Non-Pecuniary Damages: A New Decalogue

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Abstract

In the perspective of a personalisation of personal damage and a downsizing of the rigidity of pre-established tabular criteria, we analyse what has been achieved by the Third Section of the Italian Court of Cassation (*Corte di Cassazione*), a little more than a five-year period after the Italian Court of Cassation-Joint Sections of November 2008, for which the protection of the human person and the integrity of the compensation of this value are central.

I. «Abstract Classificatory Taxonomies» and 'Revirement' of the Italian Court of Cassation (*Corte di Cassazione*)

An unhoped-for development was achieved by the Third Section of the Italian Court of Cassation (*Corte di Cassazione*) with a view to the personalisation of personal injury and an appropriate reduction in the rigidity of the pre-established tabular criteria. This was just over five years following the pronouncement of the Joint Sections (of the Italian Court of Cassation) of 11 November 2008,[1] for whom the protection of the human person and his full compensation are central.

Consequently, after these pronouncements of 2008 (so-called 'pronuncements of San Martino'), aimed at affirming a statute of non-pecuniary damage suffered by the person for the new millennium according to a unitary meaning, a jurisprudential orientation was adopted which aims at configuring further additional compensation items, such as damage due to the loss of a relationship and damage to psychological health, when the victim or the next of kin are injured due to the catastrophic death of the former[2] or in the case of a macro-

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[1] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972 [and no 26973, 26974, 26975], *Rassegna di diritto civile*, 499 (2009). On this subject, see: P. Perlingieri, 'L'onnipresente art. 2059 c.c. e la "tipicità" del danno alla persona' *Rassegna di diritto civile*, 520 (2009); also refer to A. Malomo, 'Responsabilità civile: unitarietà della tutela della persona umana e atipicità delle situazioni da tutelare' *Corti salernitane*, 127 (2011).

[2] Corte di Cassazione 8 May 2015 no 9320, *Massimario Giustizia civile*, 2015; in a different sense, Corte di Cassazione 27 August 2015 no 17210, *Guida al diritto*, 57 (2015); Corte di Cassazione 20 August 2015 no 16992, *Danno e responsabilità*, 1127 (2015), with an unfavourable commentary by G. Ponzanelli, 'La III Sezione: tabelle, risarcimento integrale, voci di danno'; see Corte di Cassazione 23 January 2014 no 1361, *Danno e responsabilità*, 363 (2014); differently Corte di Cassazione-Sezioni

injury suffered by the latter.[3]

These injuries, 'various and others', must be quantified in a personalised manner regardless of the tabular settlement. Where there is moral suffering, which takes the form of the violation of a fundamental right, it is argued that it should be recognised autonomously from any biological damage as well as any damage inherent to dynamic-relational aspects pursuant to Art 138 of the Italian Private Insurance Code. This is due to it representing a compensation item in its own right and does not entail the risk of duplicate compensation. It is important that it is adequately proved and included in the case so as to make it possible for the judge to correctly assess it and, consequently, appropriately compensate the damage caused.[4] Not only. In the assessment, the judge may also take into account «presumptions and notoriety, if necessary, exclusively».[5] All the more so, if the tort has strongly deteriorated the personal relationships in the affective context, since the victim's next of kin has to provide for any needs of the latter (in the case in point, the son) with relative corrosion of the parental relationship, the damage to the interest of a non-pecuniary nature – defined by the majority in doctrine and jurisprudence as non-pecuniary damage, equal to the disruption of the daily habits of the family member who has become the carer, forced into heavy and unthinkable rhythms of life due to the imperishable commitment of having to take care of every aspect of the daily life of his son, who has survived, but is severely disabled – requires to be repaired according to the protection provided by Art 2059 of the Italian Civil Code –, for the author according to Art 2043 of the Italian Civil Code –[6] since it is the injury of a constitutionally protected personal interest.[7]

unite 22 July 2015 no 15350, *Foro Italiano*, I, 2682 (2015).

[3] Cf Corte di Cassazione 14 January 2014 no 531, *Diritto di famiglia e delle persone*, I, 1067 (2014); Corte di Cassazione 3 October 2013 no 22585, *Foro italiano*, I, 3433 (2013); Corte di Cassazione 20 November 2012 no 20292, *Danno e responsabilità*, 129 (2013).

[4] See Corte di Cassazione 9 June 2015 no 11851, *Foro italiano*, I, 2737 (2015), with critical remarks by G. Ponzanelli, 'Incertezze sul risarcimento del danno alla persona: sofferenza e qualità della vita in r.c. auto'.

[5] Corte di Cassazione 20 April 2016 no 7766, *Danno e responsabilità*, 720 (2016) with a favourable commentary by P.G. Monateri, 'La fenomenologia del danno non patrimoniale', 725, and another unfavourable commentary by G. Ponzanelli, 'Postfazione a Monateri', 727-728. See Corte di Cassazione 17 September 2019 no 23146, available at www.dejure.it, according to which 'the legal paradigms governing presumptions must be applied, and the necessary consequence in terms of suffering must be deduced from the known fact indicated'.

[6] See A. Malomo, *Responsabilità civile e funzione punitiva* (Napoli: Edizioni Scientifiche Italiane, 2017), 140, footnote no 312. This is a general clause of extended scope in accordance with the principle of solidarity. (Art 2 Italian Constitution): P. Perlingieri, 'I princípi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali Sisdic*, 1, 13 (2017); see also G. Perlingieri, 'Sul giurista che come «il vento non sa leggere»' *Rassegna di diritto civile*, 399 (2010); Id, 'Sul criterio di ragionevolezza' *Annali Sisdic*, 39, footnote no 40 (2017). See S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffré, 1967), 92, 105.

[7] Cf Corte di Cassazione 14 January 2014 no 531 n 3 above, 1067; Corte di Cassazione 3 October 2013 no 22585 n 3 above, 3433; Corte di Cassazione 20 November 2012 no 20292 n 3 above, 129.

II. Dynamic-Relational Damages

In the light of the orientation that emerged from the Third Section–[8] and supported for some time by the most attentive doctrine,[9] but according to others in divergence with respect to the above-mentioned 'pronouncements of San Martino' of 2008–[10] the new 'statute of non-pecuniary damage' allows for an existential lesion to be qualified when not only the health of a person is affected, but also when the dynamic-relational sphere is.[11]

The «all-encompassing nature» to be considered in the quantification of damage means that «in the liquidation of any non-pecuniary damage, the judge must take into account all the consequences that have derived from the damaging event, without exception, with the concomitant limitation of avoiding duplicate compensation, attributing different names to identical damage, and not exceeding a minimum threshold of appreciation, in order to avoid so-called 'small-claims' compensation».[12] The careful assessment to be carried out regarding the inner aspect of the loss (moral suffering) and its capacity to modify a person's daily life for the worse (so as to evoke so-called existential

[8] See Corte di Cassazione 31 January 2019 no 2788, *Nuova giurisprudenza civile commentata*, I, 279 (2019); Corte di Cassazione 27 March 2019 no 8442, available at www.utetgiuridica.it; Corte di Cassazione ordinanza 29 March 2019 no 8755, available at www.ilcaso.it; Corte di Cassazione 20 October 2020 no 22858, available at www.dejure.it.

[9] See G. Ponzanelli, 'Le sezioni unite di San Martino abbandonate progressivamente dalla Terza Sezione e dal legislatore' *Nuova giurisprudenza civile commentata*, II, 1349 (2018); firstly, G. Ponzanelli, 'Il decalogo sul risarcimento del danno non patrimoniale' *Nuova giurisprudenza civile commentata*, I, 836 (2018); G. Ponzanelli, *Postfazione* n 5 above, 727; Id, 'Il nuovo statuto del danno alla persona è stato fissato, ma quali sono le tabelle giuste?' *Nuova giurisprudenza civile commentata*, I, 277 (2019); C. Castronovo, 'Il danno non patrimoniale dal codice civile al codice delle assicurazioni' *Danno e responsabilità*, 15 (2019) reiterates that he has already been critical of the unified sections of the Italian Court of Cassation [C. Castronovo, 'Danno esistenziale: il lungo addio' *Danno e responsabilità*, 1 (2009)], insofar as they made the disorder possible, as demonstrated by the jurisprudential orientation of the Third Section (of the Italian Court of Cassation) aimed at overturning the assumption of equilibrium, which, according to the author, was never achieved; G. Alpa, 'Osservazioni sull'ordinanza n. 7513 del 2018 della Corte di cassazione in materia di danno biologico, relazionale, morale' *Nuova giurisprudenza civile commentata*, II, 1330 (2018); M. Franzoni, 'Danno evento, ultimo atto?' *Nuova giurisprudenza civile commentata*, II, 1337 (2018); R. Pardolesi, 'Danno non patrimoniale, uno e bino, nell'ottica della Cassazione, una e Terza' *Nuova giurisprudenza civile commentata*, II, 1344 (2018); secondo C. Salvi, 'Diritto postmoderno o regressione postmoderna' *Europa e diritto privato*, 871 (2018), there has been a disconnection with the nomothetic function of the Joint Sections (of the Italian Court of Cassation). Similarly G. Comandé, 'Dal sistema bipolare al sistema biforcuto: le linee guida della Cassazione sul danno non patrimoniale a dieci anni dalle sentenze dell'Estate di San Martino' *Danno e responsabilità*, 157 (2019). On the topic, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 372-374.

[10] Cf P.G. Monateri, 'Danno biologico e danni da lesione di altri interessi costituzionalmente protetti' *Nuova giurisprudenza civile commentata*, II, 1341 (2018); as well as P. Cendon, '*Gemütlichkeit*: dieci fragranze esistenziali in Cass. n. 7513/2018' *Nuova giurisprudenza civile commentata*, II, 1333 (2018).

[11] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[12] ibid; firstly, Corte di Cassazione 7 March 2016 no 4379, *Foro italiano online*.

damage) – «without any compensatory automatism being predictable», since such consequences 'are [...] never catalogued according to universal automatisms' –[13], together with the examination of the 'peculiarities and [...] exceptionality of the concrete case', is prodromic, as well as unavoidable, in order to allow for 'an adequate personalisation of the damage'.[14]

The negation expressed as 'abstract classificatory taxonomies' leads to a pondered evaluation of the

> 'real phenomenology of personal injury, denying which the judge risks incurring in an even more serious error, namely that of substituting a legal meta-reality for a phenomenal reality'.[15]

The issue that comes before the court always regards human suffering inflicted to which an adequate remedy must be provided if the judge is to ascertain injuries caused to the person and their fundamental rights. According to the majority of jurisprudence and doctrine, this would be done according to Art 2059 of the Italian Civil Code;[16] but, for another part of the doctrine, reasonably in accordance with Art 2 of the Italian Constitution and Art 2043 of the Italian Civil Code.[17]

Therefore, the opinion of the Court of Cassation appears to be acceptable, ie, that it is necessary to carry out a

> 'reading of the 2008 pronouncements [...] not according to a formal-deductive interpretative logic, but through an inductive hermeneutics which, after having identified the indispensable subjective situation protected at a constitutional level [...], then allows the judge to decide on the merits of the case. After identifying the essential subjective situation protected at a constitutional level [...], it then allows the judge to carry out a rigorous analysis and consequently a rigorous assessment, in terms of proof, of both the internal aspect of the damage (moral suffering) and its modifying impact *in pejus* with regard to daily life (so-called existential damage, in this sense correctly understood, or, if preferred a less disturbing lexicon,

[13] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[14] ibid

[15] ibid 720. The importance of this 'approach' is highlighted by P.G. Monateri, *La fenomenologia* n 5 above, 725.

[16] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 720.

[17] As discussed by P. Perlingieri, *Il diritto civile* n 9 above, 358. In particular, the Art 2 of the Italian Constitution provides: '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'; the Art 2043 of the Italian Civil Code provides: 'Qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno'; the Art 2059 of the Italian Civil Code provides: 'Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge'.

damage to the life of relationships)'.[18]

This way of reasoning outlines a 'construction of categories that do not erase the phenomenology of personal damage through sterile unifying formalisms', although it would have been desirable to argue in terms of the need to always identify 'upstream' the damaged interests, so as to be able to consider, 'downstream' of this careful examination, both the 'inner suffering' as well as the 'relational dynamics of a life' that have been fatally changed.[19]

The parallelism between the need for full reparation of the injury caused to the duality of subjective situations (not coincident) such as the 'inner pain' and/or the 'significant alteration of daily life', and the provisions of Art 612 *bis* of the Italian Penal Code, which, in terms of persecutory acts, outlines both situations to the realisation of which must follow the sanction (in particular, imprisonment) for 'whoever', precisely,

> 'with repeated conduct, threatens or harasses someone in such a way as *to cause a persistent and serious state of anxiety or fear* (or to give rise to a well-founded fear for one's own safety or that of a close relative or of a person associated to them through a relationship of affection), or *to force them to alter their daily habits*'.[20]

Moreover, the findings of the Third Section, namely that 'the category of 'existential' damage is 'undefined and atypical', since it is «the same dimension of human suffering, in turn, 'undefined and atypical' »,[21] implies overcoming the erroneous assumption – from 2003 onwards upheld –[22] of the so-called 'typicality' of non-pecuniary damage relegated to the restrictive reading of Art 2059 of the Italian Civil Code, according to which only that damage expressly provided for by a written rule (implementing a constitutional norm) would be compensable. It is necessary to ensure that the reparation of any interest, both of a pecuniary and non-pecuniary nature, once injured, can be traced back to Art 2043 of the Italian Civil Code, the only general clause capable of ensuring broad, indefinite and atypical protection.

Similarly, it is also worth mentioning the Italian Constitutional Court (*Corte Costituzionale*) ruling no 235 of 2014. In confirming the constitutional

[18] Corte di Cassazione 20 April 2016 no 7766, n 5 above, 721.

[19] ibid

[20] ibid. The italics have been added by the author.

[21] ibid. See P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 175 and 185, with a view to a corresponding 'elasticity' of personality protection, so as to be able to protect 'the value of the personality without limits'. Cf also A. Flamini, 'Il danno alla persona: danno patrimoniale, danno non patrimoniale, danno morale' *Corti marchigiane*, 317 (2005) and Id, *Il danno alla persona. Saggi di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2009), 118 and 121.

[22] See what is stated in para 4 and footnote no 51.

legitimacy of Art 139 of the Italian Private Insurance Code, the court emphasises that 'he provision denounced is not closed [...] to the possibility of compensating moral damage', since when this 'is proven', it must be taken into account by the court with an increase in the 'amount of biological damage (now non-pecuniary damage) by 20%', thus 'definitively' removing the justification for 'the thesis of the 'uniqueness of biological damage', as a sort of immobile prime mover of the entire compensation system'.[23] Such a limitation is justified in a system of compulsory insurance for motor vehicles (third-party liability insurance) in which

> 'the particular compensation interest of the injured party must be measured against the general and social interest of the insured to have an acceptable and sustainable level of insurance premiums',[24]

with it being in line with what we intend to support in these pages, namely the need for full reparation of the injury caused, which must always be considered pre-eminent.[25] Basically, the Italian Constitutional Court (*Corte Costituzionale*) correctly states that the 'standard mechanism for quantifying damages' only has reason to exist for the 'specific and limited sector of minor injuries', where, in any case, the judge must be allowed 'space' to personalise the *amount* due, so as to be able to 'possibly increase it by up to one fifth in consideration of the subjective conditions of the injured party'.[26]

However, focussing on macro-injuries and the relative margin of operation, it is symptomatic that the wording of Art 138 of the Italian Private Insurance Code, which coincides

> 'in its morphological aspect (a medically ascertainable injury) with Article 139 of the same code, differs in its functional aspect by dealing with an 'injury' which has a negative impact on the daily activities and on the dynamic relational aspects of the injured party. A [...] dynamic dimension of the injury, a projection entirely (and only) external to the subject, an injury to everything that is 'other than itself' with respect to the inner essence of the person'.[27]

In light of these arguments of the Court of Cassation, a further element of distinction from moral damage can be seen in Art 138 of the Italian Private Insurance Code, 'even more crystal clear', where it is stated that

[23] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722, in rejection of the relevant Pisan doctrinal thesis: P.G. Monateri, *La fenomenologia* n 5 above, 725.

[24] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

[25] See P.G. Monateri, *La fenomenologia* n 5 above, 726.

[26] Corte Costituzionale 16 October 2014 no 235, *Corriere giuridico*, 1483, recalled by the Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

[27] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 722.

> 'if the ascertained impairment has a significant effect on specific dynamic personal-relational aspects, [...] the amount of the damages can be increased by the judge up to thirty percent with a fair and motivated assessment of the subjective conditions of the injured party'.[28]

Since all this does not constitute 'any 'duplication of compensation' ', the assessment of the possible increase of up to 30 per cent, now up to 40 per cent,[29] becomes functional to the 'demonstrated peculiarity of the concrete case' which requires 'in relation to the damage caused to the relational life' of the person an adequate compensation.[30] 'Another and different investigation' – it is further underlined – 'will be carried out in relation to the suffered inner suffering'.[31]

By reasoning in this way, an attempt is being made to dismiss, albeit indicated in many voices in the doctrine, 'automatic compensation' as it is unthinkable to have 'a universal table of human suffering'.[32] Consequently, it will be up to the judge to determine the economic liquidation of the damage in an adequate, reasonable and proportionate manner, so as to ensure full compensation for the damage caused to interests of this nature.[33] It is fully understood how the judge, 'can never be the judge of mathematical automatisms' or 'of juridical super-categories when the juridical dimension ends up openly betraying the phenomenology of suffering'.[34]

III. Full Reparation: Inadequacy of Pre-Established Criteria

Some pronouncements of 2018[35] are paradigmatic, in the full affirmation of the jurisprudential orientation undertaken by the Third Section; and, in particular, it is important to note what emerges from an order of the Court of Cassation in 2018,[36] regarding a dispute involving a person who, as a result of an accident, suffered a serious physical impairment to the point of being forced

[28] As recalled verbatim by the Corte di Cassazione 20 September 2016 no 7766 n 5 above, 722.

[29] This is confirmed, according to the Corte di Cassazione 20 September 2016 no 7766, n 5 above, 723, in the projected reform of Art 138 of the Italian Private Insurances Code, which has been implemented in the 'competition' decree, where para 3 «distinguishes, without any possibility of equivocation, the dynamic relational aspect of the damage from psychophysical suffering of particular intensity, foreseeing in such cases an increase in compensation, compared to that foreseen in the single national table, of up to 40%».

[30] Corte di Cassazione 20 September 2016 no 7766 n 5 above, 722.

[31] ibid 723.

[32] ibid; similarly, P.G. Monateri, *La fenomenologia* n 5 above, 727; G. Ponzanelli, *Postfazione* n 5 above, 728.

[33] As criticised by G. Ponzanelli, *Postfazione* n 5 above, 728.

[34] Corte di Cassazione 20 September 2016 no 7766, n 5 above, 723.

[35] Corte di Cassazione 17 January 2016 no 901, *Foro italiano*, I, 923 (2018); Corte di Cassazione 31 May 2018 no 1370, *Danno e responsabilità*, 465 (2018).

[36] Corte di Cassazione 27 March 2018 no 7513, *Nuova giurisprudenza civile commentata*, 836 (2018).

to opt for early retirement supplemented by the payment of an INAIL (this stands for *Istituto Nazionale Assicurazione contro gli Infortuni sul Lavoro*) pension, albeit minimal compared to the salary enjoyed up to that time, together with a sudden change in the quality of his life, caused by the abrupt interruption of his relations with others[37] and the definitive renunciation of all those 'activities of care of the vineyard and the garden', which strongly affected his previous *modus vivendi*.

All this resulted in dynamic-relational damage, liquidated by the Court with the *standard* tabular measure according to the victim's age and degree of permanent invalidity, increased by 25 per cent, according to 'a personalised parameterization',[38] which, however, the Court of Appeal, subsequently called upon, did not confirm, since the loss of the possibility of devoting oneself to recreational activities represented 'an already compensated injury' with the settlement of the *standard* tabular value, ie already 'included in the biological damage', in order to avoid double compensation of the 'same injury, calling it by two different names'.

This event is a good opportunity for the Third Section to confirm and better clarify its reasoning (reiterated below in the same terms)[39] and, downstream, for that part of the doctrine most attentive to the evolution of the system of civil responsibility, to comment – some in favour, others critically–[40] on the 'new statute of personal damages'[41] as established by the First Section, by way of clarification of everything that should be considered in force regarding non-pecuniary damage.

First of all, the Italian Court of Cassation considers a singular assumption, namely that, with regard to so-called non-pecuniary damage,

> 'the law contains very few and non-exhaustive definitions; those coined by case law and practice are often used in a polysemic manner; those proposed by academia often obey the intentions of the doctrine that advocates them'.

The risk, therefore, is that «identical lemmas are used by litigants to express different concepts, and conversely that different expressions are used to express the same meaning».[42] This is the 'state of affairs' capable of 'generating a great deal of confusion' and 'preventing any serious dialectic, since any scientific discussion' would be 'impossible in the absence of a shared lexicon'.

[37] Now being confined to the house.

[38] See P. Perlingieri, *Il diritto civile* n 9 above, 379.

[39] As defined by G. Ponzanelli, 'Il nuovo statuto del danno alla persona' n 9 above, 277, in the commentary to Corte di Cassazione 31 January 2019 no 2788, n 8 above, 279.

[40] See n 9 and n 10 above.

[41] This can be understood by the title of the commentary by G. Ponzanelli, 'Il nuovo statuto della danno alla persona' n 9 above, 277.

[42] Corte di Cassazione 27 March 2018 no 7513 n 36 above, 842.

Moreover, it is argued, emphatically, that 'the need for linguistic rigour as an indispensable method in the reconstruction of institutions has already been pointed out by the Joint Sections [of the Italian Court of Cassation]' by indicating, 'as a necessary precondition for the interpretation of the law, the need to

> 'clear the field of analysis from [...] elusive and abused expressions that have ended up becoming "mantras" repeated ad infinitum without a prior recognition and sharing of meaning [...], [which] remains obscure and serves only to increase confusion and encourage conceptual ambiguity as well as exegetic laziness' '.[43]

According to the Third Section (of the Italian Court of Cassation),

> 'it is necessary to establish what must [...] be meant by 'dynamic-relational damage'; and, first of all, whether there exists *in rerum natura* an injury that can be so defined'.

IV. Decalogue of the So-Called Non-Pecuniary Damages

The Supreme Court of Cassation draws three conclusions.

The first is that the 'dynamic-relational damage', proclaimed 'with a more archaic but more noble formula, [such as] 'damage to the life of relationships' ', due to an injury to health represents the 'impairment' of every possible ordinary activity for the injured person ('from doing, to being, to appearing'). This implies that the so-called damage to health, rather than including dynamic-relational damage, constitutes in itself ' 'dynamic-relational' damage'.[44]

Secondly, that the occurrence of a permanent impairment of the victim's daily 'dynamic-relational' activities is certainly not a different type of damage from biological damage. Any injury to health is capable of generating the most damaging and diverse consequences but can be 'classified' into two groups: a) consequences necessarily common to all persons suffering that particular type of disability; b) consequences particular to the specific case, which have made the damage suffered by the victim different and greater than in similar cases. All constitute non-pecuniary damage; but while those falling within group A presuppose «the mere demonstration of the existence of the invalidity» and will be settled as biological damage as the ' 'normal' consequence of the damage' which is determined for any person suffering an «identical» impairment; those

[43] ibid, recalling Corte di Cassazione-Sezioni unite 15 June 2015 no 12310, *Foro italiano,* I, 3174 (2015).

[44] Corte di Cassazione 27 March 2018 no 7513 n 36 above, 844 continues: 'If it did not have 'dynamic-relational' consequences, the injury to health would not even be a medical-legally appreciable and legally compensable damage'.

falling within group B require 'concrete proof of the actual (and greater) damage suffered' and must therefore be compensated in an appropriate manner by increasing the estimate of the biological damage itself (ie through personalisation).[45]

However, for the purposes of personalising the compensation, it is not important which aspect of the victim's life has been compromised, but rather that the consequence or consequences are so extraordinary that they cannot be included in the damage already expressed by the percentage of permanent invalidity, 'allowing the judge to proceed with the relevant personalisation at the time of settlement'.[46]

Finally, the third is that 'the factual circumstances justifying the personalisation of compensation for non-pecuniary damage integrate a 'constitutive fact' of the claim'; and, consequently, they must be attached in a detailed manner and proved by any means and, therefore, even with the attachment of notoriety, the maxims of common experience and simple presumptions,[47] 'without being able, however, to be resolved in mere generic, abstract or hypothetical statements'.[48]

Reasoning in these terms, therefore, the Third Section arrives at the establishment of a sort of 'decalogue'–[49] claiming for itself, in some ways, a task already carried out, and in an exhaustive manner according to many in doctrine,[50] by the Joint Sections (of the Italian Court of Cassation) in 2008 – which, to complete what has been outlined so far, will be discussed in detail.

1) 'The legal system provides for and regulates only two categories of damage: pecuniary damage and non-pecuniary damage'.[51]

[45] In this sense, Corte di Cassazione 29 July 2014 no 17219, available at www.foroplus.it. Therefore, 'the consequences of the impairment which are not general and inevitable for all those who have suffered that type of injury, but were suffered only by the individual injured person in the specific case, due to the peculiarities of the concrete case, justify an increase in the basic compensation for biological damage' (Corte di Cassazione 27 March 2018 no 7513 n 36 above, 844).

[46] See Corte di Cassazione 21 September 2017 no 21939, available at www.foroplus.it; Corte di Cassazione 7 November 2014 no 23778, *Nuova giurisprudenza civile commentata*, I, 331 (2015); Corte di Cassazione 18 November 2014 no 24471, *Repertorio Foro italiano*, 208 (2014).

[47] Corte di Cassazione 27 March 2018 no 7513, n 36 above, 84, evokes Corte di Cassazione-Sezioni unite 11 November 2008 no 26972 n 1 above, 499.

[48] Corte di Cassazione 18 November 2014 no 24471 n 46 above.

[49] See G. Ponzanelli, 'Il decalogo' n 9 above, 836.

[50] See G. Ponzanelli, n 9 above, 836; Id, n 4 above, 2737; Id, 'Novità per i danni esemplari?' *Contratto e impresa*, 1202 (2015) and Id, 'Alcune considerazioni sul livello italiano del risarcimento del danno alla persona' *Nuova giurisprudenza civile commentata*, II, 558 (2019).

[51] The Italian Court of Cassation is therefore in line with the majority of doctrine and case-law which, from 2003 onwards, have accredited a bipolar system of civil liability. On the topic, see A. Procida Mirabelli di Lauro, *La riparazione dei danni alla persona*, (Napoli: Edizioni Scientifiche Italiane, 1993), 272; Id, 'I danni alla persona tra responsabilità civile e sicurezza sociale' *Rivista critica di diritto privato*, 773 (1998); Id, 'Il danno ingiusto (Dall'ermeneutica "bipolare" alla teoria generale e "monocentrica" della responsabilità civile)' *Rivista critica di diritto privato*, 13 (2003). However, this division is questionable: A. Malomo, 'Sub art. 2043 c.c.', in G. Perlingieri ed, *Codice civile annotato con la dottrina e la giurisprudenza*, IV, 2, (Napoli: Edizioni Scientifiche Italiane, 2010), 2607; P.

2) 'The [so-called] non-pecuniary damage (like pecuniary damage) constitutes a legally (although not logically) unitary category'.

3) 'Unitary category' means that any non-pecuniary damage will be subject to the same rules and criteria for compensation [Arts 1223, 1226, 2056, 2059 of the Italian Civil Code].

4) In settling non-pecuniary damage, the judge must, on the one hand, examine all the harmful consequences of the tort; and on the other, avoid giving different names to identical damage.

5) During the preliminary investigation, the court must make a detailed and in-depth assessment, in concrete and not in abstract, of the actual existence of the damage claimed (or denied) by the parties, to this end using all the necessary means of proof, appropriately ascertaining in particular whether, how and how much the victim's condition has changed compared to the life led before the unlawful act; using also, but without *a priori* taking refuge in it, known facts, the maxims of experience and presumptions, and without proceeding to any automatic compensation.

6) In the presence of permanent damage to health, the joint awarding of a sum of money as compensation for biological damage and the awarding of a further sum as compensation for damage which is already expressed by the percentage degree of permanent invalidity (such as damage to daily, personal and relational activities, which is indefectibly dependent on the anatomical or functional loss: that is to say, dynamic-relational damage) constitute a duplication of compensation.

7) In the presence of permanent damage to health, the standard measure of compensation laid down by the law or by the uniform equitable criterion adopted by the courts of merit (nowadays according to the [so-called] variable point system) can be increased only in the presence of completely abnormal

Perlingieri, n 21 above, 17; Id , 'L'art. 2059 c.c. uno e bino: una interpretazione che non convince', (2003), in Id, *La persona e i suoi diritti* (Napoli: Edizioni Scientifiche Italiane, 2006), 574; Id, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1063 (2004). Similarly, critical of the case-law and doctrine delimiting the applicability of Art 2043 of the Italian Civil Code for only pecuniary damage V. Scalisi, 'Diritto e ingiustizia' *Rivista di diritto civile*, 32 (2004). See Id, 'Danno alla persona e ingiustizia', (2007), in Aa.Vv., *I rapporti civilistici nell'interpretazione della Corte costituzionale. La Corte costituzionale nella costruzione dell'ordinamento attuale. Princípi fondamentali*, I, (Napoli: Edizioni Scientifiche Italiane, 2007), 56, who, with regard to the unreasonable restriction on the typical nature of damages to the person pursuant to Art 2059 of the Italian Civil Code, underlines that the 'legal reserve of the indemnifiability of non-pecuniary damage' established in the codicil provision in question 'has continued to represent in the system of the protection of third parties an authentic *vulnus* to the personalist principle, determining in the system a situation clearly unbearable for the person, all the more serious if one considers the profile of the strident contrast with the Constitutional Charter, which [...] thanks fundamentally to cardinal provisions such as those in Articles 2 and 3 has marked a profound break with certain strategic choices of the codicil, not only sanctioning in a definitive and irreversible manner the full recovery in the norm of the historical-real subject, the human person, but above all consecrating the ascendancy of the same as an apex value of the entire system'.

and quite unusual harmful consequences. The harmful consequences to be considered normal and unquestionable according to *id quod plerumque accidit* (those that any person with the same disability could not fail to suffer) do not justify any personalisation increasing the compensation.

8) In the presence of damage to health, the joint awarding of a sum of money by way of compensation for biological damage and a further sum by way of compensation for damage which has no medico-legal basis, because it has no organic basis and is not part of the medical-legal determination of the percentage of permanent invalidity, represented by inner suffering (such as, for example, pain of the soul, shame, self-loathing, fear and despair) does not constitute a duplication of compensation.

9) If the existence of one of these non-medical-legal damages is correctly deduced and adequately proved, they must be subject to separate assessment and settlement (as confirmed by the text of [Arts 138 and 139 of the Italian Private Insurance Code, as amended by legge 4 August 2017 no 124, Art 1(17)], in the part where, under the unitary definition of 'non-pecuniary damage', they distinguish the dynamic relational damage caused by injuries from 'moral' damage).

10) Non-pecuniary damage not resulting from an injury to health, but consequent to the injury of other interests protected by the constitution, is to be settled, not differently from biological damage, taking into account both the damage suffered by the victim in relation to himself (inner suffering and the feeling of distress in all its possible forms, ie the inner moral damage), and that relating to the dynamic-relational dimension of the life of the injured party. In both cases, without any automatic compensation and after careful and in-depth investigation.

In a ruling filed a year after this one and mentioned earlier,[52] the need for separate compensation (autonomously) for non-pecuniary damage is reiterated once again, with a historical reference to the closest decades of jurisprudential pronouncements on the issue in question, which originates in the pronouncement of the Italian Constitutional Court of 1986 aimed at rejecting the question of the constitutionality of Art 2059 of the Italian Civil Code and then arriving at the decisions of 2014 by the same court together with the Court of Justice of the European Union, aimed at legitimising the conformity of Art 139 of the Italian Private Insurance Code with constitutional and European principles.

Therefore, it is reiterated 'in clear letters' that so-called moral damage must be indemnified in an autonomous manner, without making any distinction according to whether it falls under ordinary civil liability or respectively under civil liability for motor vehicle traffic or civil liability for healthcare (initially only for micro-permanent injuries with the provision of indemnity limitations), precisely because it is detrimental to Art 3 of the Italian Constitution and

[52] Corte di Cassazione 31 January 2019 no 2788 n 8 above, 279.

European principles. In addition, the legislator endorsed the autonomy of the compensation post, in the formulation of Art 138 of the Italian Private Insurances Code for macro-permanent injuries as set out in legge no 124 of 2017, due to the specific nature of the damage. If there is evidence (attached) of injury to the dynamic-relational sphere of the victim, with a strongly negative impact on the (quality of) a person's life, such injury must also be compensated in a personalised manner, taking into account the 'wholly anomalous, exceptional and [...] peculiar' harmful consequences that have occurred, with a necessary increase compared to the *range* established for each point of disability in the tables.[53] There, therefore, seem to be the re-emergence of so-called existential damage,[54] which was rejected in 2008.[55]

V. Possible Implementation of a Punitive Function

However, it does not seem possible to share the jurisprudential orientation according to which, in quantifying the damage due to such an injury, it is necessary to consider the seriousness of the consequences of the harmful event, and certainly not the seriousness of the

> 'culpably causal conduct of their author, given that civil liability, beyond its functional consequences and express legislative exceptions, [would] have a general compensatory and not punitive structure'.[56]

[53] Corte di Cassazione 31 January 2019 no 2788, n 8 above, 284.

[54] This category, which at first fell within the scope of biological damage [Corte di Cassazione 30 January 1990 no 645, *Archivio giuridico della circolazione e dei sinistri stradali*, 382 (1990)], then as a non-pecuniary injury under the general clause of the injustice of damage [Corte di Cassazione 21 May 1996 no 4671, *Archivio giuridico della circolazione e dei sinistri stradali*, 730 (1996); Corte di Cassazione 3 July 2001 no 9009, *Lavoro e previdenza oggi*, 1396 (2001)], see M. Barcellona, *Il danno non patrimoniale* (Milano: Giuffré, 2008), 41; cf also M. Bussani, 'L'illecito civile', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2020), 304-305. For a reconstruction, with reference to the Corte Costituzionale 27 October 1994 no 372, *Foro italiano*, I, 3297 (1994), which makes it possible to reconfigure the non-pecuniary damage in light of Art 2059 of the Italian Civil Code, see E. Capobianco, 'Lesione di interessi esistenziali della persona e loro risarcibilità: il c.d. danno esistenziale. Il contributo della «Rassegna di diritto civile»', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea. Venticinque anni della Rassegna di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 445.

[55] Corte di Cassazione-Sezioni unite 11 November 2008 no 26972, n 1 above, 512, highlights not that 'existential' damages cannot be included in the compensation, but that if they exist and are proven, they are among the possible items of so-called non-pecuniary damage, which must be fully compensated: S. Delle Monache, 'Alla ricerca del danno esistenziale' *Nuova giurisprudenza civile commentata*, II, 315 (2009). See G. Ponzanelli, 'Il danno non patrimoniale: una possibile agenda per il nuovo decennio (2010-2020)' *Nuova giurisprudenza civile commentate*, II, 248 (2011), who underlines: 'This is thus confirmed the unity of the category of non-pecuniary damage and the inappropriateness of dividing it into sub-categories, in the general perspective of achieving the principle of full reparation of damage'.

[56] Corte di Cassazione 31 January 2019 no 2788 n 8 above, 284.

Rather, it is the very seriousness of the injury caused to the victim concerning one or more of the inviolable rights of the person that makes the implementation of the punitive function reasonably justified.[57]

In view of the maximum protection that must be provided to safeguard fundamental European, international and constitutional principles, it is necessary that, where these are infringed, full and adequate reparation is made, which may also have a punitive (deterrent) connotation if it is useful to prevent the repetition of similar conduct or omissions (due to inexperience, carelessness or negligence) in the future.[58]

From this point of view, it is worth supporting the orientation of the Third Section (of the Italian Court of Cassation), according to which, since Art 138 of the Italian Private Insurance Code makes no reference to moral suffering when it occurs, the judge is 'free [...] to quantify it in the *an*', that is, if it is due, together with the '*quantum* [its economic quantification] with further, fair assessment'.[59] An 'endorsement' of this way of proceeding can also be found where there is an orientation towards

> 'overcoming the configurability of *compensatio lucri cum damno* [ie in overcoming the risk of assessing, in the settlement of damages, the advantageous consequences for the injured party caused directly by the harmful event] in situations in which the indemnity, although due (for example: survivor's pension; life insurance) and therefore received by the injured party following the death of a relative, does not achieve the aims which instead preserve the compensation for damages which is also due and must therefore be commensurate with the injury suffered'.[60]

[57] See M. Grondona, 'L'auspicabile "via libera" ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)' *Diritto civile contemporaneo*, 17 (31 luglio 2016); Id , *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui «risarcimenti punitivi»* (Napoli: Edizioni Scientifiche Italiane, 2017), 105.

[58] Even with the implementation of the punitive function (A. Malomo, n 6 above, 29, 62).

[59] Corte di Cassazione 20 April 2016 no 7766 n 5 above, 723. Conversely G. Ponzanelli, n 5 above, 728: on the point, n 32 above.

[60] See P. Perlingieri, n 9 above, 386. So that, in the face of the loss of parental relationship, Corte di Cassazione 17 January 2018 no 901, n 35 above, 923, considers compensable, without risk of duplication, the so-called biological damage and the so-called moral damage *iure proprio* (non-pecuniary damage); in accordance with Corte di Cassazione 13 April 2018 no 9196, *Foro italiano*, I, 2038 (2018). In order to ensure full reparation also Corte di Cassazione-Sezioni unite 22 May 2018 no 12564, *Foro italiano* I, 1901 (2018), disapplies the so-called non-accumulation principle [Corte di Cassazione 31 May 2003, no 8827 and 8828, *Foro italiano*, 2003, I, 2272, and Corte di Cassazione 11 February 2009 no 3357, *Giustizia civile*, I, 2653 (2010); conversely Corte di Cassazione 13 June 2014 no 13537, *Foro italiano*, I, 2470 (2014)]. Cf also P. Perlingieri, L. Corsaro, G. Carapezza Figlia and A. Malomo, in P. Perlingieri et al, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 925; E. Bellisario, *Il problema della* compensatio lucri cum damno (Padova: CEDAM, 2018), 1; M. Bussani, n 54 above, 802. Perplexity expressed by G. Mattarella, '*Compensatio lucri cum damno* e tipicità dei danni punitivi: una prospettiva critica' *Nuova giurisprudenza civile commentata*, II, 583,

Once again, there is explicit and clear confirmation that the peculiarities of the concrete case make it necessary (or better: fair) to determine a settlement of damages that corresponds to the interests affected – especially if they involve fundamental personal rights – beyond any labelling of individual possible items of damage and far from any restriction of tabular criteria that would otherwise mortify them.[61]

592 (2019).

[61] Cf P. Perlingieri, n 1 above, 520; as well as A. Malomo, n 1 above, 127; Ead, 'Perdita della vita e riparazione integrale' *Diritto delle successioni e della famiglia*, 403 (2015).