

The damage suffered by the victim law general essay

Law



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The literal translation of 'danno esistenziale' is 'lesion to existence.' Hence, here we have the summation of all the negative impacts, and the cascade effect of the damage suffered by the victim and any dependants. The damage sustained by the victim/s encompasses not only the 'damnum emergence', 'lucrum cessans,' psychological damage and moral damage but, also affects the victim's existence. This results from the harm sustained by a 'subjective interest' which bears a constitutional right to enjoy life and self-realization. However, the divergence from moral damage lies in the fact that, while moral damage belongs only to the victim, 'danno esistenziale' belongs to the victim and any dependant, because the individual does not 'self-realise' in a vacuum, but does so with others.[1]Therefore, 'danno esistenziale' may be demanded not only by the victim, but also by his dependants. This was decided in cases 233/2003, 8827/2003[2]and 8828/2003,[3]by the Corte di Cassazione (the latter two also known as le sentenze 'gemelle'). Here, the court dealt with the relationship between article 2059 of the Italian Civil Code and article 2 of the Italian Constitution. The latter (i. e. article 2) must be widely interpreted to include any inherent personal right. The courts also upheld that article 2059 of the Italian Civil Code should supersede the impositions found under article 185 of the Italian Criminal Code. The Costa Concordia disaster of 2012 may also attract 'danno esistenziale,' if the cases are not decided amicably. 'Danno esistenziale' may then be demanded, both by the victims, and/ or their dependants.

2. 2. 3Cases of the Supreme Court - Sezione Unite N. 6572/2006 and N. 26972/2008[4]

Case N. 6572/06[5] dealt with damage from professional services. The ratio decidendi followed the previously described cases above. In this particular case, the court upheld that ' danno esistenziale' is not the same as ' danno biologico.' In fact, while the latter must be proven via medico-legal verification, yet ' danno esistenziale' must to be confirmed through documentation and testimony. In other words, the probative weight in ' danno esistenziale' is lower than that for other damages.[6]7Hence, the ' danno esistenziale' is a remedy when the ' victim's'[8]inherent and constitutionally guaranteed rights or interests (apart from health) are infringed. This may be viewed as a damage that ' encapsulates the overall activities of the injured party and those connected to him/her.'[9]Case N. 26972/08 addressed the heated debates vis-à-vis the subsistence, determination and compensation of ' danno esistenziale.' The court upheld that while ' danno esistenziale' should be awarded, yet it should fall under the umbrella of ' danno non patrimoniale,' and not as a category for damages per se. The court specified what is to be understood as ' danno non patrimoniale,' and that it should be interpreted via article 2059 of the Italian Civil Code. Moreover, the court stated that ' danno esistenziale' may be distinguished from the other types of damages, under the umbrella of non-patrimonial damages according to its description. In fact, ' danno esistenziale' is part and parcel of ' danno non patrimoniale,' and may be awarded on its own if the victim's rights to redress are prejudiced.[10]The ratio decidendi in Italian jurisprudence may be summarised as follows that:- distinguished among the quantum calculation vis-à-vis ' danno biologico,' ' <https://assignbuster.com/the-damage-suffered-by-the-victim-law-general-essay/>

'danno per se' and 'danno esistenziale';-'danno esistenziale' should not be viewed as a category on its own, unless the damage is not compensable under article 2059 of the Italian Civil Code, as otherwise the award would be duplicated;-although the types of damages are descriptive, yet it is up to the presiding judge to decide under which category the damages fall;-cases of lesions which prejudice social life (including sexual dysfunction), should be categorised under 'danno biologico,' vide the statutory definition found in 'Decreto Legislativo' 209/2005;[11]-even when non-pecuniary damage falls under inviolable rights, then the nexus of the cause and effect must be proven, and such proof must be the only source which the presiding judge should use to award judgment;-non-pecuniary damage from injury encompasses a large variety of lesions, to which liquidation and compensation may be accounted for by the court. However, while the court is obliged to take on board all the prejudice suffered by the victim, yet the presiding judge must award compensation without duplicating the award;-contractual default may also lead to non-pecuniary damage, which may be awarded either through express legal provisions, or if the default has violated the individual rights as protected by the Constitution, non-pecuniary damage responsibility should be awarded without duplication. This was echoed in the Supreme Court in Cass. civ., sez. III, 26 March 2011, no. 11609. The court upheld that 'danno esistenziale' may exist if there is the nexus between the damage and the cause. However, such damage is not on the same footing as damage to health and moral damage, otherwise the courts would end up duplicating awards. Moreover, the court gave legal direction as to what the constitution of 'danno esistenziale' may include

(hence this is not an exhaustive list) namely: 1. Personal injuries;^[12] 2. Harm to the family unit's relationship, such as the death of a spouse, partner or child; 3. Family abuse; 4. Medico-legal issues; 5. Coercion, abuse and harassment; 6. Contractual issues;^[13] 7. Unfair hearing/trial or unfounded arrest; 8. 'Danni da vacanza rovinata' - This is a debatable issue, since unanimity has not been reached by the Italian Courts yet. This is mainly an issue of whether the damage is an economic one or not, and what criteria qualifies it for 'danno esistenziale.' For a period of time the Italian courts awarded compensation on grounds of 'danni morali', vide article 2059 of the Italian Civil Code. Compensation was excluded, unless the harm done was from an offence, since compensation as per Article 2059, is limited by article 185 of the Italian penal code (which defines what constitutes an offence). However, according to EU Regulation which came in force on the 18th December 2012,^[14] both the carrier and the tour operator are joint and severally liable, in case of death and/or bodily harm and damage to personal belongings. Other countries, such as Austria, cater for this under consumer protection law. However, Italian Law tackles this situation through article 2043, of the Italian Civil Code (i. e. applies 'danno esistenziale'), but not via consumer law. The ratio decidendi of the Italian High Courts confirmed the reasoning that compensation for loss of holiday enjoyment is a sub-category of this regulation. Moreover, the ratio decidendi behind most of the decisions by the Corte di Cassazione was that article 2 of the Italian Constitution afforded and provided the legal framework for the protection of human rights through the direct effect concept.

2.3 Sources of ‘danno esistenziale’

In order to understand where we are, we must understand where we come from. One may find traces of the foundations of ‘danno esistenziale’ in Roman Law. The continuity of Italian Law may justify why Italian Law may be considered as "the cradle of European legal culture."^[15] While it would be interesting to enter into the historical merits, yet this is not the aim of this thesis. Nevertheless, certain historical and legal intersections will be discussed, in order to explain the ratio behind the past and present Italian and Maltese legislations. The difficulty posed in tracing sources of Roman law lies in the fact that jurists did not define their sources. Moreover, different sources may have influenced different eras. Roman law was primarily customary law, and then followed by royal decrees. This was confirmed by Pomponius, a legal historian and jurist who wrote in the 2nd century. Jurists such as Cicero (1st century BC), followed by Gaius (Institutes 2nd century) and Justinian (Institutes 6th century) compiled most of the Roman law. ^[16] According to Kaius Tuori,^[17] the ius commune heritage is at the heart of EU private legal harmonisation. A contrario sensu, others such as Pierre Legrand,^[18] proffer that, rather than emphasising the schism between Common law and Civil law tradition, one should explore the common origin. However, one might also conclude that the origin of Italian law in Roman law and its development may open debates both in favour and against convergence between Civil law and Common law traditions. On the other hand, the EU is aiming at harmonising (not unifying) Private International law. ‘Danno esistenziale’ is a relatively new concept, and its main source is the 1948 Italian Constitution. The layout of this Constitution is very similar to

our Maltese Constitution. Moreover, both constitutions supersede the legislative, imposing a vertical hierarchy, where the Constitution is supreme and ordinary legislation cannot amend the Constitution's dispositions. Courts use the Constitution as a tool to interpret ordinary legislation and allow redress to the applicant. This is the case with ' danno esistenziale,' In fact, according to Tampieri,[19]the Italian Constitution laid down a legal direction vis-a-vis the rights and duties of individuals, both in a vertical and horizontal approach. This is a pragmatic approach which ensures an automatic protection' of the individuals' rights, without the need to resort to other legislative measures.[20]21The major points of contention with ' danno esistenziale' are how it evolved, and whether it can be applied in other countries or whether it existed under a different name. Malta, is a Civil law country founded on the code Napoleon (French system), while the Italian legal system is founded on Germanic law. Moreover, Italian and German Constitutions have points of contention between them. The Italian Constitution is silent with regards to this concept, while Article 1 para 3 of the German Constitution deals with Grundgesetz.[22]A contraio sensu, the Corte di Cassazione and the Constitutional Court in Italy have applied the direct effect principle.[23]In order to admire the similarity or point of origin, one should move further away to evaluate the work of art that Roman law has imprinted onto Civil law systems. Roman law catered for personal injury. In fact, one may find l'actio iniuriarum, and damnum of the lex Aquila. [24]Roman law catered for both pecuniary and non-pecuniary damages, and in fact the Italian law simply elaborated on the non-pecuniary damages when it introduced the concept of ' danno esistenziale.'[25]