Profiles in terms of medico-legal damage to death

ANIELLO MAIESE 1
MASSIMILIANO DELL’AQUILA 2
ANIELLO MAIESE 2
GIORGIO BOLINO 2

1 Doctor in Law
2 Department of Anatomy, Histology, Forensic Medicine and Orthopedics, “Sapienza” University of Rome, Italy.

Corresponding author:
Aniello Maiese
Department of Anatomy, Histology, Forensic Medicine and Orthopedics, “Sapienza” University of Rome, Italy
E-mail: aniellomaiese@msn.com

Summary

This article contains several judgments of the Court of Cassation focusing on the various matters that arise following the death of a subject, caused by an unlawful act committed by someone else, not only in the medical field, but above all in the juridical one. The ultimate goal is to analyze and clarify what are the various items of damage compensation due to the secondary victims of the offense, to the disruption that the event brought in their lives, to pecuniary and non-pecuniary damages \textit{jure proprio}, as well as to the damage directly inflicted to the now dead person; well defining, furthermore, the distinction between terminal, catastrophic and thanatological biological damage, transferable to the heirs \textit{jure hereditatis}.

Specifically, as inherent \textit{jure proprio} profile, it is clearly apparent how due is to the close relative of a person who has suffered fatal injuries, in addition to compensation for a recognized possible pecuniary damage, also the compensation for the non-pecuniary damage suffered following such event, to be regarded, for the purposes of the liquidation of the compensation thereof, the state of suffering (or state of anguish) even in the terms of his degeneration in objective relational profiles.

Such damage, however, even in the case of lesions to the values of the person, should not be considered in \textit{re ipsa}, since thereby the function of the related compensation would result denatured, because it would be granted not following the actual assessment, but rather as private penalty of an harmful behavior, that, instead, has to be proved by the injured in accordance with the general rule pursuant to art. 2697 c.c.

Conversely with regard to the other profile (\textit{jure hereditatis}), it becomes relevant the situation where, in the lapse of time between the lesion and the death, the deceased has acquired an autonomous right to the damage compensation in his own assets, for which the heirs will be able to act, within the limits of their shares. Therefore, it is clear that we need to go and verify which damages the victim suffered are claimable by inheritance by the relatives, but not regardless of the analysis of the terminal biological damage, or the catastrophic damage and the thanatological one.

In this regard, the jurisprudence states that, in the event of physical injury with lethal outcome, a biological damage compensable for the benefit of the victim, transmissible to the heirs, is configurable only if the death occurred after a noticeable period of time, so that an actual impairment of the physical and psychological integrity of the injured subject can concretely be configured, and not when death supervenes either at once or shortly after the event, since this would not be the maximum possible lesion of the right to health, but of a different legal right, namely the right to life.

\textbf{KEY WORDS}: terminal biological damage, catastrophic damage, thanatological damage.

The death of an individual as a result of a tort from a third party opens many problems not only in the medical field, but especially in the strictly legal one. In fact, it is not always easy to disentangle the maze of recoverable damages and the persons entitled to take legal action in order to achieve the refreshment of the same (1, 2).

When analyzing the legal aspect (3), we face the problem to clarify what sums shall accrue to the secondary victims of the offense both for the damage caused by the disruption that the event has caused in their lives, and for those directly incurred by the person now dead (4).

We should note that even in cases of hypothesis of inheritance or succession legitimize where, as it often happens, there is a coincidence, partial or total, between the locus standi \textit{jure proprio} and those entitled to assert the claim \textit{jure hereditatis}, you really have to make a distinction between the two profiles, as they are relevant to different items of damage (5).

Focusing on the first profile (\textit{jure proprio}) it is clearly apparent how due is to the close relative of a person who has suffered fatal injuries, in addition to compensation for a recognized possible pecuniary damage, also the compensation for the non-pecuniary damage suffered following such event, to be regarded, for the purposes...
of the liquidation of the compensation thereof, as the state of suffering (or state of anguish) even in the terms of his degeneration in objective relational profiles. Such damage, however, even in the case of lesions to the values of the person, should not be considered in re ipsa, since thereby the function of the related compensation would result denatured, because it would be granted not following the actual assessment, but rather as private penalty of an harmful behavior (Cass., Sez. Un., 11/11/2008, n. 26972; Cass., Sez. Un., 11/11/2008, n. 26973; Cass., Sez. Un., 11/11/2008, n. 26974; Cass., Sez. Un., 11/11/2008, n. 26975), that, instead, has to be proved by the injured in accordance with the general rule pursuant to art. 2697 c.c.

In view of this, (even) non-pecuniary damage should always be attached and proved because, as also observed in doctrine, the burden of proof does not depend indeed on the qualification in terms of “damage-consequence”, all non-contractual damages having to be tried by those who claim compensation, and therefore even the non-pecuniary damage, in its various aspects, and the proof can be given by any means (see, in particular, following the rulings of the United Sections of 2008, Cass., 5/10/2009, no. 21223; Cass., 22/7/2009, no. 17101; Cass., 1/7/2009, n. 15405) (6).

As a result, "the proof of the non-pecuniary damage by killing or injury (see below) of the strait combined can thus be also given by means of presumptions" (see Cass., 31/05/2003, n. 8827; Cass., 31/05/2003, n. 8828; Cass., 19/08/2003, n. 12124; Cass., 15/07/2005, n. 15022) (7). This is true for every component of the non-pecuniary damage, including that relating to the possible onset and stabilization of biological damage.

It is clear that as a result of a fatal event occurring to a combined psychic disorders can really be likely to affect the validity of the individual or, rather, his psychic equilibrium and for this reason a jure proprio biological damage can be compensated to the family of the deceased which, however, do not escape the burden of proving the nature and extent of the psychic disablement suffered, as well as its character of permanent disability, through psychiatric assessments eventually supported by appropriate psychometric tests and mental tests (8).

With a competent and indispensable psychiatric support, the medical examiner must, therefore, proceed to the not easy task of:

- assessing the previous mental state of the subject;
- detecting a psychopathological condition derived from the death of the family member and, more importantly, relating this infirmity to the deadly event under consideration;
- expressing a judgment on the prognostic evolution of the observed psychic infirmity.

In this sense, the intervention of the medical examiner will be helpful to those who are called to the settlement of damages to bring elements of clarity in determining the eligibility of the consequent damages: both as an effect of the biological damage on the economic assets (adequacy of medical expenses incurred, quantification of foreseeable future medical expenses, qualitative judgment regarding the reduction of specific working capacity), and as a technical support in the equitable evaluation of the sufferings and afflictions which constitute the moral damage (nature and extent of the injury, duration of the temporary disability, necessity to be hospitalized, execution of periodic clinical controls, etc.). The other profile (jure hereditatis) becomes relevant in the situation where, in the lapse of time between the lesion and the death, the deceased has acquired an autonomous right to the damage compensation in his own assets, for which the heirs will be able to act, within the limits of their shares.

Therefore, it is clear that we need to go and verify which of the damages the victim suffered are claimable by inheritance by the relatives, but not regardless of the analysis of the terminal biological damage, the catastrophic damage and the thanatological one.

The first circumstances of terminal biological damage consists of the damage to the health suffered by the victim of the offense, included in the period which starts from the moment of the lesion and ends with death. The issues of this present case are all focused on when this injury may be considered matured, since the concept of biological damage presumed to the existence of a verifiable medical pathology, that to be considered appreciable needs to be developed in an appropriate time frame. In this regard, the jurisprudence states that, “in the event of physical injury with lethal outcome, a biological damage compensable for the benefit of the victim, transmissible to the heirs, is configurable only if the death occurred after a noticeable period of time, so that an actual impairment of the physical and psychological integrity of the injured subject can concretely be configured, and not when death supervenes either at once or shortly after the event, since this would not be the maximum possible lesion of the right to health, but of a different legal right, namely the right to life” (confr. Cass. civ. January 17, 2008, n. 870; Cass. civ. August 28, 2007, n. 18163; Constitutional Court. n. 372, 1994).

Consequently, to be able to attribute the above described damage, it is relevant to know the time frame elapsed between injury and death. On this issue, the jurisprudence has often identified in each case the number of days or hours required for the crystallization of the biological damage. In fact, in order to find a claim for compensation for the damage suffered by the deceased to his physical and mental integrity, it is considered sufficient a period of time, and not, a period of time of only a few hours or half an hour, because it is considered unsuitable to allow a clear disjunction between the time of the death and the injury inflicted to life.

The other two circumstances of catastrophic damage and thanatological damage are relevant in the case there is a different component of non-pecuniary damage of whom the legal heirs may require the restoration with an action for damages jure hereditatis.

The catastrophic damage materializes in the perception of impending death. In other words, the presence of the fatal injury, in accordance with the teaching of medico-legal science and psychiatry science, defined as catastrophic, imposes on the psyche of the individual who lucidly expects the end of his existence, and is in the condition to fully understand the event is about to occur even in a short time interval.
The Court of Cassation has defined the catastrophic damage as compensable, clarifying that “it can be claimed *jure hereditatis* only when (the psyche of the dying person) has been able to perceive their own state, that has had the agonizing awareness of the imminent end, and goes off when the event is received immediately detrimental to the coma and the victim was not polished in the period preceding the death” (confr. Cass. civ. November 28, 2008, no. 28423; Cass. civ. March 24, 2011, n. 6754). The thanatological damage concerns the *vulnus* to the right to life suffered by the deceased person, as a result of the killing by a third party (9-11). In this regard, it is clear that in the naturalistic sense, you can never affirm in an absolute sense the instantaneity of the event of death, because there is always a chronological relationship between the time of the injury and that of the death. If not, this could lead to the absurd of not admit the existence of the causal relationship between the two events because it is implicit that in order to speak of consequence, the cause must precede the effect, even if for a minimum time, otherwise you should detect the concomitance of the two events unrelated one with the other: hence the basilar chronological principle of *post hoc ergo propter hoc* in terms of the assessment of the causal relationship; this criterion must necessarily precede all the others because, in the case of a recognized lack of the same, any possible further medico-legal and juridical deepening comes less *ipso facto*. However, even not being able to share the immediacy between the moment of injury and the death, the immediacy between the two moments should be considered, which does not exclude the consequential, but that may affect the existence of the compensable damage *jure hereditatis* (12).

Indeed, the Court of Cassation has rated as “not compensable the thanatological damage, caused by the loss of the right to life, claimed *jure successionis* by the heirs of the deceased, for the technical impossibility to configure the acquisition of a compensatory right resulting from the damage of a property intrinsically linked to the person of the owner, and from whom usable only in nature: and indeed, seeing as long as the subject is alive, there is no infringement of his right to life, while when the death occurred, the dead one, as lacking legal capacity, is not in a position to acquire any right, the compensation would ultimately take, in such cases, an anomalous punitive function, especially noticeable where the compensation should be paid to heirs different from their relatives or, in the absence of descendant, even to the state “(confr. Cass. civ. November 28, 2008, no. 28423; Cass. civ. March 24, 2011, n. 6754; Cass. civ. May 16, 2003, n. 7632). Therefore, in the light of the above considerations, it is absolutely clear the importance of a careful medico-legal evaluation in order to check and quantify the survival time after the injury, to set as the basis of solid anatomical and pathophysiological assumptions as well as clinical assumptions.

References