

Note to Court of Modena judgment no. 1367/2023: violation of religious freedom constitutes compensable moral damage.

Although there is already case law on the religious factor as a motivation for refusing medical treatment, including by the Court of Cassation (most recently, see Court of Cassation no. 26209/2022, n. 29469/2020, Court of Cassation no. 28985/2019, Court of Cassation no. 23676/2008; Court of Cassation no. 4211/2007), the violation of religious freedom as a ground for compensable damage seems to be fairly new in general (Court of Cassation no. 370/2023 compensates the non-patrimonial damage caused by an erroneous cremation, considering it a violation of relatives' personality rights; Cassation no. 220/2023, on the other hand, rejects the compensable nature of the damage to religious freedom deriving from the impossibility of celebrating the Jewish New Year due to the prolonged interruption of the gas supply), and therefore the annotated judgment by the Court of Modena appears to be of great importance.

The case dealt with a Jehovah's Witness who had been given four blood transfusions, despite the fact that she had, personally and through her support administrator, clearly expressed her refusal for religious reasons to such medical treatment, and this manifestation of will had been recorded by the doctors in her medical file.

Following her death, therefore, her husband, as well as her appointed support administrator, instituted legal action: while the complaint for private violence was dismissed by the Judge of Preliminary Investigations, who did not consider the doctors' conduct to be criminally relevant, in civil proceedings, on the other hand, the Court of Modena upheld the request for compensation for damages *iure proprio* and *iure successionis*.

In the reasons for judgment, it is explained that the refusal of transfusions was justified by a profound religious belief, to which the deceased adhered deeply and wholeheartedly: hence the doctors' duty to propose effective therapies, but at the same time to implement them in a manner as respectful as possible not only of the patient's dignity and freedom, but also of her religious freedom.

In spite of such markedly expressed dissent, however, the doctors proceeded with the blood transfusion therapy, carrying out 'manifestly inadequate and brutal behaviour', and in so doing imposed on her therapeutic decisions contrary to her religious convictions, thereby 'annihilating her personal identity', of which religious convictions are an essential part.

The exercise of the function of guarantor on the part of doctors, as well as the contractual obligation to perform the service, cannot go so far as to transgress the inviolable and constitutionally protected rights of every human being (Articles 2, 13, 32 and 19 of the Constitution), such as personal

freedom, dignity, solidarity, religious freedom, which impose on anyone an insurmountable threshold of respect.

The choice of the manner in which the therapeutic treatment was carried out thus resulted in prejudice to the life and other rights of the deceased: it follows, therefore, that the obligation to pay compensation under Articles 1218, 1226 and 1228 of the Civil Code was established.

As regards quantification of compensation for non- patrimonial damage - subjective moral damage - to be awarded, the Court of Modena agrees with the assessment made by the new Tables of 2021 issued by the Court of Milan, which classify “blood transfusions in Jehovah’s Witnesses” in the section relating to “Exceptional damage to self-determination: compensation of over 20,000.00 euros”, defining it as “very serious inner suffering resulting from treatment not preceded by consent and breach of the right to self-determination”.

In these terms, therefore, also considering the consequences of the injury and the time of perception of the same and, therefore, the duration of the suffering (for almost 40 days), it seems fair to proceed to a personalization of the damage equal to a total value of EUR 30,000; the right to compensation, therefore, must be considered acquired by the woman while she was still alive, thus becoming part of her estate at the time of the illicit act, before her death, and is, therefore, transmissible to her heirs.

As for the husband, considering the bond that united them both in life and in sharing the religious faith, the state of mind and suffering that such a situation must have caused in him certainly constitute non-patrimonial damage, compensable in the amount of EUR 8,000.

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