Compensatio lucri cum damno in Portugal

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According to Articles 562 and 566(2) of the Portuguese Civil Code, someone who is under an obligation to repair loss must reconstitute reality as it would have been, were it not for the occurrence of the event giving rise to a claim for reparation. In the calculation of the amount of compensation due, the loss which must be considered shall not be limited to a reconstitution of the *status quo ante*, but shall include any benefits which would have accrued to the injured party were it not for the occurrence of the harmful event, as per Article 564(1) of the Portuguese Civil Code.

Portuguese legal provisions do not explicitly cater for the need to deduct from that amount any economic benefits or advantages which the injured party would not have obtained, were it not for the occurrence of the harmful event. However, the above provisions are commonly understood by both courts and legal authors implicitly to reflect the compensation principle according to which injured parties are entitled to seek full reparation for all the loss they have sustained but may not make a profit at the expense of the offending party[1]. Hence, loss assessment must be made by establishing the difference between what is and what should have been, but for the harmful event – which would include taking into account the good alongside the bad.

Portuguese courts often allude to *compensatio lucri cum damno* in order to justify their taking into account of the economic benefits or advantages which would not have happened, were it not for the occurrence of the harmful event ('but-for advantages'). The main issue to be determined is not, therefore, whether or not the courts see *compensatio lucri cum damno* as being an integral part of the applicable law, but rather how it should apply to each case in order to become a useful decision-making tool. Having gone through a fair number of

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[1] See P. MOTA PINTO, *Interesse contratual negativo e interesse contratual positivo*, I, Coimbra Editora, pp. 710-803. See also M.ª M.ª Nazareth LOBATO GUIMARÃES, "Compensação de lucros com danos (*compensatio lucri cum damno*)" 1946-47 *Revista de Direito e Estudos Sociais* 79-102; A. VAZ SERRA, "Obrigação de indemnização" (1959) 84 *Boletim do Ministério da Justiça* 5-303, at pp. 183-224; F. PEREIRA COELHO, *O problema da causa virtual na responsabilidade civil*, Almedina 1998, *maxime* p. 283. See the judgments of the Portuguese Supreme Court of 31.05.2011 (Sebastião Póvoas) ECLI:PT:STJ:2011:851.04.7BBGC.P1.S1.EE, and of 22.11.2012 (Lopes do Rego) ECLI:PT:STJ:2012:110.2000.P3.S1.80.

judgments, my conclusion is that it is currently *not* a useful judicial decision-making tool, there being no universally accepted criteria nor any serious attempts, by local courts, at setting forth criteria which would allow one to distinguish between the but-for advantages that are relevant to the determination of the loss and therefore to the calculation of damages from those which are not[2]. Decisions are not based on solid common grounds, but rather appear to depend on a case-by-case analysis, the result largely depending on the court's assessment of the merits and particular circumstances of each case.

A brief analysis of a few recent judicial decisions appears to be the best way of grasping the Portuguese take on *compensatio lucri cum damno*.

In a number of very similar cases decided on 28 February 2002, on 27 April 2002 and on 25 October 2005 by the Portuguese Supreme Court, two different groups of students sought compensation from a driving school, alleging that the school had misled them into enrolling in a driving examiners course by erroneously informing them that successful completion of that course would make them eligible to register as driving examiners themselves[3]. In fact they would need to meet other criteria, such as experience as a driving instructor, to be able to register as an examiner. The school argued that the calculation of loss should take into account that, a few years later, the law happened to be altered in such a way as to allow the claimants to register as driving examiners simply by having successfully completed that course.

As in every other case which I have examined, the existence of a causal link between the harmful event and the advantage was purported to be essential for the deduction of but-for advantages to take place[4]. However, the court did not go to great lengths to explain when or why that causal link is to be found lacking, nor why it was found to be lacking in the cases under analysis.

The court drew a sharp distinction between advantages caused by the harmful event and advantages derived from subsequent, unrelated coincidences in order to reject the

[2] P. MOTA PINTO, *Interesse contratual negativo e interesse contratual positivo*, I, Coimbra Editora, pp. 770-803.

[3] Judgments of the Portuguese Supreme Court of 28.02.2002 (Araújo Barros) ECLI:PT:STJ:2002:02B182.36; of 27.04.2002 (Sousa Leite) (not available online) and of 25.10.2005 (Silva Salazar) ECLI:PT:STJ:2005:05A3054.DF.

[4] Judgments of the Portuguese Supreme Court of 25.10.2005 (Silva Salazar) ECLI:PT:STJ:2005:05A3054.DF; of 31.05.2011 (Sebastião Póvoas) ECLI:PT:STJ:2011:851.04.7BBGC.P1.S1.EE; and of 07.10.2014 (Salreta Pereira) ECLI:PT:STJ:2014:965.09.7TVLSB.L1.S1.92.

defendant's contention that *compensatio* should apply to these cases[5]. However, mere chance does play a very relevant role in civil liability: loss which might well have been sustained but which has, as a matter of fact, been prevented because the course of events just happened to go one way rather than another does not form the basis of a successful claim for damages, no matter how objectionable the conduct causing the potentially harmful event may be. This is so because under Portuguese law you do not fall under an obligation to compensate someone from a loss unless they have actually sustained it.

When reading these judgments, one is left with a sense that the decisions could have easily gone either way, or at least that mere lack of a strong enough causal relation is not a very robust justification for their outcome. The above described case appears to be somewhat different from a situation where a passenger is abandoned by a taxi driver in the middle of nowhere but then happens to find an object of great value lying on the ground[6]. That situation can be classified as a pure coincidence, wholly unrelated to the taxi driver's bad conduct, although the passenger would not have found the money if it had not taken place.

According to chaos theory, simply by flapping its wings, a butterfly can give rise to very small changes in the atmosphere that may ultimately alter the path of a tornado[7]. However, the causal link is admittedly tenuous. It would not have led to the establishment of liability, had a human being been flapping whose wings. The driving school students, on the other hand, did benefit directly from the training provided by the school because it gave them the qualification that was required for them to register as driving examiners, which was why they had enrolled in the course. The new law did eliminate their problem, even if not retroactively. Their having taken the course is an adequate cause of their now being able to register as driving examiners. Quite differently, a passenger's abandonment by a taxi driver in the middle of nowhere is not the adequate cause of the discovery of large sums of money on the ground. Hence, these cases are not very helpful in the setting up of guidelines as to where the line should be drawn.

Moving on to a different stream of cases, the civil sections of the Portuguese Supreme Court have consistently held that the burden of proof of both the existence and

[5] Judgment of the Portuguese Supreme Court of 25.10.2005 (Silva Salazar) ECLI:PT:STJ:2005:05A3054.DF.

[6] J. M. ANTUNES VARELA, *Das obrigações em geral*, I, 10th ed., Almedina 2000, p. 938.

[7] See, for instance, BISHOP, Robert, "Chaos", *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/chaos/>.

quantification of an advantage falls upon the defendant (the offending party)[8]. *Compensatio* is therefore treated as a defence, an exception which allows the defendant to reduce the amount of damages which would otherwise have been due to the claimant when the negative consequences of the harmful event are found to have occurred, applying the general rules to be found in Article 342 of the Portuguese Civil Code.

The Portuguese Supreme Administrative Court, on the other hand, has held that when the existence of an advantage is proven but no evidence is provided that would enable the court to quantify it, the decision should be for the defendant, because proof of the existence of that advantage alone would suffice to undermine the very conclusion of fact that the claimant has indeed suffered any loss at all, it being the claimant's burden to prove that loss has occurred, also according to the general rules contained in Article 342 of the Portuguese Civil Code[9].

In the case before the Portuguese Supreme Administrative Court, a physician had been illegally fired by the Portuguese State. The court found that the physician had continued to practice medicine in his private clinic. The court was unable to quantify that advantage, as no evidence as to how much the claimant had profited in private practice after being fired from his public position had been supplied to the court. The court found that the claimant may well have made more money in private practice than he would have made by continuing to spend some of his time working for the Portuguese State. On that basis, the court found for the defendant, the Portuguese State. No damages were found to be due to the physician. If the case had been heard before the Portuguese Supreme Court, judging by the above mentioned prior decisions, the court might have disregarded this advantage and have sentenced the defendant to pay damages in full, solely on the basis of the lost earnings.

Let us briefly look into the first of the four judgments, dated 22 May 2018, nn. 12564, 12565, 12566 and 12567, of the United Sections of the Italian Court of Cassation. In case no. 12564, a man had been run over by a motor vehicle. His widow filed an action for

[8] Judgment of the Portuguese Supreme Court of 22.11.2012 (Lopes do Rego) ECLI:PT:STJ:2012:110.2000.P3.S1.80.

[9] Judgment of the Portuguese Administrative Supreme Court of 28.05.2008 (São Pedro) (available at www.dgsi.pt). See also the judgments of the Portuguese Administrative Supreme Court of 14.07.2008 (Pires Esteves) and of 17.05.2018 (Madeira dos Santos) (both available at www.dgsi.pt). Following the same reasoning, see, however, the judgment by the labour section of the Portuguese Supreme Court of 20.11.2003 (Fernandes Cadilha) ECLI:PT:STJ:2003:03S2178.2F and 06.07.2004 (Fernandes Cadilha) ECLI:PT:STJ:2004:04S919.D4.

damages. Upon the death of her husband, she became entitled to a survivor's pension granted by the National Institute of Social Security. The Court of Cassation held that this pension should not be taken into consideration in the calculation of the damages that were due to her, because only those economic advantages that have the same purpose as the payment of damages should be taken into consideration. The Court found that the survivor's pension was granted with a solidarity aim: that of guaranteeing an income to survivors when their relatives are gone, rather than compensating them for their loss.

On 13 September 2012, the Portuguese Supreme Court had to examine a very similar case. A man had also died as a direct result of a motor accident. His son filed an action for damages. Upon the death of his father, he became entitled to a survivor's pension granted by the Portuguese Social Security. No evidence of that pension having actually been paid was brought to the court's attention. However, in an *obiter dictum*, the Supreme Court stated that, due to the need to apply the *compensatio lucri cum damno*, the claimant's right to damages for loss of future profits would have been subject to a deduction of his survivor's pension, if proof thereof had been made[10]. The difference of purposes was not referred to nor taken into consideration by the Portuguese Supreme Court.

In case no. 12565 of the Italian Court of Cassation, an aircraft had been destroyed by a missile. Its owner filed an action for damages against the Italian State. The claimant had been compensated for the loss of the aircraft by its property insurer. The Court held that the amount paid to the claimant by its insurer must be deducted from the damages to be paid by the Italian State. According to the Court, although the claim for compensation as against the tortfeasor has a different ground than the claim for compensation as against the insurer, the former being based on liability in tort and the latter corresponding to the exercise of a contractual right, both would satisfy the same purpose: reparation. Hence they should not be allowed to coexist, as that would give rise to the claimant's unjust enrichment.

In Portugal, the case would most probably have had the same outcome, although the courts usually deal with such cases without resort to the *compensatio*. Article 1916 of the Italian Civil Code sets forth the insurer's right to claim compensation from the liable party in subrogation, and so does Article 136 of the Portuguese Insurance Contract Act. This

[10] Judgment of the Portuguese Supreme Court of 13.09.2012 (Lopes do Rego) ECLI:PT:STJ:2012:1026.07.9TBVFX.L1.S1.6B. See also the judgment of the Portuguese Supreme Court of 22.11.2012 (Lopes do Rego) ECLI:PT:STJ:2012:110.2000.P3.S1.80.

provision only applies to property and liability insurance. In personal insurance, subrogation only exists when stipulated by the contracting parties, and only applies to indemnity insurance, as set forth in Article 181 of the Portuguese Insurance Contract Act.. The different treatment of different kinds of insurance payments is therefore grounded on the different purposes served by insurance: whilst indemnity insurance is limited by the value of the insured's loss, no such limit applies to non-indemnity insurance. Whenever an insurer is involved, the insured's right to claim compensation from the liable party is deemed to have been transferred to the insurer in subrogation. That the insured may not claim compensation for the same loss both from the insurer and the liable party is undisputed[11].

In case no. 12566 of the Italian Court of Cassation, once again a motor accident had taken place, but this accident also qualified as an accident *in itinere*. The Court held that the disability pension that the injured party could claim from the National Institute of Insurance for Accidents at Work should be deducted from the amount that he could claim from the offending party's motor insurer as damages for the injuries the former had suffered as a consequence of the accident, because both had the same purpose of compensating the victim for his permanent disability.

In Portugal, Article 26(1) of the Mandatory Motor Liability Insurance Act[12] determines that, when an accident qualifies both as a motor accident and as an accident-at-work, including *in itinere*, its qualification as a motor accident shall prevail. The Portuguese Supreme Court does not usually refer to *compensatio* in this context but the reasoning it follows is essentially the same: the injured party may not receive a duplication of indemnities[13]. The Supreme Court clarifies that, to the extent the amounts that are due to the injured party serve different purposes, they are to be treated as complementary, and as such susceptible of being paid to the injured party. However, a duplication of indemnities must be prevented, to the benefit of the injured party's employer and its accidents-at-work insurer: the latter will be able to deny payment when the injured party has already been indemnified by the motor insurer or, if payment has already occurred, will be able to claim what it has paid to the

[11] See, for instance, the judgment of the Portuguese Supreme Court of 25.03.2010 (Lopes do Rego) ECLI:PT:STJ:2010:2195.06.0TVLSB.S1.87.

[12] Decree-Law 291/2007, of 21 August (as amended). ELI:https://data.dre.pt/eli/dec-lei/291/2007/p/cons/20080806/pt/html.

[13] See the judgment of the Portuguese Supreme Court of 11.12.2012 (Lopes do Rego) ECLI:PT:STJ:2012:40.08.1TBMMV.C1.S1.1A.

injured party back from the motor insurer. The Supreme Court clearly states that these rules aim to protect the interests of the injured party's employer and its accidents-at-work insurer, who, when it takes up the risk of an accident, is allowed to factor in that, at the end of the day, the motor insurer will be the one absorbing the greater loss. The Supreme Court also qualifies the relationship which is formed as a case of 'improper joint and several liability'.

Finally, in case no. 12567 of the Italian Court of Cassation, the parents of a child who had been the victim of medical malpractice at birth, with serious permanent effects consisting of a tetra paresis, had sued the hospital and the relevant physicians, who were found liable for the injuries caused to the child. Once again, the issue of the potential cumulation of damages making up for the child's need for personal assistance for life with the disability pension awarded by the National Institute of Social Security. The Court also excluded the possibility to cumulate both awards, explaining that they served one and the same purpose.

In Portugal, Articles 6 and 7 of the Disability and Old Age Pensions under Social Security Act[14] determine that, when a third party is liable for the disability, damages for loss of earning capacity which are paid to the injured party by the offending party or their insurer shall be deducted from the pension for loss of earning capacity, Social Security abstaining from any monthly payments until the sum total of the payments which would otherwise have been paid reaches the amount paid as damages. Whilst not referring to *compensatio* in this context, the Portuguese Supreme Court has made clear that, on the basis of those legal provisions, a disability pension may not be cumulated with damages for loss of earning capacity when both are based on the same fact determining the disability[15].

To sum up, although *compensatio lucri cum damno* is regarded as part of the applicable law in Portugal, courts often alluding thereto in order to justify their deduction of the but-for advantages when assessing loss in civil liability cases, in my view *compensatio* is currently *not* a useful judicial decision-making tool, there being no universally accepted criteria nor any serious attempts, by local courts, at setting forth criteria which would allow one to distinguish between the but-for advantages that are relevant to the determination of the loss and therefore to the calculation of damages from those which are not. However, in some of the most relevant contexts that would require an application of *compensatio*, the requirement to

[14] Decree-Law 187/2007 of 10 May (as amended). ELI:https://data.dre.pt/eli/dec-lei/187/2007/05/10/p/dre/pt/html.

[15] See the judgment of the Portuguese Supreme Court of 11.11.2010 (Lopes do Rego) ECLI:PT:STJ:2010:270.04.5TBOFR.C1.S1.AC.

deduct is already clearly set forth in the applicable legal provisions, which minimizes the need – and therefore the incentive – for such criteria to be established by the courts.