

## **ITALY**

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*Compensatio lucri cum damno*

**To what extent does social security impact on  
calculation of damages?**

## FACTS AND QUESTION

- The victim of a car accident filed an action for damages against both the tortfeasor and the insurance company. The question arose **whether the annuity given by the Italian Workers' Compensation Authority (INAIL) should be taken into account in calculating damages to be awarded to the victim and these should be reduced accordingly** (*compensatio lucri cum damno*).

## **PLAINTIFF'S ARGUMENTS**

(against *compensatio lucri cum damno*)

- Risk of underdeterrence
- The annuity could be paid alongside any compensation awarded as far as they derive from different sources and, therefore, the *compensatio lucri cum damno* limitation would not play any role

## **Defendant's arguments** (*pro compensatio lucri cum damno*)

- Risk of over-compensation/duplication
- Social insurance is granted a subrogation right against the damaging party pursuant to art 1916 of the Italian Civil Code (CC)
- If INAIL exercises its subrogation right, the tortfeasor has to refund the insurer and, as a consequence, the victim is no longer entitled to file an action for damages, unless the indemnity does not cover the whole amount of damages, being the victim entitled to damages for the remaining quota

## The Cassation's reasoning

### Mapping social benefits – Two sets of cases

**1. *Damage and benefit to be awarded by the same person:*** for instance, *infected blood transfusions cases* → Health Ministry responsible for both social benefits and compensation; *asbestos cases* → the employer responsible for both damages and social security indemnity

**General rule:** the victim is prevented from cumulating damages and indemnity. If this were not the case, he/she would be enriched

**2. *Damage and benefit deriving from different causes and actors:*** for instance, when the victim is the recipient of a private or social insurance.

**General rule:** Since the harmful event gives rise to two different claims and the tortfeasor and insurer do not coincide, **damages and indemnity may in principle be cumulated.**

However, **benefits which are 'immediate and direct consequences of the harmful event' must be detracted from damages**

## **Which benefits are 'immediate and direct consequences' of the harmful event?**

- **Starting point: Legal causality (art. 1223 CC)**
- Meaning? Not any consequential benefit
- Application of the concept of **adequacy** → ex., inheritance received by the claimant as a consequence of the victim's death not to be taken into account

## Beyond adequacy: rationale of the benefit as core issue

Principles of European Tort Law, art 10:103: *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**.*

Draft Common Frame of Reference, art 6:103, Book VI, Equalisation of benefits: *the benefits deriving from the harmful event can't be taken into account in calculating damages, unless it is just and reasonable to do it, once one takes into account the type of damage, the type of liability and the **rationale of the benefit**, if this is given by a third party.*



## **From the general guidelines to the decision of the present case**

- Social benefit and damages are functional to compensate the same loss.
- The court held the annuity to be **taken into account in calculating damages** in order **to prevent V's unjust enrichment**