DOI 10.26807/rfj.v10i10.386

When conceptual autonomy leads to in the (autonomous) absence: Where is moral damage going? A revision of Italian case law

Cuando la autonomía conceptual lleva a la inexistencia (autónoma): ¿hacia dónde va el daño moral? un panorama de la jurisprudencia italiana

Luca Oliveri
University of Genoa
City: Genoa
Country: Italy

Original article (research)
RFJ, No. 10, 2021, pp. 181-210, ISSN 2588-0837

ABSTRACT: The starting point of this brief itinerary within the jurisprudence of legitimacy is constituted by the famous sentences of San Martino, pronounced by the United Sections in November 2008, a true and proper crucial moment concerning the subject matter of attention. If this is the starting point, it is not yet possible, on the other hand, to identify a real moment of conclusion of this path, since the point of arrival, far from being reached, looks more and more like a mirage. However, within this (secular) litaniae sanctorum, one may sometimes come across some statements that could be peacefully defined as unexpected, if not surprising: small deviations, in short, from the usual path of argumentation that struggle to fit into the latter in a logically coherent way, generating not a little confusion in the jurist.

KEYWORD: jurisprudence, theory of law, damages, morality, justice

RESUMEN: El punto de partida de este breve itinerario dentro de la jurisprudencia de la legitimidad está constituido por las famosas sentencias de San Martino, pronunciadas por las Secciones Unidas en noviembre de 2008, un verdadero y propio momento crucial con respecto al tema que nos ocupa. Si este es el punto de partida, todavía no es posible, por otra parte, identificar un momento real de conclusión de este camino, ya que el punto de llegada, lejos de ser alcanzado, se parece cada vez más a un espejismo. Sin embargo, dentro de estos litaniae sanctorum (seculares), uno puede encontrarse a veces con algunas afirmaciones que podrían definirse tranquilamente como inesperadas, cuando no sorprendentes: pequeñas desviaciones, en definitiva, de la senda habitual de la argumentación que pugnan por encajar en ésta de forma lógicamente coherente, generando confusión en el jurista.

PALABRAS CLAVE: jurisprudencia, teoría del derecho, daños, moral, justicia.

CODICE JEL: K41, K12.

INTRODUCTION

Carlo Francesco Gabba, back in 1911, reflecting on the ontology (to use a term that is very common today in Italian legal theory and jurisprudence on the subject) and, consequently, on the compensability of moral damages, said that French and Belgian jurisprudence - in favor of the compensability of this type of prejudice - never defined the concepts relating to it and, therefore, the indeterminacy of ideas that followed was the cause of the continuous flooding of the doctrine of compensation for non-asset damage (Gabba, 1911, pp. 219-220), "which today is a spectacle in civil jurisprudence, especially Italian" (Gabba, 1911, pp. 219-220). The indefiniteness of ideas, according to the

illustrious scholar, was caused "only by the generic expression non-material damage" (Gabba, 1911, pp. 219-220).

Well, I would use these brief and incisive words of a master of Italian civil law doctrine as the starting point and guiding thread for the reflections we wish to propose here. The analysis, however, is not intended to be a historical reconstruction of the doctrinal reflections and jurisprudential evolutions on moral damage from the last century to the present day, but an attempt to demonstrate that these words can be considered well-applicable also to the most recent jurisprudence of legitimacy of the Italian Court of Cassation, whose modus operandi seems more and more often (and to an increasing extent) to be assimilable to a show.

Closely related to this last aspect, almost as if to complete this brief introductory overview, is the attitude that, in recent times, seems to have reached a veritable phase of exasperation: the reference is to the way of formulating the motivating part of the judgments of legitimacy. The latter has now become the natural place in which to proceed - in addition to the facetious display of the personal level of culture achieved[1] - to a continuous (but very tired and always irritating) repetition of arguments (legal and otherwise) that have now exhausted what, according to their supporters, was their persuasive force (assuming they ever had any).

And it is not so difficult to identify the reasons behind such an attitude: the need to spasmodically repeat as many times as possible a speech that has already been made, at best may be aimed - thanks to the hypnotic and obtunding power of repetition

1 "A certain idea of nomofilachia, coupled with the Italian legal and jurisdictional tradition's unfamiliarity with the culture of judicial precedent, has made possible the Court's slide towards a sort of 'doctrinalistic' drift, often uncritically applauded" (Sassani, 2019, p. 60).

- at generating in the reader the conviction (but perhaps also the self-conviction of the speaker) of the goodness of the theses sustained; In the worst-case scenario, on the other hand, such behavior may be considered to be maliciously preordained to create a large number of concordant case law precedents, to give rise - in an entirely artificial manner - to an interpretative orientation that takes on the power of "established precedent".

1.THE SAN MARTIN JUDGMENTS OF NOVEMBER 2008

An important moment of reflection on non-asset damage by jurisprudence was, without a shadow of a doubt[2], November 2008, when the unified sections of the Court of Cassation (2009) were called upon, as they say, to "take stock" (Procida Mirabelli di Lauro, 2009, p. 33)[3]. The main reason that prompted the third section to request the intervention of the highest court of the Court (Court of Cassation, no. 4712/2008, 2008) was the uncertainty regarding the conceptual admissibility of an autonomous subcategory of non-asset damage such as existential damage. However, the questions put to the Joint Sections we're not limited to existential damage only but showed some interesting profiles of extension to so-called moral damage as well: the reference is to those statements[4] -

2 San Martino (2008) 'has represented, and still represents, an excellent argumentative model, both concerning conceptual and systematic requirements and concerning the requirements of legal policy' (quoted by Grondona, 2021, p. 40).

3 "It was frankly to be expected that the United Sections, worried by the number of disputes already started and, above all, by the much higher number of those that could have been started, would intervene in a strictly counter-reformist manner" (Scognamiglio, 2009, p. 261), speaks of a "construction of a new system of non-asset damage for the third millennium" (Scognamiglio, 2009, p. 261).

4 Ibid, c. 1458. See, in particular, the last four points of the list drawn up by the Third Section, which asks: i) whether subjective moral damage, characterized by different ontogenesis compared to existential damage, is characterized by the fact that it is limited to the inner sphere of feeling; ii) whether subjective moral damage and existential damage are uncon-

which were requested to be confirmed, clarified, or modified - regarding the correct configuration of moral damage (and, consequently, albeit implicitly, the relations with other types of damage not characterized by patrimonial nature). It should be noted, however, that even in this case the question of the autonomy of the specific type of prejudice was not placed in the background, but played a particularly important role; a role so important that it can be stated, in general terms, that the most important theoretical and dogmatic questions concerned these two aspects: the clarification of the content of the different types of damage and their configuration, within an (alleged) sub-system[5] of non-asset damage, as autonomous sub-categories[6] .

The sentences handed down by the unified sections, therefore, should have brought order to a panorama which the order of reference itself had not hesitated to define as characterized by strong moments of contrast and confusion on the morphological and functional aspects of non-asset damage (Court of Cassation no. 4712/2008, cited above, c.

ditionally indemnified within the limits of the legal reserve as per article 2059 of the civil code; iii) moreover, whether they are also indemnifiable beyond the limit as per article 2059.

c.c. if (and only if) the conduct of the aggrieved party has affected values or interests that are constitutionally protected; iv) and, finally, whether they are compensable only if the aggrieved party provides actual proof of the damage (including by way of allegations and presumptions).

5 The expression seems to recall (deliberately) the doctrinaire reflections on medical liability, defined, precisely, as a 'subsystem' of civil liability 'endowed with an intrinsic rationality' (Matteis, 1995, p. IX).

6 point 3 of the list cited above in note 8, where it is asked whether the broad category of non-asset damage is divided into a subsystem made up of biological damage in the strict sense, existential damage, and subjective moral damage. The fact that the types of damage are to be understood as autonomous from each other emerges even more clearly from a question that can be read a little earlier (cf. ibid., c. 1456): ¬" Concerning the tri-partition of the categories of non-asset damage made by the constitutional court in 2003, it is legitimate and current to discuss, alongside subjective moral damage and biological damage, existential damage, meaning damage deriving from the violation of constitutional values/interests.

1456)[7]. Since we cannot go into every single aspect of the sentence here, we will limit ourselves to analyzing the figure of so-called moral damage.

From this point of view, there appear to be two main moments of reflection by the Supreme Court: firstly, the "pure and simple" moral damage is analyzed, as consigned to us by the nineteenth and twentieth-century civil law tradition; subsequently, attention is shifted to those situations in which the "moral" component of the prejudice is not the only one to come to the fore after the damaging action carried out by the damaging party. To dispel any doubts, it should be noted first of all that neither of the two parts mentioned above can be considered more important than the other or, worse still, to be read separately from the other: the sentence gives us a unitary and harmonious picture of so-called moral damage, which may or may not be liked, but certainly cannot be roughly "sectioned off" (on pain of losing the organic nature of the same).

The first point, as mentioned above, concerns non-pecuniary damage in and of itself, and it is perhaps in this area that the most marked break with the civil law tradition referred to above can be seen. In fact, non-material damage was considered compensable only in cases where the wrongful act of the damaging party was configurable (even if only in the abstract) as a crime and where the consequences of that act were limited to what, with a cultured but verbose diction, was usually defined as "contingent suffering, transeunt disturbance of the soul".

Now, the Joint Sections take a clear position on the question of the time limitation of the inner suffering suffered

7 Scognamiglio (2009) speaks of a 'construction of a new system of non-asset damage for the third millennium' (p. 261).

by the injured party for the configurability of moral prejudice, unhinging a doctrinaire system that jurisprudence had over time accepted, but which had no normative basis. And the words used could not have been more effective: it is affirmed that the (narrow, we would add) figure of transeunt subjective moral damage must be definitively surpassed, as it has a very doubtful normative basis and is lacking in terms of the adequacy of protection for the injured party (Court of Cassation, section one, no. 26972/2008, 2008, p. 107).

In this way, the position is truly radical: once the constraint of the temporary nature of suffering has been dropped, there is no obstacle to the harmful effects of the harmful action also unfolding over the long term[8] . Therefore, the temporal extent of the suffering will be relevant only to quantify the amount of compensation, and not - as previously occurred, erroneously - for its existence and legal relevance.

The court, proceeding in this way, provides the answer to the first of the two (dogmatic) questions identified above, and then - almost as if it were a corollary of the answer itself - also provides the answer to the second question: since the so-called moral prejudice is not necessarily limited to the moments immediately following the harmful event (and, therefore, destined to disappear over time), it does not seem necessary (and, indeed, not even correct from a legal point of view) to

8 "the unified sections attribute the same [traditional categories] to distinct cases and give them a content that is so extensive as to absorb the entirety of the indemnifiable injury: moral damage, expanded to embrace an injury that accompanies existence, is referred to the illicit crime; existential damage, including suffering, is linked to the violation of fundamental rights; biological damage, extended to pain, exhausts the effects of the violation of the right to health" (Navarretta, 2009, p. 86). In a critical sense, Mazzamuto (2009, p. 610), who highlights the inability "of the Supreme Court to set aside the categories received from the previous phase of the debate on the protection of the person against civil liability [...] to inaugurate a new season of language and concepts with which to describe non-asset damage".

proceed to the identification of "moral" prejudice. Since the so-called moral prejudice is not necessarily limited to the moments immediately following the damaging event (and, therefore, destined to disappear with time), it does not appear necessary (and, indeed, not even correct from a legal point of view) to identify a further and autonomous conceptual sub-category of non-asset damage[9] that goes alongside moral damage and that would have served to emphasize (conceptually and in terms of compensation) the further negative consequences of the wrongful act on the life of the injured party. Once the content of so-called moral damage has been extensively remodeled[10] , all those fascinating (but erroneous and artificial) "existentialist" constructions seem to have been fragile, whose alleged objective was precisely that of giving compensatory (rather than juridical) importance to the so-called "long-term" consequences that had modified in plus the existence - precisely - of the injured party[11] .

The criticism of the previous conception of non-material damage, as noted, is the result of a careful re-reading of the

9 In addition to the outright rejection of a configuration in autonomous terms of what had been presented as sub-categories of non-asset damage, the correct reading key for approaching the latter is provided: the Court is clear in affirming the merely "descriptive" value of the individual names previously adopted by jurisprudence (Court of Cassation, section one, no. 26972/2008, 2008, p. 108), whose scope had been misunderstood and, as a result, had generated considerable confusion. For a singular interpretation of this passage, see Ziviz (2011): "It should be [...] noted that - at the time when it is stated that the various items of injury have a descriptive value - it is recognized that they concern impairments of a different nature: which, therefore, differ from each other on an ontological level" (p. 1737).

10 In fact, in a subsequent passage of the reasoning, a 'renewed configuration' of the moral damage is discussed (p. 116).

11 The terms used in point 5 of the final list of the order of reference are unequivocal (Court of Cassation, no. 4712/2008, 2008, c. 1458), where existential damage is defined as prejudice about the sphere of the subject's habitual actions and which takes the form of damage to a previous "system of life" that has been permanently and seriously modified in its essence following the offense.

normative data already present in Italian law. However, on closer inspection, a further element of interest can be found in the Court's reasoning, which must be highlighted as much as possible to highlight from the outset how some of the criticisms that have subsequently fallen on the San Martino rulings are based on erroneous assumptions motivated only by a priori hostility.

The reference is to the particular point of observation also adopted in the interpretation, a perspective angle that made it possible to look at the concrete reality of the facts (or, in other words, at the phenomenology of moral damage) and to assess, consequently, whether the ontology of moral damage was reflected in the legal framework, so as not to create (or, possibly, accentuate) one of those (rightly vilified) situations in which there is a mortifying disgrace between factual reality and legal reality. Well, the Court, by giving importance to suffering as such and freeing it from the terrible noose of temporal limitation, does nothing but look at the concreteness of the prejudice suffered by the subject: the enhancement of the phenomenology of damage is inherent in this very passage because it recognizes how even the negative changes in the life of the injured party destined to accompany him for a long time (potentially - and, indeed, this frequently happens - even for the rest of his life) are the result of the permanence of suffering that the subject is unable to overcome; a permanence that, from within, is projected outside the person, negatively affecting the activities that the latter can carry out[12].

12 Where it is stated that, once "the traditional orientation that limited compensation to subjective moral damage only has been overcome, identified with the transient uneasiness of mind, and the compensability of non-asset damage in its widest sense has been affirmed, non-asset damage consisting in not being able to do (but it would be better to say: in moral suffering caused by not being able to do) is also compensable" (Court of Cassation, section III, no. 26972/2008, 2008, page 110). A similar argument is used for damages deriving from the violation of constitutionally protected rights: "the joint attribution of moral damage, in its new configuration, and

The picture that emerges from the grounds of the judgment, therefore, seems to favor - thanks to the extensive reinterpretation of the specific figure of damage - a harmonious reconstruction of this small fragment of the legal system: harmonious, because legal reality and empirical reality now go hand in hand and there do not seem to be, compared to the past, any particular gaps worthy of censure due to an alleged defect in the protection granted to the injured parties.

The same considerations can be used to express an evaluation on the second point of reflection of the Court that was previously indicated, i.e. the case in which moral suffering is not the only component of the injury to come to the fore. If in the case just examined, suffering that is prolonged over time produces further consequences that are not, however, susceptible to medical assessment, in the second case under consideration, the intensity of suffering (or its duration, but also a combination of both) affects the injured person so severely that it results in a medically ascertainable impairment of psychological and physical integrity.

For this reason, the Court maintains that suffering is a constituent component of biological damage13 deriving from the above-mentioned ways in which suffering can occur: the affirmation is based on the observation of the ontogenesis path of the final lesion, a path which the medico-legal expert - during the assessment - cannot but observe and evaluate in the widest possible way to give importance to the peculiarities of the

damage due to the loss of a parental relationship determines a duplication of compensation, since the suffering experienced at the time when the loss is perceived and that which accompanies the existence of the subject who has suffered it are only components of the complex prejudice, which must be fully and unitarily compensated" (Civil cassation, section III, no. 26972/2008, 2008 p. 110). 26972/2008, 2008, p. 116)

concrete case since the medico-legal assessment is not an aseptic (as well as impossible) transposition of the entity of suffering and lesion into cold numbers. The possibility of evaluating the above-mentioned peculiarities is also recognized by the judges of the panel of judges who decide to make use of the 'known tables' (Court of Cassation, section un., no. 26972/2008, 2008, p. 116) (but we will return to this point shortly).

In this case, too, therefore, the multiplicity of subjects (competent in the fields of their specialization, i.e. forensic medicine and law) who intervene to try to quantify in the best possible way the compensation to be awarded to the injured party seems to constitute an important guarantee for the protection of the injured party.

2. INITIAL RESISTANCE TO THE NEW ORIENTATION

This, very briefly, seems to be the (agreeable) framework outlined in November 2008 by the unified sections at the request of the third section. This framework was almost immediately accepted by the Observatory on Civil Justice in Milan through the modification of the tables for the[13] settlement of non-asset damage, which would provide - from now on - an all-inclusive amount for all the items of non-asset damage deriving from injury to psycho-physical integrity (without prejudice to the possibility, for the judge, of departing from the amount provided for by the tables based on the particularities of the concrete case).

13 An excellent overview of the "historical" evolution of the tables is contained (p. 2) in the "Orientation criteria for the settlement of non-asset damage arising from injury to psycho-physical integrity and from the loss - serious injury - of the parental relationship", which accompanies the "2018 edition" of the tables themselves (https://www.tribunale.milano.it/index.phtml?Id_VMenu=1&daabstract=847). On the tabular method, see an interesting (and critical) paper by Benatti (2018, p. 105 ff.).

Moreover, the tables were subsequently recognized (Court of Cassation no. 12408/2011, 2011)[14] , due to the continuing absence of the regulatory tables provided for by the private insurance code, as having a para-normative value such as to allow their application - at least potentially - throughout the country.

But the history of non-asset damage, far from moving towards calm reflections[15] and - why not? - even possible improvements to certain aspects of the San Martino verdicts considered by some to be not fully satisfactory, has seen an increase in the hostility of those who, at the time, had requested the intervention of the Supreme Court, revealing ill-concealed dissatisfaction with a result that was not shared and unexpected[16] . Here, we will consider only a few decisions of the Third Section of the Court of Cassation made in the five years after 2008, highlighting - albeit very briefly - the passages that seem to be in contrast with the precedent jurisprudence analyzed above.

First, for a purely chronological reason, a ruling from 2011 (Court of Cassation no. 18641/2008, 2012) comes[17] into play, which came a little later than the one mentioned above concerning the Milanese tables. Well, only three months later,

14 Incidentally, it should be noted that the president of the panel of judges in 2011 is the same person designated as the draftsman in 2008. Franzoni (2011), speaks of a "rewarding reason for the victims", because "with the Milanese tables more is given". (p. 1088).

15 Scognamiglio (2010) pointed this out with hopeful hope: "The image of non-asset damage that they give us back [...] is an image that is organic and balanced in substance [...] and that is destined to open [...] a new chapter in the problem of non-asset damage" (pp. 264265).

16 Ponzanelli (2008), speaks of a "framework of reference [...] less and less dominated by a scientific sensibility and more and more [...] altered by ideological-cultural temptations" (p. 681).

17 Again, it should be noted that the draftsman of the judgment in question was the draftsman of the order of referral to the Joint Sections cited above in note 5.

the situation seems to change: the change is not radical and passes almost unnoticed because there is no serious criticism of the San Martino rulings, but it exists. If in judgment no. 12408/2011 there are relevant references to the dicta of the Joint Sections - the aim of which is to reaffirm the validity and the agreement of the judging panel -, in judgment no. 18641/2011 there are only quick hints with a slightly nostalgic flavor, which seem to give exclusive importance to the mere factor of discontinuity. With specific regard to this last factor, we cite only a few passages considered to be illustrative: the ground of appeal:

> is broken [...] by the correct motivational structure adopted by the magistrate of appeal in the part where he considered that the joint settlement of biological damage and moral damage, in the case in question, was made by applying the (then-current) Milanese tables which, before their revision following the sentences of the unified sections [sic] of 11 November 2008, provided, based on a now consolidated living law, for the settlement of moral damage as a fraction of biological damage unless personalized. (Court of Cassation no. 18641/2008, 2012, s. p.).

But again: the judgments of the United Sections:

> on a more careful reading, they have never preached a principle of law functional to the disappearance by ipso facto absorption of the moral damage in the biological damage, having, on the contrary, only indicated to the judge of merit the need to avoid, through a rigorous analysis of the probative evidence, duplication of compensation. (Court of Cassation no. 18641/2008, 2012, p. 54).

This last passage serves as a link between what could be defined as the general aspect (the way the sentences are formulated and the vocabulary used, as mentioned above) and the particular aspect of the judgment (the reasons in law adduced in support of the thesis): In this short passage (but also elsewhere), an attempt is made to silently re-evaluate the scope of a previous decision, but it seems that - in doing so - one is guilty of generality (and one could at least have indicated the passage that should have been the subject of the most careful re-reading suggested, while nothing is said in this regard, limiting oneself to a very vague "re-reading") or, worse still, of irrelevance (by referring to normative or jurisprudential data that do not seem suitable for the purpose).

The points to be overturned[18] are precisely those that, above, were indicated as issues of theoretical interest that were the subject of the Supreme Court's reflections in 2008, namely the content of non-material damage and its relationship with other types of damage.

On the first question, the reader could rightly be astonished and even disconcerted by the attitude of the panel of judges (or the drafter?), since in the motivating part of the judgment, previous judgments of the Court itself are listed, which continue to discuss moral damage in terms of "contingent suffering" and "transient disturbance of the soul". Well, such a way of proceeding must be criticized, since the ex officio elimination of the teaching of the Joint Sections on the content of moral damage takes place not only without any normative reference (unlike what was done by the Joint Sections) but even without taking into consideration the re-reading (this one, yes, precise and intelligible) of the regulations made only a few years earlier.

18 Ponzanelli (2016) speaks of a 'trend towards an anarchic use of liability rules [...] in the territory of personal injury' (p. 222).

In short, a substitution - we might well say - made by authority (even if we do not know which one).

The second question concerned the relationship between non-material damage and other types of damage, in particular biological damage. In this case, concerning the one just examined, some normative references can (fortunately) be found; however, the slightest argument in favor of the theses obstinately sustained by some interpreters cannot be drawn from them, so much to suggest that their specious reference is only a convenient accessory element with which to embellish an idea and thought already well outlined. Therefore, two decrees of the President of the Republic have been presented[19] which, due to their extreme sectorial nature[20] , one would never have expected to encounter in this forum: these measures, in addition to regulating numerically reduced cases of compensation for non-pecuniary damage (and, consequently, no general and wide-ranging value can be attributed to them), are so close in time to the San Martino sentences that it does not seem at all reasonable to expect, not so much an acknowledgment of the dicta of the Joint Sections, but even their (explicit) subversion. Detailed measures, we could say, we're used to reviving an "autonomist" conception of individual non-asset damages (in particular, in our case, moral damage).

19 Presidential Decree No. 37/2009 - concerning the regulation governing the terms and procedures for the recognition of particular disabilities from causes of service for personnel employed in military missions abroad, in conflicts, and on national military bases (emphasis added) - and Presidential Decree No. 181/2009, concerning the medical-legal criteria for the assessment and determination of disability and biological and moral damage for victims of terrorism and massacres of the same matrix

20 On this point, the acute observation by Scognamiglio (2016): "It is certainly not possible to overemphasize the meaning of these regulatory data, which are not at all sectoral and do not even refer specifically [...] to a context of civil liability in the proper sense; all the more so since the formulation of the same is effected by the language of the case law practice widely accredited up to the unified sections of 11.11.2008 [...]". (p. 251).

Lastly, the heavy emphasis insistently placed on the term "cancellation" of moral damage seems specious and misleading: no one - and certainly not the Joint Sections - has ever sustained a wicked cancellation sic et simpliciter of the so-called moral damage (which - on the contrary - has been renewed, as seen, by the examination to which it was subjected only three years ago).

The ruling just analyzed was not destined to remain without (worthy) company, since the following year a judgment would be handed down (Court of Cassation no. 20292/2012, 2013, p. 315 ff.) which, in addition to the factors mentioned above, would add to the already unconvincing arguments a regulatory reference that was certainly broader in scope than the previous ones (i.e. the aforementioned private insurance code), but still not suitable for the purpose pursued. Indeed, it is not possible to argue that Articles 138 and 139 of the Insurance Code in force at the time:

> did not allow (nor do they still allow) [...] a different interpretation from that which advocated separating the criteria for settling biological damage codified in them from those functional to the recognition of non-material damage: in other words, the "non-continuity", not only ontological, in the syntagm "biological damage" also of non-material damage. (Court of Cassation no. 20292/2012, 2013, p. 319).

As, in the same text of the judgment, it is correctly recognized that:

> the same "tables" used by the court of Milan [...] provided for a separate settlement [of moral damage], indicating the percentage of biological damage which could be used as a parameter for the settlement of the

> (different) subjective moral damage as one third. (Court of Cassation, no. 20292/2012, 2013, pp. 318-319).

It is difficult to understand how such an argument can have any persuasive force, given that the tables and the settlement mechanisms provided for therein (the first version of which dates back to 1995) have exerted some form of influence on subsequent regulatory provisions (in this case, the 2005 Private Insurance Code): Therefore, the use of a regulatory provision that came into force before the disputed ruling (the 2008 judgment of the Joint Sections), and influenced by extra-regulatory elements (not yet para-regulatory) also before the ruling, does not appear to be a sufficiently well-founded reason to seriously consider the hypothesis of a critical review of the orientation assumed only a few years earlier[21] .

In short, one could say that it could not have been worse. Moral damage, inexplicably given up for dead, is even resurrected with its oldest features, an exceptional case of resurrection (and even rejuvenation!) of something still... alive! Well, after this "first act" of the spectacle that Italian jurisprudence has offered us - as Gabba would say - to give an image of the modus procedendi of the Court, we could use, modifying it, a famous Latin saying: regredi est progredi.

21 At a later stage, the rulings analyzed above will be widely cited as precedents to be brought in support of the new orientation that can now be peacefully called "autonomist": Cass. 19402/2013, Cass. 22585/2013. (whose rapporteur is the same magistrate who drafted the above-mentioned rulings). With specific reference to this last pronouncement, Ponzanelli (2013), notes: "Today's drafter, who had already urged the united sections in February 2008 in this direction, after five years wants to re-discuss the conclusions reached then, perhaps without necessarily going through a further examination of the united sections [...]" (p. 3449). As we have seen, however, the desire to re-discuss the outcome of 2008 is not new in 2013 but has already been present for (at least) two years.

3. ACT TWO: THE ASSAULT ON THE STAGECOACH

With a not excessive time lag, we can therefore pass - in this third part - to the analysis of some rulings made during 2018 and 2020. The latter deserve interest and careful reading, as they aim - and the reference is to the rulings made during 2018 - to consolidate and "strengthen" the results previously achieved, even if, in the last period (and here we refer to the recent, very recent rulings of 2020), the consequences of the orientation that we wanted to give life to previously seem to reach completely unexpected results, the result of moral damage badly understood and even worse engineered.

The leitmotif of the orientation in question - as we have seen - is the desire to make all the different types of non-asset damage independent of each other again. It can be considered that this desire is aimed at achieving two identifiable objectives: one made explicit by the supporters of the "autonomist" current themselves - i.e. satisfying the need (real or presumed as it may be) to bring the legal categories back into line with the reality of the facts, to avoid useless and abstract superfetation's -; the other, although implicit, is easily intuitable - i.e. increasing the amount recognized to the injured parties.

As mentioned, in the course of 2018, several judgments were rendered which - by convincingly reaffirming the adherence to the[22] aforementioned case law precedents - sought to strengthen that line of case law which had put up such resistance to the November 2008 decisions. Since it is not possible to go into all the aspects of the case, we will limit

22 See the enlightening words of Libertini (1990): "There is today, on the contrary, a widespread and uncritical tendency towards the self-legitimization of jurisprudence: this can be seen in the diffusion, already mentioned, of self-referential motivations in judgments or in the doctrinal legitimization of solution criteria that refer to the jurisprudential practice as such" (pp. 145-146) (original italics).

ourselves to the analysis of a single (new) piece of legislation, cited by the Court as a decisive element in support of its thesis.

In 2017, the legislator had revised Articles 138 and 139 of the Private Insurance Code, changing both the heading of the articles in question (from "biological damage" to "non-asset damage") and their wording. Presented as diriment the new text of Article 138, in which:

> after the extremely significant modification of the heading [...] we read, verbatim, in letter e), that "to take into account the component of non-material damage due to injury to physical integrity, the quota corresponding to biological damage established in the application of the criteria set out in letters a) to d) is increased on a percentage basis and progressively by point, identifying the percentage increase in such values for the overall personalization of the settlement". (Cass. no. 901/2018, 2018, pp. 466-467)

Following the first paragraph of Article 12 of the so-called "Prelegislations", the first criterion to be taken into account here to interpret the provision as amended is the literal one, referring only to the textual content (and, to be more precise, not also to the heading[23]). Using this criterion, it is not clear how the new wording of the provision can be used to support the autonomist conception adopted by the Third Section of the Court of Cassation, since the word "component", in the Italian language and the meaning of the syntagma, indicates

23 On this point, see the words of Tarello (1980): "[T]he fact remains that the habit of precluding internal titles and headings in attributing meaning to legislative documents in the civil law field has become entrenched (although perhaps not reasonable) and the interpreter - at least when forecasting the attribution of meaning by others - cannot but take this into account" (p. 105).

a "constituent element". In this case, to understand what is a constituent element, it is necessary to proceed to a reading of the entire provision in question (and not just a small part of it, taken out of context, because of its interpretability in a sense favorable to the interpreter who proposes such a reading). 138, speaks of "a specific single table on the whole territory of the Republic [...] of impairments to psycho-physical integrity ranging from ten to one hundred points", which must be drawn up considering also the above-mentioned principle (see paragraph 2 of the same article) and used by the Court of Cassation. A single national table, therefore, for impairments to psycho-physical integrity to be drawn up based on the criteria envisaged in the list under paragraph 2, a list which includes the moral damage component. Nothing more, nothing less.

More. The word "component" is the same as that expressly used by the Joint Sections in November 2008: in the reform, therefore, it was not chosen to use a synonym (harbinger of possible misunderstandings), but the same term. Without wishing to revive (let alone take a position on) the long-standing debates on the historical interpretation criterion, this specific factor cannot be ignored, if only because it indicates a desire not to reject the result reached less than ten years ago.

And so, we come to the second interpretative criterion explicitly indicated by Article 12 of the Prelaws: the criterion of the *voluntas legislatoris*[24] . The will to give continuity to the orientation that emerged from the San Martino rulings (and, therefore, to transpose it at the regulatory level) is made clear if one only has the patience to consult the report accompanying the draft law no. 3012 (annual law for the market and competition):

24 Again, see Tarello's words (1980): "[T]he psychological argument by its very nature is all the more effective the closer the time at which the utterance subject to interpretation is uttered to the time at which the attribution of meaning is decided, motivated or proposed".

> Article 7, paragraphs 1 and 3, revise articles 138 and 139 of the code based on the interpretative guidelines issued by the unified sections of the Supreme Court of Cassation (the highest expression of nomofilachy), which in several 2008 sentences confirmed the unitary nature of non-asset damage in the case of health injuries, identifying it in the all-inclusive category of biological damage. In the light of this reconstruction, the concept of biological damage includes all the consequences of the impairment suffered, including possible forms of physical or psychological suffering experienced by the victim, which can also be assessed when personalizing the case according to the specific subjective condition of the injured party. This guideline needs to be implemented by law since the sector regulations in force (for third party motor liability insurance) were devised before this definitive classification was outlined, and the economic aspects are therefore lacking in the non-asset damage component referring to subjective suffering. (Cass. no. 901/2018, 2018, p. 4)

It is therefore incomprehensible how the 2017 reform of the Private Insurance Code can be brought - loudly, among other things - in support of a current of thought that preaches the exact opposite of what is expressed in the reform itself and the clear intentions of the legislator: the violent interpretative twist, even doubly contra legem (doubly because it is contrary both to the rules guiding the interpretative activity and to the interpreting rules themselves), is in itself evident.

But, despite this, nothing has prevented the Third Section from continuing undaunted on its autonomist path, rendering - after judgment no. 901/2018 - other pronouncements of

the same tenor, in which the magnificent fate of the theory of the autonomy of individual injuries is extolled, which almost seems to rise to the status of a new (indisputable) dogma of civil liability (one ruling even indicates ten points summarising the principles set out by the Court: The ambition to replace the dicta of the San Martino verdicts with a new "statute" of non-asset damage is increasingly marked): any possible jolt of resistance to the prevailing theory is destined to be nipped in the bud, having to clash with an interpretative monopoly that is unlikely to give way. Peace, therefore, and interpretative uniformity, but... at what price!

4. EPILOGUE

At this point, it should not have been long before the Milanese tables were also affected, the last real obstacle still to be eliminated to proclaim the full force of the new "statute". The latter - suffering the "mortal sin" (as it is quite easy to guess) of having complied with what was established by the Joint Sections and of having provided, as a consequence, for a unitary settlement of non-asset damage deriving from injury to psycho-physical integrity - embodied a mechanism that was intolerable for the now dominant autonomist conception: the individual items were to be "atomized", to make it easier (and more incisive) for the judge to intervene on them, to pursue the (implicit) objective highlighted above of being able to adjust upwards the quantum of compensation, constantly accused of being excessively ungenerous towards the injured parties.

Therefore, relying on the "most recent and well-established case-law of this court (among others, Court of Cassation, 17 January 2018, no. 901 [...]; 27 March 2018, no. 7513 [...]; 28 September 2018, no. 23469 [...]) on the subject of compensation for personal injury" (Court of Cassation, no. 2461/2020, 2020,

s. p..), it is stated that "it does not appear correct to invoke a standard criterion of liquidation also concerning moral damage", since "moral damage, i.e. subjective suffering, which does not have a medical-legal basis, by definition escapes an aprioristic assessment, but must be attached, proved and assessed in its concrete, multiform and variable phenomenology which no logical reason, as well as no positive foundation, allows relating in standardized terms to the seriousness of the lesion to psycho-physical integrity" (Court of Cassation, no. 2461/2020, 2020, s. p. 1). No. 2461/2020, 2020, s. p.).

On this point, just a few brief remarks. Stating that the "a priori" assessment (defined, with a strongly negative meaning) of suffering has no positive basis does not correspond to the truth. It is, in fact, article 138 of the code of private insurance companies (also cited in this sentence) which foresees, in the part used as a picklock to unhinge the previous system, an increase "in a percentage and progressive manner per point", "to consider the moral damage component": the regulatory support is, therefore, present and establishes a strong presumptive mechanism aimed at greater protection of the injured party.

Moreover, this statement also contradicts the more general objective (also seen above) of bringing the tort system more into line with phenomenal reality again after the 2008 interlude: from this point of view, the presumptive mechanism just mentioned is nothing more than the legalization of a fact that is easily ascertainable by everyone since it is normal that in almost every case (practically in every single case) of injury to psycho-physical integrity the subject experiences physical and/or psychic suffering (the greater the higher the invalidity score resulting from the injury itself). What emerges from the ruling is moral damage that is now 'autonomous', which, however, since it is autonomous, must be proved and attached, thus

running the risk of nullifying the special protection accorded to the injured party inherent in the presumptive mechanism and shareable reflection in the legal world of material reality. The question then arises spontaneously: what need was there to go against the system of tables to grant (only in certain cases, mind you) compensation greater than the average because of the particular nature of the suffering suffered, when the tables themselves provide for the possibility for the judge to depart from the value indicated and increase the quantum? To provide greater protection in a few cases (which is already possible, we repeat), it was decided to forcibly modify a regulatory and jurisprudential system, at the risk of depriving - at the same time - many injured parties of an important evidentiary facility.

Exactly in the wake of this judgment is the latest ruling that we will analyze in this brief itinerary. There is nothing new in terms of the precedents cited in the case law or the normative elements (in fact, article 138 of the code of private insurance companies is referred to, which is the real cornerstone of the new orientation, given that the measures used in 2011 have been abandoned after having exhausted their function). Nothing new about the autonomist assertions of moral damage. The real novelty lies in the fact that - this time - moral damage, from being an autonomous element and, as such, independently assessable, is presented as a prejudice that may not even exist in the event of injury to psycho-physical integrity:

> in settling the damages to health, the magistrate must 3) in the event of a negative assessment, and consequent exclusion of the moral component of the damage (assessment to be carried out on a case by case basis [...]), consider only the biological damage item, purified by the increase in the table provided for moral damage

> according to the percentages indicated therein, settling, consequently, only the dynamic-relational damage [...]. (Court of Cassation no. 2461/2020, 2020, s. p.)

The statement in question, however, is incorrect. Well then, preaching the autonomy of the individual damages has certainly brought advantages concerning the increase in the quantum of compensation, but it has exposed - at the same time - a risk which here, punctually, occurs: autonomy can be used not only in the positive sense to affirm the existence of a type of damage but also in the negative sense to sustain its non-existence. And it is precisely this second outcome that does not seem acceptable because it is in direct contradiction with that distant objective just mentioned of making the legal reality a mirror of the phenomenal reality (but, in the end, also with the implicit objective of increasing the amount of compensation): in fact, how can it be argued that a subject whose psyche or physicality has been damaged does not feel suffering?

On the other hand, on the contrary, as seen in the passage quoted above, the Milanese Tables, previously condemned to be destroyed by the sentence passed at the beginning of the same year, seem to be regaining strength (and legitimacy): if the magistrate recognizes the existence (autonomous, heaven forbid!) of a moral prejudice, he can apply the Tables in their entirety, once again giving importance - to prove moral damage - to the inferential reasoning linked to the seriousness of the injury and which also informs the Milanese Tables.

On the one hand, this latest judgment corrects distortion of the previous ruling (which, however, it does not even mention), recognizing the validity of the presumptive tabular mechanism and putting a stop - it is hoped - to the excessively generous drifts in compensation; on the other hand, it takes

the theory of the autonomy of individual injuries to its extreme consequences, going against the objective that the orientation in question had set as its basis years ago and failing to explain how a statement of this kind can be reconciled harmoniously with the previous statement on the increasingly strong presumptive force deriving from the greater seriousness of the injury.

CONCLUSIONS

At the end of this brief itinerary through Italian case law, all the problems that the so-called "autonomist" orientation has brought with it emerge.

The non-acceptance of the legal framework that had been proposed in 2008 gave rise to a real hostility towards the results achieved and, consequently, all subsequent efforts have been driven more by the objective of canceling what was portrayed as an "inauspicious parenthesis", than by a serene confrontation among practitioners. Therefore, mindful of this experience, the supporters of the line of thought rejected by the United Sections, to subvert the dicta of San Martino, have been careful not to resort again to the body that - instead - would have been deputed to resolve any hermeneutic conflicts to ensure the uniform interpretation of the law.

Perhaps, and the suspicion is at least legitimate in the light of what has been said above, a further factor that has led the Third Section not to invoke the intervention of the Joint Sections - even if only to confirm the new structure, as had also done the order of referral of 2008, in the part where it asked for "confirmation" of a series of statements - is to be found in the awareness (intimate, but not expressed, of course) of the inconsistency of the reasons given: In fact, it is one thing to argue and subject the product of such argumentation to critical scrutiny by others

(with all the risks associated with such an operation); it is quite another to continually re-propose an argument until it becomes dominant by mere repetition (weakening the resistance of others) and to present it, finally, as a consolidated orientation no longer in need of the approval of others.

However, by avoiding confrontation and a moment of shared reflection, guided by the will to demolish, there is a risk of constructing a system whose premises are clear, but whose ultimate implications and the line to be followed are not so clear: examples of this are the attitude taken towards the Milanese Tables (first condemned and then rehabilitated), and the affirmation of moral damage that might not even exist, as if one could give the case of a non-sentient subject and, therefore, stoically devoid of emotions for the injury suffered.

Well, 110 years after Gabba's words, we can see that Italian case law on moral damage has once again put on a 'show', at the end of which we can only exclaim: Acta est fabula, plaudite!

REFERENCES

Benatti, F. (2018). La difficile quantificazione del danno non patrimoniale. *Nuovo dir. civ.*

Cass. n. 18641/2008. (2012). In Corr. giur., p. 53 ss.

Cass. n. 20292/2012. (2013). In Corr. giur., p. 315 ss.

Cass. n. 4712/2008. (2008). In Foro it., I, c. 1447 ss.

Cass. n. 901/2018. (2018). *Danno resp*.

Cass., sez. un., n. 26972/2008. (2009). Ex aliis in Nuova giur. civ. comm., I, p. 102 ss.

Così Cass. n. 2461/2020. (2020). In Foro it., I, cc. 2018-2019.

De Matteis, R. (1995). *La responsabilità medica. Un sottosistema della responsabilità civile.* Padova.

Franzoni, M. (2011). Tabelle nazionali per sentenza, o no? (Nota a Cass. civ., sez. III, 7 giugno 2011, n. 12408, Pantaleo c. Rana e Cass. civ., sez. III, 30 giugno 2011, n. 14402, Lodi Rizzini c. Tosi). Il *Corriere Giuridico*, 9.

Gabba, C. F. (1911). Risarcibilità dei danni morali. In Id., *Questioni di diritto civile,* vol. II, 2a ed. Milano-Torino-Roma.

Grondona, M. (2021). A proposito dell'autonomia fenomenologica e ontologica del danno morale. Ovvero, tra categorie descrittive e categorie concettuali. *Danno resp.*

Libertini, M. (1990). Il vincolo del diritto positivo per il giurista. *Riv. crit. dir. priv.*

Mazzamuto, S. (2009). Il rapporto tra gli artt. 2059 e 2043 c.c.e le ambiguità delle Sezioni unite a proposito della risarcibilità del danno non patrimoniale. *Cotr. impr.*

Navarretta, E. (2009). *Danni non patrimoniali: il compimento della Drittwirkung e il declino delle antinomie.*

Ponzanelli, G. (2008). La responsabilità civile e la perdita di scientificità: dai system builders al danno esistenziale. *Liber amicorum per Francesco D.* Busnelli. Milano.

Ponzanelli, G. (2013). Nomofilachia tradita e le tre voci di danno non patrimoniale. *Foro it.,* I, c. 3449.

Ponzanelli, G. (2016). L'imperialismo della responsabilità civile. *Danno resp.*

Procida Mirabelli di Lauro, A. (2009). Il danno non patrimoniale secondo le Sezioni unite. Un "de profundis" per il danno esistenziale, in *Danno resp.*, 2009, p. 33

Sassani, B. (2019). La deriva della Cassazione e il silenzio dei chierici. *Rivista dir. proc*.

Scognamiglio, C. (2009). Il sistema del danno non patrimoniale dopo le decisioni delle Sezioni unite. Resp. *civ. prev.*

Scognamiglio, C. (2010). Il danno morale soggettivo. *Nuova giur. civ. comm.*

Tarello, G. (1980). *L'interpretazione della legge, in Trattato Cicu-Messineo*. Milano.

Received: 16/03/2021

Approved: 02/11/2021

Luca Oliveri: Ph.D. candidate, Department of Law, University of Genoa.

E-mail: luca.oliveri@edu.unige.it

City: Genoa

Country: Italy

ORCID: https://orcid.org/0000-0002-2416-3977