

# CORONAVIRUS AND MEDICAL LIABILITY

## The Italian Perspective

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*Malpractice cases or public bodies' liability cases, both originated by coronavirus, are bound to be discussed in terms of liability for non-pecuniary losses and of medical liability. This contribution outlines the Italian scenario and some possible future development of the relevant law.*

### 1. INTRODUCTION

The COVID-19 emergency currently has much more to do with contract law than with both tort in health-related issues, and medical liability. This might almost seem a paradox during a pandemic. However, there is a quite obvious reason for it. As a result of the disease and of the disruption to trade it has caused, many governments (the Italian government for sure) have been forced to adopt exceptional measures that mainly address contractual relationships.

On the other hand, malpractice cases or public body liability cases, arising out of the coronavirus, are bound to be matters for discussion in the future. Nobody yet knows how close we are to that future. There still is time in abundance for the filing of lawsuits. Nevertheless, since much has happened and continues to happen as a result of the pandemic, medical liability will become a matter of paramount relevance, whether in tort or contractually, so now is a good time to address the topic, even if how exactly the situation will develop cannot yet be known.

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This contribution will therefore examine certain principles in Italian law governing damages for non-pecuniary losses in actionable personal injury cases. First, I would like to look at the rules governing when personal injury is actionable and how the amount of any such damages are calculated. Secondly, I will focus attention on the rules on medical liability. Finally, I will say something about the current situation and future prospects.

## 2. NON-PECUNIARY LOSSES

On the first count, the situation in Italy was clarified by the so-called S. Martin judgments of 2008.<sup>1</sup> These decisions addressed the problem of non-pecuniary losses both in tort and in contract.

The problem of non-pecuniary losses in tort requires the interpretation of Article 2059 Italian Civil Code (c.c.). This rule of law states that compensation for non-pecuniary losses is awarded only in the specific cases provided for in law. Following much uncertainty, the Supreme Court (Corte di Cassazione) decided there are three groups of cases that could be said to be provided for in law according to Article 2059 c.c. The first group are those cases in which a criminal offence is involved, i.e. where the tortfeasor is liable both in criminal and in civil law.<sup>2</sup> The second group are those cases affected by special provisions of statutes which specifically state that compensation for non-pecuniary losses is to be awarded.<sup>3</sup> The third group refers to cases that involve violations of constitutional rights. It is this third group that concerns us here. Since there is a right to health according to Article 32 Italian Constitution, it follows that personal injuries give rise to a right to compensation for damages. Furthermore, according to the Corte di Cassazione, the same rule (Art 2059 c.c. as interpreted by the Court) applies in cases of non-pecuniary losses caused by breach of contractual or non-contractual obligations.<sup>4</sup> All cases of mental or physical harm are therefore actionable in either tort or in contract law.

As far as the assessment of this kind of damage is concerned,<sup>5</sup> Italian law uses a points-based system. The particular harm suffered is given a score according to

<sup>1</sup> Cass., Sez. Un., 11 October 11, 2008, Nos 26972, 26973, 26974, 26975. On the pre-existing situation, see Francesco Donato Busnelli and Salvatore Patti, *Danno e responsabilità civile* (3rd edn, Giappichelli 2013) 46 ff.

<sup>2</sup> Art 185 c.p. (Italian Criminal Law Code).

<sup>3</sup> E.g. Art 44 s 7, d. lgs. 286/1995 on the compensation for non-pecuniary losses caused by discrimination for gender, language, race, religious reasons; Art 2, l. 89/2001 on the compensation for non-pecuniary losses caused by an unreasonable duration of the process.

<sup>4</sup> Matteo Maria Francisetti Brolin, *Danno non patrimoniale e inadempimento. Logiche 'patrimonialistiche' e valori della persona* (Esi 2014) 128 ff., 563 ff.; Francesco Zecchin, *Il danno non patrimoniale dal torto al contratto* (Giuffrè rancis Lefebvre 2020) 227 ff.

<sup>5</sup> Antonina Astone, *I danni non patrimoniali alla persona: la prova* (Giuffrè 2011).

the severity of the injury, the length of the disability, the age of the victim and so on. A fixed amount of money is awarded for each number in the scoring system. The finale score therefore corresponds to an amount of money to be awarded for the damage suffered.<sup>6</sup>

These rules form the framework for assessing medical liability.

### 3. MEDICAL LIABILITY: STATUTE LAW

On the question of medical liability, it should be emphasized that until the late 1970s and early 1980s the Italian legal system afforded substantial immunity to medical professionals, hospitals and/or healthcare institutions.

The situation changed with a new sense of the doctor-patient relationship developing. Courts started to allow compensation to be awarded in cases of malpractice. The situation rapidly evolved and tilted the balance the other way, with the liability of professionals and healthcare institutions being deemed contractual in nature;<sup>7</sup> with causality becoming virtually presumed;<sup>8</sup> while the rules on the running date for the statute of limitations were adapted to the peculiarity of the offence.<sup>9</sup>

This sort of strict liability imposed by courts gave rise to the problem of so-called defensive medicine.<sup>10</sup> This very well-known issue has resulted in two laws being passed in Italy in the last few years.

The first of these was the “decreto Balduzzi” (d.l. 158/2012), which provided comprehensive public health legislation covering the organization of hospitals, rules for the medical profession, limitations on the sale of tobacco, as well as provision on pharmaceuticals and on scientific research. Its Article 3, section 1, stated that there would be no criminal liability for simple fault on the part of a medical professional who complies with the best practice as recognized by scientific consensus. In such cases, there may only be tortious liability under Article 2043 c.c., however the court should take into account the matter of compliance with best practice in each case.<sup>11</sup> Article 3, section 3, stated that the damages must be awarded according to the Italian Private Insurances Code (Art 138 and Art 139), i.e. applying the points system referred to above.

The new rules provided some reassurance for medical professionals who had felt threatened by the possibility of dangerous and punitive contractual

<sup>6</sup> See Art 138, 139, d. lgs. 209/2005 (Private Insurances Code).

<sup>7</sup> See Cass., 28 November 2008, no 24742 for Healthcare Institutions; Cass., 3 October 2016 for Physicians. The leading case is Cass., 22 January 1999, no 589.

<sup>8</sup> See Cass., 26 February 2020, no 5128.

<sup>9</sup> See Cass., 22 September 2017, no 22045.

<sup>10</sup> See Simona Viciani, *Errore in medicina e modelli di responsabilità* (Esi, 2016) 11 ff.

<sup>11</sup> Art 3 also provides for principles to be implemented by Presidential decrees concerning insurance duties.

liability, although they did not, and still not do, have a clear perception of how the technicalities of such rules will actually affect them in regard to tort and contract in the event of non performance or of breach.<sup>12</sup> The drafting itself proved, however, to be unsatisfactory, for example where Article 3 indicated the “obligation” arising from Article 2043 c.c., or where the law indicated the importance of compliance with best practice (which is relevant in terms of fault) when calculating the amount of damages to be awarded.<sup>13</sup>

There was therefore a need for a change to the system, with two different strands developing: one legislative, the other judicial.

From the legislative standpoint, a new Act was passed in 2017, known as “legge Gelli – Bianco” (l. 24/2017), the scope of which was narrower than that of the decreto Balduzzi. The new statute does not affect the organizational aspects of the public health system, dealing only with the medical/patient relationship. More specifically, the first part of the Act deals with the safety of medical treatments (Art 1); with the possible assignment to the regional Ombudsman of competences as relevant Public Authority (Art 2). A new Agency was put in place to draft and monitor good practices on safety in the health system (Art 3) and a duty was placed on the healthcare professionals to comply with medical treatment guidelines where such have been drawn up by registered scientific bodies (Art 5). The Act also addresses matters of privacy and transparency (Art 4). After a provision for the possibility of criminal liability for medical professionals (Art 6),<sup>14</sup> the law establishes both substantive and procedural rules on the civil liability of healthcare institutions and medical professionals (Art 7).

In substantive terms, the new rules respectively confirmed the nature of the liability of healthcare institutions and medical professionals, as set forth in the Decreto Balduzzi.

The situation is now perfectly clear as there is now an express provision in the law to the effect that while liability of healthcare institutions – both private and public – is contractual, i.e. it is a liability for the non-performance of an obligation (the liability of healthcare institutions is contractual even if the medical professional has been chosen by the patient and even if the medical professional is not an employee of the health institution, under sections 1 and 2), the liability of the medical professional him or herself is in tort (s 3).<sup>15</sup> At the same time the new law confirms the importance of good practices and

<sup>12</sup> Marcello Maggiolo, *Il risarcimento della pura perdita patrimoniale* (Giufre 2003) 100 ff.

<sup>13</sup> Pietro A. Sirena, ‘La responsabilità medica alla luce della legge Balduzzi’, [https://www.altalex.com/documents/news/2014/03/26/la-responsabilita-medica-alla-luce-della-legge-balduzzi#\\_Toc356829919](https://www.altalex.com/documents/news/2014/03/26/la-responsabilita-medica-alla-luce-della-legge-balduzzi#_Toc356829919) accessed 4 August 2020.

<sup>14</sup> Article 3 of ‘Decreto Balduzzi’ has been repealed, and a new Article 590 *sexies* c.p. has been introduced. It deals with manslaughter or personal injuries committed by medical professionals.

<sup>15</sup> With the obvious exception of cases where the patient and the medical doctor entered into a specific contractual agreement (s 3).

their compliance (s 3), as well as indicating how damages should be calculated in accordance with Article 138 and Article 139 of the Italian Private Insurances Code (s 4). Lastly, these rules are deemed mandatory (s 5), so they may not be waived by contractual clauses seeking to do so.

The following part of the law contains an extremely relevant procedural rule.

An action for compensation may be brought before the court only either after a pre-emptive technical assessment procedure has been carried out, pursuant to Article 696 Italian Code of Civil Procedure (c.p.c.),<sup>16</sup> or after an ADR procedure pursuant to d. lgs. 28/2010 (Article 8, ss 1 and 2).<sup>17</sup> There is also of course a right of recourse for healthcare institutions against medical professionals, but only in cases in which there has been malice or gross negligence (Art 9).<sup>18</sup> There also are specific rules on insurance obligations for healthcare institutions (Art 10, Art 11).<sup>19</sup> Most notably, again regarding the relationship with the insurance companies, the law allows the injured person to sue the insurance company directly to recover damages caused by the insured healthcare institution and/or medical professional (Art 12).

The law is quite recent and its efficiency has not yet been fully tested. It is, however, already apparent that the procedural rules have improved the chance of an injured party's being quickly and adequately compensated. This is because, as the proceeding starts with a pre-emptive technical assessment, from the outset the parties have a clear overview both of the pathology and of its causes. This is particularly true for insurance companies, for which participation in the pre-emptive technical assessment is mandatory. The result is that they are often willing to settle amicably in ways that may be favourable for the claimant, depending on the result of the technical assessment, thus avoiding wasting time and accumulating costs, as well as many of the uncertainties of the court process itself.

#### 4. MEDICAL LIABILITY: CASE LAW

Meanwhile, case law evolved accordingly, as it was supposed to.

The whole issue of medical liability is highly sensitive and delicate, and in view of its social and economic importance, a myriad of judgments of both lower

<sup>16</sup> The joinder of parties is necessary also for the insurance companies, which are moreover required to come up with a compensation proposal or to explain the reason why they do not want to present anything (s 4). A special provision relates to the appointment of specialized medical professionals in technical assessments (Art 15).

<sup>17</sup> The eventual agreement must be reached in six months. After this deadline, it is possible to sue according to Article 702 *bis* c.p.c. (s 3).

<sup>18</sup> The right of recourse is based on an obligation for the healthcare institution and/or the insurance company to disclose to the medical professional the legal action brought by the damaged person against them (Art 13).

<sup>19</sup> A special Guarantee Fund for the victims of medical malpractice is formed by the Health Ministry (Art 14).

and higher courts have been made. It obviously is impossible to enter into a full examination of their contents. There was, however, one especially important day at the end of 2019 when the third section of the Court of Cassazione (which has jurisdiction on medical liability cases) decided to issue 10 judgments on medical liability, its rulings 28985 to 28994.<sup>20</sup> The date and the cluster of cases were by no means coincidental: it was 11 November St. Martin's day. The Court clearly linked these judgments to the ground breaking St. Martin judgments of 2008, in order to provide a general framework of rules on medical liability. The intention was for these to be a bench-mark for the years to come.<sup>21</sup> The purpose has an obvious implication. The judges may expect their set of rules to stand firm for the future as long as they manage to craft them convincingly. Thus, they set out to found their decisions on a sound theoretical ground. But it cannot be denied that sometimes they fell a little short.

Providing an overview of the content of the judgments is useful at this juncture.

Two judgments deal with the question of the retroactivity or the non-retroactivity of the new laws.

Decision no 28994 stated that the rule on liability in tort for healthcare professionals, i.e. Article 3 of d.l. 158/2012 (decreto Balduzzi) and Article 7 of l. 24/2017 (legge Gelli – Bianco), does not apply if the malpractice happened before those Acts had come into force. In such cases, any liability is deemed to have been contractual in nature. The second decision (no 28990), on the other and, states that the criteria for the assessment of Article 138 and Article 139 Italian Private Insurances Code apply also when the personal injury occurred before the Acts came into force. What is important from this point of view is the stage that has been reached in the proceedings, i.e. if, when the new law came into force, an assessment of the damages has already been carried out, then Articles 138 and 139 Italian Private Insurance Code apply. Lastly, again with reference to the situation existing prior to l. 24/2017 (legge Gelli – Bianco), judgment no 28987 ruled that in malpractice cases where the medical professional is guilty, the cost of the compensation must usually be equally shared through the right of recourse between the medical professional and the healthcare institution.

Another judgment (no 28985) deals with the right to self-determination.<sup>22</sup> In particular, on the question of the difference between personal injury and prejudice to the right to self-determination, it states that damages may be awarded

<sup>20</sup> Guido Alpa, 'Orientamenti della giurisprudenza sulla nuova disciplina della responsabilità medica', 2019 C. E I., 1 ff.

<sup>21</sup> Giovanni Comandè, 'Sulla responsabilità la Cassazione lancia il guanto di sfida' (2019) Guida al Diritto 10, 11.

<sup>22</sup> Roberto Pucella, *Autodeterminazione e responsabilità nella relazione di cura* (Giuffrè 2010); Mariassunta Piccinni, *Il consenso al trattamento medico del minore* (Cedam 2007); Simona Cacace, *Autodeterminazione in salute* (Giappichelli 2017).

to a patient who has not expressed their informed consent to the treatment given by the medical professionals even in the absence of any malpractice on their part.

Judgment no 28989, and especially no 28986, have dealt with matters of causation, both confirming the notion of “double causation”, meaning that, for there to be direct damages, the causal connection must be “material” (adequate). Indirect damages and consequent damages, on the other hand, rely on what they called “juridical” causation (substantial).

Judgment nos 28991 and 28992 deal with issues related to the burden of the proof. According to no 28991, in malpractice cases the claimant has the burden of proof to show that the medical professional has caused the aggravation of the illness or a new pathology as the case may be, whilst the defendant must prove that the aggravation or the new pathology happened due to extraordinary and unforeseeable factors that prevented the proper performance of medical duties. The burden of the proof for causation is placed on the claimant in decision no 28992,<sup>23</sup> while no 28994 makes it clear in this regard that medical records which are incomplete, or which have been tampered with, will assume importance in the case.<sup>24</sup> Other judgments deal mostly with the question of damages.

The first rule (in no 28986) concerns damage assessment where personal injury has been suffered by a person already suffering from some sort of pathology. The court moved from the distinction between cumulative physical impairment, for example where a person already blind in one eye then also loses sight in the other, and coexisting physical impairment, for example where a person has had a hip replacement and loses their sight in one eye. The difference lies in that it is self-evident that if the physical impairment is co-existing, it will not then be relevant to the damage assessment. On the other hand, in the case of cumulative physical impairment, the compensation is for the difference between the current state of invalidity and the pre-existing state of invalidity, being calculated according to the invalidity points system and corresponding scales. On the matter of damage assessment, the Court proceeds with decision no 28988 to the effect that the standards set by the law (Art 138 and Art 139 Private Insurances Code), or with the courts “points” scales system for personal injury compensation, can be departed from in favour of the injured person only in exceptional and abnormal cases. Judgment no 28989 moreover emphasizes the difference between loss of family relationships and any subsequent health damage, while clarifying that so-called “moral” damages (i.e. pain and suffering) can be included among the damages awarded for loss of family relationship. The judgment also addresses wrongful death, seemingly with the intention of

<sup>23</sup> Roberto Pucella, *La causalità “incerta”* (Giappichelli 2007); Luca Nocco, *Il “sincretismo causale” e la politica del diritto: spunti dalla responsabilità sanitaria* (Giappichelli 2010).

<sup>24</sup> See also Cass., 26 January 2010, no 1538 and Vittorio Occorsio, *Cartella clinica e responsabilità medica* (Giuffrè 2011) 19 ff.

clarifying the issue once and for all. The Court ruled that in a case of instant or near-instant death, no damages are claimable since such damages are not envisaged for such persons and therefore their heirs cannot inherit the claim. If, however, the death occurs after a lapse of time, the Court states that both “terminal health damage”, i.e. the health damage suffered by the person during that period of time, and “terminal ‘moral’ damage”, i.e. the pain suffered by a person who realizes he/she is dying, must be awarded. Lastly, the Court of Cassazione (no 28993) examined the difference between pecuniary and non – pecuniary loss of chance, emphasizing that in a pecuniary loss of chance the pre-existing situation is positive (in terms of curriculum, capabilities, experience, qualifications, etc., which offer potential earning capacity), whilst, in the non-pecuniary loss of chance the pre-existing situation is negative (a person is ill and loses the chance to get better as a result of medical malpractice).

## 5. MEDICAL LIABILITY AND CORONAVIRUS

So far, the Italian situation up to the end of 2019 has been considered, although further innovation had been expected. On 19 March 2019 the Prime Minister (perhaps uncoincidentally a professor in private law) proposed a bill (no 1151) of delegation to the Government for the review of the Civil Code. Article 1, point n) of the bill refers to the rules on compensation for non-pecuniary loss, which were therefore bound to change to some extent.<sup>25</sup> In particular, the rule of Article 1, letter n) requires the Government to rationalize the law on tortious and contractual liability for non-pecuniary loss, giving two indications for the purpose. On the one hand, it was considered that the system under Article 2059 c.c. (which stated that compensation for non-pecuniary losses could be awarded only in the specific kinds of cases provided for in law) should be made more flexible. On the other, it was deemed desirable to link the recovery of non-pecuniary losses to the constitutional importance of the interest prejudiced.

While the legal scholars were at work on the task,<sup>26</sup> the pandemic struck and everything changed with the issue of health developing a rather different relevance and importance. Until last year, when addressing cases of physical or mental harm, the focus had been on how much health (or lack thereof) could be converted into money.<sup>27</sup> Now, health is health and its perception focuses less on

<sup>25</sup> A second Article of the draft refers to civil liability: Art 1, point m) of the bill requires a rationalization of the relationship between contractual liability, tortious liability and pre-contractual liability.

<sup>26</sup> At the end of 2019, the Italian Society of Civil Lawyers (Associazione Civilisti Italiani), one of the prominent Italian Societies of Private Law Scholars, has drawn up a proposal for a new draft of Articles 1218, 1223, 1226, 2057, 2059 c.c.

<sup>27</sup> Some interesting remarks along these lines in Gianfranco Palermo, ‘Contributo allo studio della responsabilità per danno non patrimoniale’ (2018) C. e I., 19 ff.



the economic implications or on the possibility of converting health into money. The economic relevance of health is nevertheless still there, as it is evidenced by the discussions on the desirability of creating exceptional rules.<sup>28</sup> Some have already been proposed.<sup>29</sup>

There has also been speculation on what developments the near future withholds. Giulio Ponzanelli – a renowned academic who is an expert in this field – has, for example, clearly and sharply outlined five possible case types that may arise from the current situation.<sup>30</sup> The first group is plain malpractice cases, the arising of which may have been caused also by the desperate conditions in which medical professionals have sometimes had to work during the coronavirus emergency. As is very well known, during the worst moments of the pandemic, medical professionals were working under unbelievable strain, in situations of great difficulty, and with great courage. There is a widespread feeling that, given such circumstances, protection against claims would be appropriate for medical professionals. To this effect, an extensive application of Article 2236 c.c. has been mooted. According to the rule, if the performance requires the physician to solve extremely difficult technical problems, possibly associated with the emergency or related structural inadequacies, there would be no liability outside of cases of malice or gross negligence.<sup>31</sup> The second group involves healthcare institutions and the effects of the emergency on their organization and their performance, for example where a person has not been promptly hospitalized in an intensive care unit due to overcrowding or where a person has not been swabbed for COVID-19 quickly enough. The issue is one of the foreseeability of the risk,<sup>32</sup> i.e. whether the risk was foreseeable, and it seems that, at least by the end of January, it was partly foreseeable and certainly underestimated so there could be grounds for liability of the institutions, though not of the medical professionals themselves. The third group of cases, similar to the second, regards claims by the heirs of

<sup>28</sup> Giovanni Comandè, 'La responsabilità sanitaria al tempo del coronavirus ... e dopo' (2020) *Danno e resp.*

<sup>29</sup> For instance, according to the Italian Society of Civil Lawyers (Associazione Civilisti Italiani) it is desirable that only healthcare institutions can be sued by the victims. The liability of medical professionals should, therefore, be a matter of right of recourse for the benefit of the healthcare institution.

<sup>30</sup> Giulio Ponzanelli, 'La responsabilità sanitaria e i possibili contenziosi da Covid' (*Giustiziacivile.com*, 19 May 2020) <http://giustiziacivile.com/danno-e-responsabilita/articoli/la-responsabilita-sanitaria-e-i-possibili-contenziosi-da-covid> accessed 23 June 2020.

<sup>31</sup> Luigi Mengoni, 'Obbligazioni "di risultato" e obbligazioni "di mezzi" (Studio critico)' in *Obbligazioni e negozio. Scritti II* (Giuffrè 2011) 168 ff., 206 highlights that the rule contained in Art 2236 of the Italian Civil Code, rather than establishing a limitation of liability, sets a limit on the obligation itself. See also Andrea Nicolussi, 'Sezioni sempre più unite contro la distinzione fra obbligazioni di risultato e obbligazioni di mezzi. La responsabilità del medico' (2008) *Danno e resp.* 877 ff. 35 and Idem, 'L'interesse del creditore e il risultato dell'obbligazione' in Luigi Capogrossi Colognesi and Maria Floriana Cursi (eds), *Obligatio – obbligazione. Un confronto interdisciplinare* (Jovene 2011) 127.

<sup>32</sup> Roberta Montinaro, *Dubbio scientifico e responsabilità civile* (Giuffrè 2012).

medical professionals who died carrying out their duties, also in this case in association with organizational and operational shortcomings. The fourth group of cases relates to residential healthcare centres for the elderly and disabled i.e. extremely vulnerable patients who are prone to catching or succumbing to the disease. Sometimes persons who were not seriously ill were unwisely admitted to residential centres where the virus spread, with dramatic consequences for the health, and sometimes survival, of other residents. The fifth and last group is made up of patients who were not treated according to the relevant therapeutic programmes due to the hospital overcrowding. Here too, the question regards the organization of healthcare institutions and what should be expected from them.

In conclusion, it seems probable that future disputes will develop along more or less these lines and not only in Italy. It should be added that there may well be a very large number of claims, in which case it is unlikely that the matter will be left solely to the courts, so State intervention appears to be a distinct possibility.

Aside from these remarks, it can be added in a much wider perspective, and specifically in a *de iure condendo* perspective, that it might be worth considering who should benefit from compensation of non-pecuniary losses in cases of medical liability. I would like to reiterate some ideas I have already put forward elsewhere.<sup>33</sup>

The basic assumption is that victims of personal injury cannot really be compensated with money insofar as the non-pecuniary damage is exactly the same before and after the monetary “compensation”. The harm, injury or the condition does not disappear because money is paid to the victim. There is now a widespread acceptance of the idea that providing victims with money means that they, although not truly compensated, or even not compensated at all, have a sum available to them that allows them to console themselves, whether by spending, sparing, donating, or doing whatever they please with it.<sup>34</sup> This *rationale* underlies all the above-mentioned judgments and statutes.

The coronavirus emergency, however, provides the opportunity to explore a somewhat different scenario. There is no reason to doubt that in malpractice and in similar cases the tortfeasor or those in breach of a contractual or legal obligations must pay, since there is no reason for granting them even partial immunity, particularly in view of usual insurance cover. It might, however, be worth reflecting on who is the most appropriate recipient of any compensation. Certainly, a part of the sum awarded should benefit the claimant. If this were not so, there would be no incentive to bringing lawsuits and no losses would be

<sup>33</sup> Marcello Maggiolo, ‘Una autentica solidarietà sociale come eredità del coronavirus: per una diversa destinazione del risarcimento del danno alla salute’ (*Giustiziacivile.com*, 2 April 2020) <http://giustiziacivile.com/danno-e-responsabilita/editoriali/una-autentica-solidarieta-sociale-come-eredita-del-coronavirus> accessed 23 June 2020.

<sup>34</sup> Cesare Salvi, *Il danno extracontrattuale* (Jovene 1985).

compensated, which would certainly be an undesirable result. At the same time, there is no reason why the whole settlement sum should go to the claimant. Provided the injured party can be afforded some consolation, a percentage of the damages awarded might be used in a more sensible, efficient, pragmatic and, ultimately fairer, way, if it were granted to the healthcare system itself, thus benefiting the entire community.

This is, moreover, a sort of compensation in kind (and compensation in kind is allowed in Italy by Article 2058 c.c.). If indeed the healthcare system improves because of the funds raised through this proposed mechanism, such improvement also benefits the injured person, who can potentially be treated with a higher level of care and expertise.

To end on a constitutional note, if Article 2 of the Italian Constitution states that social solidarity is a duty for everyone, then it is a duty also for the injured person. Therefore if, as often stated,<sup>35</sup> the social solidarity principle is a justifying factor for compensation for non-pecuniary losses, then it should also justify the allocation of a part of that sum to the wider community.

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<sup>35</sup> E.g. Cesare Salvi, 'La responsabilità civile' in Giovanni Iudica e Paolo Zatti (eds), *Trattato di diritto privato* (Giuffrè 1998) 32.

