Essays

The Recoverability of the Loss of the Right to Life per se: A Brief European Overview

Paolo Sanna[*]

Abstract

Traditionally, with a few exceptions, in Europe, decisions of the courts have denied the recoverability of the loss of the right to life per se (and the subsequent transfer of the claim from the primary victim to his/her heirs). In a comparative perspective, the author, as a starting point, analyzing the Italian legal system, briefly retraces the topic, contrasting with the other most important European legal systems.

I. The Recoverability of the Loss of the Right to Life per se in the Italian Legal System

Historically, in the Italian legal system, there was no specific statute, so compensation for the non-pecuniary loss (*danno non patrimoniale*) suffered by a person killed through the negligence or misconduct of another was essentially judged by the courts on the basis of the thin and uncertain temporal thread that separates life from death.

Until recently, the majority of courts dealing with such cases have awarded damages exclusively when death occurred within a significant period of time after the moment of the injury, based on the assumption that only in this situation could an injury to health, generally called 'biological terminal damage' (*danno biologico terminale*), materialize. This damage would be recoverable, as a loss *iure proprio*, since it was an impairment of the victim's psycho-physical integrity and was suffered during the said time-period; the right to claim damages was transferable to the heirs, who were, per se, entitled to claim compensation (a so-called claim *iure successionis*) against the tortfeasor.[1]

[*] PhD in Private Law, University of Pisa; Adjunct Professor of Private Law, University of Pisa; Qualified for the position of Associate Professor of Private Law.

[1] Biological damage (*danno biologico*) is an injury to health, legally described as an injury to the physical and mental integrity of a person, that can be subject to medico-legal investigation, regardless of whether or not this injury impairs the person's ability to earn an income. For the recognition of the right to compensation for biological damage *iure successionis* (then awarded *sub specie* temporary total disability depending on the time of survival), arising only in the case 'when there is a significant lapse of time from the moment of the wrongful injuries until death' (*in cui intercorra un apprezzabile lasso di tempo tra le lesioni colpose e la morte causata dalle stesse*), see Corte di Cassazione 20 February 2015 no 3374, available at www.dejure.it.

In this way, this line of cases was intended to align with the *dicta* of *Corte Costituzionale* 27 October 1994 no 372,[2] which denied the autonomous recoverability of the loss of life per se under Art 2043[3] and Art 2059[4] of the Italian Civil Code. It followed the doctrine established by *Suprema Corte di Cassazione* in the early 1900s,[5] hence the judgment of *Corte Costituzionale* was based on the ontological difference between health, protected under Art 32 of the Italian Constitution,[6] and life.

It was only in the case of injury to health, once the exclusively compensatory purpose of tort law had been established, that the victim could benefit from compensation as a substitute source of satisfaction or solace. Otherwise, in the event of instantaneous or almost immediate death caused by an injury, there would be no presumption of compensation for the victim; in other words, because of the death of the person who should have been compensated, the compensation would have merely had a punitive purpose rather than being reparative and per se, it would have been unacceptable, since punishment is a characteristic function of the criminal law.

This is the reason why the recoverability of the loss of life has been affirmed solely in the event of injuries to health that caused the victim's death after a reasonable lapse of time, being treated as a normal personal injury; in these exclusive circumstances, damages could usefully serve their (exclusively) compensatory purpose.

The above-mentioned ruling of *Corte Costituzionale* (27 October 1994 no 372) was not overruled, even by the updated interpretation of the system for non-pecuniary damage of 2003 by the *Corte di Cassazione-Sezioni Unite*[7] and

[2] See Corte Costituzionale 27 October 1994 no 372, *Responsabilità civile e previdenza*, 996 (1994), with note by E. Navarretta: 'in the case at hand, the trial judge doubted the constitutional legality of Articles 2043 and 2059 of the Italian Civil Code in the case of an immediate death deriving from wrongful injuries'.

[3] Art 2043 Italian Code Civil, 'Compensation for unlawful acts', provides that: 'Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'.

[4] Art 2059 Italian Civil Code, 'Non-patrimonial damages', provides that: 'Non-patrimonial damages shall be awarded only in cases provided by law'.

[5] See Corte di Cassazione-Sezioni Unite 22 December 1925 no 3475, *Foro Italiano*, I, 828 (1926), according to which the victim was entitled to compensation only for damages occurring from the moment of the personal injury until his or her death but no compensation in the case of immediate death, because an instantaneous demise prevents the injury from becoming a loss recoverable by the tort victim.

[6] Art 32 of the Italian Constitution provides that: '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 health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person'.

[7] See, in particular, respectively Corte di Cassazione-Sezioni Unite 31 May 2003 nos 8827 and 8828, *Foro Italiano*, I, 2272 (2003), with note by E. Navarretta; *Danno e responsabilità*, 826 (2003), with note by F.D. Busnelli; *Responsabilità civile e previdenza*, 675 (2003), with notes by P. Cendon, E. Bargelli and P. Ziviz.

by the *Corte Costituzionale* itself,[8] when the compensation for general non-pecuniary losses was separated from non-pecuniary damage arising from a criminal offence (so-called moral-subjective damage) and thus from Art 2059 Italian Civil Code, so that it was exclusively to be considered in conjunction with Art 185 of the Italian Penal Code.[9] Therefore, non-pecuniary damages were also deemed to be recoverable in other cases in which, although there had been no criminal offence, the violation was serious enough to affect the core of one of the inviolable human rights protected under Art 2 of the Italian Constitution.[10]

The recent interpretation of Art 2059 Italian Civil Code has also altered the definition of biological damage as pecuniary damage, according to Art 2043 Italian Civil Code, meaning that it qualifies as a non-pecuniary loss, recoverable within the scope of Art 2059 Italian Civil Code. Within the more accurate development of the system of non-pecuniary loss, and specifically with judgments nos 26973 and 26974 of 2008,[11] the *Corte di Cassazione-Sezioni Unite* answered the question of law as to

> 'whether the so-called thanatological damage, ie damage resulting in instantaneous death, constitutes a particular category of non-pecuniary loss' ('*se costituisca peculiare categoria di danno non patrimoniale il c.d. danno tanatologico o da morte immediata*');

the Court still denied compensation for the loss of life per se, but recognized and gave compensation only for the moral damage ('*danno morale*'), in the light of the aforementioned broadening of the category, with the compensation intended as a means by which

> 'to give solace for the pain and suffering, shortly followed by death, undergone by the victim of personal injuries, who remained lucid during agony, consciously awaiting impending death' ('*ristoro della sofferenza psichica provata dalla vittima di lesioni fisiche, alle quali sia seguita dopo*

[8] See Corte Costituzionale 11 July 2003 no 233, *Foro Italiano*, I, 2201 (2003), with comment by E. Navarretta*; Danno e responsabilità,* 939 (2003), with notes by M. Bona, G. Cricenti, G. Ponzanelli, A. Procida Mirabelli di Lauro and O. Troiano.

[9] Art 185 of the Italian Penal Code, 'Restitution and compensation for damages', provides that: 'Every criminal offence requires restitution according to the civil rules of law. Any criminal offence which causes pecuniary or non-pecuniary damage obliges the wrongdoer, as well as any person who is responsible for the conduct of the wrongdoer according to civil law, to compensate that damage'. Historically, compensation for non-pecuniary damage, as defined by Art 2059 Italian Civil Code, was strictly linked to the moral-subjective damage caused by actions that constituted a crime under Art 185 of the Italian Penal Code.

[10] Art 2 of Italian Constitution provides that: 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled'.

[11] See Corte di Cassazione-Sezioni Unite 11 November 2008 nos 26972 and 26974, *Responsabilità civile e previdenza,* 38 (2009), with note by D. Poletti.

breve tempo la morte, che sia rimasta lucida durante l'agonia in consapevole attesa della fine').[12]

This explains why, in the past five years, a line of cases has considered as recoverable the moral damage from injury followed by death (so-called catastrophic damage) even when an extremely short time elapses from the moment of the injury until the time of death, provided that the victim remains conscious and has lucid awareness of his/her inevitable death. Compensation is therefore denied in the event of instantaneous or almost instantaneous death resulting from injuries when it is preceded by unconsciousness because in this case it would not be possible to suffer and thus undergo moral damage.[13] Consequently, *rebus sic stantibus*, although compensation is awarded for the damage *iure proprio* suffered by subjects linked to the deceased by marriage or blood or having a relationship with the deceased through marriage (and also *more uxorio* cohabitation), it is not the case that the primary victim who dies instantly or a short period after the moment of the injury but is in a state of unconsciousness from the time of the injury until the time of death, has a *iure proprio* right to compensation for the non-pecuniary damage deriving from the loss of his/her right to life (and therefore, a right to compensation that could be transmitted to the heirs *mortis causa*).

The doctrine accepted by the majority of the courts raises various issues both in practical terms and most importantly on the effectiveness of the protection of the right to life. Firstly, the criterion of a reasonable time having elapsed (or of a state of consciousness when the period of time is too short) as a *discrimen* between compensation and no compensation, besides not having a defined quantitative chronological dimension, makes the burden of proof extremely difficult. Secondly and above all, it weakens the protection of the right to life, which, although it is not expressly protected under the Italian Constitution of 1948 (unlike the more recent Constitutions of several other member states of the EU),[14] nonetheless implicitly emerges as a fundamental and inviolable right,

[12] See, in particular, Corte di Cassazione-Sezioni Unite 11 November 2008 nos 26973 and 26974, *Responsabilità civile e previdenza*, 38 (2009).

[13] See Corte di Cassazione 20 February 2015 no 3374 n 1 above.

[14] See Art 38 of the Polish Constitution of 1997 (*Rzeczpospolita Polska zapewnia każdemu człowiekowi prawną ochronę życia*) (*The Republic of Poland shall ensure the legal protection of the life of every human being*); Art 15, para 1, of the Spanish Constitution of 1978 (*Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de Guerra*) (*Everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment. Death penalty is hereby abolished, except as provided for by military criminal law in times of war*); Art 17 of the Slovenian Constitution of 1997 (*Človekovo življenje je nedotakljivo. V Sloveniji ni smrtne kazni*) (*Human life is inviolable. There is no capital punishment in Slovenia*); Art 21, para 1, of the Croatian Constitution, in the text from 2010 (*Svako ljudsko biće ima pravo na*

almost as the natural prerequisite for recognizing all other constitutionally inviolable rights. Even at the level of supranational law sources, the right to life is expressly set forth in many rules; to name a few: Art 3 of the Universal Declaration of Human Rights,[15] Art 2 of the EU Charter of Fundamental Rights[16] and Art 2 of the European Convention on Human Rights (ECHR).[17] Specifically, in the latter, the right to life is not regarded as, so to speak, a 'simple right' but it is instead deemed to be the primary and most important of all rights, because 'if one could be arbitrarily deprived of one's right to life, all other rights would become illusory'.[18]

These problematic issues have been highlighted by some Italian scholars, who have always had contrasting opinions[19] in this field. Among academic commentators in favour of the recoverability of the loss of right to life per se, there are some who propose listing the right to life under the heading of 'individual rights' and protecting it in the same way, although only for as long as it pertains to its holder and considering it as a right to be protected in the social interest when it is destroyed.[20]

Diverting from this position, in 2014 a judgment (no 1361) by the third civil section of the Italian High Court[21] additionally recognized the general and express

život) (*Every human being has the right to life*); Art 15, para 1, of the Slovakian Constitution from 1992 (*Každý má právo na život. Ľudský život je hodný ochrany už pred narodením*) (*Everyone has the right to life. Human life is worth protection even before birth*); Art 6, para 1, of the *Charter of Fundamental Rights and Freedoms*, part of the Czech Constitution of 1993 (*Každý má právo na život. Lidský život je hoden ochrany již před narozením*) (*Everyone has the right to life. Human life is worthy of protection even before birth*). Obviously, these are all relatively or extremely recent constitutions that were guided by the supranational European laws in expressly stating the protection of the human right to life.

[15] See Art 3 of the New York Convention, 10 December 1948, where it is explicitly stated that 'everyone has the right to life, liberty and security of person'.

[16] Art 2 of the Charter of Fundamental Rights as proclaimed in Nice in December 2000 (and later modified in 2007), entitled 'Right to life', provides that '1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed'.

[17] Ratified in Italy by legge 4 August 1995 no 848, the ECHR, in conjunction with Art 13, provides that the contracting States must guarantee in their domestic legislation the effective protection of the rights in the Convention, among which the right to life is stated in Art 2. The rule literally provides that 'Everyone's right to life shall be protected by law'. According to R.C.A. White and C. Ovey, *The European Convention on Human Rights* (Oxford: Oxford University Press, 5th ed, 2010), 143 'the obligation of states under the right to life consists of three main aspects, namely (1) the duty to refrain from unlawful killing, (2) the duty to investigate suspicious deaths, and (3) under certain circumstances the positive obligations to take steps to prevent the loss of life'.

[17] See D. Korff, *The Right to Life. A Guide to the Implementation of Article Two of the European Convention on Human Rights*, *Human Rights Handbooks*, no 8 (Strasbourg: Council of Europe Publishing, 2006), 6, available at https://tinyurl.com/yd5aey75 (last visited 30 June 2018).

[19] For discussion, see E. Navarretta, 'Danni da morte e danno alla salute', in F.D. Busnelli and M. Bargagna eds, *La valutazione del danno alla salute* (Padova: CEDAM, 4th ed, 2001), 261.

[20] See N. Lipari, 'Danno tanatologico e categorie giuridiche' *Rivista critica di diritto privato,* 528 (2012).

[21] See Corte di Cassazione 19 November 2013 no 1361, *Danno e responsabilità*, 388

compensation for thanatological damage in the event of instantaneous death, that is, regardless of the intensity of the suffering of the victim and his/her awareness of his/her impending death. In doing so, for the first time, the Court strongly questioned the consolidated line of decisions of the Italian High Court itself (although there have been several timid signs of dissent through the years[22] and more frequent dissent in the lower courts).[23] Such a *revirement* is based on two major assumptions. First, the social conscience does not want to leave a victim who has lost his/her life as a result of an unlawful act without any compensation and thus make killing cheaper than maiming. Second, human life has an exceptional and unique value[24] and its legal protection must be of

(2014), with note by G. Ponzanelli and R. Foffa; *Nuova giurisprudenza civile commentata,* I, 396 (2014), with note by A. Gorgoni. For a first overview, *Responsabilità civile e previdenza*, 492 (2014), with note by C.M. Bianca; *Foro Italiano*, I, 719 (2014), with note by A. Palmieri, R. Pardolesi, R. Simone, R. Caso and C. Medici. The High Court's ruling (although it is not immune from criticism) seems to have persuaded the majority of scholars, among them, see C.M. Bianca, 'La tutela risarcitoria del diritto alla vita: una parola nuova della Cassazione attesa da tempo' *Responsabilità civile e previdenza*, 492 (2014), (which is really one of the cultural references of the decision); G. Villanacci, 'Rilevanza e bilanciamento degli interessi nella qualificazione e quantificazione del danno' *Ius Civile*, 266 (2015); R. Simone, 'Il danno da perdita della vita: logica, retorica e sentire sociale' *Danno e responsabilità*, 795 (2014); P. Ziviz, 'Grandi speranze per il danno non patrimoniale' *Responsabilità civile e previdenza*, 89 (2014). For an explicitly critical view, see E. Bargelli, 'Danno non patrimoniale *iure hereditario*. Spunti per una riflessione critica' *Responsabilità civile e previdenza*, 728 (2014). See also Corte di Cassazione 16 October 2014 no 21917, available at www.dejure.it; Corte di Cassazione 5 December 2014 no 25731, available at www.dejure.it. In the latter case, based on the ontological diversity between biological damage and damage from loss of life, and having to judge on the admissibility of the appeal against the denial of the *iure hereditatis* to claim for thanatological damage*,* the court ruled that the plaintiff, in order to avoid the *no new-claim* rule, should have claimed under this head of damage from the beginning (which was not the case in that particular trial).

[22] See, for example, Corte di Cassazione 25 January 2002 no 887, available at www.dejure.it, which is at least partially in favour of granting compensation for the loss of life as such, in order to overcome the existing discrepancy between the non-recoverability of damages arising from instantaneous or almost immediate death caused by an injury and the recoverability of biological damage resulting in a later demise but only through legislation and in accordance with policy criteria that are respectful of domestic and international laws. See also Corte di Cassazione 12 July 2006 no 15760, available at www.dejure.it, where, *obiter*, the damage arising from loss of life is regarded as wrongful and *mortis causa* transferable as a claim of the deceased against the tortfeasor.

[23] See the most recent trial judge decisions: Tribunale di Brindisi 1 December 2014, *Questione Giustizia*, 14 January 2015; Tribunale di Vallo della Lucania 30 April 2014 no 158, unpublished; Corte Appello di Cagliari no 438 of 2014, unpublished; Tribunale di Brindisi 12 December 2013, available at https://tinyurl.com/y7vnwc77 (last visited 30 June 2018). For less recent cases, see Tribunale di Venezia 15 June 2009, *Danno e responsabilità*, 1013 (2010); Tribunale di Terni 4 March 2008, *Corriere del merito*, 803 (2008); Tribunale di Venezia 15 March 2004*, Foro Italiano,* I, 2256 (2004); Tribunale di Terni 20 April 2005, *Giurisprudenza italiana*, 2281 (2005); Tribunale di Santa Maria Capua Vetere 14 May 2003, *Giurisprudenza italiana*, 495 (2004); Tribunale di Foggia 28 June 2002, *Foro Italiano*, I, 3494 (2002); Tribunale di Tropea 28 May 2001, *Danno e responsabilità*, 1097 (2001). However, it is recognised that the Tribunale di Massa has been a pioneer regarding biological damage from death *iure hereditario* (for an in-depth discussion see E. Navarretta, *La valutazione* n 19 above, 282, fn 101).

[24] See Corte di Cassazione 23 January 2014 no 1361, *Foro Italiano*, I, 3, 719 (2014).

primary importance, as well as being distinct and autonomous from the legal protection of health;[25] therefore, its loss cannot be ignored by private law and must be compensated. At the same time, the third civil section of *Corte di Cassazione* has ruled that the loss of the right to life per se is an

> 'ontological and essential exception to the principle of non-recoverability of the damage resulting from the mere occurrence of a harmful event and the recoverability only of damage actually caused by a harmful event' ('*ontologica ed imprescindibile eccezione al principio della irrisarcibilità del danno-evento e della risarcibilità dei soli danni-conseguenza*').

Thus,

> 'the victim acquires the related right to claim compensation at the exact moment of the fatal injury, prior to the demise' ('il relativo diritto al risarcimento sorge in capo alla vittima, istantaneamente, al momento della lesione mortale, anteriormente all'*exitus*').

This ruling by the third section, for the first time openly challenging the traditional doctrine, has inevitably raised a judicial dispute that has been brought before the Joint Chambers of the Italian High Court,[26] in terms of the possibility of the recoverability *iure hereditatis* of the loss of the right to life per se in the case of instantaneous death caused by a wrongful act.

Nevertheless, the Joint Chambers of *Corte di Cassazione* (22 July 2015 no 15530)[27] upheld the traditional doctrine (as stated by the Constitutional Court in 1994 and by the Joint Chambers themselves in 2008), disappointing many scholars and receiving contrasting comments. The Joint Chambers reiterated that, in the event of an instantaneous or almost instantaneous death caused by injuries, a compensation *iure hereditatis* for the loss of life per se cannot be claimed but

> 'death causes both pecuniary and non-pecuniary losses to the relatives of the primary victim, who are compensated for such losses' ('*(...) la morte provoca una perdita, di natura patrimoniale e non patrimoniale ai congiunti che di tale perdita sono risarciti (...)*').

[25] ibid.

[26] Corte di Cassazione 4 May 2014 no 5056, *Responsabilità civile e previdenza*, 490 (2014).

[27] Corte di Cassazione-Sezioni Unite 22 July 2015 no 15530, available at https://tinyurl.com/ydf2r47j (last visited 30 June 2018); for the first strongly favourable comment on the decision, see E. Navarretta, 'Con il risarcimento del danno ' "È forse il sonno della morte men duro?" Riflessioni in margine alla Sezioni Unite della Cassazione no. 1530 del 2015' *giustiziacivile.com*, 14 September 2015, 2, and Id, 'La "vera" giustizia ed il "giusto" responso delle S.U. sul danno tanatologico iure hereditario' *Responsabilità civile e previdenza*, 1416 (2015); for a more in-depth and sometimes critical position, see F.D. Busnelli, 'Tanto tuonò, che…non piovve. Le Sezioni Unite sigillano il "sistema" ' *Corriere Giuridico*, 1206 (2015).

Therefore, on the one hand the Joint Chambers of the Italian High Court did not deem the novelty elements introduced by the third section of *Corte di Cassazione*, in case no 1341/2014 to be convincing, when supporting its own decision (the social conscience argument and the supposedly exceptional nature of the compensation for the loss of right to life per se). The first of these arguments was turned down, both because it is not a 'technically' adequate criterion to guide the interpretation of statute law (but is, at most, useful as an assumption to inspire reforms *de jure condendo*) and because it has the sole purpose of enriching the victim's heirs. The latter was, instead, considered to be an exception incompatible with tort law, based on the necessary subsistence of a loss relatable to a specific subject who in this case no longer exists and wide enough to frustrate the converse principle that tort law only compensates damage as a 'consequence' of a harmful event.

Conversely, the denial of the Joint Chambers of the High Court was grounded on the more usual 'negating' arguments according to the following: the damage for instantaneous death (or death occurring after a very short time) affects not health but life; the loss of the right to life, being, by its nature, a right enjoyed exclusively by its holder, is not recoverable after the instantaneous death of the claimant; tort law has only a compensatory purpose, while punishment is a characteristic function of the criminal law; the opinion that the denial of compensation for the loss of life per se makes the death of a victim 'cheaper' than his or her injury is groundless, since it is

> 'not demonstrated that the mere exclusion of the claim transferable to heirs necessarily entails a smaller compensation for the relatives' ('*è indimostrato che la sola esclusione del credito risarcitorio trasmissibile agli eredi, comporti necessariamente una liquidazione dei danni spettanti ai congiunti di entità inferiore*');

and finally, the principle of the full recoverability of all damages is not constitutionally recognized and the Constitution does not require criminal punishment to be accompanied by monetary compensation, especially since there is no subject to which such loss is traceable.

II. The Recoverability of the Loss of the Right to Life per se in the Main European Countries

The long-standing Italian doctrine of the non-recoverability of the loss of life per se is by no means unusual. In Europe, with the sole exception of Portugal,[28] the recoverability of the non-pecuniary loss of the right to life per se and its transferability *iure successionis* are generally denied by the courts, especially in

[28] See *infra*.

the event of the instantaneous death of the victim,[29] with arguments similar to those characterizing the Italian debate. At the root of this negative view, several recurring considerations can be found. First, the victim of an instantaneous death could not suffer any recoverable damage, so that the compensation would acquire an exclusively punitive purpose and per se would be unacceptable. Second, the instantaneous loss of life causes the contextual extinction of the victim's capacity to have rights and thus makes the *iure proprio* acquisition of the claim and its subsequent transferability *iure hereditario* impossible.[30]

On this basis, the almost unanimous opinion of academic commentators in Spain[31] and of the Spanish courts in the few cases in which the issue has been raised is that, in the event of instantaneous death, the loss of life is not per se a recoverable damage for the deceased and per se is not transferable *iure successionis*. In particular, so far as the courts are concerned, the Spanish High Court (*Tribunal Supremo*) has ruled on more than one occasion since the beginning of the twentieth century that the loss of life per se is not a recoverable loss.[32] More recently, the *Tribunal Supremo* ruled out the recoverability of that loss, at first in its judgment of 20 October 1986[33] and later, more explicitly, in its judgment of 19 June 2003, which reads as follows:

> 'están legitimadas para reclamar indemnización por causa de muerte "iure proprio", las personas, herederos o no de la víctima, que han resultado personalmente perjudicadas por su muerte, en cuanto dependen económicamente del fallecido o mantienen lazos afectivos con él; negándose mayoritariamente la pérdida del bien "vida" sea un daño sufrido por la víctima que haga nacer en su cabeza una pretensión resarcitoria transmisible

[29] See C. Van Dam, *European Tort Law* (Oxford: Oxford University Press, 2nd ed, 2013), 170; also E. Bargelli, 'Danno non patrimoniale "*iure hereditario*": spunti per una riflessione critica' *Responsabilità civile e previdenza*, 723-732 (2014), highlights how in the European legal systems the denial of the recoverability by the heirs of the non-pecuniary damage for immediate loss of life is almost unanimous. For a brief review of the French, German, English and Spanish systems see C.M. Bianca, 'La tutela risarcitoria del diritto alla vita' n 21 above, 504.

[30] This is the so-called Epicurean argument: *'Death, therefore, the most awful of evils, is nothing to us, seeing that, when we are, death is not come, and, when death is come, we are not. It is nothing, then, either to the living or to the dead, for with the living it is not and the dead exist no longer'*.

[31] For a view of the Spanish scholars' positions, see T. Cano Campos, 'La transmisión "mortis causa" del derecho a ser indemnizado por los daños no patrimoniales causados por la Administración' *Revista de Administración pública*, 122 (2013); see also A.M. Rodríguez Guitián, 'Indemnización por causa de muerte: Análisis de los ordenamientos jurídicos inglés y español' *InDret* (*Revista para el analisis del derecho*), 2-8 (2015). In this area, a point of reference is still the contribution by A.F. Pantaleón Prieto, 'Diálogo sobra la indemnización por causa de muerte' *Anuario de Derecho Civil,* 1567 (1983), which is structured as a dialogue between two fictional characters, *Primus,* who rejects the category of the damage for the loss of life as such, and *Secundus*, who is favourable to the argument.

[32] Among the first decisions in this regard, see Tribunal Supremo 19 February 1902, *Colección Legislativa,* volume 93, no 47 (1902).

[33] See Tribunal Supremo, 2ª, 20 October 1986, *Repertorio de Jurisprudencia,* 5702 (1986).

"*mortis causa*" a sus herederos y ejercitable por éstos en su condición de tales "*iure hereditatis*" ' (in the case of fatal injury are entitled to damages awards in their own right or "*iure proprio*" the persons, heirs or not heirs of the victim, who have been personally damaged, as soon as they economically depend on the deceased or are in a particularly close personal relationship to the victim; the majority of courts dealing with such cases denying the recoverability of the non-pecuniary loss of the right to life per se and, therefore, the heirs of the deceased person are not entitled to inherit any direct compensation for the death (*jure hereditatis*)).[34]

As an indirect proof of the non-recoverability of damages for loss of life per se, the table '*I del Baremo para la valoración de daños personales producidos por accidentes de circulación*' (Table I for the assessment of non-economic damage arising out of motor vehicle accidents), implementing the Legislative Decree 8/2004 '*sobre Responsabilidad Civil y Seguro Circulación Vehículos*' (On Liability and Insurance for Motor Vehicle Traffic), does not include, at least under the regulated area, the victim himself or herself among those who have a right to claim compensation for damages arising from his or her death.

In France, the outcomes are similar. In the absence of a specific statute, the courts[35] do not award any compensation for damages for '*perte de chance de survie*', even though they have created the category of the so-called damage *par ricochet*[36] and have acknowledged the transferability *iure successionis* of the claim for the non-pecuniary losses suffered by the victim.[37] Moreover, according to the French judges, the claim cannot be attributed to the deceased victim nor, consequently, can it be transferred by way of inheritance.[38] Furthermore, an acquired right to live for a statistically-determined time cannot be argued.

The German legal system does not allow the non-pecuniary loss arising from the instantaneous death of the victim of an unlawful act (with the subsequent transfer of the claim) to be recovered,[39] since § 253, subpara 2 of the *Bürgerliches*

[34] See Tribunal Supremo, 1ª, 19 June 2003, *Repertorio de Jurisprudencia*, 4244 (2003); Tribunal Supremo, 1ª, 4 October 2006, *Repertorio de Jurisprudencia*, 6427 (2006).

[35] E. Bargelli, n 29 above, 725.

[36] Ie damages resulting from a fatal unlawful act that violates the juridical sphere of persons holding protected interests and linked to the victim by a '*lien de droit*'.

[37] See Cour de cassation, chambre mixte, 30 April 1976 no 74-90.280 and no 73-93.014, available at https://tinyurl.com/y6ws3cbr (last visited 30 June 2018) which recognized the transferability of the claim to the victim's heirs, without any kind of restriction and regardless of the type of loss.

[38] See, most recently, Cour de cassation, chambre criminelle, 26 March 2013 no 12-82600, *Bulletin criminal*, no 69 (2013), and also *Responsabilité civile et assurances*, no 6 (2013), with note by L. Bloch.

[39] See H. Kötz and G. Wagner, *Deliktsrecht* (Munich: Beck, 10th ed, 2006), § 731, 284. In Germany, § 7 of the *Produkthaftungsgesetz* of 15 December 1989 exclusively regulates pecuniary losses suffered directly by the victim who afterwards dies because of an unlawful act and provides that persons lacking any means of subsistence must be compensated but from the different perspective of the infringement of the right to receive support.

Gesetzbuch (*Immaterieller Schaden*) does not include life among the protected interests.[40] In contrast, in Germany, the non-pecuniary loss in the event of non-instantaneous death is considered recoverable when death occurs within a significant period after the moment of the injury; this period of time can last from a few minutes to several weeks (the elapsed time and the state of consciousness of the victim are relevant exclusively for the quantum of compensation).[41]

The English system deserves a special mention because of its peculiarities. For decades, two obstacles have prevented both the victim and his/her relatives from being compensated for the loss of life. The first obstacle depended on the principle, *action personalis moritur cum persona* and the second on the doctrine stated by Lord Ellenborough in *Baker* v *Bolton* (1808), according to which the death of a human being could not be complained of as an injury in a civil court.[42] Crucial elements to overcome these obstacles were the *Fatal Accident Act* 1846 (better known as *Lord Campbell's Act*) and the *Law Reform* (*Miscellaneous Provisions*) *Act* of 25 July 1934.[43] The first created a new cause of action for the benefit of any dependant of the victim for any economic loss resulting from his/her death; the second stated that the right to compensation against the tortfeasor's estate, in the event of the tortfeasor's death and the right to claim compensation, when the victim dies because of the injuries, both survive and are to be defended or pursued by the executors or administrators.

So, in *Flint* v *Lovell* (1935), the House of Lords[44] had to decide for the first time if the shortening of life of a still-living person resulting from the serious injuries caused by an unlawful act constituted a specific recoverable non-pecuniary loss (and was not just a claim for pain and suffering); the decision was in the affirmative.[45] Besides the positive solution accepted by the House of Lords, the

[40] The rule provides that '*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*' ('*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*').

[41] See U. Magnus and J. Fedtke, 'Non-Pecuniary Loss under German Law', in W.V. Horton Rogers ed, *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Wien, New York: Springer, 2001), 114.

[42] 170 ER 1033 (King's Bench 1808).

[43] The *Fatal Accidents Act* 1846 was repealed and replaced by the *Fatal Accidents Act* 1976 and the latter was amended by the *Administration of Justice Act* 1982; see W. Van Gerven et al, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford and Portland: Hart Publishing, 2000), 107; S. Deakin et al, *Markesinis and Deakin's Tort Law* (Oxford: Oxford University Press, 7th ed, 2012), 854; A.M. Rodríguez Guitián, 'Indemnización por causa de muerte: Análisis de los ordenamientos jurídicos inglés y español' *InDret (Revista para el analisis del derecho)*, 5 (2015).

[44] (1935) 1 KB 354.

[45] The case concerned a claim by a sixty-nine year-old man who had suffered severe injuries as the result of the defendant's negligence. For an in-depth analysis see F.X. Conway,

judgment of the trial judge had to be reconsidered; in fact, although favourable, the judgment had considered the loss of life expectancy more from a 'qualitative' perspective than a 'quantitative' one, that is, as a shortening of life per se. The latter seemed to be the object of the recoverable damage, according to the House of Lords. However, there were many uncertainties, since the judgment of the Court lent itself to an interpretation as compensation for the pain and suffering undergone by the victim of the personal injury, who had remained lucid and in agony, consciously awaiting his impending death.[46] The latter solution was, however, clearly rejected by the House of Lords in *Rose* v *Ford*,[47] when it upheld a claim to compensation filed by the personal representative of the estate of a thirty-four year-old woman who had died from her injuries (the infection of an amputated limb) four days after a road accident caused by the defendant's negligence. The claim was upheld regardless of the victim's state of consciousness or of the timing of death. The right to bring an action, which arose at the moment of the death from negligence, was deemed eligible to be brought by the personal representative, in accordance with the *Law Reform (Miscellaneous Provisions) Act* 1934, as the damage was recoverable because it stemmed from the tortfeasor's unlawful act. Despite the many uncertainties on the assessment of damages, the doctrine stated in *Flint* v *Lovell* survived until 1982, when the *Administration of Justice Act* (*Part* I, *section* 1) came into force. The new statute repealed the right to damages for loss of expectation of life[48] and the damages for loss of expectation of life became ancillary to the damages for pain and suffering.

At present, English law recognizes the recoverability of damages for loss of expectation of life for the benefit of the victim by virtue of the *Administration of Justice Act* 1982 (*Part* I, s 1) but exclusively when there is a valid claim for pain and suffering, since the fear of having one's own life expectancy reduced cannot be, by itself, the basis for a valid claim for damages. In the event of the victim's instantaneous death, the only compensation allowed for her/his benefit is the

'Damages for shortened life' *Fordham Law Review*, 219-220 (1910); see also G. Belgrad, 'Compensation for negligently shortened life expectancy' *Maryland Law Review*, 24-25 (1969).

[46] G. Belgrad, n 45 above, 26.

[47] *Law Reports Appeal Cases*, 826 (1937). In this case, the trial judge, by interpreting the doctrine originating with the case of *Flint* v *Lovell*, ruled that the victim could not have suffered from the shortening of his life because he was in a state of unconsciousness (see also *Slater* v *Spreag*). The appeal court reversed the judgment of the court below, ruling that the principle in *Flint* v *Lovell* was applicable only to the case where a victim was living at the time of the action. This was maybe due to a fear, especially from the insurance business, of excessively extending the scope of the principle.

[48] The rule is clearly located in the section dedicated to the 'Abolition of certain claims for damages etc' and it provides that: 'In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries: (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced'.

reimbursement of reasonable funeral expenses, while compensation for any non-pecuniary loss is not allowed, even to the victim's family;[49] the sole exception is the so-called damages for bereavement.[50] In the case of a victim who loses consciousness instantaneously or shortly after the damaging event and dies within a week, the compensation in England and Wales for the non-pecuniary loss is, according to the *Judicial College Guidelines for General Damages*, a rather low amount (between one thousand one hundred pounds and two thousand two hundred and fifty-five pounds).

III. The Recoverability of the Loss of the Right to Life per se in Some European Projects for the Harmonization of European Tort Law

The *Principles of European Tort Law* (PETL) clearly reflect the *status quo* emerging from the above analysis of the legal systems of the main European countries. On the one hand, the *Principles* clearly include life among the interests that need to be protected most extensively[51] but, on the other hand, this assertion is not followed by the clear recognition of any right to compensation for the loss of the right to life per se.[52] This argument is grounded in the assumption that the PETL ascribe only a compensatory purpose to liability for tort,[53] in line with

[49] According to the doctrine of Lord Ellenborough in *Baker* v *Bolton* (1808) in a civil court, the death of a human being could not be complained of as an injury. In other words, not even the next of kin could have a claim for compensation in case of the death of a householder that was the result of another's negligence: this, as already noted, was the position until the coming into force of the *Fatal Accident Act* 1846.

[50] Damages for bereavement were first introduced by the *Administration of Justice Act* 1982 with the introduction of *section* 1A of the *Fatal Accidents Act* 1976. Damages for bereavement are exclusively for the benefit of certain categories of persons indicated in the statute and are currently set at no more than twelve thousand nine hundred and eighty pounds (the original amount was three thousand five hundred pounds). K.M. Stanton, *The Modern Law of Tort* (London: Sweet & Maxwell, 1994), 282, fn 87, observes that, in substance, damages for bereavement 'replaced the old award of damages for loss of expectation of life which, when it survived for the benefit of the victim's estate, achieved much the same purpose indirectly' (see *infra*).

[51] The PETL, presented in Vienna on 19 and 20 May 2005, is the result of an academic project for the standardization of civil liability carried out by the *European Group on Tort Law*. The PETL, Art 2:102, 'Protected interests', provides that '(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection'.

[52] See the PETL, Art 10:301, 'Non-pecuniary damages'.

[53] In the hypothesis considered, the compensatory purpose is deemed to be lacking and this is the only purpose that PETL seems to assign to tort law, as F.D. Busnelli critically highlights in 'Deterrenza, responsabilità civile, fatto illecito, danni punitive' *Europa e diritto privato,* 911-913 (2009). The author covers similar considerations when referring to the *Principles of European Law: Non-contractual Liability Arising out of Damage Caused to Another*. For recent general considerations on the PEL and the PETL, see M. Serio, 'La responsabilità civile

the current developments in European tort law.[54]

Even clearer is the refusal that emerges from Art VI – 2:202 of the *Draft Common Frame of Reference* (DCFR) of 2012.[55] The rule attributes a legal nature to the non-pecuniary loss suffered by a person as a result of the death or the damage to the physical integrity of another who is linked to that person by either affective relations or a blood relationship (see § 1). Subsequently, the article also provides – for the scenario where the victim dies because of someone's tortious act – for the recoverability of: the damage of a legal nature suffered by the deceased but only from the moment of the injury until death and its *iure successionis* transferability to the entitled persons (see § 2(a)); the reasonable funeral expenses for whomever incurs them (see § 2(b)); and the loss of maintenance or alimony suffered by a natural person who was maintained by the deceased or, had the death not occurred, who would have been maintained under statutory provisions or to whom the deceased provided care and financial support (see § 2(c)). The comment clarifies that the rule is grounded on the principle that death per se is not damage under tort law, so that the deceased could not make any claim on the basis of death per se, nor could the private law legal system assign to the heirs or to other entitled persons any quantifiable economic value, since human life is priceless.

IV. Some Cracks in the Wall

As is demonstrated in this brief overview, the denial of the recoverability of the damage for the loss of life per se is one of the few standard principles in the field of non-pecuniary loss at a European level, which is otherwise a more inconsistent and diverse field than that of pecuniary damage, especially regarding the criteria and the conditions for assessment. This is mainly for policy reasons but also because of the historical and social *milieu* of each judicial system[56] and numerous other factors, such as the kind of socio-economic system and the average income levels, living standards, and healthcare standards.

The wall of non-recoverability, although still quite solid from a panoramic perspective, seems weaker when inspected more closely. In relation to this, it is important to note the recurring criticisms of the traditional opinions that are

in Europa: prospettive di armonizzazione' *Europa e diritto privato*, 339-353 (2014).

[54] For a general view, see F.D. Busnelli, n 53 above.

[55] See the English version of this Article, *sub* Book VI, DCFR, '*Non-contractual liability arising out of damage caused to another*' available at https://tinyurl.com/yactwqxa (last visited 30 June 2018). The DCFR was written by the Study Group on a European Civil Code and by the Research Group on EC Private Law (Acquis Group) coordinated by Christian von Bar, Eric Clive and Hans Schulte-Nolke.

[56] See C. Salvi, 'Il risarcimento integrale del danno non patrimoniale, una missione impossibile' *Europa e diritto privato,* 523 (2014).

brought by many European legal theorists.[57] These criticisms are based, among other considerations, on the inherent inconsistency between deeming the right to life to be the most important of all rights and denying any compensation for its unlawful loss;[58] moreover, damages in respect of other, less 'important' rights are recoverable, often with compensation in the millions (eg for breaches of the right to privacy).[59]

Further, it is a widely-held belief that the traditional position makes it cheaper for the tortfeasor to kill than to maim;[60] at the same time, there would be no reason to worry about double compensation to the heirs (for the non-pecuniary damage suffered *iure proprio* and for the *iure hereditario* claim for the loss of the life of the immediate victim of the wrongful act), since the compensation would in any case be for different losses.[61]

Even the courts tend to use various strategies to erode the traditional doctrine somewhat, maybe in recognition of its subtle injustice, although they appear to adhere to it, at least in principle. In Italy, before the judgment of the third section of the High Court in 2014 theatrically changed the *status quo,* this happened rather cryptically, with the doctrine being softened up,[62] by, for example, taking aim at the criterion of the 'significant lapse of time from the moment of the wrongful injuries until death', the length of which has been reduced further and further in order to award compensation for the non-pecuniary

[57] See, among others, G. Brüggemeier, *Civil Liability Law in Europe, China, Brazil and Russia. Texts and Commentaries* (Oxford: Oxford University Press, 2011), 153; F.D. Busnelli, 'Tanto tuonò, che...non piovve. Le Sezioni Unite sigillano il "sistema" ' n 27 above, 1206; T. Cano Campos, n 31 above, 127; N. Lipari, n 20 above, 528; E. Vincente Domingo, 'El daño', in L.F. Reglero and J.M. Busto Lago eds, *Tratado de Responsabilidad Civil* (Cizur Menor: Thomson Reuters Aranzadi, 5th ed, 2014), vol I, 318. For an overview of the opinions of German scholars, see H. Kötz and G. Wagner, n 39 above.

[58] See G. Brüggemeier, n 57 above.

[59] This is most evident in the English legal system, where, as has already been said, any right to compensation for loss of life is denied and the law awards only twelve thousand nine hundred and eighty pounds as bereavement damages to those who are entitled. In contrast, the violation of a famous singer's privacy by a tabloid newspaper, which published a defamatory statement concerning an alleged diet, was worth three hundred and fifty thousand pounds to the victim. The disparity is so evident that it has also been highlighted by the media: see T. Heyden, 'How is a life worth £12,980?' available at https://tinyurl.com/nvpsoeg (last visited 30 June 2018). Similarly, in Italy, instead of the next-of-kin of the victim being adequately compensated for the death of their relative, compensation of a million euros was awarded at first instance to a famous soccer player for a breach of his right to privacy. This created a scandal but on appeal the amount of the compensation was drastically reduced, to eighty thousand euros.

[60] See, for example, Tribunale di Venezia 15 March 2004, *Foro Italiano*, I, 2256 (2004) and, among scholars, see, for example, A. Palmieri and R. Pardolesi, 'Di bianco o di nero: la *querelle* sul danno da morte' *Foro Italiano,* I, 763 (2014). The authors note with bitter irony that is better not to take prisoners on zebra crossings; see also C. Van Dam, *European Tort Law* n 29 above, 170.

[61] Most recently, see T. Cano Campos, n 31 above, 129.

[62] See P. Ziviz, 'Perdita della vita come danno conseguenza', available at https://tinyurl.com/yb9qkwd8 (last visited 30 June 2018).

loss suffered by the victim, even when death occurred within a few hours of the injury.[63] Another strategy was to emphasize the state of lucid agony of the victim[64] (and in some cases even to disregard the victim's state of consciousness)[65] or to widen the chances of the victim's relatives recovering the loss of life per se as a loss *iure proprio*.

In 2007, for the first time, the French High Court, civil section (*Cour de cassation, chambre civile*)[66] awarded damages *iure successionis* to the parents of a girl who had died in consequence of medical negligence, for the '*perte de chance de n'avoir pas vécu plus longtemps*' (loss of the chance of living longer). Subsequently, the same French *Cour de cassation* (*chambre criminelle*)[67], in its decision of 23 October 2012, upheld the judgment of 26 April 2011 of the Nouméa Appeal Court, which had granted to the parents of a boy who had died three hours and thirty minutes after a road accident, compensation *iure successionis* for the pain and suffering of the victim and different (and much more conspicuous) compensation for '*la perte de chance de survie*' (loss of chance of survival) or '*préjudice de vie abrégée*' (damage for shortened life). Then again, also granting compensation for the '*préjudice de vie abrégée*', is a solution that could overcome the objection according to which the loss of life per se, since it is the mere occurrence of an event, is not recoverable. From this latter perspective, the right to life is an intangible asset and therefore the injury causes damage that has to be evaluated on the basis of logical-legal considerations and not on the basis of time, in the same way as an injury to a protected interest. Therefore, the damage is not death per se but rather the fact that the victim is deprived of his right to survive – or his attitude to survival – which is linked to the enjoyment of life.[68]

This is not a new conclusion and appears to echo, *mutatis mutandis* and given the differences in the common law legal system, the decision of the English House of Lords in the *Flint* v *Lovell* case,[69] which seems also to have inspired the most recent French case law recognizing the '*préjudice de vie abrégée*'. However, the English case law currently seems to show that there is

[63] Only sixteen hours were needed by Corte di Cassazione 20 February 2015 no 3374, available at www.dejure.it, to grant compensation for biological damage; only thirty minutes were deemed sufficient for the recognition of moral damage by Corte di Cassazione 8 April 2010 no 8360, available at www.dejure.it.

[64] See Corte di Cassazione 10 January 2011 no 1072, available at www.dejure.it; most recently, Corte di Cassazione 5 December 2014 no 25731, available at www.dejure.it.

[65] For example, Corte di Cassazione 6 October 1994 no 8177, *Foro Italiano,* I, 1852 (1995), with note by R. Caso, awarded moral-subjective damages for a comatose victim.

[66] See Cour de cassation, première chambre civile, 13 March 2007, *Responsabilité civile et assurances,* no 7, comm. 207 (2007), with note by S. Hocquet-Berg.

[67] See Cour de cassation, chambre criminelle, 23 October 2012 no 5478, available at https://tinyurl.com/y84wdzhr (last visited 30 June 2018).

[68] See P. Ziviz, 'Riflessioni sulla perdita di chances di sopravvivenza' *Responsabilità civile e previdenza*, 393 (2014).

[69] See n 44 above.

some discontent with the resolution of the *Administration of Justice Act* 1982, which seriously diminishes the compensation relating to loss of life and overturns the doctrine in *Flint* v *Lovell*. An example of this comes from an important decision from 2014 of the English Court of Appeal (Civil Division) (*Kadir* v *Mistry and others*)[70]. The Court of Appeal, having to decide the case of a woman who had died prematurely of a tumour that, through negligence, had been diagnosed late and consequently for which the treatment had been delayed, awarded compensation (in an amount that was not indicated) for the loss of expectation of life but denied compensation for pain and suffering, on the grounds that the victim would have suffered even in the event of a timely diagnosis and treatment. At the same time, the Court ruled that the prerequisite of the 'awareness that his expectation of life has been so reduced', provided for by the *Administration of Justice Act,* did not need to be proved on the basis of direct evidence but could be proved on the basis of circumstantial evidence.

Finally, there are many decisions at an international and European level that are openly favourable to the recoverability of damages for the loss of life per se.

Firstly, this happens, as has already been noted, in the Portuguese legal system. After a contrary ruling in 1969, where the judges simply granted compensation for pain and suffering from the moment of the injury until death,[71] the *Supremo Tribunal de Justiça* made an award of damages and recognized the transferability of the claim *iure successionis* for the first time in its judgment of 17 March 1971,[72] under Art 496 of the Portuguese Civil Code (1966).[73] In the past, the question raised many doubts among scholars but today the great majority of academic commentators agree with the doctrine held by the majority of the courts[74] and note that it is commendable because of its double social purpose both of the prevention and suppression of the spread of crime and of responding to a loss that deserves compensation at the private law level.[75] This is the right choice, given the fact that, when the injury causes the instantaneous death of the victim, it would be treated as more severe and therefore to result in compensation;[76] it is also the correct choice in the protection

[70] See Court of Appeal (Civil Division) *Kadir (Personal Representative of the Estate of Saleha Begum, Deceased)* v *Mistry & Ors*, 26 March 2014, All England Report (D) 247 (2014).

[71] See Supremo Tribunal de Justiça, 12 February 1969, *Boletim do Ministério da Justiça* 184º, 161.

[72] See *Boletim do Ministério da Justiça* no 205, 150.

[73] The Article, 'Danos não patrimoniais', in the 1966 text, was amended by law 30 August 2010 no 23.

[74] More recently, see Supremo Tribunal de Justiça, 14 December 2016 7.ª Secção, available at https://tinyurl.com/y85ok4k6 (last visited 30 June 2018).

[75] See D. Leite De Campos, 'A Indemnização do Dano da Morte' *Boletim da Faculdade de Direito de Coimbra,* 24 (1974).

[76] F.M. Pereira Coelho, *Direito das Sucessões* (Coimbra: 1992), 70, who adds that without this rule it would be better for the tortfeasor that the victim died instantly.

of rights by hierarchy. Loss of the right to life per se must be recoverable, since all legal sources consider the right to life as the most important of all rights.[77] More recently, in Portugal, compensation for the loss of life was expressly recognized under Art 2 of Decree no 377 of 26 May 2008, concerning the extrajudicial assessment of losses resulting from traffic accidents.[78]

Secondly, at supranational level it is important to note the decisions of the European Court of human rights, which has many times awarded compensation for non-pecuniary damage deriving from the loss of the right to life per se, under Art 2 ECHR. However, this was not a general principle but was only applied to cases of violation perpetrated by the acceding State towards its citizens (ie so-called vertical relations, as in *Keenan* v *The UK*)[79] and excluded relationships between private parties (so-called horizontal relationships) because the Convention does not impose an obligation on the Contracting States to award compensation to victims for non-pecuniary losses.[80]

Undoubtedly, these timid signs from some court decisions and the more vigorous ones from some legal scholars are only small cracks that, at present, are not enough to demolish the foundations of the wall that prevents damages being given for the loss of life per se. It is also premature to say if those cracks, without specific statutory measures, will widen and bring down the wall (at least partially, in some European areas). Certainly, the arguments regarding the exclusively compensatory purpose of tort law or the extinction of the capacity to have rights, even though they are far from trivial, should not be an obstacle, since, as a matter of method, the protection of life requires the traditional legal

[77] See A.G. Dias Pereira, 'Portuguese Tort Law: A Comparison with the Principles of European Tort Law', in H. Koziol and B.C. Steininger eds, *Tort and Insurance Law Yearbook* (Wien: Springer, 2004) 644.

[78] See H. Koziol and B.C. Steininger, *European Tort Law 2009* (Berlin: De Gruyter, 2010), 504. The provision was issued by the implementation of the 3rd Chapter of the 2nd *Decreto-Lei* 21 August 2007 no 291. The rule is entitled '*Danos indemnizáveis em caso de morte*' (Recoverable damages in case of death) and at (a) provides that, in the event of death, there has to be compensation for '*a violação do direito à vida e os danos morais dela decorrentes, nos termos do artigo 496.º do Código Civil*' (a violation of the Right to Life and of the resulting moral damages under art. 496 of the Civil Code).

[79] See Eur. Court H.R., *Keenan* v *The United Kingdom*, Judgment of 3 April 2001, available at https://tinyurl.com/ya52y7ka (last visited 30 June 2018). C. Van Dam, *European Tort Law* n 29 above, 170, notes that 'although the consequences for the States remain quite modest, this positive obligation to protect life is of increasing importance in the European Court's case law'.

[80] See Eur. Court H.R., *Zavoloka* v *Latvia*, Judgment of 7 July 2009, available at https://tinyurl.com/yanwnk47 (last visited 30 June 2018). In the case, regarding the death of a twelve year-old girl from a road accident, the tortfeasor was ordered solely to provide reimbursement for the funeral costs of two thousand six hundred Euros. Hence, the court noted the lack of effectiveness of the right to the protection of life but was prevented from doing more by the impossibility of extending the rule in the *Keenan* case, since the Court stated that the Eur. Court H.R. does not impose on the States an obligation to grant compensation in favour of victims for non-pecuniary damage.

categories to be updated, and not the reverse.[81] Finally, in the absence of any clear indication from the lawgiver on the matter of *quantum*, neither can the customary observation, stemming from Roman law,[82] that 'human life is priceless', be an obstacle to recoverability. In fact, as per Lord Wright's words in the *Flint* v *Lovell* case,

> 'it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all, because none would be adequate. The judge or jury must do the best they can, in the circumstances, in this case as in other cases'.

[81] See G. Villanacci, n 21 above.
[82] *Cum liberum corpus aestimationem non recipiat* (D. 9.1.3).