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The Johnston Case, the Compensation of Pleural Plaques and Psychiatric Harm in Italian Tort Law

Abstract: The case note investigates the compensability of pleural plaques, anxiety, and psychiatric harm, consequent to the exposure to asbestos dust, in Italian tort law.

1. Problems Arising Out of the Compensation of Pleural Plaques

One of the possible consequences of the exposure to asbestos dust is the occurrence of pleural plaques, a fibrous thickening of the pleura membrane that surrounds the lungs.

Generally, they cause no symptoms and are not the cause of any other asbestos-related disease. However, since they signal the presence of asbestos in the lungs and pleura and the possibility to develop asbestos-related illnesses in the future, patients with a diagnosis of pleural plaques may consequently develop anxiety and clinical depression.

A large number of persons exposed to asbestos dust have been diagnosed with pleural plaques. Many others will be diagnosed with the same illness in the future.

Consequently, the problem of the compensation of pleural plaques is becoming more pressing in many western legal systems.

The problem is two-fold.

First, it must be ascertained if the pleural plaques are compensable injuries. Then, it must be investigated if the future risk to develop an illness and the state of anxiety or the state of clinical depression that may follow the diagnosis of pleural plaques is a compensable injury.

The House of Lords investigated these issues in the *Johnston* case, pronounced on 17 October 2007.

The Lords held that pleural plaques are not to be considered compensatable damage, because they generally do not cause any symptoms, do not increase the possibility to incur in other diseases, and do not shorten the expectation of life.

Furthermore, to their opinion, neither the risk of a future illness or the anxiety following the diagnosis of pleural plaques is a cause of action. They can only be taken into account to calculate the losses suffered by someone who claims the compensation of physical damages.

Finally, the Lords affirmed that a recognized psychiatric illness, such as a clinical depression, consequent to the contemplation to develop an illness in the

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future, can be compensated only if it was reasonably foreseeable that the event that actually happened would cause psychiatric illness to a person of reasonable fortitude. In the case, the event (the contraction of an asbestos-related disease) had not occurred and the psychiatric illness was the consequence of the fear of it to happen.

The decision of the House of Lords in the Johnston case sets out principles of law that can be applied either to cases of pleural plaques or cases in which a dangerous exposure occurred, but no damage or injury followed it.

My investigation will deal with the principles applied by Italian courts when the same issues are raised.

2. The Cause of Action and the Breach of Duty

The first principle of law held by the House of Lords is that in cases of negligence, a cause of action in tort is not complete unless and until damage has been suffered by the claimant. As long as pleural plaques are symptomless, they cannot be considered a compensable injury.

Italian courts have not yet been confronted with cases concerning the compensation of pleural plaques, but some first directions can be drawn from the existing rules and case law.

Article 2043 of the Civil Code, providing the general rule for the compensation of tortious damages, states: 'Compensation for unlawful acts. Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.'¹

This article has constantly been interpreted as imposing on the claimant the burden of proof of the damage, the causation between the act of the defendant and the damage, and his fault.

It is doubtful that, in the event a compensation for mere pleural plaques were asked and these same pleural plaques caused no physical impairment, an Italian court would affirm the liability of the defendant. Article 2043 of the Civil Code requires the proof of the injury, but in cases of pleural plaques, there is generally no harm to the body of the victim.

When the compensation is warranted for the breach of a contractual duty, Article 1218 of the Civil Code states: 'Liability of debtor. The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.'²

¹ Translation by M. BELTRAMO, G.E. LONGO, & J.H. MERRYMAN, *The Italian Civil Code* (Dobbs Ferry, NY: Oceana, 1991). The original version is Art. 2043 Codice Civile: '*Risarcimento per fatto illecito. Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*'.

² Translation by BELTRAMO et al. The original version is Art. 1218 Codice Civile: '*Responsabilità del debitore. Il debitore che non esegue esattamente la prestazione dovuta è tenuto al risarcimento del*

That means that the claimant must prove the existence of a contractual relationship and of the damage that is the consequence of the breach of a contractual duty owed by the defendant. However, the fault of the latter is presumed, which means that he can escape liability only if he proves that the breach of contract was not dependent from his fault.

As long as many cases of exposures to dangerous substances, and asbestos dust among them, are due to the negligence of the employers or to their breach of contractual duties toward their employees, Italian courts are often asked to state their liability.

In both cases, the existence of a damage is a prerequisite of the claim.

Comparing Italian court decisions to the Johnston case, it is interesting to underlie two points.

First, the breach of contractual duties is almost always invoked in Italian cases in which there was a contractual relationship between the claimant and the defendant, especially when the claimant was an employee.

The statements of Lord Hope of Craighead and Lord Scott of Foscote in the Johnston decision make clear that the counsels of the claimants are not used to act against the defendants in force of their contractual liability, for the exposure of the employees to asbestos dust.

Second, Italian court decisions allows that a claim for this type of damage is for joint tortious liability (*responsabilità extracontrattuale*) claims and contractual liability (*responsabilità contrattuale*) claims in the same case. In addition, they generally take advantage of that freedom.

Apparently, that is not the case of English courts.

3. The Compensation of the Anxiety and of the Psychiatric Harm Consequent to Asbestos Exposure

The issue of the compensation of the anxiety and the psychiatric harm consequent to the exposure to asbestos dust was tackled by the Italian Corte di Cassazione, in Case No. 23719 of 7 November 2006.³

Some employees, exposed to asbestos dust when working as carpenters, sued their former employer asking compensation for the damages they were experiencing because of their physical and psychological sufferings, consequent to the danger to develop a serious illness.

danno, se non prova che l'inadempimento o il ritardo è stato determinato da impossibilità della prestazione derivante da causa a lui non imputabile'.

³ Cass. (Corte di Cassazione), 7 Nov. 2006, no. 23719, in *Responsabilità civile e previdenza (Resp. civ. prev.)*, (2007):1648, with note by N. COGGIOLA, 'esposizione ad amianto e mancato risarcimento dell'ansia di contrarre una patologia'.

None of them could complain physical or psychiatric injuries or illnesses that were the consequence of the working exposure to asbestos dust.

They maintained that those psychological injuries could be presumed from the common experience and that they were the consequence of their exposure to asbestos dust.

The Corte di Cassazione rejected their claims. According to the Court, when an employee asks compensation of a psychiatric damage that is the consequence of the exposure to pathogenic agents, in the absence of a physical illness related to the dangerous exposure, he must prove the existence of that psychiatric damage.

The Court then stated that the existence of that injury cannot be inferred from the fact that he worked in a polluted environment. The proof of the psychiatric damage can be given by direct demonstration of its existence or it may be inferred from external circumstances, such as the existence of psychosomatic illnesses, insomnia, loss of appetite, and disturbed behaviours.

This was a case of first impression, because the Corte di Cassazione had not considered before the question concerning the compensation of pure psychiatric losses as the consequence of asbestos dust exposure.

The Court was required to identify the kind of damage claimed by the claimants, to ascertain how this damage could be proved, and lastly, to state if a compensation could be asked for it, although it was not coupled with a physical illness or injury.

If the employees did not actually suffer any psychical illness or injury consequent to asbestos dust exposures, the formula used to identify the damage for which the compensation was required was undisputedly vague.

A rough translation of the definition used by the claimants could be: ‘the moral damages for the physical and psychological sufferings that are the consequence of the danger to develop a mortal illness, because the employees were obliged to keep on working in a polluted environment’.

In brief, I would say that the damage for which the claimants required the compensation was neither an injury to their physical or psychiatric sphere, nor to their economical sphere. The damage was instead a state of anxiety, of physical and psychological uneasiness, lasting for an appreciable length of time. Apparently, a damage very akin, if not the same, to the one discussed in *Johnston*.

4. Italian Case Law Concerning the Compensation for Anxiety

The cited decision of the Corte di Cassazione No. 23719 of 7 November 2006 is by now and to my knowledge the first and only reported case dealing with the compensation of the mere anxiety consequent to asbestos dust exposures.

However, Italian courts have already been confronted with the issue of the compensability of psychological sufferings arising out of noxious exposures, which did not cause any physical or psychiatric injury.⁴

There are only a few decisions on the issue, and not homogeneous.

In some decisions, the courts denied the existence of physical and psychiatric injuries (*danno biologico*), because they held that there was no harm to the physical and psychiatric integrity. However, they recognized that the state of anxiety could be compensated inasmuch as an injury to the daily activities of the victim (*danno esistenziale*), because it had adverse consequences on their everyday life.⁵

In other cases, instead, the courts held that psychological states of alterations, such as depression, anxiety, and phobias, are to be considered as physical and psychiatric injuries (*danno biologico*), because the scientific evidence shows that those alterations are characterized by a change in the chemical and physical structures of the body and are a burden to the free development of the personality.⁶

Other courts affirmed the liability of the defendants for the compensation both of non-material damages (*danno morale*) and of physical and psychiatric damages (*danno biologico*). In these cases, the same defendants were convicted for the crime of environmental pollution and the causation between the polluting substance and the harm to the health was proved.⁷

But surely, the most famous Italian case concerning the compensation of injuries that are the consequence of the exposure to toxic substances is the ‘Icmesa Case’.

In July 1976, the explosion of some boilers belonging to Icmesa, a chemical factory, polluted with dioxin a large portion of Seveso, a small town in Northern Italy.

The managers and the technical staff of the factory were held responsible for the accident and of the consequent injuries to the health of a large number

⁴ On the subject, L. GAUDINO, ‘Il danno da pericolo’, in *Il diritto civile nella giurisprudenza, I danni risarcibili nella responsabilità civile, Vol. III, Il danno extracontrattuale*, ed. P. Cendon (Torino: UTET, 2005): 53 ff., in which the author makes an interesting comparison of Italian and American decisions.

⁵ Cf. App. Milano, 14 Feb. 2003, *Giur. it.* (2003): 2287, with note by B. THELLUNG DE COURTELARY, ‘Danno esistenziale da immissioni acustiche intollerabili: entusiasmi e confusioni’, *Resp. civ. prev.* (2003): 798, with note by P. ZIVIZ & F. BILOTTA, ‘Il silenzio è d’oro ... (considerazioni sul danno esistenziale da rumore)’, *Rivista giuridica dell’ambiente (Riv. giur. amb.)* (2003): 829, with note by M.A. MAZZOLA, ‘Il danno esistenziale da immissioni intollerabili’ and L. Prati, ‘Il danno all’ambiente tra tutela della persona e interessi collettivi: il danno esistenziale da inquinamento’, *Dir. giust.* (2003): 47, with note by F. PECCENINI. In that case, the state of anxiety was caused by intolerable noises.

⁶ Trib. Monza, 30 Gennaio 1997, *Resp. civ. prev.* with note by D. FEOLA (1997): 1060.

⁷ App. Milano, 10 Gennaio 1997, *Foro padano (Foro pad.)* I (1997): 85.

of individuals by the criminal court.⁸ The government set up a repayment plan of the damages to the town population, especially to the owners of commercial enterprises.⁹

Two separate civil actions were introduced by some of the inhabitants of the town, who claimed compensation for the damages caused by the accident: the injuries to their health as well as the non-material damages (*danno morale*), which included inter alia damages for psychological sufferings and the expenses to compensate the trouble related to follow-up screening.

The first¹⁰ and second instance¹¹ courts rejected the claims concerning the injuries to health. On the other hand, the defendants were held liable for the compensation of the *danno morale*, consequence of the criminal negligence that had

⁸ Trib. Monza, 24 Sep. 1983, *Rivista giuridica del lavoro (Riv. giur. lav.)* IV (1983): 458, annotated by C. PIERGALLINI, 'Il concorso apparente di norme nella sentenza sui "fatti" di Seveso', *Riv. giur. lav.* IV (1985): 19, with note by S. CANESTRARI, 'Note in tema di dolo nel delitto di "rimozione od omissione dolosa di cautele contro infortuni sul lavoro [Art. 437 c.p.]"', *Riv. giur. lav.* IV (1984): 381, with note by E. CARLETTI, 'La responsabilità penale nel gruppo di società: il caso della Icmesa di Seveso', *Riv. giur. lav.* IV (1984): 3.

The decision was confirmed by App. Milano, 13 May 1985, *Giustizia penale (Giust. pen.)* II (1986): 171, with note by A.A. SAMMARCO, *Dolo eventuale, colpa cosciente e soggetto attivo nel delitto di omissione di cautele contro gli infortuni* and lastly by Cass. 23 May 1986, VON ZWEHL, *Cassazione penale (Cass. pen.)* (1988): 1250 and *Rivista italiana di medicina legale (Riv. it. med. leg.)* (1989): 652.

⁹ D.L. 10 Aug. 1976, no. 542 converted with some modifications by L. 8 Oct. 1976, no. 688. The government and the region even decided to surrogate the responsible persons and to settle with the enterprises liable for the accidents, to avoid any controversy on the issue. For more details, see F. SALERNO, *La Givaudan risarcisce i danni prodotti dall'Icmesa*, *Rivista diritto internazionale (Riv. dir. int.)* (1980): 888.

¹⁰ The first instance decisions are Trib. Milano (Tribunale di Milano), 11 Luglio 1991, *Sampogna c. Icmesa S.p.A.*, and Trib. Milano, 11 Luglio 1991, *Cacace c. Icmesa S.p.A.*, both in *Archivio civile (Arch. civ.)* (1991): 1277, with note by M. MEDUGNO, 'La liquidazione del danno non patrimoniale in conseguenza del "disastro di Seveso" tra affermazioni di principio e risarcimento simbolico', and *Resp. civ. prev.* (1995): 136, with note by D. FEOLA, 'Il caso "Seveso" e la risarcibilità dei danni non patrimoniali alla collettività vittima di disastro ambientale'.

¹¹ The second instance decisions are, respectively, App. Milano (Corte di Appello di Milano), 15 Apr. 1994, *Giur. It.* I, no. 2 (1994): 961, with note by P. RIGHI, 'Danno all'ambiente e interessi diffusi: un'ipotesi di liquidazione del danno', *Ambiente* (1995), fasc. I, 88, with note by M. MEDUGNO, 'Danno ambientale ... non patrimoniale', and App. Milano, 15 Apr. 1994, no. 667, *Giur. it.* I, no. 2 (1994): 961, with note by P. RIGHI, 'Danno all'ambiente e interessi diffusi: un'ipotesi di liquidazione del danno', *Corriere giur.* (1994): 999, with note by P. RIGHI & C.M. VERARDI, 'Disastro ambientale e danno morale "collettivo"', *Resp. civ. prev.* (1995): 136, with note by D. FEOLA, 'Il caso "Seveso" e la risarcibilità dei danni non patrimoniali alla collettività vittima di disastro ambientale', *Riv. giur. amb.* (1995): 327, con nota di M. DE FOCATIS, 'Danno morale e reato di pericolo', *Diritto ed economia delle assicurazioni (Dir. econ. assic.)* (1995): 561, with note by D. CHINDEMI, 'Risarcibilità del danno morale "collettivo" conseguente a disastro ecologico e criteri di quantificazione del danno'.

caused the exposure to undeterminable quantities of dioxin. The claimants were compensated with a sum of ITL 2 million (approximately EUR 1,000) each.¹²

The Corte di Cassazione reversed those conclusions, with Decision No. 4631 of 24 May 1997¹³ and No. 5530 of 20 June 1997,¹⁴ holding that non-material damages (*danno morale*) arising out of an environmental accident could not be compensated, in the absence of proof of personal physical and psychiatric injuries. As no harm of this kind was at issue in these cases, the Court rejected the claims.¹⁵

The solution was harshly criticized by many scholars,¹⁶ and the issue was examined again by the Corte di Cassazione with a decision of its joint panels rendered on 21 February 2002, No. 2515.¹⁷

¹² The amount of the sum awarded to the claimants was considered reasonable by the Corte di Appello di Milano, because it was not proved that they suffered more serious injuries. App. Milano, 12 Oct. 1993, in *Arch. Civ.* (1994): 1269, with note by M. MEDUGNO, 'Danni da inquinamento: casi diversi stessa soluzione'.

¹³ Cass., sez. III, 24 May 1997, no. 4631, *Corriere giur.* (1997): 1172, with note by G. DE MARZO, 'Danno morale e reati di pericolo: il caso Icmesa', *Resp. civ. prev.* (1997): 1059, with note by D. FEOLA, 'Il risarcimento del danno morale nei reati di pericolo: il caso "Seveso" in Cassazione', *Giur. it. I*, no. 2 (1998): 1363, with note by M. BONA, 'Riflessioni sul risarcimento del danno morale da sinistro ambientale: critica ai limiti delineati dalla Corte di Cassazione nel caso Seveso e osservazioni sulla distinzione tra danno-evento e danno-conseguenza'.

¹⁴ Cass., sez. III, 20 Jun. 1997, no. 5530, *Foro it. I* (1997): 2068, with note by A. PALMIERI, 'Disastro di Seveso e condizioni di risarcibilità del danno morale soggettivo', *Danno e resp.* (1997): 711, with note by B. Pozzo, 'Danno all'ambiente e danno morale: ultimo atto', *Resp. civ. prev.* (1997): 1059, with note by D. FEOLA, 'Il risarcimento del danno morale nei reati di pericolo: il caso "Seveso" in Cassazione', *Giur. it. I*, no. 2 (1998): 1363.

¹⁵ The decisions of the Corte di Cassazione were, in its words, based on two decisions of the Corte Costituzionale, no. 184 of 14 Luglio 1986, *Foro it. I* (1986): 2053, with note by G. PONZANELLI, 'La Corte Costituzionale, il danno non patrimoniale e il danno alla salute', *Foro it. I* (1986): 2976, with note by P.G. MONATERI, 'La Costituzione e il diritto privato: il caso dell'art. 32 Cost. e del danno biologico ("Staatsrecht vergeht, Privatrecht besteht")' and *Giur. it.* (1987): 392, with note by A. PULVIRENTI, 'Il danno all'integrità psicofisica (cosiddetto danno biologico) nella più recente sentenza della Corte Costituzionale' and no. 372 of 17 Feb. 1994, *Foro It. I* (1994): 1326, with note by D. POLETTI, 'L'azione di regresso previdenziale, il danno morale e il nuovo diritto "vivente"' and by C. CASTRONOVO, 'Danno alla salute e infortuni. La Corte costituzionale e i diritti secondari' and Corte Cost., 27 Oct. 1994, no. 372, *Resp. civ. prev.* (1994): 976, with note by G. SCALFI, 'L'uomo, la morte e la famiglia'; G. GIANNINI, 'La vittoria di Pirrone', and E. NAVARRETTA, 'Dall'esperienza del danno biologico da morte all'impianto dogmatico sul danno alla persona: il giudizio della Corte Costituzionale', *Giust. civ. I* (1994): 3029, with note by F.D. BUSNELLI, 'Tre "punti esclamativi", tre "punti interrogativi", un "punto e a capo"', *Foro it. I* (1994): 3297 with note by G. PONZANELLI, 'La Corte Costituzionale e il danno da morte', *Giur. it. I* (1995): 406, with note by A. JANNARELLI, 'Il "sistema" della responsabilità civile proposto dalla Corte Costituzionale ed i "problemi" che ne derivano'.

¹⁶ For the comments and critics of the scholars, see the references given in notes 13 and 14.

¹⁷ Cass., SS.UU., 21 Feb. 2002, no. 2515, *Foro it. I* (2002): 999, with note by A. PALMIERI, 'Risarcibilità del danno non patrimoniale tra aperture giurisprudenziali e tipizzazione legislativa', *Giur. it.* (2002): 775, *Corriere giur.* (2002): 461, with note by G. DE MARZO, 'Il danno morale nel caso

The Court eventually held that the non-material injury (*danno morale*) was compensable even when no physical or psychic harm existed and though no economic loss could be proved. The award was for ITL 4 million (a little more than EUR 2,000) for every claimant, with interests from the date of the decision.¹⁸

5. Conclusion

A few simple inferences can be drawn from the examination of the Italian decisions concerning cases similar to the one discussed in Johnston.

As a general rule, Italian courts compensate the claimant for physical and psychiatric injuries (*danno biologico*) only in those cases in which bodily or mental harm is clinically ascertained.

A diminished ability to carry on the daily activities (*danno esistenziale*) is compensated only if the claimant can demonstrate that the defendant's negligent action had negative consequences on the course of the claimant's everyday life.¹⁹

Lastly, non-material damages (*danno morale*) are awarded if the defendant's conduct is punished by the law as a criminal offence, even if the crime is not actually prosecuted.

The only exception to this rule was the 'Seveso case', in which non-material damages (*danno morale*) were compensated, even if the claimants could not prove any bodily injury or psychiatric harm.

Maybe in that occasion the Court made an exception to the general rule because the victims were forever obliged to submit themselves to follow-up screenings, and their existence had certainly abruptly changed after the day of the explosion of the boilers in the factory.

Furthermore, we have to point out that the damages compensated to the claimant were a limited amount of money.

From this general outline, we can easily infer that Italian courts would not generally compensate the claimants for pleural plaques and a mere state of anxiety, consequent to asbestos exposition, that is to say in a case alike to the Johnston case.

Seveso: l'intervento delle Sezioni Unite', *Giustizia amministrativa (Giust. amm.)* (2002): 254; *Arch. civ.* (2002): 547; *Ambiente* (2002): 775, with note by L. PRATI, 'Danno morale da inquinamento: le Sezioni Unite invertono la rotta', *Resp. civ. prev.* (2002): 384; *Resp. civ. prev.* (2002): 726 (m), with note by D. FEOLA, 'Il prezzo dell'inquietudine: il caso "Seveso" torna in Cassazione', *Dir. giust.* (2002), fasc. 11, 23, with note by A.G. CIANCI, *Nuovo diritto (Nuovo dir.)* (2002): 375, with note by F. MAZZIA, 'E' risarcibile il danno morale in assenza di danno biologico', *Danno resp.* (2002): 499, with observations by G. PONZANELLI & B. TASSONE, *Giust. civ. I* (2002): 567; *Riv. amb.* (2002): 700.

¹⁸ The calculation of the damages was made by the second instance court, App. Milano, 27 Jun. 1995, unpublished.

¹⁹ Actually, this head of damages is now under consideration of the joint panel of the Corte di Cassazione.

Pleural plaques are not clinically considered a bodily harm; therefore, they are not compensable as physical injuries (*danno biologico*). Their existence does not interfere with the routine activities of the claimants, so there would be no compensation for the injury to their everyday life (*danno esistenziale*). In addition, lastly, it is doubtful that non-material injuries (*danno morale*) would be compensated, as long as there is no evidence of physical and psychiatric injuries, and especially if the defendant is not convicted of a crime.

If an exception to the general rule were to be made in cases of asbestos exposure, it would probably already have been made by the Corte di Cassazione, in its Decision No. 23719 of 7 November 2006, following the ruling in the Seveso case. In fact, the existence of pleural plaques does not add any further and substantial elements to the fact of the negligent exposure to noxious substances.

On the contrary, in that occasion, the Corte di Cassazione clearly held that the non-material injuries consequent to asbestos exposure, which are not coupled to physical and psychiatric injuries, are not compensable damages.

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Manuscripts should be written in standard English, French or German.

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La Revue européenne de droit privé a pour objectif de faciliter, par la constitution d'un forum, la mise au point d'un Droit Privé Européen. Elle publie des articles susceptibles d'intéresser aussi bien l'universitaire que le praticien, sur un plan européen. Nous serons heureux d'ouvrir nos pages aux travaux comparatifs dans tout domaine du droit privé. La Revue est consacrée en particulier à l'étude comparée de la jurisprudence. Les travaux concentrés sur une seule juridiction sont admissibles, à condition de présenter un intérêt dépassant les frontières.

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Style guide

A style guide for contributors can be found in volume 11, issue No. 1 (2003), pages 103-108, and online at <http://www.kluwerlawonline.com/europeanreviewofprivatelaw>.

Index

An annual index will be published in issue No. 6 of each volume.