UNIVERZITA MATEJA BELA V BANSKEJ BYSTRICI

FACULTAS IURIDICA UNIVERSITAS MATTHIAE BELII

PRÁVNICKÁ FAKULTA UMB
BANSKÁ BYSTRICA

Martin Skaloš, Michal Turošík (eds.)

ĽUDSKÉ PRÁVA VČERA A DNES
PÔVOD A VÝZNAM ĽUDSKÝCH PRÁV A ICH OCHRANA V PRÁVNEJ TERMINOLÓGII A PRAXI

Univerzita Mateja Bela v Banskej Bystrici
Právnická fakulta
Katedra dejín štátu a práva
v spolupráci so Slovenským národným strediskom pre ľudské práva

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Banská Bystrica 2017

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Editori: JUDr. PhDr. Martin Skaloš, PhD.
Dr. iur. JUDr. Ing. Michal Turošík, PhD.

Recenzenti: doc. JUDr. PhDr. Tomáš Gábriš, PhD., LLM, MA
JUDr. PhDr. Martin Skaloš, PhD.
doc. JUDr. Ivana Šošková, PhD.
Dr. iur. JUDr. Ing. Michal Turošík, PhD.
Mgr. Zuzana Mičková, PhD.

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SLOVO NA ÚVOD

V dňoch 15. a 16. marca 2017 Katedra dejín štátu a práva Právnickej fakulty UMB v Banskej Bystrici zorganizovala už po tretí krát výročnú konferenciu „Banskobystrická škola právnych dejín“, tentokrát v spolupráci so Slovenským národným strediskom pre ľudské práva na tému: "Ľudské práva včera a dnes: Pôvod a význam ľudských práv a ich ochrana v právnej teórii i praxi". Katedra dejín štátu a práva si každý rok určí jednu z kľúčových tém právneho vývoja spoločnosti, ktorou sa snaží osloviť nielen akademickú obec. Po dvoch úspešných ročníkoch je už dnes možné konštatovať, že pôvodne malá katedrová konferencia zaznamenáva vysoký ohlas u odbornej verejnosti, čo dokazuje fakt, že jej tretí ročník sa v dvoch rokovacích dňoch rozhodlo poctiť svojou účasťou spolu viac než 60 účastníkov zo 6 krajín, čím konferencia výrazne prekročila svoj národný charakter. Na pôde Právnickej fakulty UMB sme mohli privítať hostí a kolegov z Talianska, Srbska, Chorvátska, Ukrajiny, Poľska či Českej republiky, ale aj domácich akademikov a odborníkov z praxe. Aj vďaka tomu bola konferencia prezentovaná aj mediálne. Okrem samotného rokovania si organizátori aj tento rok pre účastníkov pripravili bohatý spoločensko-kultúrny program, ktorý zahŕňal nielen večerný „raut”, ale aj tradičnú návštevu skvostných kultúrnych pamiatok banskobystrického regiónu. Tentokrát bola pre účastníkov pripravená návšteva obce Hronsek a nádherného dreveného kostolíka, ktorý je súčasťou svetového kultúrneho dedičstva (UNESCO) ako aj prehliadka novozrekonštruovaného „Vodného hradu”. Predkladaný zborník je publikačným výsledkom konferencie, v ktorom účastníci mapujú etapy vývoja ľudských práv, rovnako ako ich aktuálnu reguláciu v právnych poriadkoch svojich krajín. Je zbierkou rôznorodých tematických zameraní, ktorým sa autori snažili naplniť poslanie konferencie.

Tak ako sa celá konferencia niesla v príjemnom, priateľskom a profesionálnom duchu, veríme, že aj predkladaný zborník pripraví svojím čitateľom a adresátom množstvo cenných informácii a bude kvalitným zdrojom a inšpiráciou pri tvorbe ďalších vedeckých počinov.

Michal Turošík

Alessandro Palmieri

WHEN HUMAN RIGHTS ARE NOT EFFECTIVE ENTITLEMENTS: THE AWKWARD CASE OF RIGHT TO LIFE IN WRONGFUL DEATH ACTIONS

Abstract

This article focuses on the right to life and the difficulties of protecting it in an effective way before the national courts. One of the awkward problems that can be experienced in Europe is that, notwithstanding the prominence of the right to life in the framework of international human rights instruments, States are not obliged to provide the close relatives, or the heirs, of the deceased with a legal basis for claiming compensation for non pecuniary-damages, when that person died because of an act or omission, which is not attributable to governmental bodies. In all European countries, with the exception of Portugal, death as such does not constitute a legally relevant damage. The author argues that there is a need to recognize that deprivation of life shall be treated as a loss worthy of redress, even if caused by private actors.

1. - Under international human rights law, it is undeniable that States are obliged to protect human life[1]. Several commentators believe that this duty shall have some repercussions also in the domestic sphere[2]. With this respect, it seems rather interesting to investigate the role currently played by the right to life in the framework of civil disputes arising when:

a) the commission of a tort –attributable to the State or its agents (e.g., a person shot fatally by the police) or to private parties (think about a car driver running over a pedestrian)– causes a person to die; or

b) the infringement of a contractual obligation –once again, even if the violation is not directly ascribable to the State (such as the breach of a physician's duty in a treatment contract)– leads the counterpart –or a third party towards whom under certain circumstances contract extends its protection[3]– to death.

[1] I. ZIEMELE, *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies*, European University Institute Working Papers, AEL 2009/8, 30, argued that "the existing human rights law contains all the necessary elements to hold such specific legal entities as private military or security contractors accountable for human rights violations".

[2] It has been observed that "[a] number of developments in domestic law and practice owe their origins to obligations arising by virtue of the State's acceptance of various international human rights measures" (see B. MORIARTY, E. MASSA (eds.), *Human Rights Law*, 4th ed., Oxford University Press, Oxford, 2012, 97).

[3] For instance, in German law, "[t]he principal instrument in this regard is the 'contract with protective effects for third parties' (*Vertrag mit Schutzwirkung für Dritte*), which brings stranger to a contract under its umbrella" (see C. VON BAR, U. DROBNIG, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Selllier, München, 2004, 132; for a more detailed discussion, one can refer to

There is no doubt that, in situations like the ones described above, the deceased's right to life has been infringed. Let's assume that such a harmful consequence can be imputed to the alleged wrongdoer since his/her conduct has violated a legal standard (fault liability) or the loss arising from it falls within his/her sphere of risk and the agent is in the better position to bear the negative outcomes originated by his/her own conduct (strict liability)[4]. One can ask if, for this damage, there is any remediation available in tort and contract; of course, a remedy that should be actionable by the heirs or by the next-of-kin of the victim, and capable of being gotten only in the form of monetary payments made by the defendant. Moreover, the problem is to determine whether, or not, the existing remedies are adequate to shield the particular fundamental right we are focusing on: in other words, whether they are sufficient for the purpose to force potential wrongdoers to take seriously the cost of their misconduct.

2. - Just imagine for a while that someone has been assigned the task to organize a competition amongst the various human rights. Most likely, the vast majority of the observers would foresight that the right to life deserves to be top of the table. Indeed, the Strasbourg Court has acknowledged that the provisions of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (known as European Convention on Human Rights) that deal with the right to life and the prohibition of torture "rank as the most fundamental" ones amongst those set out in the framework of the said Convention[5]. The right to life is unanimously regarded as the most highly placed in the hierarchy of rights[6]: life is the necessary pre-condition for the enjoyment of the other fundamental rights[7].

B. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract:. A Comparative Treatise*, 2nd ed., Hart Publishing, Oxford, UK-Portland, OR, 2006, 204-216).

[4] Notwithstanding the differences between the two regimes, according to F. GIGLIO, *The Foundations of Restitution for Wrongs,* Hart Publishing, Oxford, UK-Portland, OR, 2007, 28-29, "it cannot be said that strict liability differs from fault-based liability in the role assumed by the unlawfulness, for, in the end, both use an objective definition of liability".

[5] See, for instance, J. CHURCH, C. SCHULZE, H. STRYDOM, *Human Rights from a Comparative and International Law Perspective*, Unisa Press, Pretoria, 2007, 273.

[6] The need for a hierarchy of rights is pointed out by D. XENOS, *The Positive Obligations of the State Under the European Convention of Human Rights*, Routledge, Abingdon, UK-New York, NY, 2013, 135.

[7] One can argue that life is the pre-requisite for the holding of any kind of positive value (in the words of D. KORF, *Guide to the implementation of Article 2 of the European Convention on Human Rights*, Human Rights Handbooks, no. 8, Council of Europe Publishing, Strasbourg, 2006, 6, "if one could be arbitrarily deprived of one's right to life, all other rights would become illusory". However, things may be more complicated. A philosopher remarked that "life is a precondition for both a specific value and its opposite. Not only happiness but also misery presupposes a living being to experience it" (L.B. YEAGER, *Ethics as Social Science. The Moral Philosophy of Social Cooperation*, Edward Elgar, Cheltenham, UK-Northampton, MA, 2001, 23). Of course, another problem can be the identification of the meaning of human life in the

Thus, unsurprisingly, the right to life, although with dissimilar formulations, is included in all the international instruments related to human rights, both at the global and at the regional level; and, in each of them, it occupies a place of prominence. The 1948 Universal Declaration of Human Rights holds that "Everyone has the right to life". The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, reaffirms that "Every human being has the inherent right to life"[8]. Identical words are contained Article 5(1) of the 2004 Arab Charter of Human Rights. In the 1981 African Charter on Human and Peoples' Rights («Banjul Charter»), is clearly outlined that "Every human being shall be entitled to respect for his life". In the Americas, there are two relevant documents: the 1948 American Declaration of the Rights and Duties of Man, which starts by saying that "Every human being has the right to life", and the 1969 American Convention on Human Rights («Pact of San José»), according to which "Every person has the right to have his life respected". Europe adheres to the same values. The first sentence of Article 2 of the above-mentioned 1950 Convention reads as follows. "Everyone's right to life shall be protected by law". Talking about Europe, there is another document that cannot be ignored: the Charter of Fundamental Rights of the European Union. Here, we find once more the primacy of the right to life, witnessed by the succinct expression "Everyone has the right to life".

The worldwide trend left footprints also in national legal systems: the right to life is guaranteed by the Constitution of various States. For instance, life is protected by the Indian (Article 21[9]) and the South African (Article 11) Constitutions, as well as by those proclaimed in Kenya (Article 26), Nigeria (Article 33), and Barbados (Article 12).

Incoherently with the premise, the prominence in written texts does not imply an analogous result in the real life of courts. What happens when judges are required to adjudicate controversies between private parties, at whose core stands the problem of

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relevant provisions of the international human rights instruments (it has been noted by T.S. JOST, *Comparative and international health law*, in *Health Matrix*, 2003, 143), that the "understandings about the nature and meaning of human life […] are […] grounded in philosophical and religious traditions that transcend national boundaries"). The meaning of term 'life', protected within the right to life, is analysed by E. WICKS, *The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties*, in *Human Rights Law Review*, 2012, 199-219.

[8] The inherent nature of the right suggests that "it is such 'the supreme right' that first and foremost necessitates effective guarantee" (see N. JIANG, *China and International Human Rights. Harsh Punishments in the Context of the International Covenant on Civil and Political Rights*, Springer, Berlin-Heidelberg, 2014, 61).

[9] Article 21 of the Indian Constitution deals jointly with life and personal liberty.

recoverable damages deriving from the death of a person? Quite often, the mixture between statutory and judge-made rules reveals that the right to life is under-valued. This actually shows the risk that the importance itself of the supra-national Charters, in the realm of human rights, might be called into question.

3. - In the current and the subsequent paragraphs, the analysis will concentrate on the European scenario. From the 1950 Convention one can readily infer that the agents of State are not allowed to use lethal force, unless exceptional circumstances occur. Nevertheless, the protection of life involves positive obligations as well[10]. Summarizing on this point, States are obliged to enact effective criminal law provisions, susceptible to deter the commission of offences against the person, and to put in place some form of effective official investigation when individuals have been killed as a result of the use of force. In addition, there is a duty to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, as it has been noted in many areas of law, criminal sanctions alone may fail to produce the appropriate level of deterrence, so they need to be complemented by private law remedies, namely –in our field– by monetary awards.

Let's try to concisely give an answer to a couple of questions, taking into account not only the statutory provisions, but also the case law having direct bearing on the matter in hand. We will notice that the reply to the first question is aligned to the goal of maximizing the protection for the endangered interest (although with some limitations). On the contrary, the response to the second question does not seem to be satisfactory in terms of deterrence.

First question: is the State obliged to compensate, both pecuniary and non-pecuniary, damages suffered by an heir or a close relative of a person died because of an act or omission attributable to a government body? The answer is "yes", in accordance with the judgments rendered by the European Court of Human Rights. The failure to pay compensation to the survivors may amount to a breach of the right to life, at least insofar as its procedural limb is concerned. It follows that, in the case of a breach of the right to life (as it would be when the ban on torture is violated), compensation for the non-pecuniary damage flowing from the breach should in principle be available as part

[10] The European Court of Human Rights held that even mere negligence may, in certain circumstances, be sufficient to establish a violation (see the decision of 15 December 2015 in the case of *Lopes de Sousa Fernandes v. Portugal;* the case involved a hospital belonging to the National Health System).

of the range of possible remedies. This lack of compensation could, at the same time, result in a violation of the right to an effective remedy[11]. Provided that such an action is brought before the European Court of Human Rights, damages may be assessed and liquidated by the same Court, since it has the competence to afford "just satisfaction" to the injured party.

In order to formulate the second question, we could simply modify the first, replacing the words “government body” with the words “private person or entity, whose acts or omissions don’t give rise to State liability”. This change leads to a completely different outcome. The answer becomes “no”. Even this conclusion is supported by the pertinent case-law. In a 2009 decision, the Strasbourg Court held that States are not obliged to provide the close relatives of the deceased with a legal basis for claiming compensation for non pecuniary-damages[12]. To put it more clearly, the absence of statutory remedy for non-pecuniary damage resulting from death in an accident caused by a private individual does not amount to an arguable claim of violation of Article 2 of the Convention.

4. - Since tort and contract lawsuits are administered by national courts, one cannot avoid giving a glance on the way in which these judicial instances, in European countries, deal with the same topic. If we scrutinize the existing national redress systems, they usually reveal certain common features:

- each of them (with only one exception) includes a number of gaps, that is to say some situations where, notwithstanding the death of an individual, the infringer will not be forced to pay anything;

- not rarely, the monetary awards granted by national judges to the survivors are lower than the amount of money to be paid by the wrongdoer if the same conduct had caused severe bodily harm.

[11] See the judgment of 13 March 2012, in the case of *Reynolds v. The United Kingdom*. As to the background of the case, a man, diagnosed with schizophrenia, had been allocated in one of the crisis rooms in a building where a mental health team operated; just before the scheduled time of medication, he broke a window in his room and fell from the sixth floor to his death. His mother, in the application lodged against the United Kingdom, complained that she had no effective domestic mechanism whereby issues of civil liability could be determined in respect of the alleged negligent care of her deceased son. The Court concluded that the applicant did not have available to her civil proceedings to establish any liability and compensation due as regards the non-pecuniary damage suffered by her on her son’s death. Consequently, the Court held that there was a violation of Article 13 in conjunction with Article 2 of the Convention.
[12] See the judgment of 7 July 2009 in the case of *Zavoloka v Latvia*.

The grim paradox is that, quite often, is cheaper to kill than to injure.

Current trends in Europe are efficaciously summed up by the drafters of Book VI of the Draft Common Frame of Reference (one of the components of this large compilation of 'model rules', that sometimes has been seen as one of the first pieces of a future codification of European private law; more specifically, the part devoted to "Non-Contractual Liability Arising out of Damage Caused to Another"). Under Article VI.-2:202, one can find the description of at least an instance where a person may obtain compensation as a result of another's death[13]. But what is really of a great significance in that text, are the words used in the Comments and in the Explanatory Notes to the provision cited above. The Comments make clear that death as such does not constitute a legally relevant damage; specifying that "[t]he deceased has no claim which can be asserted on account of the death as such, and the loss of life as such has no value quantifiable in monetary terms which can be assigned by the system of private law to heirs or successors". On their side, the Explanatory Notes give an account of the mainstream as follows: "the 'right to life' extinguishes when it is violated"; "the death of a person as such does not trigger a corresponding obligation to pay damage". The only place where things are different is Portugal[14], since in the Lusitanian experience, "the case law [not the code; not even an autonomous statute] maintains that indeed loss of life itself amounts to damage capable of monetary valuation payable to the survivors"[15].

How does the said mechanism work? Its functioning can be easily perceived when we look at the rules, mostly developed by courts, which govern wrongful death cases in

[13] Article VI.–2:202, is entitled «Loss suffered by third persons as a result of another's personal injury or death»; it states that "(1) Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person. (2) Where a person has been fatally injured: (a) legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased's successors; (b) reasonable funeral expenses are legally relevant damage to the person incurring them; and (c) loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support".

[14] See A. MENEZES CORDEIRO, *Tratado de Direito Civil Português*, II, *Direito das Obrigações*, Tomo III, Almedina, Coimbra, 2010, 614 "a morte de uma pessoa constitui um dano, uma vez que a vida é um bem juridicamente tutelado através do direito à vida; […] é um dano infligido ao morto e, reflexamente, a certos elementos que o rodeiam […]; finalmente, o ressarcimento de que beneficie a vítima transmite-se, pela morte, aos seus sucessores".

[15] The Portuguese case-law has heavily influenced the debate in Brazil (for further details, C.K.F. MOLOGNI, *Dano Morte e seus Efeitos Sucessórios*, in *UNOPAR Científica. Ciências Jurídicas e Empresariais*, 2011, n. 1, 19-27).

Italy[16]. In that country, the traditional prevailing view, backed up by the statements of the Plenary Chamber of the Supreme Court (*Court of Cassazione*)[17], does not distance itself from the general current of thought.

According to this set of rules, those who had a link of affection with the deceased are entitled to the reparation of their own losses: pecuniary (funeral expenses; loss of future income); non-pecuniary (loss of personal relationship; pain and suffering; disruption to life). Furthermore, the heirs of the deceased are entitled to obtain, as his/her successors, an award for the damages suffered by the primary victim; but this will materialize only if there was a remarkable lapse of time between the injuries and the death, or if the injured person had acquired awareness of the catastrophic consequences of the wrongful act leading to the loss of his/her own life. Anyway, loss of life as such is not deemed a recoverable damage. So that one can even face situations where no obligation at all arises on the part of the wrongdoer.

It is stimulating to take notice that, quite recently, the *Court of Cassazione* was explicitly asked to reconsider the same issue in the light of the provision set out in Article 2 of the European Convention on Human Rights. Two cases in which this

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[16] For an overview of the Italian debate, updated at the time of the so called "Scarano" decision (the name used to designate the judgment of the Third Civil Chamber of the Supreme Court of 23 January 2014, n. 1361, in "Il Foro Italiano", 2014, I, 719), see I. GARACI, *Compensation for damages in the event of death, in the Italian Legal System*, in "Quaderni di Diritto Mercato Tecnologia", 2014, no. 2, 72-83.

[17] See the judgment of 22 July 2015, n. 15350, in "Il Foro Italiano", 2015, I, 2682, with comments by A. PALMIERI, R. PARDOLESI, *Danno da morte: l'arrocco delle sezioni unite e le regole (civilistiche) del delitto perfetto*; R. CASO, *Le sezioni unite negano il danno da perdita della vita: giorni di un futuro passato*; R. SIMONE, *La livella e il (mancato) riconoscimento del danno da perdita della vita: le sezioni unite tra principio di inerzia e buchi neri dei danni non compensatori*. The same decision has been deeply analyzed in several articles: M. BONA, *Sezioni unite 2015: no alla loss of life, ma la saga sul danno non patrimoniale continua*, in "Responsabilità Civile e Previdenza", 2015, 1537-1567; F.D. BUSNELLI, *Tanto tuonò, che ... non piovve - Le sezioni unite sigillano il «sistema»*, in "Il Corriere Giuridico", 2015, 1206-1226; V. CARBONE, *Valori personali ed economici della vita umana*, in "Danno e responsabilità", 2015, 894-898; L. D'ACUNTO, *Le sezioni unite riaffermano l'irrisarcibilità iure hereditatis del danno da perdita della vita*, in "La nuova giurisprudenza civile commentata", 2015, I, 1015-1023; R. FOFFA, *Il danno da morte tra Epicuro e Guglielmo d'Occam*, in "La nuova giurisprudenza civile commentata", 2015, I, 1023-1028; M. FRANZONI, *Danno tanatologico, meglio di no ...*, in "Danno e responsabilità", 2015, 899-904; M. GORGONI, *L'altalena qualificatoria del danno da morte: da Cass. n. 3475/1925 alle sezioni unite n. 15350/2015*, in "Danno e responsabilità", 2016, 224-231; I. MUSU, *Analisi economica della responsabilità civile e valore del danno da morte*, in "Il Foro Italiano", 2015, I, 3513-3518; R. PARDOLESI, R. SIMONE, *Danno da morte e stare decisis: la versione di Bartleby*, in "Danno e responsabilità", 2015, 905-908; G. PONZANELLI, *Le sezioni unite sul danno tanatologico*, in "Danno e responsabilità", 2015, 909-910; R. PUCELLA, *Le sezioni unite confermano il divieto di cittadinanza al danno da morte - Brevi note a Cass. sez. un. 22 luglio 2015, n. 15350*, in "La nuova giurisprudenza civile commentata", 2015, II, 652-654; D. RONCALI, *Il danno da morte: riflessioni medico-legali*, in "Il Foro Italiano", 2015, I, 3518-3520; P. VALORE, *Le sezioni unite confermano l'irrisarcibilità agli eredi del c.d. danno «tanatologico»*, in "La Giurisprudenza Italiana", 2015, 2065-2067).

argument was raised were finally decided in 2016[18]. Although their results are comparable, the different panels reasoned in a notably different manner. Indeed the first of the two judgments (n. 14940/16), in line with the Plenary Chamber's decision, entails a foreclosure; while the second (n. 18619/16) authorizes the interpreter at least to think that something might change. On the latter occasion, the opinion of the Court acknowledged that Article 2 must be taken into account by the national courts, although actions brought by the survivors of people who died due to negligence or intentional acts need to be carefully scrutinized in light of the principle of proportionality.

Indeed if the right to life has to be taken seriously in domestic contexts, there is a need for effective remedies in private suits. Deprivation of life shall be esteemed as a loss worthy of redress, even if caused by private actors[19]. All the supposed technical obstacles on the way to compensation can be surmounted[20]; as a matter of fact, one can argue that all the practical obstacles need to be overcome, in order to avoid an unfair outcome in several cases, to prevent discriminations between different categories of victims, and to provide potential tortfeasors with incentives to invest in precautions to defend life.

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[18] See the judgments of 20 July 2016, n. 14940 (Labour Chamber), and of 22 September 2016, n. 18619 (Sixth Civil Chamber), both published in "Il Foro Italiano", 2016, I, 3426, with comments by A. PALMIERI, R. PARDOLESI, *Diritto alla vita (da carte europee), danno da morte*.

[19] Among those who uphold this approach, R. RIJNHOUT, J.M. EMAUS, *Damages in Wrongful Death Cases in the Light of European Human Rights Law: Towards a Rights-Based Approach to the Law of Damages*, in *Utrecht Law Review*, 2014, 91-106.

[20] Although attempts to quantify the value of human life have met considerable criticism in the literature of economics (so that J. GARCÍA-PÉREZ, *Optimal values of seismic design coefficients considering variations of indirect economic losses*, in M. GUARASCIO et al. (eds.), *Safety and Security Engineering*, no. IV, WIT Press-Computational Mechanics, Southampton, UK-Billerica, MA, 2011, 95, observed that "[t]he criteria proposed in the literature to quantify the value of human life lead to such different results that it lacks of a reliable criterion"), several methods have been developed to give practical guidance to the judges. One of the most intriguing of this techniques is labelled "Disgorgement Damages for Accidents", or simply DDA (see, R. COOTER, A. PORAT, *Disgorgement Damages for Accidents*, in *The Journal of Legal Studies*, 2015, 249-276).

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