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Recent Developments in Ruined Holiday Damage

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ABSTRACT

The aim of this brief presentation is to evaluate the status of ruined holiday damage (i.e. the loss of enjoyment suffered by a tourist who experiences a holiday of inferior quality) in Italian law since the recent case law on moral damages.

Keywords:

Ruined Holiday Damage
Italian Law
Moral damages

Introduction

The aim of this brief presentation is to evaluate the status of ruined holiday damage (i.e. the loss of enjoyment suffered by a tourist who experiences a holiday of inferior quality) in Italian law since the recent case law on moral damages.
In recent years, scholars and case law have elaborated different interpretations on the place of ruined holiday damage in Italian law.
According to an early opinion, ruined holiday damage must be considered an economic loss[1].
This view rests on the assumption that the enjoyment of a holiday can be defined as a good, in accordance with art. 810 of the civil code; consequently, such a loss of enjoyment is characterised by the possibility of being evaluated from an economic perspective and, thus, of being represented by a precise sum of money. In fact the enjoyment of a holiday can be

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[1] LAMBERTI, *Nuovo dir*., 1973, 621; RIGUZZI, *Il danno da vacanza rovinata*, *Dir. tur*., 2003, 11.

guaranteed by the provision of a paid service[2] and the vacation represents, in its turn, a good which is purchased by workers using income from their paid employment[3].
However, this point of view has been contested on the grounds that it implies that ruined holiday damage should be compensated with a sum of money which is equal to that for which the tourist purchased the holiday or the specific service that could not be enjoyed as a result of the non-fulfilment of the obligation on the part of the travel agent or tour operator[4]. This consequently undervalues the subjective reasons for which tourists may have purchased a holiday and thus compensates them only on the basis of the objective economic loss which they have suffered. However, it can be argued that, for example, a couple on honeymoon who are unable to enjoy their holiday would suffer greater damage than other tourists in the same situation.

Ruined Holiday Damage in the light of art. 2059 c.c.

From this differing viewpoint, ruined holiday damage must be made good in accordance with art. 2059 c.c., which regulates compensation for non-economic losses.

According to this article, as interpreted by recent case law ([5]), moral damage can be compensated in two different cases:

a) in cases expressly provided for by law;
b) when an infringement of a person's constitutional interests occurs and this violation can be considered as a sufficiently serious breach of the person's fundamental rights.

In the light of this, some scholars deem that ruined holiday damage can be compensated under art. 2059 c.c., since it represents one of the specific cases in which the law allows moral damage to be compensated.
Most experts view this opinion as more correct.
In fact, the European Court of Justice held that Article 5 of Directive 90/314 on package travel, package holidays and package tours must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday[6]. Every decision of the ECJ which interprets Community Law is directly applicable in each member State, so there is therefore no doubt that it is possibile to affirm that ruined holiday damage is one of the specific cases in which the law allows the compensation of moral damage.
Nevertheless, it is not possible to maintain that ruined holiday damage implies a violation of the fundamental rights protected by the Constitution. First of all, there is no article in the Constitution that directly protects the right to enjoy vacations without inconvenience. Secondly, ruined holiday damage is not likely to represent a sufficiently serious breach of a person's fundamental rights, such requirement being intended to limit tortuous liability to relevant violations of an individual's rights.

[2] ZENO ZENCOVICH, *Il danno da vacanza rovinata: questioni teoriche e prassi applicative*, *Nuova giur. civ. comm*., 1997, I, 879; PARDOLESI, *Turismo organizzato e tutela del consumatore: la legge tedesca sul contratto di viaggio*, *Riv. dir. civ*., 1981, I, 75.
[3] PIERFELICI, *La qualificazione giuridica del contratto turistico e la responsabilità del* tour operator, *Rass. dir. civ*., 1986, 659.
[4] RIGUZZI, *Il danno da vacanza rovinata*, cit., 11.
[5] Cass., sez. un., 11.11.2008, nn. 26972 – 26075, *Resp. civ. prev*., 2009, 38; Cass., 31.5. 2003, nn. 8827, 8828, *Danno e resp*., 2003, 816, Corte cost., 11.7.2003, n. 233, *Giur. it*., 2003, 1777.
[6] Case C. – 168/00.

The link between Ruined Holiday Damage and Contractual Liability Rules

A third view of the issue of ruined holiday damage is that, as a non-economic loss, ruined holiday damage can be compensated in the normal way in accordance with the provisions of the law relating to contractual liability.
There are three separate reasons for supporting this opinion.
First of all, it is consistent with the recent case law on moral damage, which, differently from the past, admits the possibility of recovering non-economic losses by relying on the provisions of the law relating to contractual liability[7].
Secondly, this point of view allows travellers a more favourable burden of proof and thus is compatible with the need for consumer protection, which is one of the main goals being pursued by the European Union. In fact, the option to make use of the law of contract only requires the claimant to demonstrate the existence of the contract itself and provide evidence of the non-performance of the obligation on the part of the other party, who in turn has to demonstrate the fulfilment of the obligation[8] or prove that, due to factors outside of his control, the obligation could not have been fulfilled, and thus avoid liability. In contrast, by relying on the set of rules which regulates extra-contractual liability, the plaintiff would have to prove every element of the tort - the conduct of the tortfeasor, the unlawful damage, the link of causation between these two latter elements, and the negligence of the tortfeasor - in order to obtain compensation.
Thirdly, this approach also allows adequate consideration of the distinctive aspect of package travel contracts, which are usually concluded by consumers in order that they may enjoy their opportunities for relaxation and amusement. In fact, as is maintained by the most recent case law[9], this latter aspect is not merely to be considered a subjective reason for the contact – which would be irrelevant in law – but it is part of the consideration of the contract even if it is not expressely considered by the parties[10].
In the light of the above-mentioned considerations, scholars, as well as the case law of the Supreme Court[11], maintain that the obligation to allow travellers to enjoy their holidays should be considered one of the most important obligations arising from the travel contract. Consequently, in the event of the non fulfilment of such an obligation on the part of the organizer or of the retailer, travellers would surely be entitled to obtain compensation in accordance with the provisions of the law concerning contractual liability.

[7] Cass., sez. un., 11.11.2008, nn. 26972 – 26075, *Resp. civ. prev*., 2009, 38.
[8] Cass., sez. un., 30.10.2001, n. 13533, *Corr. giur*. 2001, 1565.
[9] Trib. Roma, 19.5.2003, *I Contratti*, 2004, 72; Trib. Roma, 26.11.2003, *Giur. romana*, 204, 88; Trib. Milano, 7.2.2002, *Danno e resp*., 2003, 553.
[10] Trib. Ragusa, 7.2.2006, unpublished.
[11] Cass., 24.4.2008, n. 10651, *Giust. civ. Mass*., 2008, 626; Cass. 24.7.2007, n. 16315, *Giust. civ.*, 2008, I, 699.