XVI. Italy

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As tort law is strongly influenced by social developments and upcoming needs of protection, many decisions have introduced innovative solutions and changed the interpretation of legal provisions over the last 25 years. This is particularly evident in Italy, where an extensive interpretation of the prerequisites of the right to damages has led to the evolution of a victim-oriented system of tort law over time. In a legal system where the boundaries of civil liability are considered 'flexible',[1] it has not been easy to identify five landmark cases in 25 years.

The following factors have been considered when selecting the decisions listed below: the fact that they were issued by the Grand Chamber of the Supreme Court as a result of conflicting interpretations arising among its sections; the fact that they were preceded by an extensive academic debate and followed by a great deal of commentary; and the fact that they provided solutions that have been followed by subsequent case law without *revirement*.

It is evident that there have been far more than five important decisions of the Grand Chamber of the *Corte di Cassazione* that meet such criteria in the past 25 years. In addition to the five selected cases, the Grand Chamber addressed, inter alia, the following crucial issues: the damage suffered by the residents of Seveso as a consequence of the chemical pollution (*Corte di Cassazione, Sezioni Unite*;[2] the victim's right to damages for loss of life in the event of a fatal accident;[3] the scope of *compensatio lucri cum damno*;[4] the burden of proof relating to causality and other issues of medical liability[5] and the concurrence between tortious and unjust enrichment claims.[6]

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[1] *F Galgano*, Le frontiere mobili del danno ingiusto Contratto e impresa (1985) 1 ff; *C Castronovo*, Le frontiere nobili della responsabilità civile (1989).

[2] Cass SS UU 21 February 2002, no 2515, Responsabilità civile e previdenza (Resp civ e prev) (2002) 385.

[3] Cass SS UU 22 July 2015, no 15350, Foro italiano (Foro it) (2015) 9, I, 2682.

[4] Cass SS UU 22 May 2018, no 12565, Resp civ e prev (2018) 1158.

[5] Cass SS UU 11 November 2019, no 28985-28994, Resp civ e prev (2020) 477.

[6] Cass SS UU 5 December 2023, no 33954, Foro it 2024, I, 120.

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Nevertheless, precedence has been accorded to those rulings that concentrate on the requirements of the right to damages, and, more specifically, on the nature and concept of damage, the scope of wrongfulness, as well as the definition and proof of causation. Judgments concerning the commencement of the prescription period in cases of latent damage deserve to be highlighted, given the significant change in the interpretation of the wording of the Civil Code that they have brought about. Indeed, it is these aspects of the action for damages that better delineate the trajectory of tort law and its boundaries over time.

1. Cassazione, Sezioni Unite Civili (Italian Supreme Court, Grand Chamber, Cass SS UU) 11 November 2008, nos 26972, 26973, 26974 and 26975

The Grand Chamber of the Italian Supreme Court passed the four cited decisions on the same day (11 November 2008), with the aim of providing uniform interpretative tools regarding all controversial issues concerning non-pecuniary loss other than personal injuries (*danno biologico*). Indeed, compensation for *danno biologico* had been uncontroversially recognised since the Constitutional Court's 184/1986 judgment, which maintained a constitutionally-oriented interpretation of the general tort law rule (art 2043 of the Italian Civil Code) based on art 32 of the Constitution ('right to health'). The question subsequently arose as to whether damages for non-pecuniary losses other than personal injuries should also be awarded beyond the strict limits of art 2059 of the Civil Code, which restricted such compensation to cases expressly provided for by legislation. For example, in one of the above mentioned four cases, the plaintiff had a testicle removed due to medical negligence and claimed compensation for personal injury and, in addition, loss of amenities of life. This raised the question of whether the latter claim should be upheld in addition to *danno biologico* in the absence of an express provision that allowed compensation for non-pecuniary loss in such cases. A further example of non-pecuniary loss other than personal injury is given by cases of bereavement damage, that is the grief and mourning following the death of a family member.

The Court addressed several questions: firstly, whether, and if so under what conditions, compensation for loss of enjoyment of life (*danno esistenziale*) might be awarded; secondly, whether loss of enjoyment of life constitutes a distinct form of damage from pain and suffering, and whether it should be compensated under the general tort law rule (art 2043 CC) or the rule on non-pecuniary loss (art 2059 CC); thirdly,

whether non-pecuniary loss should be allowed in cases of both extra-contractual and contractual liability; and fourthly, how damages for loss of enjoyment of life should be calculated.

The first two questions were fundamental and lay at the heart of a decade-long debate that had divided scholars and case law. According to one view, loss of amenities should be compensated for under art 2043 of the Civil Code, which requires only that a legally protected interest be violated, either intentionally or negligently. It is then up to the courts to decide which interests deserve compensation. According to an alternative doctrine, loss of amenities of life should fall under the more restrictive rule on non-pecuniary loss (art 2059 CC). However, to overcome the strict boundaries of such a provision, this doctrine advocated a constitutionally-oriented interpretation of art 2059 CC, which, therefore, should be read in conjunction with art 2 of the Constitution protecting all human rights.

In these landmark decisions, the Supreme Court upheld this second line of thought, which led to allowing claims for compensation for non-pecuniary loss as long as the violation of an inviolable human right having constitutional relevance takes place, regardless of whether a legal provision expressly states that compensation is available. Although the Court rejected the idea of a closed list of protected interests, it mentioned life, bodily and mental health, personality rights, and human dignity as interests deserving tort law protection. Consequently, all non-pecuniary losses arising from violations of human rights (including personal injury) were consolidated under the innovative interpretation of art 2059. Conversely, pain and suffering arising from the violation of other rights (for example, property rights) should not be covered by art 2 of the Constitution, with the consequence that they should be only compensable in cases provided for by law. Thus, the Court clearly rejected the fairly generous approach that had sometimes been upheld by case law. This approach allowed plaintiffs to claim compensation for any deterioration in their daily life that was causally linked to wrongful behaviour, regardless of whether the infringed right fell under the heading ‘human rights’.

In addition to the violation of a constitutionally relevant human right, the Court also required a certain degree of seriousness of the infringement and excluded compensation for trivial losses. In assessing damages, the Supreme Court recommended that all losses suffered by the victim be covered, but rejected the idea of awarding punitive damages. Regarding the proof of non-pecuniary loss, the Court reaffirmed that it is a consequential damage and deemed all the circumstances of the case relevant.

Finally, the Court ruled in favour of compensation for non-pecuniary loss in cases of contractual liability, contrary to the prevailing opinion at the time. The main argument was, again, that in the case of an infringement of constitutionally relevant human rights, compensation for non-pecuniary loss is a form of minimal protection to be granted to the injured party.

The four rulings marked a turning point in the doctrine of non-pecuniary damage in Italy, establishing a system of interpretative rules that are still followed by case law today.

2. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 11 January 2008, no 577

The present decision is one of several (nos 578, 579, 580, 581, 582, 583, 584 and 585) concerning causality and prescription in tort law that the Plenary Session of the *Cassazione* passed on the same day (11 January 2008). All of them dealt with personal injury claims relating to hepatitis C and/or HIV contracted by the plaintiffs in the period from 1978–1980 and caused by infected blood transfusions carried out in public hospitals. The claims were brought against the Ministry of Health, which was held liable for failing to control the transfusion service in violation of its duties to supervise and manage the use of human blood for therapeutic purposes.

These decisions represent a significant shift in understanding regarding both proof of causality in tort law and the starting point of the limitation period in typical cases involving latent damage and an uncertain causal link. As they are all expressions and applications of the same doctrines, they will be reported together.

With regard to causation, the decisions reiterated the prevailing opinion that criminal and tort liabilities are subject to the same rules (arts 40 and 41 of the Criminal Code). Consequently, they also concluded that the application of material causation (*conditio sine qua non*) must be limited by the adequate causation theory, which selects the consequences that were foreseeable according to an ex ante prognosis. The cited judgments, however, established a fundamental difference between criminal and tort liability concerning the proof of causation. In fact, in line with the Grand Chamber's decision of 11 September 2002 no 30328 (known as the *Franzese* judgment), the Grand Chamber ruled that the 'beyond reasonable doubt' standard of proof applies in criminal law and that the 'more likely than not' standard of proof applies to tortious liability.

Since then, such understanding of the probatory rule of causation has become uncontroversial in Italian tort law.

With regard to the prescription period, the decision in question upheld and reinforced a victim-oriented interpretation of the strict rule enshrined in art 2947 of the Italian Civil Code, which states that 'the right to compensation for damage resulting from an unlawful fact expires five years after the date on which the fact occurred'. Prior to the Grand Chamber's judgments of 2008, a line of case law had softened the interpretation of such a rule by requiring that the limitation period could not begin before the injured party was aware of the damage.

The 2008 decisions represent a further step forward, as they clarified that this knowledge must encompass both the harm and its unlawful cause. In other words, the Supreme Court established that the prescription period does not start when hepatitis C or HIV manifests itself and becomes known by the victim, but from the moment the disease can be perceived as unjust damage using ordinary diligence and in light of the state of scientific knowledge. Conversely, if the cause of the infection is unknown, the limitation period cannot begin, because the disease itself is not sufficient to constitute the 'fact' identified in art 2947, para 1 of the Italian Civil Code as the start of the limitation period. For example, in the cases that led to the decisions, medical science had identified the hepatitis B virus in 1978, the HIV virus in 1985, and the hepatitis C virus in 1988.

This innovative anti-literal interpretation of art 2947 of the Italian Civil Code had a significant impact on subsequent case law (for instance, in the case of consumption of medicines with teratogenic effects during pregnancy and consequent birth of a child affected by phocomelia;[7] in the case of damage allegedly caused by the flooding of a river where the plaintiff had no knowledge of the deficiencies in designing and maintaining the hydraulic works).[8] From this point onwards, to establish whether the limitation period for the right to extra-contractual damages has started to run, it is necessary to determine whether an average person could have identified the event that caused the damage in light of the available scientific knowledge.

3. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 22 December 2015, no 25767

This judgment settled a dispute over the interpretation of the right of a child born with malformations to claim damages resulting from a

[7] See Cass 24 January 2024, no 2375.

[8] Cass SS UU 29 November 2021, no 2146, Guida al diritto 2021, 10.

failure to diagnose the malformations prenatally, which prevented the mother from choosing to have an abortion. In addressing this question, the Supreme Court was tasked with determining the extent to which the boundaries of tort law can be transcended.

It should be noted that, under Italian law, both parents of a child born with a malformation can seek compensation for pecuniary and non-pecuniary damage suffered as a result of an incorrect or failed prenatal diagnosis, provided the mother can prove that she would have chosen an abortion had she been informed.

On this occasion, however, the Grand Chamber was asked to rule on whether the child itself could claim damages for being born. The facts were as follows. A medical doctor failed to recognise the fact that a foetus was suffering from Down's syndrome. After the birth of the child, the mother affirmed that, had she known about the Down's syndrome, she would have had an abortion. Not only did she claim compensation from the hospital for the damage she suffered because of the wrongful birth, but she also claimed for the child's damage of having been born.

The aforementioned question has been the subject of extensive discussion among scholars of tort law, philosophy, and bioethics since 2012, when the Supreme Court recognised a right to damages for a child with Down's syndrome in a case involving an erroneous prenatal diagnosis.[9] A similar debate had been raised by the 2000 French *Perruche* decision, which had clearly influenced the analogous Italian judgment of 2012, but had been subsequently contradicted by the 2002 *Loi Kouchner*. In fact, this Law denied compensation to children born with a malformation.

Given the 2012 precedent and the great deal of discussion it had raised, in the present case the Third Section of the Supreme Court decided to refer the question to the Grand Chamber, which affirmed that no damages may be awarded to the child.

In particular, the Court rejected both a 'right not to be born' and a 'right to be born healthy', affirming that life itself, rather than its denial, is the supreme good protected by the legal system. Consequently, the Grand Chamber refused the idea that the medical misconduct had violated a legally protected interest of the child.

Since there was neither wrongful injury nor proper damage, the plaintiff's claim was rejected, inasmuch as the requirements of art 2043 of the Civil Code, in particular, the existence of *danno ingiusto* (that is, the violation of a legally protected interest), had not been met.

[9] See Cassazione civile (Cass civ) 2 October 2012, no 16754, Giustizia Civile 2013, I, 640.

The present decision provides a clear demarcation of the scope of tortious claims related to wrongful birth without challenging a pregnant woman's self-determination. Following this ruling, the question of whether a child born with a birth defect can claim damages for being born when their mother could have opted for an abortion had they been properly informed has not been raised again.

4. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 5 July 2017, no 16601[10]

This decision resolved a conflict in case law concerning the recognition of foreign judgments relating to punitive damages. At the same time, it sparked a lively debate on the functions of civil liability in Italian law.

In the present case, an American company (the plaintiff) sold a defective crash helmet produced by an Italian company (the defendant). After compensating the victim (a motorcycle racer) for the punitive damage on the basis of a compromise agreement, the American company obtained a reimbursement order from the Florida court against the producer of the helmet, and, subsequently, requested its recognition and enforcement in Italy. The defendant quoted the well-established doctrine which denied any recognition of foreign judgments awarding punitive damages,[11] and, as a consequence, raised the public order defence.

The present judgment overturned the prevailing opinion at that time that punitive damages could never be recognised in Italy. In doing so, it posited two primary arguments.

Firstly, while previous judgments had emphasised the purely compensatory function of tort law, the Grand Chamber argued that damages might fulfil additional roles under Italian law. The Grand Chamber openly stated that, while compensation plays a key role, there are cases where damages also fulfil a deterrent and punitive function where legal provisions allow so. This is particularly true in the area of non-pecuniary loss.

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[10] Foro it 2017, I, 2613, with comments by *d'Alessandro, Palmieri, Pardolesi, Simone* and *Monateri.* See also *C Consolo*, Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sopracompensativi, se in regola con il nostro principio di legalità, Corriere giuridico (CG) 2017, 1050; *C Scognamiglio*, Le Sezioni Unite ed i danni punitivi: tra legge e giudizio, Resp civ e prev 2017, 1109.

[11] Cass 19 January 2007, no 1183, Resp civ e prev (2007) 1890.

Although this part of the judgment was not substantially innovative, it explicitly stated a reading of the current civil liability system that has not been contested since that time.

Secondly, the Supreme Court reinterpreted the public order as a set of principles common to different EU legal systems (art 67 Treaty on the Functioning of the European Union [TFEU]) and fundamental rights based on international charters. Against this background, it concluded that the recognition and enforcement of foreign judgments awarding punitive damages should be consistent with arts 23 and 25 of the Italian Constitution. The former prohibits the imposition of financial obligations on citizens unless expressly stated by legal provisions, while the latter proclaims that no one may be punished except under a law that existed before the act was committed. It further reminded that the principles of legality and proportionality are also stated by art 49 of the EU Charter of Fundamental Rights.

On the basis of such assumptions, the Supreme Court concluded that a foreign judgment awarding punitive damages can be recognised and enforced in Italy if it is based on a legal provision in force in the foreign legal system, and, in addition, if the damages are predictable and subject to a certain ceiling. Furthermore, it clarified that Italian courts must assess the compliance of punitive damages with the principle of proportionality.

This aspect of the judgment represented a significant innovation in legal jurisprudence by overcoming the prevailing negative attitude towards the recognition of punitive damages. The judgment introduced a complex enforcement test that has been consistently applied by Italian courts ever since.

5. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 15 November 2022, nos 33645 and 33659

Both decisions dealt with the question of whether, in the case of the illegal occupation of an immovable, the owner's impediment to use their property is in itself damage to be compensated. The fundamental question under consideration is that of the concept of 'damage' and, more specifically, whether damage *in re ipsa* is consistent with the general tort law rule set out in the Civil Code (art 2043) for obtaining damages.

Before the Grand Chamber's rulings, the Second and Third Sessions of the Supreme Court had developed different attitudes regarding the right to damages for loss of possession of an immovable. According to the Second Session, the plaintiff would not be required to prove a specific

loss as, the immovables being profitable assets, the damage is presumed in the case of illegal occupation. The defendant, however, could prove that the owner of the immovable did not suffer any actual damage. Conversely, the Third Session required the plaintiff to prove immediate and direct consequential damage according to art 1223 of the Civil Code, while holding the mere violation of a property right as an unlawful event which, in itself, would not give rise to the right to damages.

The Second and Third Sessions of the Supreme Court both decided to refer the same question to the Grand Chamber, which delivered the aforementioned twin judgments. The Court unequivocally dismissed the notion of 'damage *in re ipsa*', reaffirming the principle that the right to compensation is contingent on the occurrence of a consequential loss. It also confirmed the distinction between 'material' causation, ie why the harmful event occurred, and 'legal' causation, ie the link between the unlawful act and its harmful consequences, as recalled by the doctrine established through the rulings of the Grand Chamber of the Supreme Court on 11 January 2008 (see 2. above).

The concept of 'presumed damage' was upheld, as opposed to 'damage *in re ipsa*', through the differentiation of two distinct situations: the damage to property and the prevention of its use. In the reasoning of the Grand Chamber, this distinction would have consequences for the assessment of the immediate and direct consequential loss required for the right to damages. In fact, in the former situation, compensation would necessitate both an unlawful violation of the property right and proof of an actual detrimental consequence. In the latter case, the onus is on the plaintiff to demonstrate that their entitlement has been infringed and that they have been prevented from enjoying the property occupied by the tortfeasor. In other words, in the case of violation of the right to use a thing, the consequential loss would consist of preventing the owner from actually enjoying their property. Such loss can be merely alleged by the plaintiff, as a presumption of 'normal' use by the owner takes place. This presumption may be reversed by the defendant, who is required to prove that the owner was not making use of the occupied immovable. As a means to assess damages, the Grand Chamber mentioned the market rent, unless the plaintiff demonstrates a higher loss (ie, loss of earnings due to missed chances to sell or rent the property at higher prices).

The Grand Chamber's doctrine aims to reconcile cases in which the plaintiff has not incurred any actual loss with the rules of tort law. In doing so, it reaffirmed the need for consequential losses to be compensated, as opposed to damages being awarded for merely the violation of a right. However, it acknowledges that such consequential loss arises from the

deprivation of enjoyment of a property. Although the decisions ended the conflict between two chambers of the Supreme Court and affirmed a uniform solution regarding loss of use of immovable property, they did not establish a systematically consistent doctrine. For example, the Supreme Court continues to rule that where a vehicle owner is unable to use their vehicle due to an accident, they must provide evidence of specific expenses incurred due to their inability to use their vehicle.[12]

[12] Cass 17 December 2024, no 32946, Cass 21 September 2023, no 27052, both in <www.dejure.it>.