

INTERNATIONAL TRAVEL AND DOUBLE RECOVERY

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A combination of the economic significance of international tourism, the increased mobility of individuals, and their greater willingness and desire to manage their own movements has significant implications for insurers which currently remain under-appreciated. International visitors to Australia are more likely to die or suffer injury as the result of a motor vehicle accident than in any other way. While attention has been focused on the complex jurisdictional issues that may arise, other equally important problems such as the potential for action in double recovery have gone largely unnoticed. The need is particularly acute because, as many studies attest, the prospect of death and injury in motor vehicle accidents involving foreign licensees is only likely to increase. Injured third parties returning to home jurisdictions with national health systems will rightly draw on the resources of the state, public welfare, and sometimes private insurance to meet their health care needs. To complicate matters further, European countries typically view the state as a guarantor of individual and collective social rights, and, to varying extents, constitutionally guarantee health care and other relevant benefits such as unemployment payments. In effect, an injured third party receiving a payout for the cost of those injuries from an Australian insurer returns home as a citizen or resident of a state in which she or he draws on publicly funded health care and benefits. In Italy, for example, the needs of the injured third party are met by a devolved health care system which places the greatest burden of responsibility for the delivery and funding of services on regionally governed public enterprises, and to a lesser extent on other entities. Some of those providers have mounted actions in recovery for money spent and goods supplied for the treatment of the same injuries that are the subject of the insurance. The aim of this article is to address the theoretical basis and practical implications of actions taken against the insured injured party in the context of foreign constitutional and personal injuries law (or constitutionalised personal injuries law).

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I INTRODUCTION: DYING TO GET THERE — ROAD TRAUMA AND INTERNATIONAL TRAVELLERS IN AUSTRALIA

One of the hidden and bitter costs of a vibrant tourism industry is that foreign nationals, as they seek to explore a vast country like Australia by road, are frequently injured or die while driving or riding in a car. Despite the relative paucity of analysis of the problem of tourists and road safety,¹ the available information supports the conclusion that motor vehicle accidents are the leading cause of accidental deaths and injuries for tourists worldwide,² including in Australia.³

International licence holders are more likely than domestic licence holders to be involved in serious accidents. Although only 0.7 per cent of all fatal road accidents in Australia involve international licensees, 49 per cent of those involve vehicle operator fatalities (compared with 44 per cent for the whole population), and 20 per cent involve hospitalisation (compared with 11 per cent for the whole population).⁴ International driver and passenger fatalities and injuries can be attributed to unfamiliarity with driving requirements and

¹ J Wilks, B Watson and I J Faulks, 'International Tourists and Road Safety in Australia: Developing a National Research and Management Programme' (1999) 20(5) *Tourism Management* 645, 646. Despite the dearth of available material, Australia is, by consensus among tourism health and medicine scholars, the best researched. See S J Page et al, 'Scoping the Extent of Tourist Road Safety: Motor Vehicle Transport Accidents in New Zealand, 1982–1996' (2001) 4(6) *Current Issues in Tourism* 503.

² See J Wilks and D Pendergast, 'International Tourists and Road Safety' in B Prideaux and D Carson (eds), *Drive Tourism Trends and Emerging Markets* (Oxfordshire, 2011) 278, 278. For an early study, see S J Page and D Meyer, 'Tourist Accidents: An Exploratory Analysis' (1996) 23(3) *Annals of Tourism Research* 666; P A Leggatt and J Wilks, 'Overseas Visitor Deaths in Australia, 2001 to 2003' (2009) 16(4) *Journal of Travel Medicine* 243.

³ J Wilks and M Coory, 'Overseas Visitor Injuries in Queensland Hospitals 1996–2000' (2002) 13(1) *Journal of Tourism Studies* 2, 4; J Wilks, D Pendergast and M Wood, 'Overseas Visitor Deaths in Australia: 1997–2000' (2002) 5(6) *Current Issues In Tourism* 550 (finding that 10 per cent of all inbound travellers' deaths were due to land transport accidents); Wilks et al, above n 1. For an earlier study reflecting similar results in the United States, see J E Sniezek and S M Smith, 'Injury Mortality among Non-US Residents in the United States 1979–1984' (1991) 19(4) *International Journal of Epidemiology* 225. A study conducted to assess mortality amongst Canadians travelling abroad concluded similarly: see D W McPherson et al, 'Death and Dying Abroad: The Canadian Experience' (2000) 7(5) *Journal of Travel Medicine* 227. Similarly, see C Guse et al, 'Fatal Injuries of US Citizens Abroad' (2007) 14(5) *International Journal of Travel Medicine* 279.

⁴ The study was conducted for the years 1996–99: B Watson, D Tunnicliff, J Manderson and E O'Connor, *The Safety of International Visitors on Australian Roads* (Carrs-Q, Caseldine, 2004). Watson et al noted that this figure did not include all road- and driver-related injuries and fatalities such as those involving passengers and pedestrians because data focused solely on drivers of motor vehicles and riders of motor cycles.

conditions in a foreign country.⁵ For example, in the Northern Territory, where 13 per cent of fatalities and 8 per cent of all injuries involved international drivers, 64 per cent were drivers from right hand side drive jurisdictions.⁶ Because rental vehicles are far more likely to be involved in accidents than driver-owned vehicles,⁷ insurers face far greater costs for the registration of rental vehicles than do owner motorists.⁸ Further research shows that motor vehicle accident-related hospital admissions of tourists for the three years between 2002 and 2005 totalled 6578, amounting to 23 252 days of bed occupancy

Tourism-related motor vehicle accidents involving foreign road users therefore represent a significant economic cost.⁹ Absolute figures, however, make injury to foreign road users a low priority for road safety authorities, and the tourism sector's sensitivity to adverse publicity explains its conspicuous reluctance to address the problem.¹⁰ While Australia is a popular tourist destination, the tourism industry is not legally compelled to warn drivers about the hazards of the road,¹¹ and adjacent industries such as car rental companies largely ignore the need for the education of foreign nationals renting motor vehicles, adopting the attitude that driving involves 'obvious risks'.¹² A number of factors suggest that this lack of driver education will

⁵ Wilks and Pendergast, above n 2, 293.

⁶ Watson et al, above n 4; J Wilks et al, 'International Drivers in Unfamiliar Surroundings: The Problems of Disorientation' (1999) 17(6) *Travel Medicine International* 162. For an alternative recent explanation with respect to tourism in Spain, see Jaime Rossello and Oscar Saenz-de-Miera, 'Road Accidents and Tourism: The Case of the Balearic Islands (Spain)' (2011) 43(3) *Accident Analysis and Prevention* 675 (meteorological conditions are determinative).

⁷ Page and Meyer, above n 2.

⁸ D Matcham, 'An Insurance Perspective' in J Wilks, B Watson and R Hansen (eds), *International Visitors and Road Safety in Australia: A Status Report* (Australian Transport Safety Bureau, 1998).

⁹ At 1997 prices it was calculated that 2482 international driver crashes cost AU\$18 912 000 consisting of: AU\$4 272 000 for fatalities; AU\$9 620 000 for hospitalisations; AU\$1 980 000 for medical treatment; AU\$1 020 000 for minor injuries; AU\$2 020 000 for property damage: Jeffrey Wilks and Barry C Watson, 'Road Safety and International Visitors in Australia: Looking Beyond the Tip of the Iceberg' (1998) 16(5) *Travel Medicine International* 194. See also T Bentley et al, 'Recreational Tourism Injuries among Visitors to New Zealand: An Exploratory Analysis Using Hospital Discharge Data' (2001) 22 *Tourism Management* 373. Equally significant and harder to calculate is the cost of the suffering endured by the injured, the ongoing management and treatment of their injuries, legal costs, the impact on industry and generally on the economy.

¹⁰ Wilks et al, above n 1.

¹¹ Wilks and Pendergast, above n 2, 278.

¹² Ibid. For a model developed on risk averse tourism, see B Prideaux and H Master, 'Reducing Risk Factors for International Visitors in Destinations' (2001) 6(2) *Pacific Journal of Tourism Research* 24.

continue to be an important issue for the insurance industry. Without concerted efforts to adjust driver behaviour, and to educate foreign drivers about local conditions, the cost of international road trauma will be borne by the insurance industry.

II INSURING INTERNATIONAL TRAVELLERS IN AUSTRALIA: COMPULSORY THIRD PARTY INSURANCE REGIMES AND THE CONSEQUENCES FOR THE FOREIGN TRAVELLER

Compulsory third party (CTP) schemes that provide compensation to people injured in motor vehicle accidents are a feature of insurance law in virtually all developed nations. The underlying rationale of all such schemes, despite significant differences between them, is that — for the sake of fairness to injured persons, and for cost efficiency — the burden of paying for the negligence of a few drivers is shared by all drivers contributing to a pool of funds. The motor vehicle registration scheme operating in Australia, which requires all vehicles using Australian roads to be registered, operates on a state by state basis. The accompanying CTP insurance schemes provide compulsory state-based injury insurance for all registered vehicles.¹³ Under Australian laws which require insurance with all vehicle registrations, an at-fault driver becomes the insured under a contract of insurance, and provides coverage for injuries sustained by third parties. The cost to the insurance industry of a third party fatality is fixed, but the cost of injuries to the third party is ongoing. These state-based CTP schemes, while disparately structured, are similarly motivated: they make funds available for the management of the health and recovery of persons injured in motor vehicle accidents due to the negligence of drivers.¹⁴

Australia currently has a patchwork of common law fault-based insurance schemes, or no-fault and hybrid schemes. In Victoria, for example, a no-fault system of insurance restricts access to the common law by imposing whole

¹³ Refer *Motor Accidents (Compensation) Act 1999* (NSW); *Motor Accident Insurance Act 1994* (Qld); *Motor Vehicle Third Party Insurance Act 1943* (WA); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA); *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas); *Road Transport (General) Act* (ACT); *Motor Accident (Compensation) Act 1979* (NT). In the Australian Capital Territory (ACT), vehicles owned by the Commonwealth of Australia or the ACT are not required to be insured. The governments involved meet claims under their own arrangements in the same way as an insurer.

¹⁴ Typical is s 5A of the *Road Transport (Third-Party Insurance) Act 2008* (ACT). These objectives include promoting the rehabilitation of people injured in a motor accident, encouraging the speedy resolution of claims, keeping the costs of insurance at an affordable level, and promoting competition for CTP premiums in the ACT.

person impairment (WPI)¹⁵ thresholds, reducing the eligibility of the injured person to claim for pain and suffering. The loss of access to the common law is somewhat mitigated, however, by ‘narrative’ tests, allowing courts to take into account the subjective impact of injury on the particular claimant.¹⁶ Tourists who are involved in accidents involving other vehicles and who suffer personal injuries in Australia are insured under CTP schemes, and suits against the insured are subrogated to the insurer. Typically, insurers meet the injured person’s medical expenses incurred within the first six months after the accident. Thereafter, upon admitting liability, the insurer assumes the obligation of meeting the further, reasonably incurred, medical expenses of the claimant, and of providing for, and making available, reasonable and appropriate rehabilitation services pending settlement of the claim.

Frequently, however, the claimant–visitors return to home jurisdictions where they receive treatment and assistance for the injuries sustained in that accident and for the consequences of those injuries. This assistance is given by various regional and corporate facilities and service providers, sometimes on the basis of constitutionally guaranteed rights.¹⁷

In those cases one of two situations may theoretically arise. The insurer in Australia, which has covered the third-party costs, may wish to seek recovery from the injured traveller of that portion of the costs that has been duplicated by the overseas authority. Conversely, the overseas authorities may wish to take action against the traveller for payments which have duplicated the payments of the Australian insurer. In other words, action for recovery of double payment may theoretically be instigated by either state or its agencies

¹⁵ See the *Transport Accident Act 1986* (Vic) s 93(3) (‘TAA’) used in conjunction with the *Guides to the Evaluation of Permanent Impairment* (American Medical Association, 4th ed, 1993). For further interpretation, see *Transport Accident Commission v Elworthy* [2007] VSC 48 [22] followed in *Transport Accident Commission v Serwylo* [2010] VSC 421 upholding the Tribunal’s decision in *Serwylo v Transport Accident Commission* [2010] VCAT 181.

¹⁶ See the TAA s 93(17) requiring that the injuries be ‘at least “very considerable” and certainly more than “significant” or “marked”’. For clarification refer to *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1; *Sutton v Laminex Group Pty Ltd* (2011) 31 VR 100. WPI thresholds also operate in New South Wales (see *Motor Accidents Compensation Act 1999* (NSW)) and have been criticised as unfair, and as merely a cost saving measure: see Law Council of Australia, *South Australia’s Compulsory Third Party Insurance Scheme — 2012 Green Paper* (Law Council of Australia, 2012). The law applying to CTP claims in the ACT is the *Road Transport (Third-Party Insurance) Act 2008* (ACT) and the *Road Transport (Third-Party Insurance) Regulation 2008* (ACT). CTP claims are also subject to the *Civil Law (Wrongs) Act 2002* (ACT) and the *Limitation Act 1985* (ACT). South Australia has no-fault cover with no access to common law compensation. The Queensland motor accident scheme allows unrestricted access to common law compensation within a tight procedural framework.

¹⁷ Examples of European Constitutions with ‘right to health’ provisions include those of Italy, Poland and Hungary.

for expenses incurred in treating and managing the care of the patient. The success of such actions would, however, depend on the provisions of the local law.

A *The Prospect of a Double Recovery Action Taken against the Traveller under Victorian Law*

A double recovery provision has been introduced into the Victorian *TAA*.¹⁸ Section 42(1)(a) of the *TAA* entitles the Transport Accident Commission ('TAC') to recover payments made to an injured person, or a deceased's dependant, following a claim for compensation, or a suit that sounds in damages. The provision is, however, limited to seeking the repayment of money paid to the injured person, or their dependent or surviving spouse, only where the person has received, been awarded, or accepted, the payment of compensation, or a sum in damages 'under the law of a place outside Victoria'.

Section 42(2) disentitles injured persons, or the deceased's dependants or surviving partners, to compensation under the Act where eligible persons, under the laws of 'a place outside Victoria' have recovered '(a) an amount of compensation or damages', or when '(b) an award of compensation or judgment for damages has been made', or a '(c) payment into court has been accepted', or '(d) a compromise or settlement of a claim' has been reached, or '(e) a claim for compensation ... has been accepted', or '(f) an action for damages' has commenced.

Where the relevant person has been compensated under the *TAA*, the Commission may recover as a 'debt' the amount it has paid that person if the person has received 'compensation or damages', or 'an award of compensation or judgment for damages', or has accepted payment into court.¹⁹

The question of whether the reference in section 42 to 'place' was a reference to geographical location on the one hand, or a jurisdiction on the other, was considered in *McClurg v Transport Accident Commission (General)*.²⁰ In that case, the Victorian Civil and Administrative Tribunal was asked to consider whether the applicant — who had been granted compensation under the *TAA* for injuries suffered in a motor vehicle accident — could also claim damages under the *Trade Practices Act 1974* (Cth) ('*TPA*') against the manufacturer of

¹⁸ The section appears not to have equivalents in the related acts.

¹⁹ *TAA* ss 42(3)(b)(i)–(iv).

²⁰ [2010] VCAT 482.

the motor vehicle. The primary question for determination was whether the *TPA*, being an Act of the Commonwealth, was a law of a place outside Victoria. The issue was resolved in favour of giving the word 'place' the meaning of 'geographical area or location' (as submitted by the applicant), as opposed to the 'metaphorical concept of a legal jurisdiction which may overlap Victorian territory'.²¹ The Tribunal based its reasoning on the principles of statutory construction which promote locating the meaning of a statute in 'the text of the Statute itself';²² and, further, was persuaded by the omission of the *TPA* from section 37 of the *TAA* which lists those Commonwealth Acts that specifically disentitle injured persons', or deceased persons' dependants or spouses, to claim compensation.

A further question, that was neither relevant to, nor raised in, the proceedings, is whether 'place', given its geographical definition, includes a place outside Australia. By virtue of section 37, the Commission is not liable to 'pay compensation in respect of a person who is injured or dies' where the person is 'entitled to compensation in respect of their injury or death under' certain Commonwealth Acts, or Commonwealth, state or territory laws equivalent to the *TAA*. Similarly, section 39(1)(a) relieves the Commission of liability in Victoria, and other states or territories. Under section 35, compensation is available where the accident occurred in Victoria, or another state or territory. Nothing in the Act appears to indicate that the legislators had foreign or international 'places' in contemplation. By reference to the text of section 42 and the related sections²³ of Division 3 of the *TAA*, 'place' must be read restrictively to refer to Australian states and territories only.

In short, the double recovery provisions of the *TAA* are limited to, and designed to prevent, double payments of sums of money. This is reinforced by section 42, which gives the Commission the right to recover a 'debt', and is further strengthened by the section's silence on the provision of goods and services, such as medications and treatments (whether under the law of an Australian state or territory, or a foreign place). Further, neither section 42 specifically, nor the *TAA* in general, is aimed at the institution of actions in places outside Australia, and the awards and compensation that may be available or obtained there.

In other words, the TAC could not expect to be able to take successful action for double recovery against, for example, an Italian traveller after the traveller had returned home and where the injuries covered by the TAC payment had been treated in Italy at Italian expense.

²¹ *Ibid* [25].

²² *Ibid* [24].

²³ *TAA* ss 35, 37, 39.

B *The Prospect of a Double Recovery Action Taken against the Traveller under Italian Law*

In the hypothetical scenario above, an injured third-party passenger in a motor vehicle accident where that vehicle is leased in an Australian jurisdiction under Australian law returns to her home jurisdiction (in this case, Italy) to receive treatment and other health care services and unemployment benefits.

Under such circumstances, can the Italian traveller who has the advantage of compulsory third party insurance in Australia be liable to the home state for services rendered by that home state over and above the insurance payment made by the Australian insurer under a policy enforceable in Australia? Can the Italian authorities recover from the traveller moneys that he or she has received from the TAC which were intended to cover the costs of care and rehabilitation of the kind the traveller receives in Italy? This article deals with the issues that arise in pursuing such a course of action.

The questions of law arising in the circumstances include:

- What are the rights (if any) of the Italian regional and corporate facilities and service providers to recover amounts paid to the plaintiff either by way of judgment or settlement?
- Could any Italian payments by way of unemployment or disability pensions be recovered?

The Italian example is provided because not only are Italians frequent visitors to and drivers in Australia, but also because Italian law is particularly informative and instructive in that:

- (1) the Italian Constitution²⁴ enshrines a right to health care and other benefits not only for its citizens but for all people in Italy;
- (2) the Italian Constitution is backed by the jurisprudence of a strong Constitutional Court; and
- (3) the Italian Civil Code²⁵ is an exemplar of, and the Italian jurisdiction an instructive proxy for, other code and civil law jurisdictions.

²⁴ *Constitution of the Republic of Italy* dated 22 December 1947, entered into force 1 January 1948 ('Italian Constitution').

²⁵ The project of an Italian civil code began in the early 19th century, and was first realised with the creation of the Kingdom of Italy by Napoleon, and the adoption of the French Civil Code for Italian purposes. The *Terzo statuto costituzionale 5 giugno 1805* [Third Constitutional

III THE SOURCES OF COMPENSATION UNDER ITALIAN LAW

To understand the cause of action in double recovery against the traveller it is essential to appreciate that the provision of health care in Italy is constitutionally guaranteed, as is the traveller's entitlement to unemployment benefits. Health care payments are considered first because, as guaranteed under the Constitution, they are directly and not provisionally available. While subject to fiscal conditions, health care is nevertheless universally accessible. Access to unemployment benefits, on the other hand, is dependent upon entitlement, and therefore subject to provisions made for it by the legislature.

A The Italian Health System

1 The Development of Social Rights for Citizens and Eligible Residents in Italy

Italy is a civil law jurisdiction and a Code jurisdiction and as such is distinguished from common law jurisdictions. Its law is influenced by the major 19th century civil codes,²⁶ which in turn were influenced by the first three books of the *Institutes of Justinian* (of persons, of things and of obligations).²⁷

The 19th century Italian Code was premised on the recognition of persons as owners of private property, of rights as individually held, and of negotiations as free from interference by the state. The 1942 Civil Code and 1948 Constitution, however, reformulated the relationship between civil life and commercial activity through a simultaneous 'socialisation' and

Statute of 5 June 1805] art 55 declared that: '*Non vi sarà che un solo Codice Civile per tutto il regno d'Italia*' [There will be in force, in Italy, only one civil code]. Its goal therefore was the unification of the laws pertaining to civil matters in the unified peninsula, and the replacement of those codes and statutes which had governed diverse geographical areas prior to its introduction. Nevertheless, when the Kingdom of Italy was established under a national parliament in 1861, numerous civil codes were still operative, and another unifying Civil Code was issued in 1865. The modern Italian Civil Code — *Codice Civile* [Civil Code] (Italy) — emerged in 1942, during the fascist era. The debate about whether it carries a political legacy has been settled in the negative: see R Nicolò, 'Codice Civile' in *Enciclopedia del Diritto* (Guiffre, 1960) 240, 246. It codifies all aspects of civil and commercial private law.

²⁶ The *Code civil* [Civil Code] (France), also known as 'Code Napoléon'; *Bürgerliches Gesetzbuch* [Civil Code] (Germany); *Codice Civile* [Civil Code] (Italy).

²⁷ On the history and nature of the concept of civil law see R Nicolò, 'Diritto Civile' in *Enciclopedia del Diritto* (Guiffre, 1964) 904. On the ill-fated attempt to establish a 'Fascist legal order' on the basis of the Italian *Civil Code* see Nicolò, 'Codice Civile', above n 25.

‘commercialisation’ of private law. This transformation was based on the increasingly significant role of the state in the lives of individuals. The state regulated private law (such as the protection of the weaker party in private bargains); it introduced the concept of the ‘enterprise’, defined as an organised commercial activity; it made extensive provision for the modernisation of relations between labour and capital; and it redesigned the economy, moving away from small scale agrarianism towards industrialisation and mass production.²⁸

The social rights embodied in the Code and the Constitution reflected the expanded role of government in economic development and labour reform. They also reflected a recast nationalism, offering new forms of citizenship. The right of all people legally in Italy to access to the same level of health care regardless of income, ability to pay, or place of residence is guaranteed by article 3 of the Italian Constitution.²⁹ In 1978, the state sought to meet its obligations to its people by the establishment of a national health service (the *Servizio Sanitario Nazionale*, or ‘SSN’), with the aim of delivering a system of universal health care funded out of general taxation.³⁰

The historical and social transformation of Italy from a collection of atomised self-regulated units, to interrelated citizens in a project of nationhood, is essential to explaining the policy implications of the Constitution. In essence, statehood and state membership are components of a system of reciprocal recognition. The State’s legitimacy is the product of the political endorsement it receives by legislating for the welfare of its members.

²⁸ The process of commercialisation of private law in Italy is closely related to the transformation of the Italian economy that followed unification. See T Ascarelli, *Corso di Diritto Commerciale* (Giuffrè, 3rd ed, 1962) 74–8. For the counter-tendency toward ‘civilisation of the commercial law’ see M Bianca, ‘L’autonomia dell’interprete’ (1965) 1 *Rivista di Diritto Civile* 478, 485–6.

²⁹ According to the Organization for Economic Co-operation and Development (‘OECD’), the World Health Organization (‘WHO’), and the European Union (‘EU’), all developed countries’ health systems are to be measured against the equitable provision of and access to health care: J Hurst, *Performance Measurement and Performance Management in OECD Health Systems* (OECD, 2001); WHO, *The World Health Report 2000. Health Systems: Improving Performance* (WHO, 2000); A Atkinson et al (eds), *Social Indicators: The EU and Social Inclusion* (Oxford University Press, 2002).

³⁰ The Italian system took its cue from the British National Health Service (‘NHS’). The NHS is financed from central tax revenues; purchasing decisions are made at the district level by government health authorities, secondary and tertiary care is provided by not for profit NHS Trusts, and primary care is delivered by private general practitioners who contract with the government. See Christopher Ham, *Health Policy in Britain* (MacMillan, 3rd ed, 1992).

2 *Delivering Health Care to Italian Citizens and Residents: The SSN and the Claimant in the Recovery Action*

Italy has had a national health service since the 1978 introduction of the SSN. Health care and the operation of the SSN are governed primarily by Law No 833 of 1978, which provides for a system of universal health care funded out of general taxation. It ensures comprehensive health insurance and standardised health care to all Italian citizens and, since 2002,³¹ to all legal residents. Under the Italian Constitution, responsibility for health care is shared by the state and the 20 regions. The SSN is a decentralised tri-level structure headed by a Ministry of Health, which allocates funds to 20 regional health authorities, which in turn disburse funds through 200 local health agencies (*azienda sanitaria locale* – ‘ASL’).³²

The purpose of the original devolution of responsibility to the regional government level was to ensure improved decision-making, to heighten accountability and to increase responsiveness to the needs of patients, in an effort to ensure the equitable provision of health care in line with the objectives of the welfare state. However, the SSN in fact broke down into enclaves of clientelism at the municipal level and the local management committees became power bases for local politicians who used social services as currency both in substantial transactions and in smaller everyday dealings.³³

In 1992 the Amato Government reformed the health care sector. The reforms were driven by the three factors: of endogenous budgetary constraints; exogenous constraints related to meeting *Maastricht Treaty* criteria for entry into the European Economic Zone;³⁴ and a desire to introduce the new public management paradigms into public administration. In accordance with an

³¹ *Legislative Decree n° 286 of 1998* (Italy) art 35.

³² *Law n° 883 of 1978* (Italy) arts 51, 53.

³³ See in particular M Ferrera, ‘The Partitocracy of Healthcare: Towards a New Welfare Politics in Italy’ (1996) 38 *Res Publica* 447. See also M Ferrera, ‘The Southern Model of Welfare in Social Europe’ (1996) 6 *Journal of European Social Policy* 17; M Ferrera, ‘Welfare States and Social Safety Nets in Southern Europe: An Introduction’ in M Ferrera (ed), *Welfare State Reform in Southern Europe* (Routledge, 2005) 1; D Hine, ‘Federalism, Regionalism and the Unitary State: Contemporary Regional Pressures in Historical Perspective’ in Carl Levy (ed), *Italian Regionalism: History, Identity and Politics* (Berg, 1996); F Maino, ‘The Restructuring of the Health Service: The Bindi Reform and Fiscal Federalism’ in M Caciagli and A Zuckerman (eds), *Italian Politics: A Review* (Berghahn, 2001).

³⁴ M Rhodes and D Natali, ‘The Berlusconi Pension Reform and the European Double Cleavage in Distributive Politics’ in J Newell and C Guarnieri (eds), *Politica in Italia* (Il Mulino, 2005); M Monti, *Il Governo Dell’economia e Della Moneta* (Longanesi, 1992).

enterprise formula (*aziendalizzazione*), Law No 111 of 1991 aimed to bring legal and administrative structures into line with management practices.³⁵ It provided for the position of *amministratore straordinario* (special manager) to challenge the collegial management practices in Italy by promoting the effective and efficient delivery of services over legal safeguards and constitutional formalism,³⁶ and by depoliticising health care.³⁷

The original model whereby health care was organised as an extension from a local base (municipalisation) was reversed; ASLs were transformed into public enterprises, thereby becoming dependants of the region and independent of municipal administration. As public enterprises they are organised through 100 per cent state-owned holding companies, with controlling interests in diversified sub-holdings. These, in turn, own individual enterprises, occasionally with minority private shareholders. The sub-holdings are mostly incorporated as private joint-stock corporations, are governed by private commercial law, and follow a private accounting system.³⁸ Public enterprises plan their own activities according to local demands, allocate their budgets without municipal participation, and establish strict accounting systems. The enterprise formula granted juridical autonomy to all local health care authorities and selected public hospitals, making their

³⁵ For a discussion relating to post-war economic policy and the concept of the enterprise in the 1942 Civil Code (Italy), see Ascarelli, above n 28, 133–5, 862–3, 914, 918–21. On the ‘public enterprise’ in Italy, see J C Adams and P Barile, *The Government of Republican Italy* (Houghton Mifflin, 1961) 190–6. For a history and description of the most widely discussed of these enterprises, the *Ente nazionale idrocarburi* (or ENI), see D Votaw, *The Six-Legged Dog: Mattei and ENI, A Study of Power* (University of California Press, 1964) 117.

³⁶ K König, ‘Entrepreneurial Management or Executive Administration: The Perspective of Classical Administration’ in W Kickert (ed), *Public Management and Administrative Reform in Western Europe* (Edward Elgar, 1997). On the influence of new public managerialism in Italy, see P Mattei, ‘The Administrative Framework of Intergovernmental Relations: Italian Regions and Communes after the Health Care Reforms of the 1990s’ (2004) 14(4) *Regional and Federal Studies* 538; C Hood, *The Art of the State: Culture, Rhetoric, and Public Management* (Oxford University Press, 1998).

³⁷ Minister for Health Francesco De Lorenzo said in an interview that the post was created so that local health authorities and public hospitals will be headed by a person ‘who is not involved in politics’: ‘Intervista al Ministro della Sanità’, *La Stampa* (Torino, 19 October 1992) 11. See also Mattei, above n 36; J Pierre (ed), *Bureaucracy in the Modern State: An Introduction to Comparative Public Administration* (Edward Elgar, 1995); F Ferraresi, ‘Burocrazia e Politica in Italia’ in M Ferrera and G Zincone (eds), *La Salute Che Noi Pensiamo: Domanda Sanitaria e Politiche Pubbliche in Italia* (Il Mulino, 1986).

³⁸ See A Kumar, *State Holding Companies and Public Enterprises in Transition* (St Martin’s Press, 1993) for a survey on the evolution and organisation of Italian state holding companies. The importance of the economic role that public enterprises play in Italy is reflected in the fact that they account for approximately 15 per cent of the non-agricultural labour force, 20 per cent of value added, and 25 per cent of fixed investments. The public sector also controls approximately 70 per cent of banking assets as well as playing a leading role in the provision of services and utilities.

acts subject to principles of legality. Citizens now became clients of the administration not only in a political sense, but also in a strict legal sense.

The forensic and procedural significance of understanding the structure of health care delivery is that it identifies the legal entity likely to launch actions against the injured traveller (an Italian citizen or eligible resident) who has received payment under a compulsory third party insurance scheme overseas. Following the 1992 Amato reforms, ASLs have assumed separate legal status as public enterprises with the requisite capacity for prosecuting and defending legal suits and would therefore be the parties to take action.

3 *How Justiciable and How Enforceable are Guarantees to Universal Health Care under the Italian Constitution?*

a *Guaranteeing Health Care under the Italian Constitution*

Historically, the conception of the state as welfarist has led to European constitutions acknowledging state obligations of the kind discussed here.³⁹ The Italian welfare state developed during the 1970s and early 1980s, approaching levels of welfare provision on a par with most European states. There is some degree of clientelistic dependency on forms of social payment, making for a highly diversified — and usually regionally differentiated — relationship of the individual with the state. Nevertheless, the national health system, established in 1978, is an example of the state enshrining universalistic principles. Health is included amongst the interests protected by the law and is recognised by article 32 of the Constitution as an absolute right and, as such, fundamental, inalienable and indispensable. Article 32 provides:

(1) The republic protects individual health as a basic right of the individual and in the interests of the community; it provides free medical care to the poor.

(2) Nobody may be forcefully submitted to medical treatment except as regulated by law. That law may in no case violate the limits imposed by respect for the human being.

³⁹ G Casper, 'Changing Concepts of Constitutionalism: 18th to 20th Centuries' (1989) *The Supreme Court Review* 311, 317–19. According to Casper, 18th and 19th century continental European constitutions and codes acknowledged state obligations to provide food, work and financial aid to persons in need. Early constitutions used the language of 'obligation' rather than 'rights'. Thus, the continental concept of the 'state' is closer to the Anglo-American notion of the 'welfare state' or the 'administrative state': at 318–19. According to M A Glendon, 'Rights in Twentieth-Century Constitutions' (1992) 59 *University of Chicago Law Review* 519, 520–1, these are 'second generation' constitutions, compared with the first generation United States *Constitution*.

The right to health is often referred to as a ‘second generation’ human right, and is a feature of liberal Western European constitutions.⁴⁰ It is frequently discussed as part of a larger formation of economic, social and cultural rights. Arguably, the right to health as mentioned in the *International Covenant on Economic, Social and Cultural Rights* is programmatic in that that it is not self-executing, and requires implementation by legislative means, executive action, and the expenditure of public funds.⁴¹ Further, although state action is required to implement such a right, programmatic rights per se are often seen as only aspirational and as not creating judicially enforceable individual rights,⁴² nor as being justiciable against the state.⁴³

The view of the right to health as being aspirational is inapplicable in Italy, however. The Italian Constitution comprises 139 articles dealing first with ‘fundamental principles’ (articles 1–12), and then divided into two main parts. Part I (which concerns us here and which consists of articles 13–54) deals with the ‘rights and duties of the citizen’ under four heads or titles: civil relations; ethical and social relations; economic relations; and political

⁴⁰ The concept of the ‘generations’ of rights — the first being civil and political; the second, economic, social, and cultural; and the third consisting of collective rights, such as minority rights and indigenous peoples’ rights — has been widely used but no less widely criticised for concealing both different patterns of national development and the links between rights of different ‘generations’. See, eg, P Alston (ed), *People’s Rights* (Oxford University Press, 2001) 1–2; E Asbjorn and A Rosas, ‘Economic, Social and Cultural Rights: A Universal Challenge’ in E Asbjorn and C Krause (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2nd ed, 2001) 4–5.

⁴¹ See, eg, M Scheinin, ‘Economic and Social Rights as Legal Rights’ in E Asbjorn and C Krause (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 2nd ed, 2001) 29; M Craven, ‘The Justiciability of Economic, Social and Cultural Rights’ in R Burchill et al (eds), *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law* (Martinus Nijhoff, 1999) 1. See Glendon, above n 39, 528. Although international trends indicate increased recognition of positive contents rights on the basis of fundamental human rights principles, human rights instruments and organisational definitions of ‘health,’ or a ‘right to health’ are not enforceable, so they have no ‘bite’. For a ‘violations’ approach see, eg, Virginia A Leary, ‘The Right to Complain: The Right to Health’ in F Coomans and F van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25–28 January 1995 in Utrecht* (Utrecht, 1995) 87–106 (discussing the state obligation not to violate the right to health).

⁴² See, eg, *Asahi v Minister of Health and Welfare* [1967] 21 MINSHO 1043 (Supreme Court of Japan) translated in H Tanaka (ed), *The Japanese Legal System: Introductory Cases and Materials* (University of Tokyo Press, 1976) 793, 795–6 (holding that the art 25 welfare rights are not judicially enforceable individual rights).

⁴³ A Hendriks, ‘The Right to Health in National and International Jurisprudence’ (1998) 5 *European Journal of Health Law* 389, 401.

relations.⁴⁴ The right to health (article 32) does not require supplementary legislation to ensure its full application. The right to health, at least in the first paragraph of the article, is expressed as the strongest form of individual right. By definition it is capable of being invoked in ordinary legal proceedings between individuals, as well as being the subject of claims between individual and state. By contrast, the rights in the second paragraph are expressed as being subject to specified controls ('except as regulated by law').

The traveller who is injured and subsequently compensated, and who returns to Italy, receives medical and associated treatment as of right. The inalienability of that right, expressed in the strongest possible terms, may be invoked by the returned citizen in proceedings against that person, whether by private institutions or state authorities.

To what extent the courts would limit the right so recognised, and what effect fiscal realities and policy settings would have on the fulfilment of the state's obligations under the right, is the next matter for consideration.

b The Jurisprudence of the Constitutional Court

In practice, reliance on the right to health involves a reference to a specialised constitutional jurisdiction for the authoritative interpretation of the right. That jurisdiction, the Italian Constitutional Court, was created⁴⁵ using provisions of the Constitution that deal not with the judiciary but with constitutional guarantees.⁴⁶ The Court was seen as an essential recognition of the basic

⁴⁴ Italian Constitution pt II arts 55–139 deals with the 'Organisation of the Republic' under six heads: Parliament; the President of the Republic; the Government; the Judiciary; the Regions, Provinces and Communes; and Constitutional Guarantees. The 'transitional and final provisions' are numbered separately (arts I–XVIII).

⁴⁵ The Constitutional Court was not established until eight years after the Constitution came into force. Only in March 1953 did the parliamentary situation allow the necessary enabling legislation to be passed. President Gronchi appointed five judges in December 1955, and on 15 December 1955, all 15 judges took their oath of office. On 23 January 1956, the Court held an organisational meeting where Enrico De Nicola was elected the first President of the Court. On 23 April 1956, the Court began its official life when, following an inaugural address by President De Nicola, the first public hearing was held. The President's inaugural speech is reproduced in P Curci, *La Corte Costituzionale* (Giuffrè, 1956) 9.

⁴⁶ Italian Constitution arts 101–112, 134–7. The power granted to the Court is found in art 134 by which it is granted jurisdiction over three issues: those concerning the constitutionality of state and regional laws (para 2); it is given jurisdiction when there is conflict between state authorities, state and region, or region and region (para 3); and has power to hear constitutional charges made either against the President of the Republic or government ministers, later amended to remove the Court's jurisdiction over impeachment of Ministers: *Constitutional Law n°1 of 16 January 1989* (Italy) by which Ministers committing crimes in the exercise of their official functions are no longer immune to the jurisdiction of the lower courts. Article 137 provides for enabling legislation and finality of decision.

rights of citizens created in the Constitution and as a guarantee against the removal or restriction of such rights by government. The Court's jurisdiction may be triggered by the violation of an individual citizen's right.⁴⁷ The citizen may petition a lower court to assess the reasonableness of the person's request to have the issue raised before the Constitutional Court.⁴⁸

Since the establishment of the Constitutional Court in 1956,⁴⁹ the previous interpretation of the constitutional rights provisions as merely programmatic and as not directly enforceable by administrative courts exercising judicial review has been overturned.⁵⁰ Even where some provisions have programmatic features, their core aspects may still bind the legislature and require enforcement. The jurisprudence of the Constitutional Court evinces a willingness to assume responsibility for the enforcement and protection of social rights under the Constitution.

Since Italy is a civil law country, court decisions do not have precisely the same precedential weight and effect that they have in common law jurisdictions.⁵¹ Nevertheless, the decisions of the Constitutional Court and the Court of Cassation in particular, are taken very seriously in both the political and legal arenas, and play a major role in defining the contours and boundaries of health care service provision.⁵² The Constitutional Court, for

⁴⁷ A Baldassarre, 'Structure and Organization of the Constitutional Court of Italy' (1996) 40 *St Louis University Law Journal* 649, 650.

⁴⁸ *Ibid.* See also A Pizzorusso et al, 'The Constitutional Review of Legislation in Italy' (1983) 56 *Temple Law Quarterly* 503, 504, 531.

⁴⁹ For a view that the early Court was conservative and deferential towards the legislature, see N Tranfaglia, 'Elementi Sulla Formazione e Sulle Tendenze della Politica della Corte Costituzionale in Italia' (1972) *Politica del Diritto* 451 (drawing from interviews with appointees). Later presidential and parliamentary appointees were seen as less conservative, see G Bognetti, 'The Political Role of the Italian Constitutional Court' (1973) 49 *Notre Dame Lawyer* 981.

⁵⁰ *Law of 11 March 1953* (Italy). See also Pizzorusso et al, above n 48, 504.

⁵¹ See statement by Judge Azzariti, second President of the Constitutional Court, in an official speech reproduced in *Giurisprudenza Costituzionale* (1957) 878, 885. Italian constitutional lawyers almost unanimously agree that the interpretations of statutes contained in the Constitutional Court's '*sentenze di rigetto*' (interpretative decisions rejecting the claim of unconstitutionality) have no binding force upon anybody. Cf Mortati, 'Sull Efficacia delle Sentenze della Corte Costituzionale' in *Acc Nazionale Lincei* (1973) quaderno 185, 668, 680, 1299; John Henry Merryman and Vincenzo Vigoriti, 'When Courts Collide: Constitution and Cassation in Italy' (1966) 15(4) *American Journal of Comparative Law* 665, 668, 680; Vincenzo Vigoriti, 'Italy: The Constitutional Court' (1972) 20(3) *American Journal of Comparative Law* 404. The Supreme Court of Cassation and the Constitutional Court are the supreme courts of the Italian judicial hierarchy. The powers of the Constitutional Court are given to it under article 134 of the Constitution.

⁵² A court endowed with the power to pass judgment on the constitutionality of statutes can exert a great influence on the political life of a country. Bognetti, above n 49, 981, reviewing

example, has specified that certain of its interpretations of the Constitution should be followed for the avoidance of doubt.⁵³ In general these courts have been very receptive to the claims of insured persons.

In the Italian Constitution, the right to health is formulated as a radically individual rather than as a social right; the right is attached to the individual, and not the citizen.⁵⁴ Although the SSN is funded from general taxation and from private contributions, the right to health care is not conditional on individual insurance contributions. It is primarily a 'fundamental right of the individual' and secondarily a part of the community's 'collective interest'.⁵⁵ The Constitutional Court has effectively interpreted the right to health as a right belonging to the human being as such, outside particular considerations such as nationality.⁵⁶ Consistent with this view, article 35(3) of Legislative Decree No 286 of 25 July 1998 guarantees to illegal immigrants some medical treatments free of charge when it is proved that they lack adequate funds to pay for health care.

The basic principles of the health system are that the Italian state protects physical and mental health as a fundamental individual human right and in the collective interest, through the SSN. All citizens registered with the SSN are entitled to health care. Under circumstances of regional devolution, there is no derogation from the constitutional norm, even if the operation of the norm is affected. A government body's failure to implement these rights does not detract from their existence.

The social rights embodied in the Italian Civil Code and the Italian Constitution reflect the expanded role of government. To what extent private law is subject to a public expansion, or socialisation, is a matter of

decisions of the court with respect to specifically political rights, wrote: 'Yet, its records do not show a will to participate actively in the political process that even remotely resembles the bold attitude and the firm determination of the Warren Court. Nothing like the rejuvenation of the legal system brought about by judicial decree in America during the last twenty years has taken place in Italy by the impulse of the Constitutional Court.'

⁵³ See C Mortati, 'L'interesse Nazionale Come Limite alle Legislazione Regionale Esclusive' in *Scritti Crosa* (Giuffrè, 1960) 1296, 1297. Decisions of this kind are designated as *sentenze interpretative di rigetto* (interpretative decisions rejecting the claim of unconstitutionality). See also F Pizzetti, *Il Sistema Costituzionale delle Autonomie Locali* (Giuffrè, 1979); T Martines, 'L'interesse Nazionale Come Limite alle Leggi Regionali' in *Fonti del Diritto e Giustizia Costituzionale* (Giuffrè, 2000); see further, Merryman and Vigoriti, above n 51, 680.

⁵⁴ Cf A den Exter and B Hermans, 'Constitutional Rights to Health Care: The Consequences of Placing Limits on the Right to Health Care in Several Western and Eastern European Countries' (1998) 5 *European Journal of Health Law* 261, 270.

⁵⁵ Italian Constitution art 32.

⁵⁶ Italian Constitutional Court, decision n° 509/2000; Italian Constitutional Court, decision n° 252/2001.

considerable debate. Many commentators argue that the continued emphasis on strict legalistic interpretation as opposed to interpretation in the light of social and economic context leaves entitlements unaffected.⁵⁷ It has also been argued that individual and social rights are neither conflicting nor competing rights; rather, all rights are embodied individually and unified and qualified by social contexts. In other words, individual and social rights are unavoidably co-existing rights.⁵⁸

However, fundamental rights in Italy have arguably been substantially expanded and altered by the extension of social welfare programs, such as health care, and guaranteed by generous social welfare provisions. Fundamentally, the Italian Constitution continues the European project of providing for social welfare while guaranteeing liberal rights.⁵⁹ Social rights are interpreted as the rights of the citizen (*diritti di prestazione*) to demand services from the state and its administrative bodies at any level of government wherever those services are situated (so irrespective of devolution, decentralisation or delegation). While the extent of the obligation to provide services is to be interpreted by the legislator on the basis of economic conditions, the Constitution sets out an obligation to provide minimum levels of health care regardless of circumstances.⁶⁰ The Italian SSN can therefore be considered a national system of health care that discretionally allocates a fixed budget, and incorporates constitutionally guaranteed and other legal entitlements.

In a context of scarcity, disputes concerning resource allocation will fall to be determined by the courts. The Constitutional Court has assumed the power to scrutinise and evaluate the reasonableness of the legislature's decision regarding the implementation of the Constitution's social rights. It is important to note that the Court has not approached its role with an activist attitude or a radical philosophy favouring either side of the Italian political divide (that is, neither a liberal free market nor a social collectivist approach). In no instance has it imposed an original solution to major social and political

⁵⁷ M Tushnet, 'Civil Rights and Social Rights: The Future of the Reconstruction Amendments' (1992) 25 *Loyola Law Review* 1207, 1211.

⁵⁸ *Ibid* 1212. See further W Osiatynski, *Human Rights and their Limits* (Cambridge University Press, 2009) 256 who argues that there is no empirical evidence that social rights undermine or conflict with individual rights.

⁵⁹ By contrast, American constitutional thinking finds this approach invidious. Glendon, above n 39, 537 writes: 'Perhaps it is time ... to take a fresh look at [the US] constitutional framework, and to recall not only that the Bill of Rights is part of a larger constitutional structure, but that its own structure includes more than a catalog of negatively formulated political and civil liberties.'

⁶⁰ Italian Constitutional Court, decision n° 185/1998; Italian Constitutional Court, decision n° 309/1999; Italian Constitutional Court, decision n° 509/2000.

problems. Indeed, according to article 134(5), it is required to abstain from all political activity.⁶¹ Instead, it has approached constitutional issues with a view that the political system is best placed to manage the social transition necessary to ensure economic prosperity and national security, and that the Court's role is not to divert nor accelerate the process.⁶²

The Court's initial period (1956–65) was marked by the securing of minimal protections for fundamental freedoms, and the adoption of an adequate interpretation of formal equality. Since 1965 it has approached the interpretation of rights, such as those embodied in the labour and economic rights provisions of the Constitution, less cautiously.⁶³ The Court has on numerous occasions formulated the right to health as a positive function to be performed, and not merely acknowledged, by the state, on the basis that the Constitution is worded so as to mandate that public programs be implemented and carried out by public bodies.⁶⁴ Indeed the Court has not found that the provision is subject to restrictions by reference to concepts such as necessity or reasonableness.

Moreover, while some commentary on the SSN has suggested that it was established primarily to provide health care to those who are financially unable to purchase it,⁶⁵ the Constitutional Court has gone further. It has held that the SSN is not merely a provider of health services to those without the means to purchase medical care and pharmaceuticals. Rather, it has stated that Law No 12 of 1988 (approved as part of the 1992 reforms) imports patient choice of provider as a key requirement, with the consequence that the doctor is the person who decides when care should be given to the patient. The Court

⁶¹ The principle may be difficult to reconcile with the fact that the Court has been given the power to pronounce on the constitutionality of laws made by the Legislature. By *Law n° 87 of 1953* (Italy) art 28, the Court is forbidden to declare on an 'evaluation of a political nature and any review of the use of the discretionary powers of Parliament'.

⁶² Bognetti, above n 49, 994. See W Rodino, 'The Constitutional Court of Italy' in Igor I Kavass (ed), *Supranational and Constitutional Courts in Europe: Functions and Sources — Papers Presented at the 30th Anniversary Meeting of the International Association of Law Libraries: Bibliotheque Cujas, Paris, August 1989* (W S Hein & Co, 1992) 281, 289 for the view that the Court has been accused both of overstepping its authority, and not exercising sufficient control over the activities of Parliament. See also W J Nardini, 'Passive Activism and the Limits of Judicial Self Restraint: Lessons for America from the Italian Constitutional Court' (1999) 30 *Seton Hall Law Review* 1; P Furlong, 'The Constitutional Court in Italian Politics' (1988) 11(3) *West European Politics* 7 who states that 'for the most part its role is neither opponent nor legitimiser but substitute, in the sense that it is often called on to make up for the technical and political inadequacies of legislative and executive acts'.

⁶³ Bognetti, above n 49, 994–5.

⁶⁴ Italian Court of Civil Cassation, n° 1954, 10 March 1990 reported in (1995) *Crit Pen* 50. See also Glendon, above n 39, 525–6.

⁶⁵ den Exter and Hermans, above n 54.

decision entitles individuals to a universal right to choose a doctor, and also to choose where they wish to be treated, despite the system's pronounced political regionalism, and regardless of the patient's place of residence.⁶⁶

In the jurisprudence of the Constitutional Court, social rights are considered within the pragmatic context of available state economic resources, and the financial and economic policies of the state.⁶⁷ However, the Court has held that rationing does not compromise the existence of the right, and cost does not provide a basis for a decision to refuse necessary and indispensable health care to a patient.⁶⁸ The Court's decision guarantees that the state will provide a baseline level of essential service, and that only beyond this point will it be permitted to determine (limit) service provision on the basis of available resources. According to the Court, in accordance with article 81 of the Constitution, the core of social rights will always be preserved, and their implementation protected, no matter how far its extension is suppressed by fiscal restraint and economic policy.⁶⁹

Health care packaging has important consequences for the equitable treatment of citizens under the Constitution. To the extent that unpackaged services must be purchased from private providers, the accessibility of these services differs according to the wealth of the patient. Private providers have gravitated to areas of highest income and ignored low-income regions, thereby denying many citizens access to health care on the grounds of both income and place of residence. The Constitutional Court has recognised that regional inequality threatens the social rights of citizens. Where this 'unequal balance' is produced by the pursuit of policies of economic efficiency, the Court has held that these must nevertheless be implemented in such a way as to better provide for the needs of citizens.⁷⁰

⁶⁶ Italian Constitutional Court, decision n° 173/1987. This stems directly from there being no formal contract between payers and patients such that the patients' consumption of care is not limited with any degree of certainty.

⁶⁷ Italian Constitutional Court, decision n° 243/1993; Italian Constitutional Court, decision n° 103/1995.

⁶⁸ Italian Constitutional Court, decision n° 992/1988 (requiring a local health authority to reimburse a patient who had used a private provider for a NMR scan since this service was not available at the time in public or contracted facilities).

⁶⁹ Article 81 of the Italian Constitution provides that '[e]very year, Parliament shall pass the budget and the financial statements introduced by the Government. Interim budget authority may not be granted save by law and for not longer than four months. The budget may not introduce new taxes and new expenditures. Any law involving new or increased spending shall detail the means to cover them'.

⁷⁰ See M Luciani, 'Sui Diritti Sociali' in I Cedam (ed), *Studi in Onore di M Mazziotti di Celso* (Padova, 1995). However, the court has established some limits to the state obligation, such as the subordination of the right to the availability of public or contracted facilities or to

The jurisprudence of the Constitutional Court affirms the centrality of the right of the citizen receiving health care, and by extension the primary decision-making role of the treating professional as to required treatment. Accordingly the returned traveller will receive treatment as needed, without regard to whether the provision of unpaid treatment represents the delivery of a service that the traveller has already received compensation to purchase. The Court has steadfastly refused to allow the primary objective of well-being to be determined only by policies formulated to cope with financial uncertainty and budgetary restraint, where factors such as health care provision, budgetary distribution and resource allocation have to be balanced. While the implementation of the SSN funding model focuses on the effectiveness, appropriateness and efficiency of treatment,⁷¹ the Constitutional Court has not sought to intervene in the politically and pragmatically determined management of the delivery of health services. Nevertheless it has demonstrated a commitment to preserving the relationship of the citizen to the State. In particular the Court recognises that the relationship reflects and embodies a history of social transformation during which the State has increased its provision of welfare to the citizen. As a result, the Court has consistently ruled that the health care system must operate so as to ensure its accessibility to citizens, the meaningful exercise of choice by the person seeking care, and the provision of the requisite (not the politically or economically appropriate) level of care.

B Benefits Pursuant to the Effect of Injuries on Employment: Unemployment or Disability Payments

Under Italian law, the victim of a tort may draw money from the social security system providing unemployment benefits, or from the employer where the employer, under the terms of the employment contract, continues to make payments to an employee after an accident. The relevant questions are whether such payments fall to be repaid by the victim to either the social

organisational requirements of hospitals. Italian Constitutional Court, decision n° 175/1982. Further, there is no subjective right to unlimited health services: Italian Constitutional Court, Ordinance 22–24, January 1992, decision n° 19.

⁷¹ The National Health Plan 1998–2001 officially referred to the ‘appropriateness’ of treatment for the first time. Appropriateness may be either organisational or clinical. Organisational appropriateness aims to deliver health care to patients at the lowest level of the system relative to the severity and complexity of the clinical condition, thereby realising clinical appropriateness. See George France, Francesco Taroni and Andrea Donatini, ‘The Italian Health-Care System’ (2005) 14(S1) *Health Economics* S187, S197; G France ‘I Livelli Essenziali di Assistenza: Un Caso Italiano di Policy Innovation’ in G Fiorentini (ed), *I Servizi Sanitari in Italia* (Il Mulino, 2003) 73. Clinical appropriateness is the focus of the National Guidelines Project, launched along with the 1998–2001 National Health Plan, and coordinated by the Istituto Superiore di Sanita, the central technical arm of the SSN.

insurer or the employer, and whether the employee's insured or contractual claim for past lost earnings is reduced by the amount of the payments. If there is a legal liability of the victim to repay, or the claimant has provided to his or her employer an undertaking to repay, then those moneys form part of a special damages claim. Voluntary payments from the employer do not fall to be deducted.⁷²

However, amounts paid to the claimant on the basis of either:

- (1) an expectation; or
- (2) a legally binding contract to the effect that the employer is to be reimbursed out of damages recovered,

should be added to the damages claim and subject to a direction that the money be paid to the employer.

1 *Constitutional Right of the Injured Person to Unemployment or Disability Pension*

The right to unemployment benefits for people without work is a constitutional principle. However, it is one requiring legislative enactment. It is more sensitive than health care to political contexts, and is under the direct control of government whose actions are necessary to give content to the formal right.

The Italian Constitution proclaims that Italy is 'a democratic Republic founded on labour'.⁷³ Work — as expressed in the fundamental principles — is not a restricted economic or labour concept and 'neither an end in itself, nor a mere instrument for securing the means of subsistence, but ... a necessary avenue for the affirmation of one's personality'.⁷⁴ Work is central to the material and spiritual well-being of society, and it is by its nature more than merely economic. The principle of labour is linked to the concept of the person, as a guarantee of the inviolability of the person and the dignity of the individual. This is reflected in the stated duty of every citizen, a corollary to the 'right to work': 'According to capability and choice every citizen has the

⁷² It is to be noted that the situation is not resolved under Australian or English Law: *Hobbelen v Nunn* [1965] Qd R 105; *Volpato v Zachary* [1971] SASR 166.

⁷³ Italian Constitution art 1. For a discussion of art 1 and the meaning of its reference to 'work', see M Paci, 'The Constitution and Social and Labour Rights in a Changing Italy' (2009) 1 *La Rivista Delle Politiche Sociali* [Italian Journal of Social Policy] 111, 114–6.

⁷⁴ V Onida, 'I Principi Fondamentali della Costituzione Italiana' in G Amato and A Barbera (eds), *Manuale di Diritto Pubblico* (II Mulino, 4th ed, 1994) 77, 106–8.

duty to undertake an activity or a function that will contribute to the material and moral progress of society.⁷⁵

Unemployment protection, guaranteed under article 38 of the Italian Constitution,⁷⁶ is a key concept in a social state founded on ideals of solidarity. Whereas the health care guaranteed under article 32 reflects a universalist welfarism, article 38 reflects an employment model of welfare, stating that workers have the right, in the event of injury, illness, disability, and ageing, to be assured of receiving means adequate to their life needs:

Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support.

Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment.

Disabled and handicapped persons are entitled to receive education and vocational training.

Responsibilities under this article are entrusted to entities and institutions established by or supported by the State.

Private sector assistance may be freely provided.⁷⁷

The Italian Constitution establishes that every citizen who is unfit for work and without means of livelihood has the right to maintenance and social assistance, and that people with disabilities have the right to vocational instruction and training.

⁷⁵ Italian Constitution art 4. Unless otherwise indicated, translations are those of the author.

⁷⁶ The recognition of the right to assistance of those unable to earn a living (now Italian Constitution art 38) and the right of citizens to protection of their health (now Italian Constitution art 32) was considered by a special Ministerial Commission for the Reform of Social Services which produced a report and 88 resolutions in order to translate the previously existing mass of unco-ordinated regulations into to modern, simplified and co-ordinated system: Ministro del Lavoro e della Previdenza Sociale, *Commissione per la Riforma della Previdenza Sociale: Elazione sui Lavori della Commissione (4 Inglio 1947–24 febbraio 1948)* (Rome, 1948).

⁷⁷ Ogni cittadino inabile al lavoro e sprovvisto dei mezzi necessari per vivere ha diritto al mantenimento e all'assistenza sociale.

I lavoratori hanno diritto che siano preveduti ed assicurati mezzi adeguati alle loro esigenze di vita in caso di infortunio, malattia, invalidità e vecchiaia, disoccupazione involontaria.

Gli inabili ed i minorati hanno diritto all'educazione e all'avviamento professionale.

Ai compiti previsti in questo articolo provvedono organi ed istituti predisposti o integrati dallo Stato.

L'assistenza privata è libera.

The references to ‘entitlement’ in article 38 evince a clear recognition of a prior existing right, but one which is to be legislatively formulated in order for its content to become enforceable.⁷⁸ The ‘right to be assured’ and the reference to ‘responsibilities ... entrusted to entities’ arguably require further legal or political action for either their definition or activation — although there is no express stipulation that the content of the article is to be determined by law. Where article 38 states that ‘[r]esponsibilities under this article *are entrusted* to entities and institutions established by or supported by the State’ (emphasis added), it appears to contemplate a mechanism of regulative control determining the enjoyment of the right.⁷⁹

If the right is not directly enforceable, there may be no other constitutional means to compel the government to provide for it. In that case, the provisions which enable review by the Constitutional Court will be essential to the activation of the right.⁸⁰

C *Structuring and Qualifying Social Security Payments*

Indeed in Italy workers on standard permanent contracts are covered by strong protection under labour legislation. Were our traveller an older worker in such

⁷⁸ Cf the Constitution of the Republic of Poland of 2 April 1997 art 65(4) (‘Polish Constitution’), which simply states ‘[a] minimum level of remuneration for work, or the manner of setting its levels *shall be specified by statute*’ (emphasis added). An extreme situation is where it is impossible to formulate a right which correlates with the duty urged upon the state. In such circumstances it is not possible for a court to pronounce on whether the right has been respected or denied. One example is the Spanish Constitution of 1978 art 40(1): ‘The public authorities shall promote favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income within the framework of a policy of economic stability. Special emphasis will be placed on the realisation of a policy aimed at full employment.’

⁷⁹ But it may be no more than vaguely aspirational (or political) such as art 110(b) of the Italian Constitution, under which the state ‘shall establish special measures for protecting juvenile labour and shall guarantee equal pay for comparable work’.

⁸⁰ But compare the Polish Constitution art 67(1) which provides that ‘[a] citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute’. The Italian Constitution is guarded and tends, by virtue of the drafting style adopted, to be obviously hesitant; for example, at art 42(1) which provides that ‘[p]rivate ownership shall be recognised and guaranteed by laws which shall determine the manner by which it may be acquired and enjoyed, and its limits, in order to ensure its social function and to make it open to all’.

an employment agreement, his or her unemployment entitlements would be powerfully protected and virtually guaranteed.⁸¹

The loss or reduction of working capacity due to work accidents, or industrial diseases resulting from the performance of a work activity or contracted during a working activity, is covered by a social insurance scheme administered by the social insurance body 'INAIL' — the *Istituto Nazionale per gli Infortuni sul Lavoro*. Law No 222 of 1984 introduced an inability pension for private sector employees. The *Istituto Nazionale per la Previdenza Sociale* ('INPS') provides for workers who become permanently or temporarily, and absolutely or partially, incapacitated because of events not covered by the work accident and industrial diseases scheme overseen by INAIL.⁸² The traveller in our hypothetical scenario is subject to the latter or, if a public sector employee, to an inability pension for loss caused by impairments not suffered at work.

Workers under the scheme's provisions may be affected in either of two ways:

- (1) disability (or, invalidity) — a reduction of at least one-third of their working capability in relation to their skills and attitudes; or
- (2) inability — the absolute and permanent impossibility of performing any work.

Both categories attract cash benefits and the provision of medical care from INPS.⁸³ The available grants depend on the categorisation of the injury. For invalidity, the grants available are:

- (1) *Assegno Ordinario di Invalidità* (the ordinary invalidity grant): available for three years, renewable twice on demand, then automatically confirmed.
- (2) *Assegno Privilegiato di Invalidità* (the privileged invalidity grant): for workers whose invalidity derived from the performance of working

⁸¹ Baglioni, S and Mota, Luis F Oliviera, 'Alike But Not Alike: Welfare State and Unemployment Policies in Sourthern Europe. Italy and Portugal Compared' (2013) 22 *International Journal of Social Welfare* 319. See also Eurofund, *Industrial Relations and Working Conditions Developments in Europe 2010* (Luxembourg, Publication Office of the European Union, 2011).

⁸² In 1995, the Dini reforms introduced a public sector inability pension for impairments not caused by work and made available to public sector employees who already had access at that time to a special inability pension for loss of income caused by impairments caused by work.

⁸³ See *Law n° 222 of 12 June 1984* (Italy); *Gazz Uff n° 165 of 16 June 1984* (Italy).

activities not covered by the work accident and professional disease scheme.

For inability the grants are:

- (1) *Pensione di Inabilità* (an inability pension).
- (2) *Assegno Mensile di Assistenza Personale Continuativa* (a personal continuous assistance grant), which is added to the inability pension for totally dependent persons.

Law No 104 of 1992⁸⁴ provides benefits beyond the narrow scope of compensation for incapacity to work. The law refers to:

- (1) *persona handicappata* (handicapped person), that is, any person in a condition of physical, mental, or sensory handicap, which causes him or her difficulties in learning, in establishing social relations, in integrating into the labour market and that may lead to social exclusion or social disadvantage; and
- (2) *persona con handicap in situazione di gravità accertata* (severely handicapped person), that is, a person whose handicap has so reduced his or her individual autonomy that permanent, global, and continuous assistance is needed.

Because the aim of the legislation is to cope with the consequences of impairment, under the provisions of Law No 104 of 1992, the reasons for the impairment (handicap) are not relevant as such. For example, benefits under the 'severely handicapped persons leave' provision consist of paid leave granted both to relatives responsible for handicapped persons and to the handicapped worker.

⁸⁴ *Supp Ord Gazz Uff n° 39 of 17 February 1992 (Italy).*

IV ACTIONS FOR RECOVERY

A ***Can Unemployment and Disability Payments Be Recovered as Collateral Benefits by Subrogation: Developing the 'Same Detriment' Test***

Article 14 of the law governing INPS⁸⁵ states that INPS can be subrogated to the victim's rights and can recover all losses caused by the tortfeasor if it provides social security payments to the victim. Article 14 provides:

1. The institutional distributor of the benefits provided by this Act shall be subrogated, up to their amount, to the rights of the insured or the insured's survivors against responsible third parties and their insurance companies.
2. For the purposes of the preceding paragraph the capital value of the service provided shall be calculated, by the policies and rates, on the same basis as those annexed to the Ministerial Decree of February 19, 1981, pursuant to Article 13 of the Law of 12 August 1962 No 1338, to be determined by decree of the Minister of Labour and Social Security, after consulting the Board of Directors of the National Social Security (4).
(4). *The Ministerial Decree 30 March 1987 approved criteria and rates for the action of subrogation referred to in this paragraph.*⁸⁶

An action in statutory subrogation by INPS, pursuant to article 14, is governed by the law of the institution for which the right was created. However, where private international law is at issue, the jurisdictional rules are provided by the *Legge di Riforma del Sistema Italiano di Diritto Internazionale Privato* [Italian Statute of Private International Law of 1995].⁸⁷ This statute presently deals with all aspects of international private law such as jurisdiction, conflict of laws, and the enforceability of foreign decisions. Therefore, tortious

⁸⁵ *Law n° 222 of 12 June 1984* (Italy).

⁸⁶ 1. L'istituto erogatore delle prestazioni previste dalla presente legge è surrogato, fino alla concorrenza del loro ammontare, nei diritti dell'assicurato o dei superstiti verso i terzi responsabili e le loro compagnie di assicurazione.

2. Agli effetti del precedente comma, dovrà essere calcolato il valore capitale della prestazione erogata, mediante i criteri e le tariffe, costruite con le stesse basi di quelle allegate al decreto ministeriale 19 febbraio 1981, in attuazione dell'articolo 13 della legge 12 agosto 1962, n 1338, che saranno determinati con decreto del Ministro del lavoro e della previdenza sociale, sentito il consiglio di amministrazione dell'Istituto nazionale della previdenza sociale (4).

(4) *Con il Decreto Ministeriale 30 marzo 1987 sono stati approvati criteri e tariffe per l'azione di surroga di cui al presente comma.*

⁸⁷ *Law n° 218 of 31 May 1995* (Italy). See *Codice di procedura civile* art II n° 218/95 (Italy).

liability with respect to traffic accidents is governed by article 62 of this statute, which provides:

1. The responsibility for the tort is regulated by the law of the State in which the damage occurred. However the claimant can require the application of the law of the State where the unlawful act was committed.
2. If the tort involves only citizens of the same nationality, and they reside in the state of which they are nationals, the law of that State shall apply as the proper law of the tort.⁸⁸

Under article 62(1), conflict of law rules provide that tortious liability with respect to traffic accidents is governed exclusively by the law of the *lex loci delicti* — the state where the event or the damage occurred. This rule confirms the policy of the Italian lawmaker to deny the *lex fori* the right to control the civil consequences of a wrongful act committed abroad.

Italian law applies only if all parties are citizens of the same nation, in which they also reside. In particular, where a party is injured while driving a motor vehicle, or while a third-party passenger in a motor vehicle driven by the first party, either the driver in the first case, or both driver and passenger in the second, must be Italian citizens and resident in Italy for article 62 to confer the right to request application of Italian law. Under those circumstances, the request must respect the Italian procedural rules and in particular Italy's statutory limitations. Other passengers, not being parties, are not taken into account for the purposes of this provision.

However, if, as in the instant case, one party is a driver of a vehicle leased in an Australian jurisdiction under the laws of that jurisdiction, the defendant by subrogation to the insured will be the insurer, or nominal defendant, and will not therefore conform to the statutory requirement for Italian law to apply. Australian law will therefore be the proper law of the tort.

The issue that arises is the relationship between the law of the institution in which the matter is raised to be heard and the *lex loci delicti*. That is, the institution's right to recover is to be ascertained by its own legal system, but the aggregate amount of damages recoverable from the tortfeasor is determined according to the *lex loci delicti*. When the plaintiff institution,

⁸⁸ 1. La responsabilità per fatto illecito è regolata dalla legge dello Stato in cui si è verificato l'evento. Tuttavia il danneggiato può chiedere l'applicazione delle leggi dello Stato in cui si è verificato il fatto che ha causato il danno.

2. Qualora il fatto illecito coinvolga soltanto cittadini di un medesimo Stato in esso residenti, si applica la legge di tale Stato.

under its own law, has a right of subrogation only⁸⁹ and no direct right of recovery, it must ensure that it has a claim to which it can be subrogated. Article 14 determines that the substantive content of the INPS's right is determined by the rules of the national law defining the source and limits of the right of compensation vested in the victim or his or her dependents vis-à-vis the third party responsible tortfeasor.

Subrogation, by its very nature, takes place only where the third party tortfeasor (here the TAC) and the social insurer (here the INPS) are both obliged to make payments covering the identical loss, and is permitted only insofar as the damage is the cause of the benefits paid by the Italian institution liable to pay them, and the compensation to which the victim (our traveller) or his or her legal successors are entitled under the *lex loci delicti* corresponds to the benefits paid by the Italian institution.

Moreover, since the *lex loci delicti* fixes the heads, and the measure, of damages recoverable, it must follow that the foreign insurer (the INPS) is subrogated to the insured person only where, under its national law, it pays a benefit covering precisely the same loss as the insured person has an action for under the *lex loci delicti*. That is, it is subrogated to the insured person only if, and to the extent that, a sum is recoverable under the *lex loci delicti*, for the same detriment as the detriment in respect of which the social security benefit of that subrogation applies.

1 *What Collateral Benefits Are Available under the Lex Loci Delicti, or Australian Law?*

The position under Australian law is that it is axiomatic that payments which correspond to wages must be taken into account when assessing loss of wages. Thus, unemployment benefits,⁹⁰ family income supplements,⁹¹ supplementary benefit⁹² payments under job release schemes, and student maintenance grants are statutory wages which reduce the loss of contractual wages resulting from the tort.⁹³ Tort claims by injured workers against third parties are reduced by the amount of compensation received by way of wages,

⁸⁹ *Law n° 222 of 12 June 1984* (Italy) art 14.

⁹⁰ *Nabi v British Leyland (UK) Ltd* [1980] 1 WLR 529.

⁹¹ *Gaskill v Preston* [1981] 3 All ER 427.

⁹² *Lincoln v Hayman* [1982] 1 WLR 488.

⁹³ *Hall v Cramer* [2003] ACTSC 112 [67] (Higgins CJ) citing *Smoker v London Fire Authority* [1991] 2 AC 502, 545 (Lord Templeman).

unemployment benefits, and disability benefits, coupled by a right of the employer (or the employer's insurer) to be indemnified by the tortfeasor.⁹⁴

A redundancy payment must, in certain circumstances, be brought into account against damages for tort. In *Wilson v National Coal Board*,⁹⁵ an injured miner received a redundancy payment for early dismissal but claimed damages for loss of earnings on the footing that he would have continued to be employed until he retired at the age of 62. Lord Emslie, Lord President, said that the claimant had adopted two inconsistent positions — that of one who had lost his employment, and one who, but for the accident, would have continued working until 62 years of age.⁹⁶ The claim for damages under the head of loss of earnings was not permitted on the basis that the claimant had been compensated for the actual loss of employment.

Fringe benefits such as disability pay, pensions, and medical services, after fluctuations in doctrine, are now largely governed by the decision in *Hussain v New Toplov Paper Mills*⁹⁷ which disallows double recovery. Wages, disability and unemployment benefits are covered by the indemnity principle on the ground that they diminish or extinguish the loss of earnings or earning capacity, and are treated as preventing a loss from arising. Pensions are different in kind from earnings lost and need not be brought into account.⁹⁸ Pensions do not extinguish the loss since they are payable whether or not the plaintiff has lost earnings. They were earned as part of the employment and are analogous to insurance.⁹⁹ Restitutionary claims have been refused on the basis that an employer's payments to injured workers do not save the tortfeasor any expense, even when damages are reduced by the amount paid by the employer.¹⁰⁰

2 *What Collateral Benefits Are Available under Italian Law?*

Italian law distinguishes sharply between the sums or services provided to a victim by the social security system, and payments received from a private

⁹⁴ *Graham v Baker* (1961) 106 CLR 340, 346 (wages), 351 (disability); *Westwood v Secretary of State* [1985] AC 20 (unemployment benefits).

⁹⁵ 1981 SLT 67.

⁹⁶ *Ibid* 70.

⁹⁷ [1988] 1 AC 514.

⁹⁸ *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 573 (Dixon CJ), 588, 598–600 (Windeyer J); *Smoker v London Fire Authority* [1991] 2 AC 502; *Redding v Lee* (1983) 151 CLR 117, 138, 144 (Mason and Dawson JJ); *Richards v Mills* (2003) 27 WAR 200.

⁹⁹ *Perry v Cleaver* [1970] AC 1, 21 (Lord Reid).

¹⁰⁰ *Receiver for Metropolitan Police v Croydon Corp* [1957] 2 QB 154.

insurer. Social security payments are the victim's as a matter of right, and given regardless of the facts of the case. They cannot therefore be calculated in the recovery. The Italian courts have decided authoritatively that the principle *compensatio lucri cum damno* does not apply in connection with social security payments and services.¹⁰¹

In a number of decisions, the Constitutional Court has clarified that the benefits set out by law, and payable by the state to individuals, are different in nature from compensation for damages.¹⁰² The cases in point are product liability cases where the product was a blood transfusion that caused damage to the victim. Of relevance is the distinction between payments which may be set off against damages and those which may not, based on the nature of the benefit. Obligations arising from the social security system are based on law, while the obligations of recovery are based on the tort. Accordingly, government authorities concerned with health and social security matters cannot claim reimbursement of treatment costs, unemployment benefits, or other costs from any damages awarded or settlements paid to the claimant.

3 *The Test: Do Australian and Italian Laws Cover Precisely the Same Loss and Provide for Precisely the Same Detriment?*

Italian law and Australian law are largely consonant on the subject of double recovery. However Italian law perhaps provides for more favourable treatment of the victim, and a greater degree of tolerance for some forms of double recovery by the victim despite the clearly stated legal principles guarding against this eventuality. Both jurisdictions discount payments received on the basis of the nature of the benefit. In Australia, pensions, insurance payments and pension benefits are distinguished from wages or wage-like payments. The latter stands to be set off whereas the former, which is a benefit bought by the victim, is not.

In Italy, as in the European Community generally, compensation by the tortfeasor identical to the social security benefit received, grants the institution a subrogatory right to repayment; the law sets its face against double recovery. INPS is able to subrogate to the victim's rights if, and only if, it is claiming for the identical benefit provided by way of damages compensation by the tortfeasor. Moreover, it has been the practice of the courts not to apply the double recovery principle in connection with social security payments and services. Lastly, restitutionary claims do not necessarily succeed in either jurisdiction.

¹⁰¹ See Italian Court of Cassation, n° 6228, 1 July 1994 reported in *Riv Giur Enel* n° 467 (1996).

¹⁰² See Italian Constitutional Court, decisions n° 307/1990; n° 118/1996; n° 27/1998.

B Is the Insured Injured Person Unjustly Enriched by Also Receiving Health Care and Unemployment and Disability Payments?

Restitutory claims are expressions of the general principle that what is retained without a legal basis (*sine causa*) is recoverable. Significantly, Italian law adopts and extends principles of Roman law in that it recognises an action for and remedy of recovery for general enrichment based on no more than proof that someone has been enriched without justification at the expense of another: *l'arricchimento senza causa*.¹⁰³ The font of the dictum is Pomponius, who in the *Digest of Justinian* stated that: 'it is naturally equitable that no one be enriched at the expense of another', ascribing the principle to natural law (*ius naturae*) and requiring that the enrichment be at the expense of another, and either unjust or unlawful (*iniuria*).¹⁰⁴

Article 2041(1) of the Italian Civil Code provides:

A person who has enriched himself without just cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss.¹⁰⁵

The reason for the enrichment is immaterial; the only relevant fact is that the transfer of wealth is not supported by a valid cause. The enrichment must not be justified (that is, it must be unjust) in that a basic requirement for

¹⁰³ Civil Code (Italy) art 2041; see also s 62 of the *Obligationenrecht* [Code of Obligations] (Switzerland). The French Civil Code (1804) makes no reference to a general enrichment action but French jurisprudence has filled the lacuna by recognising the *actio de in rem verso* as a general enrichment action. C Aubry and C Rau (eds), *Cours de Droit Civil Français d'après la Méthode de Zachariae* (Imprimerie et librairie générale de jurisprudence Maison Cosse, 4th ed, Marchal et Billard, 1871–75) 725–6, separated a remedy for unjust enrichment from the *negotiorum gestio*. In 1892, the French Supreme Court gave the separation legal status when it decided *Affaire Boudier* Req 15 June 1892, DP 92, 1596. Section 812 of the *Bürgerliches Gesetzbuch* [Civil Code] (Germany) provides for a general enrichment action; the Dutch *Burgerlijk Wetboek* [Civil Code] of 1838 did not give recognition to such action. However from 1992, s 6.4.3.1 inserts an unjust enrichment provision.

¹⁰⁴ Sextus Pomponius, *Digest of Justinian*, 12.6.14, 50.17.206. See in general R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1990) 834. See also D Pugsley, 'Twin Texts and the Compilers' Working Methods' (1997) 3 *Orbis Iuris Romani* 40; D Pugsley, *Justinian's Digest and the Compilers* (University of Exeter, 1995). See also N Jansen, 'The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law' (2010) 1 *Journal of European Tort Law* 16, 25–6.

¹⁰⁵ Chi, senza una giusta causa, si è arricchito a danno di un'altra persona è tenuto, nei limiti dell'arricchimento, a indennizzare quest'ultima della correlativa diminuzione patrimoniale. Qualora l'arricchimento abbia per oggetto una cosa determinata, colui che l'ha ricevuta è tenuto a restituirla in natura, se sussiste al tempo della domanda.

entitlement is absent. The central requirement of the claim is the lack of legal cause and not any injustice per se. The object of the claim is what the claimant has paid unduly — that is, the payment which finds no justification in a legal cause (article 2033 of the Civil Code).

Under Italian law, a creditor cannot ask more than is due from the debtor and must not make a profit. Under the civil law generally, and the Italian Civil Code specifically, causes of action in unjust enrichment may arise where the debtor pays a sum not owed because:

- (1) of the absence of the debt, or it arose from an invalid transaction; or
- (2) it was paid to someone not entitled (not a true creditor).

The actions of the parties with respect to their obligations bind them in equity such that one credits the other strictly ‘to the extent to which [one is] *lucratus* by [the other’s] materials and labour, but no further; and if [one is] not *lucratus* at all, [one] shall be entitled to repetition [restitution] of the whole advance, however great his expenditure and consequent loss may have been’.¹⁰⁶ In other words, the recognition of equitable obligations arising in the unjustified enrichment context demands only that the amount by which the party is enriched is able to be recovered. In Italy, unduly paid moneys are recovered by the debtor through an action for restitution (*ripetizione*). The structure of the law of unjustified enrichment is contained in the Civil Code at articles 2033–40 which deal with cases in which the claimant has made an undue payment.

Where no payment is due, article 2033 provides that:

Whoever has made the undue payment has the right of action to recover it. He further has the right to revenues (art 820 etc) and interest (art 1284) from the date of payment if the receiving party has acted in bad faith, or from the date of request of repayment (Cod Proc Civ 163) if the receiving party has acted in good faith (art 1147).¹⁰⁷

¹⁰⁶ The formulation is Lord President Inglis’s in *Watson v Shankland* (1871) 10 M 142, 152. See also *Davis and Primrose Ltd v The Clyde Shipbuilding and Engineering Co Ltd* (1917) 56 SLR 24. Scots Law, unlike English Law, follows the civil law tradition in numerous instances.

¹⁰⁷ Chi ha eseguito un pagamento non dovuto ha diritto di ripetere ciò che ha pagato. Ha inoltre diritto ai frutti (820 e seguenti) e agli interessi (1284) dal giorno del pagamento, se chi lo ha ricevuto era in mala fede, oppure, se questi era in buona fede (1147), dal giorno della domanda (*Codice di procedura civile* art 163).

Therefore, recovery is founded entirely on the lack of an obligation to pay,¹⁰⁸ without the requirement for knowledge that the payment was undue, or that an agreement between the parties could not be fulfilled.¹⁰⁹ Similarly, because the restitutionary obligation requires nothing more than the lack of an original obligation to pay, it is not necessary to prove that the payment was made by mistake. Making a payment without reason provides a sufficient basis for the payment to be recovered. The exception is the *indebito soggettivo* whereby a person who involuntarily pays the debt of another may recover only if they made the payment by mistake (article 2036). Italian private law requires that payment must be made to the creditor, the creditor's agent, or to a person nominated or authorised by statute or by the court to receive it.¹¹⁰

An action for restitution of undue payment is an action for nullity (*azione di nullità*) arising from an absence of object. There is no need, given the objective nature of the nullity, to enquire into whether the debtor's error was excusable.¹¹¹

1 *Can the Injured Person be Subject to a Claim in Pacta Sunt Servanda?*

Restitution has no place within a valid contract under civil law because the purpose of performance of a valid contract is the discharge of the contracting parties' obligations. In the civil law tradition, contracts create obligations which performance of the contract discharges. In other words, performance is not carried out in order to receive the other contracting party's performance. In an action for undue payment, the purported debtor must prove that there was no object for the payment either because (1) the sum paid was not due — *causa solvendi*; or (2) because a different debt was owed from the one money was paid in settlement of, so that the debt and the payment lacked a valid connection. The purported creditor must prove, in its defence, that the

¹⁰⁸ The basis of an action in recovery solely on the absence of a duty to pay also occurs with respect to donations: see Civil Code (Italy) art 783.

¹⁰⁹ The Italian and Dutch Civil Codes differ in this respect from the German Civil Code.

¹¹⁰ This because in Italian law a third party may extinguish the debt of one person owed to another: Civil Code (Italy) art 1180. In Germany, the Civil Code itself requires mistake in order to support a restitutionary obligation (§ 814); the Roman law approach, which adds that it must also be proved that the payor was mistaken, is more common and appears in the systems of France, Germany, England, and the United States.

¹¹¹ Under the *azione di nullità* the only available remedy is a declaration that the contract is void. The revendicatory action is brought either separately or jointly to compel restitution. See E Moscati, 'Del Pagamento Dell'indebito' in A Scialoja and G Branca (eds), *Commentario al Codice Civile* (Zanichelli, 1981) 150; G Chiovenda, *Principi di Diritto Processuale* (Napoli, 1965); D Balzano, 'L'azione di Restituzione di un Immobile Alienato' (1953) 2 *Rivista Diritto Processuale* 233.

payment was made on the basis of a valid contractual relationship, since receiving the sum without entitlement gives rise to a duty under the Civil Code to restore the sum.¹¹²

The restitutionary action is therefore unavailable with respect to valid contracts.¹¹³ Restitutionary actions may, however, be understood as attempts to recover the performance provided under a lawful agreement for a failed purpose,¹¹⁴ the failure of the purpose creating the obligation to return what was given by way of performance.¹¹⁵ The purpose for which the performance is given must be known and accepted, either expressly or because it can be inferred from the circumstances of the case.

In the civil law tradition, the subject of the restitutionary claim is a performance. Enrichment does not refer only to sums of money and property, which are acquired by transfer. A performance can include the rendering of a service, and is anything of value that passes from one party to the other. Claims for specific restitution may be founded on an 'incontrovertible benefit' accruing from the transfer of money, goods or property, or from a thing that has been, or can be, transformed readily into money, or the provision of necessities such as inevitable (that is, necessary and useful) purchases or services.¹¹⁶

The basis for a claim in and an order for restitution is either that the purpose for which a performance was carried out has failed, or a service has been rendered in the erroneous belief that it was due. Parties who transfer money or performance in respect of failed obligations have discharged obligations (*causa solvendi*) which themselves have failed. The parties are therefore entitled to recover in *condictio indebiti* for the erroneous transfer or the erroneous performance carried out under the mistaken belief that it was due.

¹¹² Otherwise the creditor would be prejudiced since payment to an apparent creditor releases the debtor: see Civil Code (Italy) art 1189(2).

¹¹³ It is an 'obediential' as distinct from a contractual obligation. See D Reid, 'Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29(2) *The Journal of Legal History* 189; N MacCormick and J Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 *Proceedings of the Aristotelian Society, Supplementary Volumes* 59.

¹¹⁴ *Connelly v Simpson* 1994 SLT 1096; W J Stewart, *The Law of Restitution in Scotland* (W Green, 1992) 78. See also W J Stewart, 'Restitution: First Thoughts on Swaps in Scotland' (1992) *SLT (News)* 315; cf J A Dieckmann and R Evans-Jones, 'The Dark Side of *Connelly v Simpson*' (1995) *Juridical Review* 90, 100.

¹¹⁵ A M Bankton, *An Institute of the Laws of Scotland* (1751) vol 1; J Erskine, *An Institute of the Law of Scotland* (1773) vol 3.

¹¹⁶ Inevitable expenses have also been recognised by some common law writers as incontrovertible benefits. See further P Gallo, 'Unjust Enrichment: A Comparative Analysis' (1992) 40(2) *The American Journal of Comparative Law* 431.

2 *Does the Claimant's Action in Unjust Enrichment Require Activation under a Legal Obligation? The Subsidiary Action of Unjust Enrichment*

Should the SSN claim that our hypothetical traveller has been unjustly enriched by receiving goods and services to which he or she was not due, the SSN will need to identify an obligation in law through which to reclaim the provision of the goods or services. In Italian law, claims for unjust enrichment are constrained by the action's subsidiarity to other causes of action, by the court's strict requirement that all necessary elements be established, and by legal principle. The action for unjust enrichment is of an entirely subsidiary character in the sense that it can be brought only if no other remedies — contractual, tortious, or 'at law' — are available (article 2042 of the Civil Code). 'Law' under this provision of the Civil Code may refer to specific regional laws, or the national law, permitting recovery.¹¹⁷ A claim in tort will need to identify a tortfeasor and a victim; otherwise, the creditor and debtor must be bound by contractual obligations. To satisfy the elements of unjust enrichment the claimant must, where a lack of damage or any correlation between damage and enrichment precludes the possibility of obtaining restitution, establish by evidence that another party was enriched by an unjustified transfer of property, and that as a result of this the claimant suffered damages, for which there is no other specific remedy.¹¹⁸

Article 2054 is located in the *Libro Quarto* [Fourth Book] of the Italian Civil Code, entitled '*Delle obbligazioni*' [On the Law of Obligations]. It gives the damaged party an entitlement to receive compensation for damages from the party which bears the obligation. Like all obligations, that referred to in article 2054 has, under article 1173 of the Civil Code, a source in law, or in another action or instrument qualified to give rise to an obligation. Article 1173 of the Civil Code states:

¹¹⁷ For example, the Regional Law of Lombardy (Italy) art 16 (now abrogated).

¹¹⁸ This approach was first accepted by the French Supreme Court, *Affaire Boudier* Req 15 June 1982, DP 92, 1596; Civ, 12 May 1914, S 1918, 1, 41; Civ 2 March 1915, DP 1020, I, 102; then by the Italian Court of Cassation Turin, 10 December 1987 reported in (1898) *Giurisprudenza torinese* n° 39; Italian Court of Cassation Florence, 24 February 1898 reported in (1898) *Foro italiano I*, n° 321; and finally, in 1942, by the Italian Legislature in the Civil Code (Italy) art 2041. See also P Gallo, *L'arricchimento Senza Causa* (Padua, 1990) 1.

Obligations arise from contract (Code Civ 1321 etc), tort (Code Civ 2043 etc), or by any other action or instrument qualified to produce them (Code Civ 433 etc, 651, 2028 etc, 2033 etc, 2-41 etc.) in accordance with the legal system.¹¹⁹

The party seeking recovery must identify an obligation in law in order to activate article 2054 in its favour. The article suggests two possible approaches to interpretation. While on its face the article appears widely drawn — apart from tort and contract, ‘any action or instrument’ giving rise to an obligation may trigger it — the stricter approach is that, for the purposes of the interpretation of this article, the technical meaning of the word ‘obligation,’ as it operates in Italian law, applies. In that case obligations are characterised by privity and are relations purely between obligor and obligee. The obligor is a specified person who provides economic performance in favour of the obligee. Characteristically, obligations devolve onto particular persons (the obligor and obligee). The obligee addressed by the obligation may not be immediately ascertainable. This may be because the undertaking on behalf of the obligor is directed to a certain class of persons. However, even if the undertaking is to a class of persons, as in article 2054 (persons to whom damage is caused either personally or to their property), particular persons (capable of being ascertained) are nonetheless addressed.

The rights created in article 2054 are obligatory in nature and create liability only as between obligor and obligee. This is supported by reference to article 1218 of the Civil Code (the personal liability of the obligor entitling the obligee to compensation for non-performance), and article 2740 of the Civil Code (the property liability of the obligor entitling the unsatisfied obligee to subject the obligor to an action against his present and future goods). Given the courts’ interest in strictly construing the basis for recovery in enrichment, an action in tort probably only imports obligations as between tortfeasor and claimant. While a contract may be the source of an obligation for more than just the contracting parties, since it may contemplate, or, in effect, advantage third-party beneficiaries and provide collateral benefits, it is likely to be understood as restricting obligations to those between parties.

As stated above,¹²⁰ the system of universal health care in Italy is the creature of Law No 833 of 1978, and therefore of a national law. More significantly, by virtue of ASL’s being transformed into public enterprises, they assumed juridical personhood and entered into strictly legal relationships with citizens

¹¹⁹ Le obbligazioni derivano da contratto (Cod Civ 1321 e seguenti), da fatto illecito (Cod Civ 2043 e seguenti), o da ogni altro atto o fatto idoneo a produrle (Cod Civ 433 e seguenti, 651, 2028 e seguenti, 2033 e seguenti, 2041 e seguenti) in conformità dell’ordinamento giuridico.

¹²⁰ See heading ‘Delivering Health Care to Italian Citizens and Residents’ above.

who became clients of their services. The relationship between the SSN and the returned traveller, therefore, is potentially both legal and contractual, and therefore able to give rise to compensable obligations arising from findings of unjust enrichment.

However, article 2054 does not displace other rights and obligations which are founded elsewhere in law — for example, in the Constitution and Civil Code, which establish the entitlement to health care. The traveller's claim is therefore independent of other rights, and article 2054 does not exhaust the traveller's rights or entitlements.

C *The Principles Determining How Much the Unjustly Enriched Party Will Have to Disgorge*

1 *The Principle that Recovery Must Correspond with Loss*

Once the enrichment of one party at the expense of another is established, the matter of recovery must be addressed. Where the performance giving rise to the enrichment is a transfer (that is, of money, or property, goods, or things of certain value), one party's enrichment corresponds to another's loss, and it will be recoverable in full. Then the enriched person returns what he or she has obtained (to the extent that he or she is *lucratus*).

Barring factors which may justify a greater liability, the civil law tradition requires only what is actually taken to be returned. There may of course be situations where there is no correlation between what is lost and what is gained, such as when one party makes a profit by using another's property, or where a person profits by using another's rights and interests without actually depriving that other person of either. Where the restitution is grounded in unjust enrichment, a restitution of the entire profit is required.¹²¹ Where a service is provided, its value and the benefit it confers may differ. Then, the actual benefit represents the extent to which the party is *lucratus* and this benefit stands to be recovered.

Under article 2047 of the Civil Code, an action in equity obliges the court to consider the economic circumstances and conditions of the parties¹²² (including whether they are compulsorily or optionally insured either privately or under the social security system). These factors may reduce

¹²¹ The account of profits achieves this in common law jurisdictions; in Germany only when wrongful (*schuldhaft*) behaviour in making the profit is found will restitution of the entire amount be required: see s 812 of the German Civil Code.

¹²² Trib Macerata, 20 maggio 1986; *Responsabilità Civile e Previdenza*, 1987, 107.

liability. The Court of Cassation, referring explicitly to article 2054, held that non-patrimonial damages (damages for non-economic loss) must be awarded where liability is presumed and evidence of liability is lacking, as well as in circumstances which import a presumption of liability.¹²³

V THE PRINCIPLE OF *COMPENSATIO LUCRI CUM DAMNO*

Italian law recognises that an award of damages must be commensurate with loss, since it is compensatory, and prohibits greater recovery. Moreover, profits will be deducted from the recovery (*compensatio lucri cum damno*) where, for example, an insured victim further obtains an award of damages from a tortfeasor. The law, however, is far from settled, and commentators have observed that the operation of the rule of *compensatio lucri cum damno* is not always applied in cases concerning damages for personal injury in Italian courts.¹²⁴

With respect to insured victims, courts have not consistently applied limiting principles. In some cases *compensatio lucri cum damno* has been cited¹²⁵ to prevent victims drawing from their insurance policy what has been paid by the tortfeasor in damages; other cases have held that the principle should not apply.¹²⁶ This divided approach appears to be based on the sharp distinction that is drawn in the judgments between private insurance and public social security payments and services. The latter do not attract the limiting principles. The sums or services offered by the social security system cannot be calculated in the recovery because they are obligatory and must be given in any case.¹²⁷

Where social security provides the insurance to the victim, the obligation arising from the health system or social pension system is based on the law, while the obligation of recovery is based on tort. Italian social security insurance schemes provide services to their members who are injured and who are already members or who become members upon experiencing an

¹²³ Italian Court of Cassation, decisions n° 7281 and 7283, 12 May 2003, [2003] DR 713; Italian Court of Cassation decision n° 7282, 17 May 2003, [2003] *Giustizia civile* I, 1480 et seq. The text of the decisions referred to arts 2050–54 of the Italian Civil Code.

¹²⁴ M Ferrari, *Lo Compensatio Lucri Cum Damno: Come Utile Strumento di Equa Riparazione del Damno* (Guiffè, 2008).

¹²⁵ Italian Court of Cassation, decision n° 9724, 7 October 1997.

¹²⁶ Italian Court of Cassation, decision n° 115, 10 February 1999.

¹²⁷ Italian Court of Cassation, decision n° 6228, 1 July 1996 reported in (1996) *Riv Giur Enel* 467.

accident. The SSN is governed by Legislative Decree No 229 of 19 June 1999. Under it, local hospitals are obliged to give assistance to all in need.¹²⁸ The Constitutional guarantee of health care also means that it prevails in the case of a conflict with other laws, or legal principles.

VI CONCLUSION

Understanding the nature and implications of actions in recovery by health service providers against insurers subrogated to the insured is an exercise in foreign law, comparative law, and private international law. Care must be taken to understand the policy and structure of health care delivery to identify the proper party (claimant) and to determine the laws by which it is bound. This is especially the case where the system of health care delivery is a regionally devolved one in a federal system of funding — as it is in Italy — such that national and regional laws, and individual agreements, need to be identified and weighed. The quantum and extent of benefits provided, the motivation of the claimant to recover, and the potential for recovery will assume significance in the financial and political realities of the state. Moreover, health care and unemployment benefits, as well as others, assume a further significance in the Constitution. As a result, an assessment of the individual justiciability of those rights in the jurisprudence of the Constitutional Court, and the weight of the Court's holdings in a civil (as opposed to common) law system, requires an understanding of how social rights as guarantees are assessed against executive policy in the context of budgetary constraint. It is further necessary to have a thorough understanding of laws relating to recovery in personal injury matters generally, such as the principles governing damages payments and the particular form of actions in unjust enrichment in civil law systems. Finally, a test for the limitation of recovery needs to be developed based on whether recovery in the relevant jurisdictions covers the same detriment to the injured traveller.

¹²⁸ See art 32 of the Italian Constitution; Italian Court of Cassation (Civil), decision n° 1954, 10 March 1990 reported in (1995) Crit Pen n° 50.