tod”) the relatives had to undertake in particular in cases of sever injured victims which were not anymore capable to express their will. The BGH, however, clarified that this change in law did not touch the strict personal character of non-pecuniary losses. See: BGH 06.12.1994 - VI ZR 80/94, (1995) NJW, 783 - 784.

485 See G. Brüggemeier, Haftungsrecht, cit., 579.
For a better understanding it seems helpful to recall what is intended here when we speak of loss “as such” or “per se”. The concepts of the recoverability of non-pecuniary losses “as such” are based on the principles of the inviolable nature of the concerned right which requires a minum standard of protection not only in the field of public law, but also in private law. The menomazione per se of the right calls for compensation without regard to the further negative impact that the damaging event might have on the victim’s life. These further circumstances influence the amount of the award but do not (anymore) constitute prerequisites of recoverability. The Italian word “menomazione” is used here to avoid misunderstandings that could result if the common English translation “infringement” was used. Not the “infringement as such”, that means the fact that a violation of a protected right has taken place, in other words focusing on the act instead of on the result - in Italy referred to as dannno evento or also dannno in re ipsa- leads to compensation, rather there has to be a concrete damage, a menomazione; one might translate as a “mutilation” of the concerned right.

The recoverability of such a menomazione was initially affirmed with regards to the right to health – we have seen the historical evolution of the Italian concept of dannno biologico and already stated that also in Germany the damage to health as such, without regard to further consequences is recoverable. Furthermore, in both analysed systems this recoverability of the loss as such is given in consideration of personality rights under the prerequisite that the inner sphere of the concerned right is infringed – mutilated. A specific feature in this context is the German case law regarding the “destruction of personality” which is the compensated harm in cases concerning comatose victims.

It seems, however, impossible to extend this reasoning to the loss of life. Putting the problem in the light of strict legal reasoning, disregarding out philospical or metaphysical considerations, a damage consisting in the loss of life as such does not

---

486 C. Castronovo, La nuova responsabilità civile, cit., 68 et seq. who confronts the common law category damage per se and the concept of damage in re ipsa which in the Italian discussion on the recoverability of new types of non-pecuniary losses has been used to argue that infringement (lesione) and damage (danno) would coincide and therefore in order to establish recoverability it would be sufficient to ascertain the infringement of a right. Cass. 10.05.2001, n. 6507 (2001) Resp. civ. 37. This theory has, however, definitively been overcome – latest since Cass. 8827, 8828/2003.

487 C. Castronovo, La nuova responsabilità civile, cit., 68. For a definition from the point of view of a medical expert see: M. Bargagna, La medicina legale ed il danno alla persona oggi, in: M. Bargagna and F.D. Busnelli (eds.), La valutazione del danno alla salute, 4th edn (Padova: Cedam, 2001) 19 – 45.
seem conceivable as a loss of the victim. At the moment of death the victim has lost the capacity to be a subject of rights and duties (Rechtsfähigkeit, capacità giuridica).\footnote{488} Consequently, it is not possible to suffer the loss of one’s own life as a legally relevant damage. The same is true if the harm is not configured as loss of life, but as 100 % loss of health or a 100 % destruction of personality. It is therefore irrelevant whether the loss of life can actually be perceived as such a 100 % loss of certain aspects of life.

Whether the fact that the victim cannot suffer such a loss, leads to the consequence that the causation of someone’s death should “as such” remain without consequences in terms of civil liability for non-pecuniary losses is a different question. In the person of the victim, however, such a claim cannot arise and thus cannot be transmitted to the heirs.

The analysis of the problem based on the function of non-pecuniary damages leads to the same result. The study of the German and Italian legal system has shown that the recoverability of losses as such primarily aims to compensate the victim as central point. The expansion of recoverable non-pecuniary losses has been based, in both legal systems, on the movement of the focus of tort law away from the necessity to blame the behaviour of the tortfeasor and towards the necessity to compensate the victim. At the moment of the death of the person the function of compensation cannot be fulfilled anymore with respect to that person.

Answered thus negatively the question of wether the loss of life as such can be conceived as a loss of the victim, now it shall be analysed, to what extent it could constitute a loss of third parties.

\footnote{488} Even thought § 1 BGB as well as Art. 1 c.c. provide explicite only for the birth as moment in which a person acquires the Rechtsfähigkeit, respective capacità giuridica in none of the two systems it is questioned that the capacity to be subject of rights and duties ceases in the moment of death. See: H. Heinrichs, § 1, cit., para 3; G. Alpa e G. Resta, Le persone fisiche e i diritti della personalità, in: R. Sacco (ed.) Trattato di Diritto Civile (Torino: UTET, 2006) 21 et seq. Subject of discussion is instead the issue how the concrete moment of death can be ascertained. This problem is, however, not concerned here.}
c.2. *loss of life as iure proprio of the relatives*

In order to analyse whether and under which premises the loss of life as such could be recoverable as a loss *iure proprio* of the heirs (relatives or others, maybe also institutions\(^{489}\)), we have to distinguish this type of loss from the more traditional concept of bereavement damages, which refers to the loss suffered directly by the secondary victim. In other words, here we do not speak of any direct loss of a secondary victim, as in particular would be the pain of losing a loved one – recoverable in Germany in cases in which it amounts to a ascertainable damage to health or in Italy recoverable not only, were the prerequisites are met – as *danno biologico*, but also as *danno alla personalità*, in particular under the aspect of an infringement of family rights. The loss of life as such is not such a, let’s say, “pure secondary victim loss”. The loss of life as such without taking into consideration the impact that loss has on the life of the plaintiff (relative or heir in general), would have to be qualified as a type of damage *sui generis*.

Similar types of damages do exist in the Islamic legal systems, for instance the *diya* of the Iranian legal system to be paid by the offender to the family of the victim in expiation of the killing.\(^{490}\) Early Germanic law knew the *Wergeld* to be paid as a form of expiation.\(^{491}\) Such a type of “blood money” serves as a punitive instrument and in particular is a substitution to satisfy the desire of vengeance of the family of the victim, which is perceived as a legit right.\(^{492}\) In modern democratic societies such as Germany and Italy the monopoly for punishment is with the state, which leaves no room for private punishment.\(^{493}\) This forbids the (re-) introduction of an obligation to pay damages as a discharge for a right to private vengeance. Meaning not, however, that

---

\(^{489}\) See G. Brüggemeier, *Haftungsrecht*, *cit.*, 579, who states that the indemnisation as he conceives it has to be paid to welfare institution in cases in which the victim has no relatives.


there is no room at all for punitive or preventive functions of damages. These purposes play above all a role in cases of an infringement of personality rights. Still it would be incoherent within the German and indeed the Italian legal system to introduce a type of damages which exclusively serves punitive or preventive purposes. This is the task of the criminal law. And from the point of criminal law one does not get away cheaper killing someone instead of just injuring him.

According to what has been said, the loss of life cannot be claimed by the relatives or by other heirs, as a loss per se. Recoverability in these cases is only given, as foreseen under German and Italian law, in cases in which the death has caused a direct harm to the relatives.

d. Personality rights
d. 1. Similar prerequisites of recoverability

A central issue in both analysed systems has been the extension of recoverability of non-pecuniary damages to cases in which the injured right is of constitutional relevance. Both systems did not foresee such a recoverability back in 1942.

In both legal systems this development has been shaped by case law. In Germany the concept of the Allgemeines Persönlichkeitrechts has been at the centre of the discussion, while in Italy this position was taken by the danno biologico in its further elaboration – here referred to as danno alla personalità.

As mentioned in Part One of the present study, in the German legal system recoverability was extended to cases concerning a violation of the Allgemeines Persönlichkeitrechtsrecht. Recoverability in these cases is not established explicitly by any

---

496 The danno biologico itself concerns the damage to health which as already be discussed.
legislative act\textsuperscript{497} but rather, according to steady case law, is based on § 823 I BGB, Art. 1, 2 GG.\textsuperscript{498} The prerequisites, however, are very strict. Recoverability is granted if the infringement of the \textit{Allgemeines Persönlichkeitsrecht} can be qualified as serious and only if there is no other possibility of restoration.\textsuperscript{499} Part Two of the present study has outlined the development within the Italian legal system from the affirmation of recoverability of damage to health – \textit{danno biologico} – to recoverability in cases of an infringement of interests protected by the constitution – \textit{danno alla personalità}.

After Cass. 26972 – 26975/2008 il \textit{danno alla personalità} is recoverable according to Art. 2059 c.c. read in light of the Constitution. In the mentioned decision the Italian Supreme Court established the prerequisites under which a recoverable \textit{danno alla personalità} is given – \textit{ingiustizia costitizionalmente qualificata} and seriousness of the offence.

The premises under which an infringement of the German \textit{Allgemeines Persönlichkeitsrecht} or an Italian \textit{danno alla personalità} are recoverable, are similar. Reformulating the criteria applied in both legal systems, the German and the Italian legal system foresee the compensation of a non-pecuniary loss resulting from an infringement of a constitutionally protected right, when a right is concerned which is endued by a minimum protection requiring an answer of tort law in cases of violation and if the infringement is so serious as to touch the core of the protected right, thus excluding Bagatellschäden.\textsuperscript{500}

\textsuperscript{497} Has has been mentioned before, the legislator of the Tort law reform of 2002 renounced explicitly to include the Allgemeines Persönlichkeitsrecht in the list of protected rights in § 253 II BGB stating that the further elaboration of this right in case law seems sufficient and more adequate.

\textsuperscript{498} BVerfG 08.03.2000 (2000) NJW, 2187 – 2189, 2187.

\textsuperscript{499} Seriousness being evaluated taking into account all circumstances of the case. Other possibilities of restorations might be a counterstatement or an injunction. For more details, see Part One.

\textsuperscript{500} E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 804. The further requirement under German law that there is no other possibility of restoration given, is of less practical relevance and results from the traditional priority given to Naturalrestition under German law – see Part One of the present study.
Interestingly, however, the issues which are at the center of attention in case law, according to the volume of decisions and, above all, attention granted to them in legal journals, diverge completely.

d. 2 Different focal applications

The German Allgemeines Persönlichkeitrecht is above all relevant in cases of unauthorized publication of pictures of famous persons. In those cases the amounts granted for compensation of non-pecuniary damages are considerable and regularly new case law appears in the legal journals. The range of application in other cases of unauthorized publication, in particular involving non famous persons, is very limited.

These types of cases are, however, of limited relevance in Italy. The reason for this is probably found in the fact that recoverability of non-pecuniary losses in cases of unauthorized publication of pictures, information or likeness has never been a problem in the Italian legal system, where the cases of unauthorized publication of pictures or information are often of criminal relevance.\footnote{See in particular Art. 595 c.p. on defamation. See also F. D. Busnelli and G. Comandé, Non-Pecuniary Loss, cit., 150.} This leads, under Italian law, to a recoverability of non-pecuniary damages according to Art. 2059 c.c. in combination with Art. 185 c.p.\footnote{However, for cases without criminal relevance other legal basis for recoverability have been discussed. In particular, Art. 2059 c.c. in combination with Art. 7 and 10 c.c. protecting the name and identity or Art. 2059 c.c. read in the light of the Italian Constitution. A particular interesting case with regard to the constitutional relevance is the Soraya case Cass. 27.05.1975, n. 2129 (1996) I Foro it. 2895, the first case in which the Corte di Cassazione affirms the right to privacy. The issue has also be dealt with in recent legislation on Privacy. See L. 31.12.1996, n. 675, now transformed in D.Lgs. 30.06.2003, n. 196, cit. For more details and case law example see: C. Mak, M. D. Sanchez-Galera and S. Wünsch, The Italian Report, cit., E. Palmerini, I danni da lesione dell’onore e della reputazione and I danni da lesione dell’identità e della riservatezza e l’illecito trattamento dei dati personali, in: E. Navarretta (a cura di), I danni non patrimoniali. Lineamenti sistematici e guida alla liquidazione (Milano: Giuffrè, 2004) 179 - 232 and 233 – 252, V. Ricciuto and V. Zeno Zencovich, Il danno da mass media. Elementi per la valutazione e criteri di liquidazione (Padova: CEDAM, 1990) 85 et seq.}

In Italy, on the contrary, two other types of decisions provide typical examples of the recoverability of non-pecuniary damages in cases of an infringement of personality rights. The first are those concerning family rights. In these cases the relatives of a primary victim claim iure proprio damages for the losses suffered in consequence of the
death or personal injury of the primary victim. As mentioned in Part Two of the present study, the secondary victims, i.e. the relatives, might claim *iure proprio* not only compensation for the damage to health, but also for the infringement of other inviolable rights. Italian case law compensates for instance the loss of enjoyment gained from living together as a family unit and ruined family planning.\(^5\) In Germany minor attention has been paid to that issue. The recoverability of damages for ruined family planning has been discussed in wrongful birth and wrongful pregnancy cases. However, it is commonly accepted in case law and scholarly writing that such a type of loss is not recoverable under the German legal system because it would extend the limits set by the legislator for liability under tort too much.\(^6\) Damages for bereavement concerning the death of a relative are discussed in the German legal system under the issue of damage to health and, as seen, recoverable only if the secondary victim suffers a own damage to health.\(^7\)

The second group of decisions which is impossible not to mention when speaking of Italian tort law and personality rights, are those dealing with non-pecuniary damages in cases concerning infringements of constitutional rights. Strictly speaking, also the cases concerning an infringement of health and family rights belong to this group. *Danno biologico*, however, has its own status due to its historical roots and also the family rights cases can be by now seen as consolidated case law. The remaining part of this group is that part for which the limits of recoverability have still to be traced clearly. Other than the German legal system, were the discussion of the recoverability of non-pecuniary damages in cases concerning personality rights was and is basically limited to the cases mentioned above, in Italy the measure of the extention of tort protection to other fundamental rights and has been for some time now strongly discussed. This has been illustrated in Part Two A of the present study giving examples of the case law

\(^5\) See case law exemples in Part Two A, in particular also the landmark decisions Cass. 8827, 8828/2003 deal with family rights.


\(^7\) From a European comparative study, it seems, however, that Germany has a lonely standpoint in that. See: W.V.H. Rogers, Comparative Report of a Project Carried Out By the European Centre for Tort and Insurance Law, in: W.V.H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Wien, New York: Springer, 2001), pp. 245-296, 262ss. See also Art. 10:301 of the European Principles of Tort Law which states in paragraph 1: “... Non-pecuniary damage can also be the subject of compensation for persons having a close relationship with a victim suffering a fatal or very serious non-fatal injury.”
during the so-called periods of confusion, in particular the case law concerning *danno esistenziale*. But also now, after Cass. 26792-26795/2008 the issue continues to be important in the Italian legal discussion. In the mentioned decision, the Supreme Court provided the interpretational tools in order to determine in which cases the infringement of a constitutional right lead to the recoverability of non-pecuniary damages. Now, however, this framework has to be applied to the concrete case law.

**d. Some final considerations concerning the recoverability in cases concerning personality rights**

One, if not the, central point emerging from the present study is that the principles of protection of human dignity and fundamental rights have influenced significantly tort law in both analysed systems. As a result of the developments in the German and Italian legal systems after World War II, tort law is now perceived as an instrument capable of guaranteeing the protection of fundamental rights in private law. Nowadays, not only are the public authorities expected to respect fundamental rights, but also private persons have to orient their acts in a way so as not to infringe the fundamental rights of others. The infringement of such protected rights would result in an obligation to pay damages for non-pecuniary losses.

This protective function is not an exclusive character of tort law. Also other areas of civil law, in particular contract law, have seen the development of similar limitations on the freedom to act and private autonomy over the last decades.\(^\text{506}\)

The historical evolution, guided by the principles of safeguarding of human dignity is to be welcomed. The question which remains to be answered in the future is, however, whether or not tort law is an adequate tool or if not instruments of social welfare would be more appropriate to reach the desired purposes.\(^\text{507}\) More than once it has been stated


in the present study that the attention of tort, in particular in cases concerning the recoverability of non-pecuniary losses, has switched from the blameworthiness of the tortious behaviour to the necessity to compensate the loss. This is in line with the aim of a more extensive protection of the victims and their personality rights. The question is, however, whether or not this is also in line with social justice.\textsuperscript{508} An exemple to illustrate the perplexity this issue might raise are the cases of bereavement damages. The arguments in favour of recoverability of non-pecuniary damages in cases concerning loss of a relative concentrate on the great pains of those left behind. The traditional tort argument, based on the behaviour – whoever causes the damage, has to restore it – plays no role. The reason for this is, that we are not speaking of liability (\textit{Haftungsbegründung}), which is presumed for this discussion, but of the consequences (\textit{Haftungsausfüllung}). The link between both should not, however, be completely lost out of sight. Otherwise it is not clear why the loss caused by the behaviour for which another is liable should be more worthy of restoration than a similar loss for which nobody can be held liable. In order to find the right balance between the protection that tort law can offer and social justice a wide range of aspects will have to be taken into consideration, which include for instance economic feasibility or the role of insurance.\textsuperscript{509}

So long as no entirely satisfying result can be found, it seems better to keep the recoverability of non-pecuniary losses in cases of the infringement of personality rights very strict. This is necessary in order to avoid that an enthusiasm to enhance the safeguarding of human dignity will not result in the creation of new injustices. The German and the Italian legal system have set the marks for such a restrictive interpretation which still allows tort law to be sensible for fundamental rights protection.

A second consideration I would like to stress again in this conclusion of my analysis is the mentioned entanglement of rights and the resulting responsibility of the judges.


It has been demonstrated that, once the recoverability of non-pecuniary losses caused by the infringement of a fundamental right is affirmed in principle, it is impossible to draw an absolute line between recoverable and non recoverable losses.

The nature of the involved interests and the variety of possible infringements of fundamental rights requires a flexibility which permits the inclusion of new types of losses under the protection. Consequently, that means that civil law countries, such as Germany and Italy, have to give up definitively the traditional theory which perceives legislation as the only competent power to define recoverable losses. The competence of judges to fill in the gaps in the legal system transforms from a power to exercise only in exceptional cases to a standard instrument. This is already the legal practise in Germany and in Italy.

Both, Allgemeines Persönlichkeitsrecht and danno biologico are concepts which have been entirely developed by case law. Even though in the Italian legal system the danno biologico has found for certain types of causation a legislative regulation, it is a concept which is continuously further developed by case law.

The German example confirms even more the statement that the competence of judges to make law has become a given standard. When reforming tort law in 2002 the German legislator abstained explicitly from giving the Allgemeines Persönlichkeitsrecht a legislative basis stating that the results provided for by case law in this area would be satisfying and moreover the right to compensation in cases of a violation of the

---

510 Cfr. E. Navarretta, I danni non patrimoniali nella responsabilità extracontrattuale, cit., che afferma con riguardo alla determinazione di which rights fall under the category of inviolable rights that this is necessarily a dynamic system (.."il sistema dei diritti inviolabili deve essere necessariamente dinamico"., 22.
511 For the Italian legal system Navarretta affirms that the legislator does not have the monopoly in the determination of cases in which non-pecuniary rights are recoverable; E. Navarretta, I danni non patrimoniali nella responsabilità extracontrattuale, cit., 15.

In conclusion it can be stated that the role the judges has already definitively changed both in Germany and Italy.

B. Assessment of damages

For what regards the modern European legal systems, the principal function of tort law is to compensate the injured person. Deterrence is an effect, but not the scope.\footnote{Rogers calls it a “by-product”. See W. V. H. Rogers, Death and non-pecuniary loss, cit., 54, para. 6.} In the assessment of non-pecuniary damages the main attention has therefore to be paid to the loss suffered.

In order to establish the correct way to assess non-pecuniary damages, the real nature of that kind of loss has to be kept in mind. In cases involving harm to the person, the situation before and after the damaging event cannot be described by the means of “less worthy” and even the possibility of defining the change \textit{a priori} as “negative” is questionable. This rather philosophical reasoning results in a special sensibility when dealing with cases involving a harm to fundamental rights and forbids in particular an automatism in the liquidation.

The philosophical and ethical fundament of compensation is destined to change, given that society is not a rigid body, but rather is continuously developing. Therefore philosophical questions can never be deemed as answered once and forever, but have to be re-analysed over and over in the context of the shifting circumstances, and in particular the changing legal and social framework. Continuous research on this metaphysical basis is necessary as an instrument to control the adequateness of the currently adopted legal solution and to guide the development of new concepts.
However, these questions have to be distinguished from the factual evidence, that in the actual historical moment both in Germany and Italy certain types of non-pecuniary damages are deemed recoverable and the practical question has to be answered, how the judge should proceed once he has ascertained that a certain non-pecuniary loss has occurred. In this context it is necessary to (further) develop standards and guidelines to support the work of the judges. Those instruments have to guarantee, on the one hand, that the particular nature of non-pecuniary losses are respected, that means above all that the compensation requires an individual contemplation of the circumstances of the concrete case and should never, follow a logic of automatism.\textsuperscript{516} On the other hand, however, the method of assessment has to allow for an effective functioning of the judicial system. This requires criteria on which judges can orientate the assessment. Moreover, the contemplation of the individual case has to be in compliance with the requirement of equal treatment. In other words, comparable losses have to be compensated in a similar way.

Both analysed legal systems dispose of an adequate framework to guarantee a fair compensation.\textsuperscript{517} In Germany this is provided for by BGH 06.07.1955, which establishes the function of non-pecuniary damages and the criteria for assessment.\textsuperscript{518} Taking steps from this decision, the German case law has developed a consolidated praxis in assessing non-pecuniary damages which leads to reliable results. In particular the \textit{Schmerzensgeldtabellen} have become an indispensible tool in the daily praxis of courts.

In the Italian legal system the decisions Cass. 26972-26975/2008 have set a new comprehensive framework for the assessment of non-pecuniary damages. Divergent from the traditional approach in case law, non-pecuniary damages have now to be assessed in a global sum and not anymore according to different heads of damages.

\textsuperscript{516} A no-fault system may to a greater extend allow automatism in the liquidation process because the function of the indemnity is different.
\textsuperscript{517} For personal injury cases the English case law has formed the notion that damages should be “fair, but not perfect”. Lee Transport Co Ltd v Watson (1940) 64 CLR, 13-14 cited from H. Luntz, \textit{Assessment of damages for personal injury and death: general principles} (Australia, LexisNexis Butterworths, 2006) 8, see also there for more case law examples.
\textsuperscript{518} (1955) \textit{VersR} 615.
Both systems may profit from the experiences of the other. It has just been stated that in Germany the case law practice reaches satisfying results, a further improvement could however be reached learning from the Italian *danno biologico*. On the other hand the Italian legal system could profit from the German experience concerning the overall evaluation of non-pecuniary losses and, in particular, with regard to the application of *Schmerzensgeldtabellen*.

As to the first aspect, the concept of *danno biologico*: In the evaluation of non-pecuniary loss it is important to distinguish cases involving damage to health and cases not involving a personal injury. Such a distinction might seem unnecessary, given that in both suppositions the assessment has to be awarded in a global sum following an overall evaluation of all relevant circumstances of the case and an all-comprehensive evaluation. This respects the legal practise in Germany ever since the mentioned decision of BGH 1955 and is also the method of liquidation of non-pecuniary damages established for the Italian legal system by Cass. 26572-26579/2008.

A distinction should be made, however, so as to retain the achievements of the Italian concept of *danno biologico*. As mentioned the damage to health is unique in that it is measurable by objective criteria. A person is not a thing and therefore a loss of a limb or a bodily function cannot be equated with a misfunction of a thing. However, a similar damage to health is *a priori* equal no matter who is afflicted. That means that to a certain extent, referring to the damage to health (better: *danno biologico*) as ascertained by the medical experts, the evaluation can be based on fixed evaluation schemes. As a starting point the schemes already used in the Italian legal system, in particular the above illustrated *tabella milanesi* could prove useful. It has already been argued that these types of tables, however, should refer exclusively to the objective medical evaluation of the mere danno biologico and not include subjective aspects such as the age of the victim or the so-called average impact the injury in question would have on every person afflicted by the same kind of injury. These aspects belong to the legal evaluation to be carried out by the judge.

---

519 E. Navarretta, Il valore della persona nei diritti inviolabili e la sostanza dei danni non patrimoniali. (2009) 1 Foro it. 139, para 3.2.
520 Cfr. E. Navarretta, Il danno alla persona tra solidarietà e tolleranza, cit., 798 who summarises this unique characteristic of danno biologico saying that: “The *danno biologico* is (…) measurable and, even though not economic, compensable in the sense that a value x of damages has to respond to a value x of compensation, (…)”
In accordance with this, the first step of evaluation of the loss in personal injury cases would include the ascertainment of *danno biologico*, expressed in terms of a disablement rate. Following the approach of the *tabella milanese*, an economic value can be attributed to this damage using the method of the variable point, the value of which increases more than proportionally with respect to the increasing of the disablement rates.\(^{521}\)

This economic value is the basis for the global evaluation which takes into consideration all circumstances of the concrete case and the different types of non-pecuniary losses suffered in their complexity, no matter which single notions are used to describe them – *danno morale*, *danno alla personalità* etc. Those further non-pecuniary losses, to which also the concrete impact of the *danno biologico* on the life of the victim belongs, have to be evaluated in a global way because it is the only possibility to avoid duplications. On the other side the *danno biologico* can be extracted from this overall evaluation as it regards the damage to health *per se* and therefore there is (as long as the definition is clear\(^ {522}\)) no risk of overlapping.

Furthermore, in the majority of personal injury cases the substantial part of the loss consists in the damage to health *per se* while the further non-pecuniary harms are connected losses. The concept of danno biologico provides the possibility of attributing to this loss an objective value, equal for all victims suffering a similar injury. This objective approach, which is based on medical expertise is adapted for a uniform application by all courts and is also appropriate for European harmonisation.\(^ {523}\) This would guarantee to a greater extent equal treatment and transparency in the assessment of personal injury cases as opposed to that achieved thus far.

Individual justice is guaranteed by the second step of the assessment process in which the objective value has to be adapted according to the circumstances of the given case. As the Italian Constitutional Court stated already in 1986: The joint role of uniformity

---

\(^{521}\) For more details see Part Two B.

\(^{522}\) See to the clear application of terminology above, Part Two III 1.a.

at the basis of compensation and the accommodation of a flexible adaptation to the actual case renders possible a guarantee of maximum justice in the assessment of non-pecuniary damages in personal injury cases.\footnote{Corte cost., 14.07.1986, n. 184, cit.; F. D. Busnelli, Il danno biologico, cit., 107; G. Comandé, Towards a global model, cit.}

This second part of the evaluation has to be left to the discretion of the judges. The problem that not only the judges but all actors dealing with compensation for non-pecuniary damages, for instance insurance companies, have to face in their daily practice is to find a way to measure the non measurable.

However, also here the elaboration of guidelines and schemes can help achieve better comparability of cases and thus promote equal treatment and a better and quicker functioning of the system. As has been mentioned the German Schmerzensgeldtabellen have proved to be a helpful tool in the assessment of non-pecuniary damages. Also in Italy several initiatives have already been undertaken for a systematic collection and analysis of case law.\footnote{A large data base on personal injury cases is administrated by the Osservatorio sul Danno alla Persona which has been founded in collaboration with the Italian National Agency controlling the Insurance Market (ISVAP). This material is available on: \url{http://lider-lab.sssup.it/odp}. See also: E. Navarretta (a cura di), I danni non patrimoniali. Lineamenti sistematici e guida alla liquidazione (Milano: Giuffrè, 2004); G. Comandé and R. Domenici (eds.), La valutazione delle macropermanenti, Profili pratici e di comparazione (Pisa: ETS, 2005).}

In order to render possible and meaningful such collections of precedents, the judges are called to motivate their decisions with as much detail possible. The sufficient motivation is not only a requirement for the lawfulness of the decision, but it helps also the analysis of the case law and the tabling of the criteria that influenced in the concrete case the award granted. The comparison with the relevant information of precedents made easily accessible by Tabellen or data bases, helps the judge who has to deal in the future with a similar case. Modern technical facilities have open the way for a wide range of possible applications to assist legal actors in the evaluation of the award to be granted for non-pecuniary loss. For instance, the problem whether it would be better to table the precedents by amounts of award or by injuries with the respective advantages and disadvantages\footnote{S. Wünsch, Il modello tedesco delle Schmerzensgeldtabellen, in: G. Comandé and R. Domenici (eds.), La valutazione delle macropermanenti, Profili pratici e di comparazione (Pisa: ETS, 2005) 85 – 96, 94.} has been overcome since computer programs offer the possibility
to search for relevant case law in both modalities. It is also possible to extract a list of criteria which have in former cases influenced the award. Such a list has been proposed in order to help lawyers to motivate a claim for non-pecuniary damages in better detail and thus provide the judge with concrete criteria for the evaluation.\(^{527}\) Of course the application of these technical tools cannot lead to a complete standardisation which would result in automatism.\(^{528}\) Nonetheless, the collection, analysis and tabelling of case law seems an adequate instrument to support the legal operators in their daily work and to thus contribute to individual justice.

**Final remarks**

Which conclusions can be drawn from the present study for the search for a fair and reasonable framework for the compensation of non-pecuniary damages. Certainly it can be confirmed what already the English judges of the nineteenth century taught: compensation for pain and suffering should be “fair, but not perfect”.\(^{529}\) And it might be added add that the search is destined to be ongoing.

Besides this recognition that the work has just begun, the present study has discovered some concrete fruits brought forward by the development of the system of compensation for non-pecuniary damages in Germany and Italy. The most important statement which can be made after the analysis is that the principles of protection of fundamental rights have definitively found entrance in private law and in tort law in particular. Whether or not the constitutional rights have *Drittwirkung* is not a question anymore. It has been answered in an affirmative way and the issue now at stake are the limits of the impact of fundamental rights on private law.\(^{530}\)

As far as damage to health is concerned, from the present analysis it can be confirmed that a fair and reasonable framework exists in the German as in the Italian legal system.

\(^{527}\) See for a concrete proposal of such a checklist for to be used in the praxis: L. Jaeger and J. Luckey, *Schmerzensgeld* 2003, cit., 171 et seq.


\(^{530}\) For a comprehensive study of this issue with regard to different European legal systems see: G. Brüggemeier et al., *Fundamental Rights, Vol. I+II*, cit.
In the latter, in particular, the concept of *danno biologico* is by now established as a solid fundament for the compensation of damage to health *per se*. For what concerns the liquidation of damage to health, the Corte di Cassazione has with its decisions of November 2008, provided for a sound framework which allows to overcome the former overlapping of different heads of damages. In the long years of application the German system of compensation of non-pecuniary damages has proven to be adequate to guarantee individual justice, transparency and equal treatment. However, the explicit recognition of the recoverability of damage to health *per se*, in the sense of the Italian *danno biologico*, would be welcomed.

Thus, with regard to damage to health, the recoverability of non-pecuniary damages has a sound legal basis in the German and Italian legal systems. Future efforts should concentrate on further improving the assessment process. The best way to do so seems to continue with the persistent collection and analysis of case law as since long started with the German *Schmerzensgeldtabellen*\textsuperscript{531} and now further developed by the Italian systems of tabling and data bases.\textsuperscript{532}

With regard to the compensation of non-pecuniary losses resulting from an infringement of personality rights the question of recoverability is answered in a positive way in both analysed systems, however one can not speak of a consolidated praxis yet. Both, the German and the Italian system, dispose of an adequate concept on which the recoverability is based and which is appropriate for the further development - the German *Allgemeines Persönlichkeitsrecht* and the Italian *danno alla personalità* as shaped by the decisions Cass. 26972-26975/2008. The search for a better clarification of these theories must, however, go on.

The *Allgemeines Persönlichkeitsrecht* seems to gather dust. It is too much focused on the protection of personality rights of celebrities only. Instead it should be further discussed and put to the test with regard to other constellations of infringements of fundamental rights. In its conception it is by no means as unilateral as its application, meaning that it is immediately fit for new challenges.

\textsuperscript{532} Osservatorio danno alla persona, data base available at lider-lab.org/odp.
The Italian *danno alla personalità*, as it is called here, has with Cass. 26972-26975/2008 finally been put on a sound legal basis. Already in 2003 the decisions of the Corte di Cassazione 8827 and 8828 had definitively affirmed the recoverability of non-pecuniary damages in cases of infringements of constitutionally protected interests. But only the November 2008 decisions have provided for a fair and reasonable framework for this type of loss. However, the *danno alla personalità* is now more or less were the *danno biologico* was in 1986. Back then the Corte Costituzionale affirmed with its decision n. 184 and after several years of discussion and first applications in case law definitively the recoverability of damage to health *per se*.\(^{533}\) After that it took two more decades to consolidate the concept in the legal application. This is the itinerary which now stretches out in front of *danno alla personalità* and the German *Allgemeines Persönlichkeitrecht* should join it on the path towards a fair and reasonable European framework for the recoverability of non-pecuniary damages in cases concerning personality rights.

Bibliography


A. D’Adda, Il cosiddetto danno esistenziale e la prova del pregiudizio (2001) *Foro it.*, 189


M. Bargagna and F.D. Busnelli (eds.), *La valutazione del danno alla salute*, 4th edn (Padova: Cedam, 2001)


E. Bargelli, Danno non patrimoniale ed interpretazione costituzionalmente orientata dell’art. 2059 c.c., commentary to Cass. 31 May 2003, n. 8827 and 8828 (2003) Resp. civ. prev., 691


M. Bessone and E. Roppo, Lesione della integrità fisica e “diritto alla salute”. Una giurisprudenza innovative in tema di valutazione del danno alla persona. (1975) Giur. it., 54


F. Bilotta, La nascita non programmata di un figlio e il conseguente danno esistenziale (2002) Resp. civ. prev., 440

A. L. Bitetto, Il diritto a “nascere sani” (2004) I Foro it., 3329

Black’s Law Dictionary (8th ed. 2004), consulted on Westlaw International (10.03.2008)

M. Bona, La saga del danno esistenziale verso l’ultimo ciak (2008) Danno e resp, 562

M. Bona and P. G. Monateri, Il nuovo danno non patrimoniale (Milano: Ipsoa, 2004)

M. Bona, Il danno esistenziale bussa alla porta e la Corte costituzionale apre (verso il ‘nuovo’ Art. 2059 c.c.), (2003) Danno e resp., 939

M. Bona and A. Castelnuovo, P.a., pretese del cittadino e danno esistenziale (2001) Danno e resp., 981


L. Buono, *Tutela del minore e mass media* (1993) 3 *Minori e giustizia*, 139 - 147


F.D. Busnelli, *Chiaroscuri d’estate. La Corte di cassazione e il danno alla persona* (2003), *Danno e resp.*, 826-829


F. D. Busnelli, *Bioetica e diritto privato* (Torino: Giappichelli, 2001)


F.D. Busnelli, Tre “punti esclamativi”, tre “punti interrogativi” e un “punto e a capo” (1994) *I Giust. civ.*, 3035


G. Cassano, *La giurisprudenza del danno esistenziale, Raccolta completa delle sentenze per esteso* (Milano: CEDAM, 2007)


P. Cendon, *Voci del verbo fare*, available at www.altalex.com


P. Cendon (ed.), Trattato breve dei nuovi danni (Padova: Cedam, 2001)

P. Cendon, Esistere o non esistere (2001), available at: www.personaedanno.it

G. Christandl, La risarcibilita' del danno esistenziale (Milano: Giuffrè, 2007)


I. Cividali, Minori sbattuti in prima pagina. Prime sanzioni contro i giornalisti (1994), 1 Minori e giustiziai, 139 et seq.


G. Comandé (ed.) Il danno nella giurisprudenza dei Giudici di Pace, Itinerari tematici e istruzioni per l’uso (Milano: Il Sole 24 Ore, 2009)


G. Comandé and R. Domenici (eds.), La valutazione delle macropermanenti, Profili pratici e di comparazione (Pisa: ETS, 2005), also available at www.lider-lab.org


G. Comandé, La rincorsa della giurisprudenza e la (in)costituzionalità dell’art. 2059 c.c. (2003) *Danno e resp.*, 771


G. Comandé, Il danno non patrimoniale: dottrina e giurisprudenza a confronto (1994) *Contratto e Impresa*, 870-937


A. D’Angelo ‘Una *deminutio* esistenziale che comincia per “νπερ”… (ovvero: la collocazione sistematica del danno da ipersessualità post-contusiva)’ (2007) *Danno e resp.*, 1030
J. C. Dammann, *Die Grenzen zulässiger Diskriminierung im allgemeinen Zivilrecht* (Berlin: Duncker&Humboldt, 2005) Also citated as: J. C. Dammann, *Die Grenzen zulässiger Diskriminierung*


G. De Marzo, ‘Nuovo danno non patrimoniale tra esigenze di descrizione e problemi di quantificazione’ (2005) *Corriere giur.*, 1709


De Matteis, Il danno esistenziale (2002) *Danno e resp.*, 565


C. Favilli, Il danno dei genitori in caso di nascita ”indesiderata”: profili di comparazione, in: G. Comandé (ed.), *Persona e tutele giuridiche*, (Torino: Giappichelli, 2003), 347

F. Ferrari (ed.), I Diritti fondamentali dopo la Carta di Nizza (Milano: Giuffrè, 2001)

R. Foffa, Il danno non patrimoniale per l’uccisione di un animale d’affezione (2008) *Danno e resp.*, 40


L. Jaeger and J. Luckey, Schmerzensgeld (Münster: ZAP, 2003) and 5th edn. (2009)

M. Kniesel, Die Versammlungs- und Demonstrationsfreiheit - Verfassungsrechtliche Grundlagen und versammlungsgesetzliche Konkretisierung (1992) NJW, 857-867

H. Kötz and G. Wagner, Deliktsrecht, 10th edn. (München: Luchterhand, 2006)


L. La Battaglia, La storia infinita dell’art. 2059 c.c.: quale via per le nuove esigenze di tutela? (2003) Danno e resp., 771


A. Laufs, Rechtsentwicklungen in Deutschland (Berlin: De Gruyter, 2006)


A. Laufs and E. Reiling, Schmerzensgeld wegen schuldhafter Vernichtung deponierten Spermas? (1994) NJW 775-776


R. Lieberwirth, Das Schmerzensgeld (Heidelberg: Verlag Recht und Wissenschaft, 1960).

H. Luntz, Assessment of damages for personal injury and death: general principles (Australia, LexisNexis Butterworths, 2006)


F. Mantovani, Il c.d. diritto del feto a nascere sano (1980) *Riv. it. med. leg.*, 244


G. Müller, Unterhalt für ein Kind als Schaden (2003) *NJW* 697-706


P. Müller, Punitive Damages und deutsches Schadensersatzrecht (Berlin, De Gruyter, 2000)


E. Navarretta, Danni non patrimoniali: il compimento della drittwirkung e il declino delle antinomie (2009) II NGCC, p. 81, also available online: Persona e Mercato, 3/Apr/2009 [www.personaemercato.it](http://www.personaemercato.it)


A. Pace, La garanzia dei diritti fondamentali nell’ordinamento costituzionale italiano: il ruolo del legislatore e dei giudici “comuni” (1989) *Riv. trim. dir. e proc. civ.*, 685-704

A. Palmieri, La rifondazione del danno non patrimoniale, all’insegna della tipicità dell’interesse leso (con qualche attenuazione) e dell’unitarietà, (2009) I Foro it. 123


G. Palombella, L’autorità dei diritti (Bari: Laterza, 2002)


M. Pedrazzoli, ‘Tutela della persona e aggressioni alla sfera psichica del lavoratore’ (2007) RTDPC, 1119-1157


G. Ponzanelli, Sezioni unite: il “nuovo statuto” del danno non patrimoniale. (2009) I Foro it. 134


G. Ponzanelli (ed.), Il risarcimento integrale senza il danno esistenziale (Padova: Cedam, 2007)

G. Ponzanelli, Oltre le duplicazioni: la babele delle voci di danno non patrimoniale risarcibili (2007) Danno e resp., 687

G. Ponzanelli, La lettura costituzionale dell’art. 2059 esclude il danno esistenziale (2007) Danno e resp., 316

G. Ponzanelli, PACS, obiter, miopia giornalistica e controllo della Cassazione sulla quantificazione del danno (2006) Corriere giur., 1379

G. Ponzanelli, La prova del danno non patrimoniale e i confini tra danno esistenziale e danno non patrimoniale (2006) *I Foro it.*, 2337


G. Ponzanelli, La Corte costituzionale si allinea con la Corte di cassazione (2003) *Danno e resp.*, 939

G. Ponzanelli, Ricomposizione dell’universo non patrimoniale: le scelte della Corte di cassazione (2003), *Danno e resp.*, 829-831

G. Ponzanelli, Danno non patrimoniale: responsabilità presunta e nuova posizione del giudice civile (2003) *Danno e resp.*, 713


G. Ponzanelli, Non c’è bisogno del danno esistenziale (2003) *Danno e resp.*, 547 et seq.


G. Ponzanelli, Sei ragioni per escludere il risarcimento del danno esistenziale (2000) *Danno e resp.*, 2000, 693

G. Ponzanelli, La Corte costituzionale, il danno non patrimoniale e il danno alla salute (1986) *I Foro it.*, 2053

G. Ponzanelli, Danno non patrimoniale e danno alla salute: due sentenze della Corte costituzionale (1979) *Resp. civ.*, 698

G. Ponzanelli, Fermenti giurisprudenziali toscani in tema di valutazione del danno alla persona, (1979) *Resp. civ. prev.*, 357 et seq


A. Procida Mirabelli di Lauro, ‘L’art. 2059 va in paradiso’ (2003), *Danno e resp.*, 831-835


A. Romano, Sono risarcibili; ma perché devono essere interessi legittimi? (1999) *I Foro it*, 3222


M. Rossetti, *Guida pratica per il calcolo di danni, interessi e rivalutazione* (Milano: IPSOA, 2006)


M. Rossetti, Quando l’offensore diviene vittima, (2004) 28 *Dir. e giust.*, 76-81


R. Sacco, ‘L’ingiustizia di cui all’art. 2043’ (1960) I Foro pad. 1420-1442


G. Scalfi, Errare humanum est, perseverare diabolicum (1976) Resp. civ. prev., 466


G. Schiemann, § 253 BGB, in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbu[ch, Buch 2 §§ 249-254 (Berlin: Sellier - de Gruyter, 2005), 270-298


E. Schneider and J. Biebrach, Schmerzensgeld: Grundlagen, Rechtsprechung, medizinische Begriffe, Mustertexte (Berlin: Herne, 1994)


G. Travaglino, Il danno esistenziale tra metafisica e diritto (2007) *Corriere giur.*, 524


C. Wagner, Das behinderte Kind als Schaden? (2002) NJW 3379-3381

A. Watson, Legal Transplants (Edinburgh: Scottish Academic Press, 1974)

A. Watson, Legal Transplants and European Private Law, EJCL. v. 4.4, December 2000

S. Wünsch, Comportamento scorretto della compagnia assicurativa e aumento dello Schmerzensgeld, in: F. D. Busnelli and G. Comandé (ed.) L’assicurazione tra codice civile e nuove esigenze: per un approccio precauzionale al governo dei rischi (Milano, Giuffrè, 2009) 231-258

S. Wünsch, La tipizzazione dei “nuovi” danni non patrimoniali tra spunti giurisprudenziali e riscontri comparatistica (2006) Danno e resp., 944-951


P. Ziviz, La fine dei dubbi in materia di danno esistenziale (2006) Resp. civ., 1439


P. Ziviz, La tutela risarcitoria della persona. Danno morale e danno esistenziale (Milano: Giuffrè, 1999), pp. 409 et seq