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The Equalisation of Benefits (*Compensatio Lucri Cum Damno*) in the Italian Law. A Possible Inspiration for Other European Member States?

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Abstract: The *Compensatio Lucri Cum Damno* concerns cases in which the behaviour of the wrongdoer caused both damages and advantages to the victim. The question is: when and under which conditions such advantages can be set-off against the liable person's obligation of paying damages? On the contrary, should such mitigation of liability be denied?

In 2018 the Italian Highest Courts established principles with regard to these questions, but only with reference to the specific cases submitted to their attention. This article shows how the Italian Courts were inspired by the common principles of European private law and the comparative method with regard to: *i)* the impossibility of stating a general rule (thus, the necessity of proceeding for categories and classes of cases), and *ii)* the necessity of looking at the purpose of the benefit, rather than at the causal link between tort and advantages. The author believes that the criteria identified by the Italian case-law for the deductibility of benefits from damages might be of inspiration for other European Member States. Furthermore, it is here highlighted that the Italian Highest Courts made decisions on *Compensatio Lucri Cum Damno* using an argument explicitly based on the *Soft Law* and this could strength the effect of the *moral suasion* within the Draft Common Frame of Reference and the Principle of European Tort Law.

Rèsumè: La *Compensatio Lucri Cum Damno* concerne les cas où le comportement du fautif a causé à la fois des dommages et des avantages à la victime. La question est de savoir quand et dans quelles conditions ces avantages peuvent être compensés contre l'obligation de la personne responsable de payer des dommages-intérêts? Au contraire, une telle atténuation de la responsabilité devrait-elle être refusée? En 2018, les Hautes Cours italiennes ont établi des principes à l'égard de ces questions, mais uniquement en ce qui concerne les cas spécifiques soumis à leur attention. Cet article montre comment les Cours italiennes se sont inspirées des principes communs du droit privé européen et de la méthode comparative en ce qui concerne : *i)* l'impossibilité d'énoncer une règle générale (donc la nécessité de procéder par catégories et catégories d'affaires), et *ii)* la nécessité d'examiner l'objectif de l'avantage plutôt que le lien de causalité entre la responsabilité délictuelle et les avantages. L'auteur estime que les critères identifiés par la jurisprudence italienne pour la déductibilité des avantages des dommages et intérêts pourraient être une source d'inspiration pour d'autres États membres européens. En outre, il est ici souligné que les plus hautes juridictions italiennes ont rendu des

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décisions sur Compensatio Lucri Cum Damno en utilisant un argument explicitement fondé sur la Soft Law et cela pourrait renforcer l'effet de la persuasion morale dans le projet de Cadre commun de reference (DCFR) et les principes de Droit européen de la responsabilité civile.

Zusammenfassung: Die *Compensatio Lucri Cum Damno* betrifft Fälle, in denen das Verhalten des Schädigers sowohl Schaden als auch Vorteile für das Opfer verursacht hat. Die Frage ist: Wann und unter welchen Bedingungen können solche Vorteile mit der Verpflichtung des Schädigers zur Zahlung von Schadenersatz verrechnet werden? Oder sollte im Gegenteil eine solche Haftungsbegrenzung gänzlich verweigert werden?

Im Jahr 2018 legten die obersten italienischen Gerichte einige Grundsätze zu diesen Fragen fest, jedoch nur in Bezug auf die konkreten Fälle, die ihnen vorgelegt wurden. Der vorliegende Beitrag zeigt, wie sich die italienischen Gerichte von den Gemeinsamen Prinzipien des Europäischen Privatrechts und der rechtsvergleichenden Methode inspirieren ließen, und zwar in Bezug auf: i) die Unmöglichkeit, eine allgemeine Regel aufzustellen (also die Notwendigkeit mit Kategorien und Fallklassen zu arbeiten), und ii) die Notwendigkeit, auf den Zweck der Leistung und nicht den Kausalzusammenhang zwischen unerlaubter Handlung und Vorteilen abzustellen. Der Autor ist der Ansicht, dass die von der italienischen Rechtsprechung identifizierten Kriterien für die Abzugsfähigkeit von erlangten Vorteilen vom Schadenersatz für andere europäische Mitgliedstaaten eine Inspiration darstellen könnten. Darüber hinaus wird hier hervorgehoben, dass die italienischen höchstgerichtlichen Entscheidungen zur *Compensatio Lucri Cum Damno* unter Berufung auf ein ausdrücklich auf dem *Soft Law* basierenden Argument getroffen wurden. Dies könnte die Wirkung der *moralischen Apelle* innerhalb des Entwurfs eines Gemeinsamen Referenzrahmens und den Grundsätzen eines Europäischen Deliktsrechts verstärken.

1. Introduction

1. The *Compensatio Lucri Cum Damno* (*CLCD*, literally: the deduction '*compensatio*' of benefits '*lucri*' from damages '*cum damno*') concerns cases where the behaviour of the wrongdoer caused detriment to the injured person but it also brought him/her some advantages (mostly economic), since third parties provided payment (or are liable for such payment) to the injured person due to the damage suffered.[1] *CLCD* is also called *equalisation of benefits.*[2]

1 C. Von Bar, E. Clive & H. Schulte-Nölke, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Walter de Gruyter 2009), under general comments of Art. VI.–6:103: Equalization of benefits.

2 Draft Common Frame of Reference «VI.-6:103: Equalization of Benefits. (1) Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account. (2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third party, the purpose of conferring those benefits».

2. The question, the Italian literature and courts have always dealt with, is when and under which conditions such advantages can be set-off against the liable person's obligation to pay damages or whether such mitigation of liability is to be denied. In 2018, the Italian Council of State and the Court of Cassation, both en banc[3] (i.e. the Italian Council of State Plenary Session and Court of Cassation Joint Panels), established principles regarding the *CLCD* only with reference to the specific cases submitted to their attention, distinguishing different categories. Among these, the most problematic is characterized by the presence of a single wrongdoer and two obligated parties upon different titles. Thus, the main question lies on the estimation of damages to be awarded to an injured person in a trilateral relationship, i.e. when the victim, in addition to the compensation received by the wrongdoer, is also entitled to receive an indemnity (collateral benefit) by a third party – private or social insurers or social security institutions. In other words, is the victim allowed to cumulate damages and benefits, i.e. the compensation and the indemnity?

3. A standard case is the car accident where the victim has the legal right to both the compensation, owed by the wrongdoer under Article 2043 of the Italian Civil Code, and the indemnity, owed by the private or social insurer pursuant to an insurance contract or a specific legal provision.[4] Should these two payments combine or not?

4. In order to understand the *revirement*[5] of the Highest Courts (the Council of State and the Court of Cassation, both en banc) of 2018, it is worth explaining the principles of awarding damages upon which the *Compensatio Lucri Cum Damno* is founded, that can be summarized as follows. The first principle is the German theory of difference – *Differenzhypothese*[6]: compensation shall consist of the difference between the value of the victim's property after the accident and the hypothetical value of his property in case the harmful event had never occurred. In second instance, according to the *indifference principle*[7] compensation shall cover the

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3 Cons. Stato, Adunanza Plenaria, 23 Feb. 2018, n. 1, *La Nuova Giurisprudenza Civile Commentata*, 2018, 7–8, p 1063, with comment of S. Monti, 'Il Consiglio di Stato e la c.d. *compensatio lucri cum damno*', pp 1063–1076, & Cass., Sezioni Unite, 22 May 2018, nn. 12564–12567, *Danno e resp. (Danno e responsabilità)*, 2018, 4, p 410, with comment of R. Pardolesi & P. Santoro, 'Sul nuovo corso della *compensatio'*, pp 424–438; B. Elena, '*Compensatio lucri cum damno*: il responso delle Sezioni Unite', pp 438–447; S. Monti, 'La *compensatio lucri cum damno* e il "compromesso innovativo" delle Sezioni Unite', pp 448–452.

4 For example, Presidential Decree 30 June 1965, n. 1124, about compulsory insurance against accidents at work and occupational diseases.

5 *Un revirement de jurisprudence* is a departure from existing precedents.

6 F. Mommsen, *Beiträge Zum Obligationenrecht, Vol. II, Zur Lehre von Dem Interesse* (Braunschweig 1855).

7 See all the judgments of the Joint Panels of 2018: specifically Cass., Sezioni Unite, 22 May 2018, n. 12565, para. 5.1. In the Italian literature, among others, see G. Tedeschi, 'Il danno e il momento della sua determinazione', *Rivista di diritto privato*, I, 1933, p 254; A. De Cupis, 'Dei fatti illeciti:

whole loss occurred, but it cannot go beyond it (i.e. it cannot serve as a source of enrichment of the victim). A third principle relies on the *compensatory function of damages*[8]: the purpose is putting the victim in the same economic position where he would have been if the tort had not taken place, without this becoming an occasion for enrichment. At last, the *principle of general liability*[9]: the wrongdoer is always obliged to compensation, without the possibility of seeing the amount of damages reduced or erased as a result of the intervention of a third party.

5. In spite of these principles, the *Compensatio Lucri Cum Damno*[10] is not expressly enshrined in the Italian Civil Code. However, the Italian courts have

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Art. 2043-2059', in *Commentario Scialoja-Branca*, 1971, p 115; A. Pinori, 'Il principio generale della riparazione integrale dei danni', *Contratto e Impresa*, 1998, pp 1144-1169.

The principle of full compensation is one of the pillars (the first) upon which the compensation system, as outlined in the Resolution of the Council of Europe 14 March 1975, n. 7, is based. See *Résolution (75) 7 relative à la réparation des dommages en cas de lésions corporelles et de décès (I-1 Dispositions générales)*: «*compte tenu des règles concernant la responsabilité, la personne qui a subi un préjudice à droit à la réparation de celui-ci, en ce sens qu'elle doit être replacée dans une situation aussi proche que possible de celle qui aurait été la sienne si le fait dommageable ne s'était pas produit*».

8 With regard to the function of damages, see Cons. Stato, Adunanza Plenaria, 23 Feb. 2018, n. 1, resuming the motivation of Cass., Sezioni Unite, 5 July 2017, n. 16601, in *DeJure*: «*con riferimento alla responsabilità civile, che essa può perseguire plurime finalità che si pongono su piani differenti (omissis). La finalità generale e prioritaria è compensativa: lo scopo è di reintegrare la sfera giuridica del danneggiato ponendolo, in attuazione del cd. principio di indifferenza, nella situazione in cui si sarebbe trovato senza il fatto illecito. La finalità generale e secondaria è 'preventiva (o deterrente o dissuasiva)': lo scopo è anche quello di evitare la reiterazione del fatto illecito. La finalità specifica ulteriore è 'sanzionatoria-punitiva': lo scopo è di 'punire' il danneggiante mediante la condanna, nei soli casi in cui la legge lo consenta in coerenza con i limiti che la Costituzione pone nella conformazione delle regole di responsabilità (cfr. Art. 25), a corrispondere una somma superiore a quella necessaria per eliminare i pregiudizi conseguenti al fatto illecito*». On that occasion, it was established that, in the Italian legal system, civil liability has not the only purpose of restoring the assets of the injured party, since the deterrent and punitive functions belong to Italian Law as well. Therefore, even punitive damages are not in themselves incompatible. However, for a foreign judgment to be recognized in the Italian legal system, it should have been rendered on a specific legal basis thus guaranteeing its predictability and proportionality: G. Mattarella, '*Compensatio lucri cum damno* e tipicità dei danni punitivi: una prospettiva critica', 3. *La Nuova Giurisprudenza Civile Commentata*, 2019, pp 583-593. On that topic see also J. Fleming, 'Collateral Benefits', in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts* (Tübingen: Mohr Siebeck 1971), p 7; M. Franzoni, 'Dei fatti illeciti: art. 2043, 2056-2059. Supplemento', *Commentario del codice civile Scialoja-Branca*, 2004; C. M. Bianca, *Diritto civile, 5, La responsabilità*, (2nd ed. Milano: Giuffrè 2012), pp 556-557.

9 Artt. 1218 and 2043 of the Italian Civil Code. See E. Bellisario, '*Compensatio lucri cum damno*: il responso delle Sezioni Unite', *Danno e Responsabilità*, 2018, 4, p 442.

10 The first Italian scholar who expressly theorized the *compensation lucri cum damno* was F. Leone, 'Compensatio lucri cum damno', *Il Filangieri*, 1916, pp 176-217. In the Italian literature see S. Puleo, 'Compensatio lucri cum damno', in *Enciclopedia del diritto*, VIII (Milano: Giuffrè 1961); R. Scognamiglio, *Responsabilità civile e danno* (Torino: Giappichelli 2010), pp 284-292; C. M.

never doubted about the existence of this legal device: in fact, they always recognized that the quantification of damages[11] should take into account not only the prejudice (i.e. the loss) suffered by the injured party, but also the advantages that he/she may have obtained as a result of the tort (or the default). Nor the Italian courts have never doubted the *CLCD*'s foundation, which is Article 1223 of the Italian Civil Code[12]: under this clause, the damage is defined not only as actual loss, but also as lost profits, insofar they are a direct and immediate consequence of the non-performance, the delay or the tort.[13] In other words, it implicitly states the principle that compensation must cover all (and only) the damage, by restoring the injured party to the position he/she was before the tort, without this becoming an occasion for enrichment.[14]

Bianca, 'Dell'inadempimento delle obbligazioni: Art. 1218–1229', in *Commentario del codice civile Scialoja-Branca*, (2nd ed. Bologna-Roma: Zanichelli-Foro italiano, 1979), pp 308–313; A. De Cupis, *Il danno: teoria generale della responsabilita civile* (Milano: Giuffrè 1979), I, pp 311–328; G. De Nova, 'Intorno alla *compensatio lucri cum damno*: considerazioni conclusive', *Relazione al convegno dedicato al tema svoltosi nell'aula magna della corte di Cassazione Il 31 Gennaio 2018* http://www.cortedicassazio ne.it/cassazione-resources/resources/cms/documents/Relazione_Prof_DE_NOVA_Giorgio.pdf. (accessed 12 August 2020); U. Izzo, 'Le giurisdizioni di fronte al senso e alla storia comparata della *compensatio lucri cum damno*', *Responsabilità Civile e Previdenza*, 2018, 10, pp 142–161; U. Izzo, *La giustizia del beneficio: fra responsabilità civile e welfare del danneggiato* (Napoli: Editoriale scientifica 2018); E. Bellisario, *Il problema della compensatio lucri cum damno* (Padova: Cedam 2018).

11 In case of both contractual and non-contractual liability.

12 See all the judgments of the Joint Panels of 2018, as pointed out by E. Bellisario, *Danno e Responsabilità*, 2018, 4, p 440.

About the existence of *compensatio lucri cum damno* as a general principle based on Art. 1223 of the Italian Civil Code, the scholars have always dealt with. Some authors identified the *compensatio lucri cum damno* as a general rule of the civil law: P. G. Monateri, 'Gli usi e la ratio della dottrina della *compensatio lucri cum damno.* E' possibile trovarne un senso?', *Quadrimestre*, 1990, pp 377–390; V. Carbone, 'La *compensatio lucri cum damno* tra ambito del danno risarcibile e rapporto di causalità', *Danno e Responsabilità*, 1996, pp 430–50; F. Molinaro, 'Il principio della '*compensatio lucri cum damno*' tra vecchi e nuovi orientamenti della corte di Cassazione', *Rassegna Avvocatura dello Stato*, 2015, pp 59–66. Some others scholars have denied the general scope of the principle: V. Colonna, 'Vajont: ultimo atto', *Danno e Responsabilità*, 1996, pp 693–710; C. Lazzara, 'Il problema dei vantaggi connessi con il fatto illecito. La c.d. *compensatio lucri cum damno*', in *Studi in onore di Gaetano Zingali* (Milano: Giuffrè 1965), pp 411–458; G. Gallizioli, 'Note critiche in tema di *compensatio lucri cum damno*', *Rivista di diritto civile*, 1977, pp 333–348; E. Bellisario, *Il problema della compensatio lucri cum damno.*

13 G. Iudica & P. Zatti, *Language and Rules of Italian Private Law: An Introduction*, (A. P. Scarso eds, Padova: Cedam 2010), p 78. Art. 1223 is applicable in case of both contractual and non-contractual liability under Art. 2056 of the Italian Civil Code, which refers to Art. 1223 for the quantification of damages.

14 See Cass., 8 March 1974, *Responsabilità civile e previdenza*, 1975, p 557, and, among others, A. Pinori, *Contratto e Impresa*, 1998, pp 1144–1169.

6. The actual problematic question is the scope (i.e. the application area) of *Compensatio Lucri Cum Damno*,[15] which in turn depends on the operational conditions identified by the scholars and the courts.

7. In fact, the conditions for the deduction of benefits from damages (i.e. the *CLCD*) have deeply changed due to the most recent tendencies of the Highest Courts. Before 2018, the criterion for deducting benefits was the causal link between tort and benefit, whereas now the criteria have become: 1) the compensatory purpose of collateral benefits and 2) the legal provision of subrogation.

8. In light of this, the article presents an overview of the Italian case-law on *CLCD*, since this could be of inspiration for other EU Member States' case-law and legislation, in perspective of a reasonable balance between legal certainty and evaluation on a case-by-case basis. The article is organized as follows: Section 2 present an overview on the state of the Italian art on *Compensatio Lucri Cum Damno* before 2018, section 3 present an overview on the state of the Italian art after 2018 analysing the new criteria identified by the Italian Highest Courts for deducting benefits from damages: a) the compensatory purpose of collateral benefits, and b) the legal provision of subrogation. Finally, section 4 introduces some further comments on certain innovative aspects of *Compensatio Lucri Cum Damno* that might be relevant to understand the importance of its future enforcement.

2. Overview of the State of the Art Before 2018

9. Before 2018 the condition for the deductibility of benefits from damages was the causal link (under Article 1223 of the Italian Civil Code) between the tort, committed by the wrongdoer, and the benefits (especially when payed by a third party). The question was how to identify such a link and two different answers can be found in the case-law.

10. Following the 'deduction' option, the minority position[16] extended the scope of *Compensatio Lucri Cum Damno* adopting an interpretation of Article 1223 of the Italian

15 As stated in Cass,. Sezioni Unite, 22 May 2018, n. 12564: «***L'esistenza*** *dell'istituto della compensatio, inteso come regola di evidenza operativa per la stima e la liquidazione del danno, non è controversa nella giurisprudenza di questa Corte, trovando il proprio* ***fondamento*** *nella idea del danno risarcibile quale risultato di una valutazione globale degli effetti prodotti dall'atto dannoso. (Omissis) Controversi sono piuttosto la* ***portata*** *e* ***l'ambito di operatività*** *della figura, ossia i limiti entro i quali la compensati() può trovare applicazione, soprattutto là dove il vantaggio acquisito al patrimonio del danneggiato in connessione con il fatto illecito derivi da un titolo diverso e vi siano due soggetti obbligati, appunto sulla base di fonti differenti*».

16 For the minority leaning of Courts' rulings, see Cass. 16 Nov. 1979, n. 5964, *Rivista degli infortuni*, 1980, II, p 87; Cass. 24 May 1986, n. 3503, *Repertorio Foro italiano*, 1986, voce «Infortuni sul lavoro», n. 238; Cass. 15 April 1998, n. 3806, *Archivio giuridico della circolazione e dei sinistri stradali*, 1998, p 775; Cass., Sezioni Unite, 11 January 2008, n. 584, *Foro italiano*,

Civil Code aimed at avoiding asymmetrical applications of the principle of causation for damages and benefits, using a test based on the same criterion for both. In fact, one definition of causality includes all the preceding facts that, if not occurred, would have prevented the injuring event from occurring. If applied in law, this concept of causation would place onto the author of a minor offense the liability for damages, even if these are remotely connected to his wrongdoing. However, in order to avoid such a levelling down of 'all' causes, Article 1223 of the Italian Civil Code sets forth that damage must be the *immediate and direct consequence* of the non-performance or the tort.[17] On the other hand, these criteria might be too strict if interpreted literally, since they might leave out the causative force of facts which are not sequential in the causation of damage, or of facts tied in a nexus of contributory causes. Therefore, it was concluded that the court has to examine whether the harmful event was *potentially apt* to cause the damage, in order to grant full compensation for damages (neither too much nor too little).[18] This approach to the problem is known as '*adequate causation*'[19] or causal regularity. Based on this rule, compensation shall include damages even if they are *mediated* and *indirect* consequences of the tort. Therefore, it would not be consistent using an asymmetrical application of Article 1223 of the Italian Civil Code, where the relationship between tort and damages could be mediated and indirect, whereas this same relationship should be immediate and direct when it comes to assessing the advantages.[20] Consequently, compensation shall include (damages and) benefits even if they are *mediated* and *indirect* consequences of the tort, since a specific legal provision or a contract are the *immediate* causes of the benefits. Recalling the case of the car accident, the amount of damages awarded against the wrongdoer who causes an injury should be reduced by the amount of insurance payments that the victim receives as a result of the same injuring event, pursuant to an insurance contract.

2008, I, p 451; Trib. Oristano 11 Febuary 1985, *Responsabilità civile e previdenza*, 1985, p 780; Trib. Spoleto 28 June 1991, *Assicurazioni*, 1992, II, p 2; Trib. Roma 8 January 2003, *Diritto e formazione*, 2003, p 699.

17 That is, it must be free of extraneous intervening causes and it must not be interspersed by any 'intermediary cause', as happens in *remote* causation.

18 G. Iudica & P. Zatti, *Language and rules of italian private law: an introduction*, p 79.

19 See for instance, Cass. 18 July 1987, n. 6325, in *Giustizia Civile Massimario*, 1987, fasc. 7; Cass. 13 September 2000, n. 12103 and Cass. 4 July 2006, n. 15274, both in *DeJure.* In the Italian literature see among others, G. Gorla, 'Sulla cosiddetta causalità giuridica: "fatto dannoso e conseguenze"', *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 1951, pp 405–421; P. Trimarchi, *Causalità e danno* (Milano: Giuffrè, 1966), pp 19–49; A. De Cupis, *Il danno: teoria generale della responsabilita civile*, I, pp 230–241; V. Carbone, *Danno e Responsabilità*, 1996, pp 430–450; P. G. Monateri, 'La responsabilità civile, le fonti delle obbligazioni, vol. 3', in *Trattato di diritto civile* (Torino: Utet 1998), pp 278–83; C. M. Bianca, *Diritto civile, 5, La responsabilità* (Milano: Giuffrè 2012), pp 142–145. More recently see Cass. 22 June 2017, n. 15534, in *DeJure*, and E. Bellisario, *Il problema della compensatio lucri cum damno*, pp 39–40.

20 See the *Referring Order* to the Joint Panels on the scope of *compensatio lucri cum damno*: Cass. 22 June 2017, n. 15534, in *DeJure.*

11. On the other hand, following the 'cumulation' option, the majority position[21] limited the scope of *Compensatio Lucri Cum Damno* adopting a literal interpretation of Article 1223 of the Italian Civil Code (i.e. the principle of causation). This means that benefits must be immediate and direct consequences of the tort (and, *viceversa*, the tort must be immediate and direct cause of benefits) in order to be deducted from damages. Consequently, the benefit cannot find its *efficient* cause in other sources such as a specific legal provision or a contract. The result is an application of the so-called *collateral source rule* (i.e. cumulation)[22]: under this rule, benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce the defendant's liability. For the case of the car accident, the amount of damages awarded against the wrongdoer who causes an injury should not be reduced by the amount of insurance payments that the victim receives as a result of the same injuring event, since these benefits *derive from* an insurance contract, which is a source collateral to the wrongdoer.

12. Accordingly, following the majority position before 2018, the conclusion was the restriction of the scope of *CLCD*: benefits arising from a specific legal provision or a contract shall not be deducted from the amount of damages (cumulation). However, this could increase the risk of overcompensating the victim, because he could be in a better economic position than the one he would otherwise have been if the tort had not occurred.[23]

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21 For the majority leaning of Courts' rulings, see Cass. 29 July 1955, n. 2442, *Foro italiano*, 1955, I, p 29; Cass. 14 March 1996, n. 2117, *Responsabilità civile e previdenza*, 1996, p 588, with comment of Pellecchia; Cass. 15 April 1998, n. 3807, *Giustizia civ*ile, 1999, p 223; Cass. 17 July 1999, n. 7612, *Danno e responsabilità*, 2000, p 516; Cass. 31 May 2003, n. 8828, *Foro italiano*, 2003, I, p 2272; Cass. 25 August 2006, n. 18490, *Repertorio Foro italiano*, 2006, voce «Danni civili», n. 364; Cass. 11 February 2009, n. 3357, *Giustizia civile*, 2010, I, p 2653; Cass. 10 Mar. 2014, n. 5504, *Repertorio Foro italiano*, 2014, voce «Danni civili», n. 245; Trib. Trento 16 September 2002, *Foro italiano*, 2003, I, p 623; Trib. Milano 15 Apr. 2009, n. 5002, *Giustizia a Milano*, 2009, p 27; Trib. Milano 23 September 2009, n. 11179, *Giustizia a Milano,* 2009, p 69.

22 In the USA the rule has been defined by the *2nd Restatement of Torts* (1977) s. 920 A(2) as: «Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable». For an analysis of the three potential solutions to the problems posed by collateral benefits – cumulation, recoupment and reduction – see J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*; R. Lewis, 'Deducting collateral benefits from damages: principle and policy', *Legal Studies*, 1998, pp 15–40; E. Pearson, 'Collateral benefits and front pay: a rule of no offset encourages agency recoupment', *University Of Chicago Law Review*, 2002, pp 1957–1982 https://doi.org/10.2307/1600623 (accessed 12 August 2020); F. Gomez & J. Penalva, 'Tort reform and the theory of coordinating tort and insurance', *International Review of Law & Economics*, 2015, pp 83–97 https://doi.org/10.1016/j.irle.2015.04.005; (accessed 12 August 2020); J. Boyd, 'Collateral benefits: defending the causal rationale', *University of Toronto Faculty of Law Review*, 2018, pp 92–129.

23 As the Courts stated in 2014: Cass. 11 June 2014, n. 13233, *Resp civ. e prev. (Responsabilità civile e previdenza)*, 2014, p 1879, with comment of Locatelli, p 1885, and Cass. 13 June 2014, n. 13537, *Foro italiano*, 2014, I, p 2470, with comment of Pardolesi, p 2489.

13. Until 2014 the contrast between the two different positions seemed peacefully resolved in favour of the second one (i.e. the restrictive thesis), when the so-called '*Rossetti* decisions'[24] pushed the debate in the opposite direction. Following the minority position, these two decisions[25] ruled that:

1) The amount of the compensation received by the victim on the basis of a non-life insurance shall be deducted from the amount of damages awarded for the same harmful event;
2) The capital of the survivor's pension, as well, shall be deducted from the amount of damages awarded for a family member's death.

14. In support of these decisions, the court referred to the *asystematic* consequences[26] of the majority position, since cumulation would imply the violation of the *indifference principle* (see section n. 1). In second instance, adopting the deduction solution (i.e. the minority position), the intention of the judges was avoiding an asymmetric application of Article 1223 of the Italian Civil Code (i.e. the principle of causation) with regard to damages and benefits: compensation must include damages and benefits even if they are mediated and indirect consequences of the tort, based on the rule of causal regularity. Finally, following the cumulation rule, the court argued that the private or social insurer would lose the right of subrogation under Article 1916 of the Italian Civil Code,[27] which is a special substitution of the insurer in the right of the policy holder against the wrongdoer. In fact, the limit of subrogation is the actual damage caused by the wrongdoer, who can never be forced to pay twice for the same damage: once as compensation to the victim, the second as subrogation to the insurer.[28] This argument is based on the distinction between *compensatory damages* and *punitive damages*, this latter banned in the Italian legal system, apart from the cases specifically provided for by law.[29]

15. Accordingly, these decisions agreed for an extension of the scope of *Compensatio Lucri Cum Damno* (which means an opposite conclusion with respect to the majority position): benefits arising from a specific legal provision or a contract shall be deducted from the amount of damages awarded to the victim (deduction). However, this again gives birth to a new risk: the wrongdoer could be exonerated from his liability, having his debt reduced or erased as a result of the intervention of a third party, thus putting a strain on the legal system by rewarding the wrongdoer.

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24 After the name of the drafter.

25 Cass. 11 June 2014, n. 13233 and Cass. 13 June 2014, n. 13537.

26 This expression identifies the solutions that are not consistent with the general principles of the Italian legal system.

27 Or other similar specific provisions.

28 G. Mattarella, *La Nuova Giurisprudenza Civile Commentata*, 2019, 3, p 586.

29 With regard to the purpose of damages, see footnote n. 8.

3. Overview on the State of the Art After 2018

3.1. The New Criteria

16. Considering the risks of the previous solutions – on one side, overcompensating the victim, on the other, exonerating the wrongdoer – the Italian Highest Courts (the Council of State and the Court of Cassation, both en banc[30]) have considered both the theses inadequate. The new perspective identified by the Highest Courts is built on the fundaments that *Compensatio Lucri Cum Damno* is not only an issue of *causation*, but of *purpose* as well: the scope of *CLCD* shall be identified by looking at the objective of collateral benefit. The 'origin' or the legal basis of the benefit are not relevant for the *compensatio*, but its *reason* and *purpose* instead (this concept will be explained in more detail in the following).

17. Accordingly, the conditions established by the Highest Courts for the deductibility of benefits from damages are: *i)* the compensatory purpose of collateral benefits, and *ii)* the legal provision of subrogation. For instance, in the case of a car accident, the courts highlight *i)* the compensatory nature of the indemnity received on the basis of a non-life insurance, since it neutralizes the same loss at which the regime of tort liability is aimed, and *ii)* the legal provision of subrogation, under Article 1916 of the Italian Civil Code.

18. Against this background, the questions arise as to whether benefits have the same purpose of compensatory damages and if there is a legal provision of subrogation. This last criterion is the object of the following paragraph, whereas the first one (i.e. the compensatory purpose of benefits) will be addressed in paragraph 3.3.

3.2. The Legal Provision of Subrogation

19. The relevance of the legal provision of subrogation relies on the fact that it would enhance the indifference principle (eliminating the risk of overcompensating the victim). At the same time it would avoid that what is provided by a third party translates into an unexpected advantage for the wrongdoer (eliminating the risk of exonerating him). Moreover, subrogation allows the private or social insurer or the social security institution to recover from the liable party the amount paid to the insured, with a possible reduction of insurance premiums and taxes.[31]

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30 Cons. Stato, Adunanza Plenaria, 23 Feb. 2018, n. 1 and Cass., Sezioni Unite, 22 May 2018, nn. 12564, 12565, 12566 and 12567.

31 See for instance, Cass. 14 Oct. 2016, n. 20740, in *DeJure* and E. Bellisario, *Danno e Responsabilità*, 2018, 4, p 442. See also, all the judgments of the Joint Panels of 2018, and especially Cass., Sezioni Unite, 22 May 2018, n. 12565, par. 6.2, with regard to the triple purpose - identified by the scholars and the courts - of subrogation *ex* Art. 1916 of the Italian Civil Code. With regard to the effects of recovery mechanisms on lowering the costs of insurance premiums

20. Because of the function of this legal device, the court cannot deduct benefits from damages when there is not a legal provision of subrogation. In fact, that would mean that the aim of the Legislator is strengthening the social solidarity '*not giving tortfeasors a windfall*',[32] by making citizens bear the costs of certain benefits[33] (and again, '*if there must be a windfall, it is more just that the injured person profit from it than the wrongdoer*'[34]).

3.2.1. Argumentation in Support of the Decisions of the Highest Courts

21. Some of the main arguments in support of the decisions of the Highest Courts are based on the common principles of European private law and on a comparative approach. In fact, a survey[35] addressing the common principles of European private law and other legal systems (e.g. the German one, the Dutch one, the Swedish one, the U.K. one ...) showed the necessity of looking at the purpose of benefits and not only at the causal link between these and the tort.[36] The same survey also showed the isolation in which the Italian experience would rely if the problem was solved with a general and strict rule,[37] that does not allow for any flexibility.

22. In particular, the common principles of European private law, as enshrined in the Draft Common Frame of Reference (DCFR)[38] and in the Principle of European Tort Law (PETL),[39] do not state a general rule but they encourage the identification of the purpose of benefits, in order to establish if taking these into account is fair and

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and public welfare, see J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*, p 22; R. Lewis, *Legal Studies*, 1998, p 24.

32 J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*, p 3.

33 Cass., Sezioni Unite, 22 May 2018, n. 12564, par. 3.8.

34 J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*, p 8. See also R. Lewis, *Legal Studies*, 1998, p 36: «However, in the absence of appropriate legal concepts recoupment will not be possible. There may then be no mechanism for the Court to arrange for recoupment, no matter how much it may think it a desirable policy to pursue».

35 U. Izzo, *La giustizia del beneficio: fra responsabilità civile e welfare del danneggiato*, p 349.

36 Or at the origin/formal source.

37 U. Izzo, *Responsabilità Civile e Previdenza*, 2018, 10, pp 156–157. Or with a '*facile monistic formula*': see J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*, p 4.

38 DCFR «VI.-6:103: Equalization of Benefits. (1) Benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account. (2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third party, the purpose of conferring those benefits».

39 PETL «Art. 10:103. Benefits gained through the damaging event. When determining the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit».

reasonable. This is one of the first times that the Italian Highest Courts have explicitly used an argument based on the *soft law*[40]: in fact, the DCFR and the PETL are not binding, on the contrary, they are devices of *moral suasion.* Therefore, the Italian Courts have attested the relevance of the common principles of European private law, thus helping their *moral suasion effect.*

23. Referring now to the comparative approach, it is useful analysing for instance the Belgian Civil Code, which (as most European legal systems[41]) does not formulate a specific rule about taking benefits into account when determining compensation. The Belgian courts formulated the rule for the allocation of benefits as follows: benefits paid by third parties may be deducted from damages only when they aim at compensating that same damage resulting from the unlawful conduct of the wrongdoer. Furthermore, the Belgian scholars proposed a partition in three models.[42] In the first one, the general tort law system (Article 1382 of the Belgian Civil Code) is excluded by special compensation schemes (exclusion of liability). In the second model, the general tort law and other special compensation systems coexist, allowing the victim to cumulate damages and benefits (e.g. the survivor's pension). At last, the most widely employed model is the third, where cumulation is prohibited and the third party has recourse against the liable person.

3.2.2. The Solutions of the Highest Courts regarding the Specific Cases

24. The Italian Council of State and the Court of Cassation have stated a set of solutions based on the path identified by the common principles of European private law, and using a comparative approach as well. General categories and classes of cases have been identified. In particular, the Council of State has distinguished three categories.

25. The first one includes cases with a single wrongdoer, one obligation and one source. It is the case where neither the victim nor the wrongdoer, and not even a third person, have directly caused the benefit, whereas the advantage was the natural consequence of the injury. A standard case is the saving of daily expenses for food if the victim is cared for in a hospital. It is uncontroversial that saved expenditures must be deducted from damages.[43]

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40 M. Franzoni, 'La *compensatio lucri cum damno* secondo la Cassazione', *Responsabilità Civile e Previdenza*, 2018, 4, p 1095.

41 For a comparative analysis on *compensatio lucri cum damno*, see U. Izzo, *La giustizia del beneficio: fra responsabilità civile e welfare del danneggiato*, p 349.

42 With regard to the coordination of tort law and other compensation systems, such as insurance law and social security law, in the Belgian legal system, see I. Boone, *Verhaal van derde-betalers op de aansprakelijke* (Antwerpen: Intersentia, 2009), pp 63–79.

43 U. Magnus, 'Vorteilsausgleichung' – a typical German institute of the law of damages?', in Magnus & Van Dijk (eds), *Voordeeltoerekening naar Duits en Nederlands recht*, 3 (Deventer: Wolters Kluwer 2015), pp 10–16.

26. The second category contemplates cases with a single wrongdoer, two debtors and two sources of obligations. It is the case where a third person has directly caused the benefit.

27. The third one includes cases with a single wrongdoer, one debtor and two sources of obligations, and the wrongdoer is the same party that caused the benefit. Standard cases for the second and third categories will be specifically addressed in few lines, as to these categories are associated the most problematic issues.

28. On one hand, the case[44] submitted to the attention of the Council of State falls into the third category: the injuring event was the exhalation of asbestos, for which the victim had the right to compensation (in tort)[45] and to indemnity (based on a specific legal provision),[46] both owed by the Italian State. In support of the deduction of benefits, the Court has argued that indemnity and compensation have the same purpose: restoring the injured party to the position he was in before the tort. In second instance, the judges have argued that the players are part of a bilateral relationship in which the wrongdoer shall pay both damages (under the general system of tort liability) and a benefit as well (under a specific system of 'welfare liability'[47]). In this case, cumulation would attribute a punitive function to non-contractual liability, beyond the cases specifically provided for by law. Therefore, the amount of the indemnity received by the victim under a specific legal provision shall be deducted from the amount of damages awarded for the same harmful event.

29. On the other hand, the four cases[48] submitted to the attention of the Court of Cassation fall into the second category. The Court of Cassation has stated different solutions for different classes of cases, distinguishing the benefits according to their type: the case of the survivor's pension (Court of Cassation Joint Panels Judgment no. 12564, 22 May 2018); the allowance for a person with permanent total disability paid by the National Institute of Social Security (INPS, *Istituto Nazionale della Previdenza Sociale*, in Italy) (Judgment no. 12567, 22 May 2018); the life benefit paid by National Institute for Insurance against Work-Related Accidents (INAIL, *Istituto Nazionale Assicurazione contro gli Infortuni sul Lavoro*, in Italy) for an accident occurred on the way to and from work (Judgment no. 12566, 22 May 2018) and, finally, the compensation from a private insurer (Judgment no. 12565, 22 May 2018).

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44 Cons. Stato, Adunanza Plenaria, 23 February 2018, n. 1.

45 See Art. 2043 of the Italian Civil Code.

46 See Presidential Decree 10 January 1957, n. 3.

47 This expression identifies the public welfare – social security systems – and the private welfare – insurance contract.

48 Cass., Sezioni Unite, 22 May 2018, nn. 12564–12567.

30. The Court of Cassation has ruled that, on one side, the capital of the survivor's pension shall not be deducted from the amount of damages awarded to the victim. On the other side, the amount of compensation received on the basis of a non-life insurance shall be deducted from the amount of damages awarded for the same harmful event. The same goes for the life annuity paid by the INAIL for permanent disability caused by an accident occurred on the way to or from work, and for the capitalized value of the allowance for a person with permanent total disability, paid by the INPS.

31. To summarize, all benefits, except the survivor's pension, shall be deducted from damages.

32. The first argument in support of the *deduction solution* is the compensatory nature of these benefits: they neutralize, in whole or in part, the same loss at which the regime of tort liability is aimed. Moreover, the court has argued that in all the specific cases there is a legal provision of subrogation (Article 1916 of the Italian Civil Code, paragraphs 1–4, with regard to private and social insurance, and Article 41, Law 4 November 2010, n. 183, with regard to social security institution). These cases fulfil the established criteria (i.e. the compensatory purpose of collateral benefit and the legal provision of subrogation) and, therefore, the benefits shall be deducted from damages.

33. On the contrary, in the case of the survivor's pension, the *cumulation rule* applies, thus the judges have emphasized its social security (not compensatory) purpose: the survivor's pension is not genetically characterized by the aim of removing the consequences that have arisen in the assets of the injured person as a result of the tort. Instead, it is the fulfillment of a promise made by the law to the worker who, through the sacrifice of part of his salary, has contributed to maintain his social security position.[49] Moreover, in this case there is not a legal provision of subrogation. Therefore, the case of the survivor's pension does not fulfil the established criteria and the benefit shall not be deducted from damages.

3.3. The Purpose of Benefits

34. In light of the analysis on the solutions to the specific cases, the compensatory purpose criterion (identified by the Highest Courts for the deduction of benefits from damages) is now addressed.

35. Trying to explain the difference between compensatory and not compensatory purpose of benefits in cases related to *CLCD*, the Italian scholars and courts[50] have argued that a deduction is admissible when the purpose of the benefit is

49 Cass., Sezioni Unite, 22 May 2018, n. 12564.

50 See Cass., Sezioni Unite, 22 May 2018, n. 12564, par. 4, with regard to the distinction between compensatory and not compensatory purpose on the issue of the survivor's pension.

compensatory, i.e. when it puts the victim in the same economic position in which he would have been if the damaging event had not taken place. This means that the function is compensatory when the victim has not preventively paid to receive the benefit. For instance, in case of a non-life insurance where there is not a functional relationship between benefit and payment, where premiums have been paid in order to be covered (i.e. protected) against the risk of a damaging event, not in order to receive the indemnity.[51]

36. On the other side, a deduction is not admissible when the purpose of the benefit is supporting the victim. This means that the function is not compensatory when the victim has preventively paid to receive the benefit: for instance, in case of a life insurance or survivor's pension,[52] where there is a functional relationship between benefit and payment, since premiums and contributions have been paid in order to receive that indemnity. Therefore, when the benefit arises from autonomous choices or sacrifices of the injured person its purpose is not compensatory but it becomes a form of support to the victim.

4. Conclusions

37. Some further comments on certain innovative aspects of the *Compensatio Lucri Cum Damno* are here reported.

38. It appears fair analysing the reasons behind the *revirement* of 2018, which introduces the new criteria (i.e. the compensatory purpose of collateral benefits and the legal provision of subrogation) for the deductibility of benefits from damages.

39. It seems reasonable that the innovation provided by the Highest Courts on *CLCD* is aimed at avoiding the opposite interpretations related to the previously used criterion (the causal link between tort and benefit). This interpretation was risking to be either too restrictive, thus always excluding the deduction of benefits when their *immediate* causes are a contract or a specific legal provision (i.e. the *cumulation solution*, with the risk of overcompensating the victim and violating the indifference principle), or too broad, thus always allowing the deduction of benefits when their *mediated* cause is the tort (i.e. the *deduction solution*, with the risk of exonerating the wrongdoer and violating the principle of general liability).

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51 Cass., Sezioni Unite, 22 May 2018, n. 12565, par. 6.4, and, among others, see U. Izzo, 'Quando è "giusto" il beneficio non si scomputa dal risarcimento del danno', *La Nuova Giurisprudenza Civile Commentata*, 2018, 10, pp 1503–1521.

52 All four judgments of the Joint Panels of 2018 affirm the cumulation between the life insurance (received as a result of a family member's death) and the compensation for the damage caused by the same event (as the result of autonomous choices and sacrifices of the insured and motivated by savings and investment purposes). With regard to the life insurance as a form of investment and saving – consequently, not deductible – see among others, J. Fleming, in *International Encyclopedia of Comparative Law, Vol. XI, Ch. 11 Torts*, p 10; R. Lewis, *Legal Studies*, 1998, p 31.

40. Therefore, the reasons behind the *revirement* of 2018 appear the necessity of respecting *all* the general principles of awarding damages.

41. On one hand, in fact, focusing exclusively on one single principle (e.g. the one of causation or the indifference principle), the risk would arise of establishing a strict and not flexible rule, and this would lead to a radical solution: either *always* cumulation, as the Courts ruled until 2018 (violating the indifference principle) or *always* deduction, as the Courts ruled in 2014 (violating the principle of general liability).

42. On the other hand, if we had a comprehensive view of *all* the principles, we would be able to establish a flexible rule that allows a flexible solution, i.e. a solution based on «classes of cases» or models. If this was the case, the aforementioned principles would be observed and the victim would not be overcompensated nor the wrongdoer would be exonerated.

43. On this basis, it would be better to coordinate the two systems – tort law on one side, and insurance and social security law on the other – avoiding general solutions, in order to find a fair and reasonable balance in the relationship between the third party, the wrongdoer and the victim.[53] This would allow the respect of *all* the principles involved: the indifference one (regarding the victim), the principle of responsibility (regarding the liable party), and the principles of economy and efficiency (regarding the Public Administration).[54]

44. However, still this would not be fully settled and uncontroversial and, in fact, the Highest Courts have not established a general rule. Indeed, what will really matter in the future is how the case-law and the scholars will apply the new criteria following the decisions of 2018.

45. With these regards, two questions have already been recently raised by the scholars.[55] The most obvious, but also the most dogmatically complex one, is: when

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53 The economic crisis has forced a reassessment of the need to coordinate the systems (the general system of civil liability on one side, and private and public welfare on the other), in order to balance the rights of the injured with the rights of the community (i.e. the scarcity of the available resources). The coordination device was identified by the courts in the new construction of *compensatio lucri cum damno.* For an economic analysis of the *revirement* started in 2014, see in the case-law, Cass. 22 June 2017, n. 15534, resuming the observation of Cass. 13 June 2014, n. 13537: «*l'orientamento tradizionale – privando l'ente previdenziale o l'assicuratore dell'azione di surrogazione – addossa alla fiscalità generale, e quindi alla collettività, un onere il cui peso economico serve non a ristorare la vittima, ma ad arricchirla: così posponendo di fatto l'interesse generale a quello individuale*»; in the Italian literature, U. Izzo, *La giustizia del beneficio: fra responsabilità civile e welfare del danneggiato*, p 48; E. Bellisario, *Il problema della compensatio lucri cum damno*, p 113.

54 That is, the provision of public services at the minimum cost, www.britannica.com/topic/public-administration/Principles-of-public-administration (accessed 12 August 2020).

55 See for instance, R. Pardolesi & P. Santoro, *Danno e resp.*, 2018, 4, pp 424–438; E. **Bellisario,** '*Compensatio lucri cum damno*: il responso delle Sezioni Unite', *Danno e resp. (Danno e*

a benefit can be said to have a compensatory purpose? The second issue is linked to the procedure of the insurance companies for including a clause waiving the right of subrogation in their contracts. This gives rise to a second question: if there is a legal provision of subrogation but the subrogee renounces its right (as it is widely used in non-life insurance) in favour of the insured (the subrogor), is this contractual provision valid and might the victim cumulate damages and benefits? Or is this contractual provision invalid and shall the victim deduct benefits from damages?

46. Future research is necessary to provide answers to both questions, showing the relevance and the inherent complexity of the topic of *Compensatio Lucri Cucm Damno.*

responsabilità), 2018, 4, pp 438–447; M. Franzoni, *Responsabilità Civile e Previdenza*, 2018, 4, pp 1101–1104.