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***Personal damages
and insurance in EU***

Prof. Avv. Diana Cerini

Personal damages in EU:

Preliminary questions:

- Do we have a common law?
- Shall we harmonize?
- What is the impact on insurance contract law and free circulation of insurance services ?

Personal damages in EU:

«Inside» each legal system: let's think about some of the problems:

1) *Terminology?* Patchwork of names for personal damages:

Es. Common law: general and special, nominal and substantial, contemptuous and aggravated, and so on

2) *Who is entitled to recovery?* Uncertainty on the number and categories of subjects entitled to get recovery (variability of damages «par ricochet»)

3) *Amount of money* → influence of economic conditions of the country

4) *When and where?* Claim solution and time for justice proceeding/
ADR

In Italy

- In Italian terminology: two macrocategories:
 - Patrimonial damages
 - Non patrimonial (non pecuniary) damages: but these are name of the courts and of the legal doctrine, not necessarily of the legislator - only in Code of Private insurance we have for the first time a clear reference to specific damages →

BUT in any cases, non patrimonial damages have a symphony of names....

So, in the EU contest:

→ Different terminology

BUT MOST OF ALL

→ (Very) Different amount of money recognized for a specific damage: the same person can get a sum «x» in a country, and «x minus y» in another country.

What is the situation in EU Member States?

In many states different strategies to reduce uncertainty

France:

- «Rapport Dinthillac» → trying to introduce homogeneous terminology
- Uk: reports and analysis by the Law Commission...

Shall we harmonize?

**Before answering:
the real problem is that legal systems and law
in action are often «obscure»**

Courts not always call things with their real name: let's make the example of punitive damages: in many of the EU legal systems p.d. are actually forbidden in tort law: the orthodox idea is that the victim can obtain only compensatory damages

But is that «truly true»? ?

See the Italian Case...

Ex. 1: Punitive/compensatory damages

- In principle: only compensatory damage can be paid

BUT....

Sometimes moral damages are so high that they probably include something more...: → Decision by the Milan Tribunal in a medical case and liability of the hospital/insurers

(see also The «Lodo Mondadori» decision by the Court of Cassation.... (Cass., sez. III civ., 21255/2013 on appeal against Court of Appeal Of Milan)

Ex. 2: Patrimonial damages as a consequence of personal damage: Two Italian decisions dated 2014

- Decision 1: Cass. 10 th March 2014 no.5504
- Decision 2: Cass. 24th June 2014 no. 13537.
- What do they have in common ?
 - 27 years for the proceedings (from facts to decision)!
 - Two victims, two cases of motor liabilities and insurance

But...

- Decision I: with reference to patrimonial damage of relatives of the victim: « **there is no *compensatio lucri cum damno*** between the sums paid by the social insurers to the heirs for pension allowance and the sum to be paid by the liable party (and its insurer)....
- Decision II: **there is *compensatio lucri cum damno***

Same chamber of the Court of Cassation !!!

Ex 3: Non patrimonial damages: damage for death

- Decision I: «San Martino Decisions» - 2008
- Decision II: “Sentenza Scarano” – 2014

So:

- No certainty
- No predictability

But let's consider....

Predictability – consistency

- 1) For victims: essential tool of a legal system in order to realize *equality* and *non discrimination*

- 2) For professionals: especially insurance companies: essential in order:
 - to correctly manage the risk
 - to set the right premium

Predictability and consistency

3) In general:

- Reduce transactional costs
- Reduce litigation

What is EU doing?

- Soft law proposals: European Principle on Tort law
- Studies and other non binding proposals: PEOPIIL
- European Court of Justice → at the border....
- ECHR : few decisions and wuth reference to very specific tort situation, low impact for the moment

ECJ decisions

- C-371/12, *Petillo e Petillo/Unipol Assicurazioni S.p.A.*
- C-22/12, *Katarína Haasová / Rastislav Petrík e Blanka Holingová*
- C-277/12 *Vitālijs Drozdovs / Baltikums AAS*

→ EU Law does not directly interfere with determination of personal damage

A common law for personal damages?

A) See some Opinions: PEOPIL reports: From one side:
«This question may look like a clever one, but it is becoming evident that it is no longer a matter of yes or no: **harmonisation is already at work at different European levels ...**»

Opinion of PEOPIL group

B) From the other side:

The differences between the European systems of personal injury compensation are much greater than the points in common →
«European legal systems are too far apart to contemplate unification or minimum harmonisation straight away.

Moreover, from a comparative perspective, there is no single national compensation system which constitutes a sufficiently prestigious model throughout Europe to influence and direct the systems in force in the other Member States»

So:

- Too different starting points
- Absence of a «model» to refer to

But as we all know: incredible impact on insurance

- Tort compensation is strictly connected to insurance
- In the majority of the legal systems, a very high percentage of claims for liability (from 85-95%) are against insurers (no «sole» liable parties) → that means that insurance can have great influence on the level of compensation awarded

Influence of insurance on compensation levels:

1) From one side, compensation awards rarely overpass maximum insurance sums → the real defendant is always the insurance company (presence of insurance as a cap to the compensation awarded)

2) Level of award is pushed at the insurance limit (insurance as a factor that increase in the amount for part of the cases)

→ lobby → can the creation of a harmonized insurance contract law help?

Actually in Europe

-part of the insurance contract law is directly harmonized → i.e. directives concerning insurance contracts, especially on information duties, right of withdrawal, etc.

Part of the insurance contract law is indirectly harmonized → i.e. directives concerning unfair contract terms

- Part of the insurance contract law is not harmonized → especially general rule on liability insurance

Compensation and Single Market for Insurance

- Problem for cross border litigation: legal uncertainty, scarce knowledge of the market
- Problem for free movement of insurance companies and insurance services
- Less competition in insurance

What is EU doing for insurance contract law?

- Consultation with stakeholders
- Creation of a Group of Expert (2013)
- New calls for measures effect of legal differences in EU country legislation

Group of Experts on Insurance Contract Law EU Commission – 2013/2014

- Commission Decision of 17 January 2013 an Expert Group on a European Insurance Contract Law, OJ 2013 C 16/6 (Commission Decision).

→ Identify obstacles to free circulation of insurance products and services

- General report , passim and section five in particular → what are the obstacles to free circulation of liability insurance (especially, but not only, in motor liability insurance and medmal insurance)?

Expert Group General Report:

“7. The legal framework of liability insurance is particularly complex due to the involvement of third parties, the interrelation with liability law, and the variety of duties to insure imposed by national legislation or regulation. While it is not easy to isolate issues of pure insurance contract law, a number of legal divergences have been identified as causing costs and uncertainty. This notably applies to the various differences concerning compulsory insurances, to rules on the mitigation of loss, in particular on the cover of legal expenses incurred for the defence and on the time-span of the insurer’s liability. The applicable rules on insurance contract law are only one element in the decision to offer cross-border liability cover alongside others; they do not appear to be the main element”.

General report :

- Rules on liability insurance:
 - Direct action /absence of direct action
 - Different Prescription limit
 - Existence of an automatic subrogation/non automatic

BUT above all

- Different tort law and amount of recovery
- Impact on insurance contract: ex. differences in setting minimum coverage: the amount of the minimum sum set by the law (if any) is strictly influenced by considerations relating to the awards made to victims in a specific country.
- Differences in judicial certainty
 - Time
 - Predictability

Some Conclusions:

- 1) Circulation of insurance products, especially in liability insurance for motor accidents and medical, are deeply concerned
- 2) Free circulation of insurance services find a major obstacle in the existence of different models and amount of compensation
- 3) Unpredictability and uncertainty are a major obstacle for local as well as for foreign insurers willing to enter a member state market.

Thank you

Further notes in the full report!

diana.cerini@unimib.it
info@studiolegalecerini.it