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PANDEMY, LAWMAKERS AND ECONONOMICAL FREEDOM: AN USEFUL LESSON FOR THE FUTURE

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PRESENTATION:

WHY I WAS MOVED TO THIS WORK

Civil liability is the central theme of this paper, the aim of which is to highlight and investigate the important role that this institution has been having in modern legal systems, especially in relation to two important events that have changed, perhaps forever, the course of the history: globalization and the Covid-19 pandemic.

These two phenomena have had a major impact on the world economy and society, and have forced legislators and lawyers to rethink some important legal institutions. These changes have become necessary in order to adapt the responses of legal systems to the pressing changes imposed by an increasingly globalized world and to a pandemic capable of causing the strongest and fastest decline in international trade flows in modern history.

The chosen theme is particularly complex and leads us to analyse the relation between economics and law. In fact, the first part will deal with the rapid and inexorable erosion of State power due to the so-called *globalization*, which is often referred to in connection with the crisis or even with the overcoming of the State institution. According to many, the reasons of this deep crisis are to be found in the almost uncontested rise of the market and its rules, which escape state law and have gradually taken its place overtime.

The second part of the paper, on the other hand, will introduce the institution of civil liability by analysing its genesis and the functions that have historically characterised this important legal institution. Afterwards, we will analyse the elements characterising civil liability and, subsequently, the gaps and most controversial aspects of the legislation in question, which have given rise to doctrinal and jurisprudential debates that are still unresolved today.

There will also be room for a brief comparative analysis of the institution, through the historical and legal investigation of *Tors Law* typical of *common law* systems.

Finally, we will focus on the many cases of civil liability present in the legal system, pointing out, first of all, the difference between contractual and extra-contractual liability. Subsequently, all the special cases of civil liability will be explained, institutions between objective liability and aggravated fault.

In conclusion, the last chapter will deal with the evolution of medical liability in recent years and the latest developments related to the Covid-19 pandemic.

CHAPTER I

1.1 GLOBALIZATION AND EROSION OF STATES SOVEREIGNTY

It is undeniable that the period of economic and financial transition that is raging across the Occident has brought with it important repercussions not only on the purely economic level but also on the legal level, where the State has often had to intervene with measures aimed at tempering the unpleasant consequences deriving from an economic crisis generated by unbridled and deregulated globalization.

Indeed, the socio-economic changes that have taken place over the last thirty years have radically changed, perhaps forever, the production process and the way of doing business, the founding values of society and the family, and the concept and role of the State. For years now, it has been impossible to address these issues without looking at them from the point of view of their transformation, which includes various elements: the role of technology, new markets, demography, labour law and, above all, the economic crisis.

These changes have severely tested the entire legal, economic and social system of the Occidental world, opening up a profound reflection on issues that do not only concern the political-ideological sphere of society, but also concrete and opposing protection needs. First and foremost, the concept of Sovereignty and, more generally, the role of the State within the dynamics of globalization.

The question of sovereignty, in fact, although very old, remains absolutely current and more central than ever.

Nowadays, sovereignty, compared to the past, has lost its role as the defining element of the State, as it is being progressively eroded by two, in some way opposite, phenomena: the inevitable inclusion of state entities in inter-state organisations that are now considered necessary on the international scene in order to strengthen the presence of the State and incisiveness of the political and economic action of the individual state in the context of a globalised world[1]; the pressures coming from within states, where often smaller political territorial entities take over, sometimes in antagonistic conflict with them and which states find difficult to control.

[1] G. DE VERGOTTINI, *La persistente sovranità*, in Consulta Online, 2020.

The doctrine oscillates between the extreme thesis of the disappearance of the state due to globalization and the thesis that globalization does not affect the permanence of the state form. Others, in an intermediate position, argue for the simple progressive transformation of the state by globalization.

Many observers believe, in fact, that the crisis of the State-institution has increased due to the so-called *globalization* that is often referred to in connection with the crisis or even with the overcoming of the State institution. Very briefly, globalization would imply the overcoming of the traditional terms of reference of sovereignty and in particular the abandonment of state territory as a space of law and sovereignty[2].

In particular, the market would escape state law, being governed mainly by rules of different origins, public and private, transposed by the community of economic operators. The contracts stipulated between the latter would constitute the dynamic legal substratum that would legitimise and regulate exchanges between subjects of different cultures and belonging, capable of overcoming the limits set by concepts such as borders and sovereignty[3].

Therefore, the State, is losing its role in favour of infra-state political entities, private actors, international and supranational entities. The accentuation of the role of political autonomies within the state and the pressure of communities in search of a guarantee of their own identity, or even oriented towards secession, contribute to reducing the weight of traditional 'internal' sovereignty. The assumption of increasingly important tasks by private actors as protagonists in the management of the international market and the attribution of functions to international and supranational bodies would make evident the tendency to overcome one of the foundations of "external" sovereignty given by the total dominion of the state over its territory, which is now exposed to the application of rules that are determined by decision-making centres outside the state due to the intervening globalisation[4].

The overbearing rise to the top of the international scene of *subjects other than states* represents, for all intents and purposes, a heavy limitation on their sovereignty. Today, politicians, individuals and enterprises seem to operate in contexts that are well outside the state and are often in conflict with it.

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[2] In tal senso B BADIE., *La fine dei territori. Saggio sul disordine internazionale e sulla utilità sociale del rispetto* (transl. it.), Trieste, 1996, 33 ss.; N. IRTI, *Norma e luoghi. Problemi del geo-diritto*, Roma-Bari, 2001, 65 ss.; P. GROSSI, *Globalizzazione, diritti, scienza giuridica*, *Foro Italiano*, 2002, V, 152 ss;

[3] F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, 2005, 30 ss.

[4] P. MANZINI, F. CASOLARI, A. LOLLINI, *Casi difficili: libertà fondamentali e globalizzazione nella giurisprudenza europea*, Torino, 2010;

Indeed, while the sphere of politics was traditionally considered to coincide with the nation state, today it is more realistic to note that the equation politics-state is not always valid.

Lately, politics has been partially emancipating by the state and some subjects are showing that they can play a role of their own beyond the state and even against it[5].

In addition, individuals are able to emancipate themselves from the state-imposed system by resorting to the possibilities offered to them by technological innovation, enabling them to operate with ease and a certain degree of speed in transnational contexts, 'skipping' the state and its barriers.

Nowadays big firms take a leading role with regards to the creation of transnational markets or communications networks that are drawn into its orbit. In fact, large companies are able to impose their own rules in the territory and towards subjects and interests within the borders of the nation state.

Banks and international investment funds are able, for example, to influence the 'economic sovereignty' of states, while international agencies, including non-governmental ones, prove to be suitable for addressing needs common to several states, establishing direct contacts with subjects operating within state territory and, at the same time, being able to act without being impeded by territorial borders.

1.2 CULTURAL APPROACHES TO THE PLAGUE AND THEIR CONSEQUENCES IN THE DECISION OF THE LAWMAKERS

Globalization with its incessant transnational flows of people, financial resources, goods, information and culture have recently increased dramatically, bringing substantial changes in the world[6].

Given the not always positive effects on the global economy and the global welfare that the phenomenon has generated, it gave rise to two different currents of thought that have consequently produced much debates and discussions in various disciplines from different points of view.

[5] G. DE VERGOTTINI, cit., p. 15.

[6] G. RITZER - E. MALONE, *Globalization theory: Lessons from the exportation of McDonaldization and the new means of consumption*, in G. Ritzer (Ed.), Explorations in the sociology of consumption, 160180 , Sage Publications, Thousand Oaks, California, 2001.

Indeed, globalization is a multidimensional phenomenon that includes not only economic components but also cultural, ideological, political and other similar aspects, and therefore needs to be addressed with a multidisciplinary approach capable to consider every possible repercussion on the economy, society, politics and international relations[7].

However, the impact of globalization on societies and their cultures has rarely been faced and studied. In fact, in an increasingly borderless world influenced by the globalization of economies, the preservation of cultural diversity produces contrary and controversial reactions. Indeed, there are those who have argued that the changes and potential losses imposed by globalization on local and traditional cultures, including those that extend to cultural differences, can be damaging and destructive, but can also lead to new prospective opportunities[8].

Globalization is a process that also affects the world of law and legal operators. In the face of the sudden changes to which social reality is subject, it is the responsibility of lawyers to guide the law in this era of great transformation, so that it can fully become an instrument capable of finding answers to the new needs emerging from a society in constant mutation.

For example, the challenges launched by the world of work, which is facing a profound upheaval linked to the fact that production is increasingly linked to market logic rather than to the employer-employee relationship based on a system of reciprocal rights and mutual duties. It is for this reason that the entrepreneurial world, faced with globalization, which has brought about the advent of ruthless competition on the international market and, consequently, the need to reduce production costs, has asked and is clamouring for reforms that can in some way support this inexorable and irremediable change. Meanwhile workers competing with cheap labour cost from other countries or with the phenomena of so-called delocalisation are clamouring for more stability and higher wages.

Moreover, in recent decades the institutional framework for public intervention in the economy has changed significantly, especially under the impetus of European integration and the globalization of

[7] A. HASSI G. STORTI, *Globalization and Culture: The Three H Scenarios***,** in https://www.intechopen.com/books/globalization-approaches-to-diversity/globalization-and-culture-the-three-h-scenarios.

[8] T. COWEN, Creative Destruction: How Globalization is Changing the World's Cultures, Princeton University Press, Princeton, New Jersey, 2002.

trade. It is self-evident, therefore, that the globalisation of markets, as places of bargaining, is also and above all producing significant effects on the legal level[9].

For this reason a different model of public action in the market has gradually emerged in legislation and practice: especially since the 1980s, a new form of public intervention in the economy, the *'regulation', has been* added to the classic '*planning', and* this has also had repercussions on the role of politics and the state in the economy.

More specifically, planning, which is carried out by the main political players, the Government and Parliament, starts from a set of statistical and economic data to arrive at the definition of general objectives and the best strategies to achieve them[10]. Therefore, planning is an active state intervention to restore economic and social balance, aimed at taking care of general interests on the basis of precise economic and financial evidence, both through incentives to enterprises and the production of goods and services through the public enterprises available.

A different procedure is that of administrative regulation, currently practised in modern capitalist economic systems, by which the State's activity assumes a subsidiary character with respect to private autonomy, towards which the State body undertakes to guarantee certain super-individual interests, such as safety, the environment, consumer protection and the right to information.

The globalization phenomenon, as already highlighted above, has deeply affected the theory of the sources of law, eroding that power reserved to the State of producing norms inherent to market exchanges. It is undeniable that today the law is no longer exclusively linked to the purely internal dimension of the State, whose main source is rules and principles in constant evolution through practice, doctrine and jurisprudence, but that it is also sensitive to external agents whose existence is due to globalization[11].

Currently the automatic and direct consequence of this regulatory power enjoyed by the markets is a national and supranational situation of incessant emergency legislation aimed *primarily* at

[9] M. R. FERRARESE, *Mercati e globalizzazione. Gli incerti cammini del diritto*, in Politica del diritto n. 3/1998, Il Mulino, Bologna, p. 411.
[10] M. CARABBA, *Programmazione*, in Dig. disc. publ., vol. XII, 1997, par. 1.
[11] F. CARPI, *Giustizia e processo. Una conversazione con Andrés De La Oliva Santos a cura di Vincenzo Varano,* in Rivista Trimestrale di Diritto e Procedura Civile, fasc.2, 01.06.2019, p. 561.

safeguarding the interests of banks and businesses, those strongest players in the economic and financial system[12].

The law, in fact, as a fundamental element of social living, cannot be static and immutable, heedless of the new needs of global society, also and above all in view of the fact that subjects have the possibility of coming into contact with different normative systems and this has led to a *de-absolutization* and a *"de-sacralisation"* of the normative references customary to their place of origin[13] .

However, such a drift has been strongly criticised by authoritative doctrine, according to which the role of law cannot be downgraded to that of mere interpreter and mirror of a pre-existing and pre-constituted order such as the market, but rather the law, depending on political decisions, must be the instrument through which legal institutions are drawn and internal dynamics are regulated so as to constitute the legal and social framework of the market[14].

1.3 HUMAN RIGHTS IN A GLOBALISED WORLD

In a context such as the one described above, if on the one hand the State and the institutional figures representing it have gradually lost their primacy in favour of third parties, at the same time it is undeniable that globalization has also had obvious repercussions on the human rights front. This process has seen a substantial acceleration due to the pandemic caused by the Covid-19 virus, which has *obtrusively* led to a severe limitation of internationally recognised human rights in order to reduce the impact of the virus on the whole community.

However, it should be recalled that in a contemporary age distorted by such events, human rights are characterised by being the backbone of a morality, which legitimises public ethics by constituting the constitutive substratum of legal-political organizations[15].

They represent the most relevant and common system of values of the last two centuries: in fact, they outline those aspects that are constitutive of human dignity, referring to the essential dimension of the development of the person, in its basic needs. They are the expression of the Universal Declaration of

[12] D. GRANATA, *Gli effetti. Della globalizzazione: the global administrative law tra luci e ombre,* in *Ratio Juris*, 2019.
[13] M.R. FERRARESE, *Le istituzioni della globalizzazione,* Il Mulino, Bologna, 2000
[14] N. IRTI, *L'ordine giuridico del mercato*, Roma-Bari, 2003, pp. 10 e ss.
[15] S. CORTELLESSA, *Diritti umani nell'era della globalizzazione,* in Civil and Commercial Law.

Human Rights of December 1948, which gave rise to the practice of rights that has profoundly marked current national and international legal experience[16]. Human rights are justified claims of universal validity concerning all people that require acts of respect and protection.

However it is fair to mention, that the legal affirmation of these values is constantly being called into question and is largely unrealised today, especially in view of the fact that the prerequisite for their full realisation is the democratic rule of law. The development of an efficient legal system, the commitment to the separation of powers and the creation of a recognised and independent judiciary system are the focus of the full and final enshrinement of human rights.

These conditions are now strongly challenged by the globalized world that is facing the Covid-19 emergency and, therefore, fundamental social rights take on a new dimension. Extreme poverty cannot be reconciled with human dignity. In many nations, entire sections of the population are excluded from progress and pushed to the margins of society.

For this reason a new season of reform, based on the principles of responsibility, solidarity and the right to participate, must be placed at the heart of the political debate.

CHAPTER II

2.1 ROLE OF CIVIL LIABILITY AND MULTIPLICATION OF ITS FUNCTIONS

The discipline of civil liability has always constituted the system's response to the various protection needs that have emerged in civil society in relation to new and varied types of damage. Indeed, the scope of the non-contractual liability mechanism has been increasingly broadened to the point of assigning it ever greater and multiple functions, which are considerably innovative compared to the sole and traditional tasks of sanctioning and preventing harmful behaviour, on the one hand, and repairing its harmful consequences, on the other[17].

Therefore civil liability falls within the broader category of legal liability, since it is an institution composed of rules which have the task of identifying the party required to bear the cost of the injury

[16] Universal Declaration of Human Rights adopted by the United Nations General Assembly at its third session on 10 December 1948 in Paris by resolution 219077A.
[17] P. PACILEO, *Civil liability and new technologies between comparison and best practices*, in *www.comparazionedirittocivile.it*.

to another person's interest, which is substantiated by a restorative obligation imposed on the liable party.

Its origin is commonly traced back to the Roman plebiscite of the 3rd century B.C. called *Lex Aquilia de damno* (*iniuria dato*), which introduced *ex-delicto* liability into Roman law, the principle by virtue of which injury to an absolute subjective right or "*erga omnes*", such as the right to life, personal rights, property and real rights, obliges the author of the injury to compensate for pecuniary and non-pecuniary damage. The basis of Aquilian liability is the coexistence principle of *neminem laedere*, a fundamental bastion present in philosophical and legal thought since the dawn of humanity.

However, the role of non-contractual offences has changed over the years according to the different needs and the different political and legal concepts that have developed within civil society. As above analysed, this institution has been entrusted with three main tasks, now conceived alternatively, now concurrently: sanction, prevention and reparation[18].

Indeed, liberal societies at the beginning of the twentieth century witnessed the accentuation of the sanctioning function, which, connected to the theory of private autonomy, gave rise to a conception of the institution as an instrument for repressing conduct that was obstructive and harmful to the economic freedom of others[19]. Subsequently, the consumer society, with mass production and distribution, the acceleration of technology, the growing socialisation of risk, the intensification of socially "inevitable" activities, but with widespread potential harm, led to a substantial paradigm shift, which determined the failure of the perspective of the prevention of *Torts* and the affirmation of a third model. The latter, putting aside the purposes of *punishment* and *deterrence*, correctly focused attention on *compensation*, by virtue of the process defined as "socialisation of damage"[20].

Thus, globalization in all legal systems of Western societies, both *common law* and *civil law*, even if with different techniques, has led to the abandonment of the interpretative scheme based on *culpa* and *injuria* and the adoption of a new scheme based on the *Torts-Insurance* binomial with objective or semi-objective liability formulas.

Nowadays compensation in the Italian legal system, has a purely reparatory function, restoring the situation *ex ante* and eliminating the prejudice suffered by the injured party. In doctrine, however, the

[18] G. ALPA - M. BESSONE, *La responsabilità civile,* II, Milan, 1980, pp.8 ss.
[19] G. CALABRESI, *The Costs of Accidents*, New York-London, 1970, pp. 68 ss.
[20] P.G. MONATERI, *La responsabilità civile*, in *Tratt. dir. civ. dir. da R. Sacco*, Turin, 1998, pp. 19 ss.

question has long been raised as to what is the legally relevant position protected by the institution in question, whether only subjective rights or also legitimate interests. With the historic sentence no. 500/99, the Supreme Court of Cassation, in its United Sections, opened up the possibility of compensating legitimate interests, stating that *"the injury of a legitimate interest, like that of a subjective right or other legally relevant interest (not merely factual but), falls within the scope of civil liability only for the purpose of classifying the damage as unjust."*

However, the Court points out, "*This is certainly not equivalent to affirming the indiscriminate compensation of legitimate interests as a general category. Compensation can in fact be awarded only if the unlawful activity of the public authority has caused damage to the interest in life to which the legitimate interest, according to the specific features of its content, is actually linked, and which is worthy of protection according to the law."*

In this way, the injury of the legitimate interest becomes a necessary condition, but not sufficient on its own, for access to the protection of damages under Article 2043 of the Civil Code, since *"it is also necessary that, as a result of the illegitimate and culpable activity of the Public Administration, the interest in the asset of life to which the legitimate interest is related is injured, and that this interest in the asset is worthy of protection in the light of the positive legal system"*[21].

2.2 CIVIL LIABILITY IN THE ITALIAN LEGAL SYSTEM

The discipline of non-contractual liability, or aquilian liability, in Italy is provided and regulated by Article 2043 of the Civil Code and is configured as that form of liability resulting from the violation of an obligation under private law, falling within the sphere of relations between private individuals, and which gives rise to the obligation on the part of the damaging party to compensate for the damage caused by another party.

However, in order for aquilian liability to arise, is necessary the coexistence of four prerequisites: he objective element, consisting of the conduct, the damaging event and the material causal link between the conduct and the damaging event; the subjective element, which may be represented indiscriminately by wilful misconduct or negligence; the unlawfulness of the fact, understood as the absence of causes of justification that exclude the unlawfulness of the unlawful conduct; the existence of a concrete and current financial or non-financial prejudice for the injured party.

[21] United Sections of the Court of Cassation in judgment no. 500 deposited on 22 July 2000.

First of all, the harmful event must be identified in an active or commissive conduct of the agent, from which damage to others derives. Conversely, the author of a merely omissive conduct can be called to answer for his conduct, if damage to third parties derives therefrom, only in the hypothesis that the law requires him to take action to avoid causing the harmful event.

Not every harmful event, however, entitles the person who suffers the injury to compensation, since the damage must be qualified as unfair and therefore be *contra ius* and *not iure datum*[22].

Finally, the harmful event must be the immediate and direct consequence of the agent's wilful or negligent act, so that there must be an etiological link between the action or omission and the harmful event. Causality, must be understood not in a material sense, but in a legal sense, in the sense that the causal link exists when, on the basis of a judgment of *ex ante* probability and a criterion of statistical regularity, the harmful event is the foreseeable and normal consequence of a given action or omission[23].

On the other hand, with regards to the subjective element, the general liability model outlined in Article 2043 of the Civil Code is therefore a model of subjective liability, based on the principle of culpability, given that the damaging party must always be motivated by a psychological factor, which may indifferently consist of wilful misconduct or negligence.

Malicious intent occurs when the harmful or dangerous event is foreseen and intended by the agent as a consequence of his action or omission or, in any event, even though it is not "intended", the agent is aware of the fact that his conduct is likely to result in a certain harmful event and nevertheless engages in the conduct, accepting the risk thereof (so-called possible malice).

On the other hand, fault occurs when the event, even if foreseen, is not intended by the agent and occurs as a result of negligence, imprudence or inexperience or failure to comply with laws, regulations, orders or disciplines.

However, in our legal system there are cases of strict liability that link the obligation to pay compensation not to conduct intentionally intended by the subject but to the breach by the latter of particular obligations linked to particular circumstances expressly indicated by law. More specifically, the legislator has identified a series of situations in which a person may be held liable for

[22] G. ALPA - M. BESSONE, *La responsabilità civile*, II, Milan, 1980, pp.8 ss.
[23] *Ibidem.*

a certain damaging event even if such event is not the consequence of his conduct characterised by wilful misconduct or negligence.

The origins of strict liability are linked to industrial progress and the multiplication of dangerous activities that create the need to allocate the risks of harmful events connected with the exercise of these activities. In essence, it is a form of liability that is able to mitigate and calm the distorting effects of economic progress by making individuals responsible for activities that may involve risks to the community.

The category of strict liability includes those liability cases based on a particular relationship between the person and a certain thing, or between the person and a certain activity, such as liability for the exercise of dangerous activities and also liability for damage caused by things in custody, animals, the ruin of a building or the circulation of vehicles.

In all the cases indicated, however, the legislator admits that the person may be freed from liability by offering proof of discharge, often identified by the legislator as a fortuitous event.

On the other hand, as regards the violation of the obligation, liability is contractual or extra-contractual depending on whether the violation concerns a previous legal obligation or the general precept of *neminem laedere*. Consequently, civil liability, in the proper sense, consists of non-contractual liability and therefore, that liability arising from an unlawful act which the Civil Code deals with in articles 2043-2059 and various other extra-codictic rules that provide for further typical and special cases of liability.

Below, we will analyse at the ways in which tort law has evolved in our legal system in order to meet the new and different requirements arising from globalization. The continuation of this chapter will focus on the evolution of liability in *common law* systems and the prospects of developing international tort law.

2.3 COMPARATIVE IDEAS: THE TORT LAW IN THE LEGAL EXPERIENCE OF THE COMMON LAW

In *common law systems*,, the institution of non-contractual tort, unlike the models of continental Europe, has not had direct links with the Roman experience, having evolved from certain typical cases. In fact, the evolution of the so-called *tort law* has been strongly influenced by the *writ* system,

and therefore by the mechanism of the formulation of a typical action for each harmful case produced in reality[24].

For these reasons, the current system of Anglo-Saxon *tort law is* based on the systematic framing of each case in one of the traditional typical torts such as *conversion, nuissance, defamation* that have been consolidated in practice. However, it recognises the authority of the courts to adapt the aforementioned facts to the changed economic and social conditions and, therefore, to rule on the obligation to pay damages even in respect of conduct that has not been sanctioned up to that point.

The *common law* tort model of non-contractual offense derives from the *writ of trespass*, which is essentially intended to punish the unlawful interference of a person with the personal sphere or property of others. Therefore, the *trespass,* was originally criminal in nature, since it was considered that actions of the type described above had the effect first of all of disturbing the common peace and the sanction was represented by a penalty.

Successively, thanks to the institution of the *action of trespass on the case*, was the obligation of the damaging party to pay a sum of money to the injured party established. The result was a purely civil law instrument with a prevalent compensation function and not exclusively a sanctioning function towards the agent. Therefore over the centuries, an essentially typical system of intentional torts has developed, such as, to name a few, *assault, battery, false imprisonment, malicious prosecution* and non-intentional torts.

Among the latter, an important role is still played today by the *tort of negligence,* which a part of comparative doctrine considers to be the counterpart of the general provisions derived from the Lex Aquilia[25]. This typical type of *tort* became widespread in practice in the nineteenth century, especially following the growing industrialisation of the economy and the emergence of numerous activities aimed at the public.

A number of prerequisites must be met in order for *the tort of negligence* to arise: the existence of a duty of *care, in the* sense that a specific duty of due diligence must be imposed on the damaging

[24] The *writ* was an order from the sovereign, drawn up in the form of a letter, in Latin, bearing the royal seal, materially prepared by the Chancellery. The *writ* is the instrument necessary for the protection of the right: a subjective right can be said to exist insofar as there is a *writ* that makes it actionable. For further details see *U. MATTEI, Common Law. Il diritto anglo-americano,* Trattato di diritto Comparato, Torino, Giappichelli, 1992.

[25] P.G. MONATERI, *Responsabilità. Civile in diritto comparato,* in Dig. IV, disc. piv. Sez. civ., vol. XVII, Turin, 1998, p. 17.

party to act in accordance with normal diligence towards all potential damaged parties; the breach of this *duty of care; the* damage; the causal connection between the breach of the duty of care and the damage, in the sense that the latter must be a consequence reasonably attributable to the wrongful conduct of the damaging party; the inexistence of causes of justification or contributory negligence on the part of the damaged party[26].

One of the peculiarities of the *tort of negligence* is the concept of *duty of care* which significantly differentiates the case at common law from the cases of aquilian liability present in *civil law* systems. Indeed, while in the continental area, the investigation is primarily aimed at verifying the existence of a legally protected situation of which the injured party is the owner and which has been harmed by the damaging party, in English *common law, on the* other hand, the first step to be taken when ascertaining the defendant's liability is to establish the existence of a specific duty of care incumbent on the latter[27].

The question is fairly relevant, since it overturns the way of setting up the legal reasoning and the construction of the tort case itself, depending on whether the preliminary ascertainment of the right or the obligation of the aforementioned elements is preferred. Indeed, in English law, the starting point is the need to declare the presence of a *duty of care*, and this will lead to greater attention being paid to the position and arguments of the alleged injurer, but above all extreme caution will be used in excessively expanding the number of duties of care.

It follows that the various cases of *duty of care* have been defined little by little, through the rules deriving from judicial precedents, the practices in force in the various sectors, as well as practical experience, which have outlined their contours and fields of application. The duty of *care,* according to doctrine and case law, must *first of all* be foreseeable, in the sense that this duty of care is configured only if it is quite evident that damage may result from the conduct in question; active, since as a rule, the duty of care is not related to negative obligations not to do, except in the case of measures aimed primarily at the safety of others; connected to the protection of legal interests of particular importance; it must be aimed at protecting certain categories of persons and not generically the entire community.

[26] P. GALLO, *Tipicità ed atipicità dell'illecito in Common Law*, in *Atlante di diritto comparato,* p. 148.
[27] P.G. MONATERI, *cited above,* p. 17.

Anyway, it is for the court to assess, on the basis of the above criteria, whether or not there is a duty of care on the part of the damaging party and whether or not it has been breached. This judgement is based on a comparison between the *standard of* care normally required in the performance of a certain activity, the so-called diligence of the average *man* or *reasonable man*, and the actual conduct of the perpetrator of the damage. If the plaintiff proves that he has suffered damage as a result of a breach of a *standard of* care, he is *ipso jure* obliged to pay damages.

The Anglo-Saxon *law of torts* also provides for hypotheses of so-called strict liability. In this case too, the most obvious difference from continental systems is the absence of a legislative provision establishing, in a general sense, the liability of a person for damage caused by persons or things under his supervision and dependent on him, so much so that the institution in question is the result of a long and tortuous process of jurisprudential elaboration, which has led to conclusions very similar to those of continental law. We speak, in fact, of *strict* liability of the owner for damage caused by things present on his property as well as for damage caused by domestic animals[28].

2.4 NEW TECHNOLOGIES AND GLOBALIZATION: THE NECESSARY CONSTITUTION OF SUPRANATIONAL RULES OF CIVIL LIABILITY

The multiple and radical innovations caused by globalisation and technological development, which in the last thirty years have overwhelmingly affected contemporary socio-economic reality, produce development models that are difficult to fit into predetermined legal schemes and models.

Digital economy, *web economy*, *knowledge economy* are now commonly used expressions, capable of defining the transformations that, investing the economic-productive processes and the structure of domestic and international markets, impose a rethinking of the pre-existing legal structures and a greater development of the interpretation and comparison of the rules governing the contractual areas.

Indeed, the *new economy is* characterized by the fact that it produces innovative goods and services with an essentially immaterial content that are placed on the market through the Internet and without the mediation of complex and often inefficient bureaucratic structures.

[28] G. ALPA - M.J. BONELL D. CORAPI L. MOCCIA, *Diritto Privato Comparato Istituti e problemi* di - Editori Laterza & Figli, 2001.

This is why the interpreter of the law is confronted with phenomena and realities that know no territorial boundaries, since the globalization of the market for services and information has led to the overcoming of the legal space of a given system and imposes the search for applicable rules in a supra- or transnational key, with a view to an inevitable transition from statehood to the universality of law[29].

In this context, a comparative approach is essential to the study of problems and the solutions of disputes which may arise in a globalized and networked society and which, more often than not, involve a plurality of legal systems, thus making the adoption of rules and the possibility of obtaining effective protection rather complicated. Therefore, modest legal problems cannot be solved by analysing them within the limits set by state legislation, which makes it essential to approximate the laws of individual states and eliminate the differences between the various systems[30].

This is especially in view of the fact that the protagonists of globalisation are not always the States, but more often the multinational companies, and this can produce even disruptive effects on the political and legal structures of the countries themselves, sometimes even depriving them of their laws. This is why, as analysed in the first chapter, some authors maintain that the principle of the statehood of law and the principle of nationality within individual states is nearing its end[31].

Among the supporters of this thesis, the need for a unified legal approach to the phenomenon of globalisation, the crisis in the role of the nation states and the inevitable ineffectiveness of state regulation in the field of electronic commerce emerge strongly.

Be careful, however, as the difficulties highlighted above do not translate into an absence of applicable rules, but rather into the complexity of the process of identifying the regulatory regime to be adopted. In fact, on the subject of torts and delicts, Article 62 of Law 218/1995 applies, according to which "*liability for a tort or delict is governed by the law of the State in which the event occurred*".

This is why many people are calling for a specific supranational law, an original legal system, independent of other legal systems and therefore new in relation to them, which, by creating a

[29] *S.* SICA, *Commercio. Elettronico e categorie civilistiche:un'introduzione*, in S. SICA and P.. STANZIONE (ed.), *Commercio elettronico. E categorie civilistiche*, p. 5.
[30] P. PACILEO, *Civil liability and new technologies between comparison and best practices*, in *www.comparazionedirittocivile.it*, p. 16.
[31] F. GALGANO, *Preface*, in V. RICCIUTO - N. ZORZI (eds.), *Il contratto telematico*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia, edited* by F. GALGANO, Padova, 2002, p. XIII.

uniform framework protected from the interference of any state legal system, would ensure legal certainty in the international fields of trade, transport, credit and finance[32].

CHAPTER III

3.1 THE MAIN CASES OF CIVIL LIABILITY IN THE ITALIAN LEGAL SYSTEM

In view of the above, we can say, as a first approximation, that non-contractual liability or liability for an unlawful act, also known as aquilian liability, is the liability of a person who causes unjust damage to others, and is therefore obliged to pay compensation for the damage caused. This liability is governed by articles 2043 e ss. of the civil code and by various other extra-codictic rules that provide for further typical and special cases of liability, such as articles 114 e ss. of the consumer code that provide for liability for damage arising from defective products.

In this article we shall only consider the facts of the code, on which we must first make some general considerations. First of all, it must be said that it is article 1173 of the Civil Code that defines the wrongful act as a source of obligation. From the causation of an unlawful act, an act that in various ways damages a legally protected interest belonging to a person, the obligation to compensate the injured party arises for its author or for the person to whom the harmful act is attributable, on the basis of the aforementioned criteria of attribution.

However, liability may be contractual or non-contractual. In fact, if the latter, it finds its source in an unlawful act, contractual liability derives from non-performance, inexact performance and late performance of a pre-existing obligation, whatever its source, clearly excluding unlawful act, and is distinguished from non-contractual liability which derives from the violation of a general obligation not to harm anyone without it being possible to identify an obligation before the violation[33].

The term contractual is improper in that it does not refer exclusively to a contract but to other sources of obligation other than torts, thus giving rise to contractual liability, in addition to the non-performance of obligations arising from contracts, that of obligations arising from the law and from

[32] F. SARZANA DI S. IPPOLITO, *Profili giuridici dei pagamenti elettronici*, in C. SARZANA DI S. IPPOLITO - F. SARZANA DI S. IPPOLITO, *Profili giuridici del commercio via Internet*, Milan, 1999, p. 164.
[33] A. CONCAS, *La responsabilità contrattuale ed extracontrattuale*, in diritto.it, 2014.

other atypical sources, such as debt, unjust enrichment, business management, alimony and social contact[34] .

In fulfilment of the obligation, the obligor must conduct itself in a manner consistent with the diligence of a good family man, so as not to incur contractual liability. If the obligor is negligent, it will certainly be guilty of non-performance, defective performance or late performance and will have to pay damages to the aggrieved party.

Moreover, if the obligation relates to the professional activity of the party in the performance of the service subject to the obligation, it will not have to use the average diligence, that of the good father of a family, but will have to have a professional conduct and a higher diligence than that required in ordinary obligatory relationships[35].

However, there are differences in the rules between the two forms of liability, not only with regard to the assumptions analysed above, but also with regard to the distribution of the burden of proof. In fact, in non-contractual liability the burden of proof is always on the injured party to prove *first of all* the damage and secondly the causal link between the damage suffered and the conduct of the damaging party, while in contractual liability it is the party deemed to be in breach who must prove exact performance or the existence of reasons excluding the imputability of fulfilment.

From this point of view, the position of the injured party is particularly advantageous in typical or special cases of tort, which presuppose a partial reversal of the burden of proof on the presumed responsible party, who has custody of the thing or animal, who, in order to free himself, will have to prove the fortuitous event.

Further differences between the two types of liability relate to the difference in the damages that can be compensated, since in non-contractual liability both foreseeable and unforeseeable damages are always compensable, while in contractual liability only damages that the party could have foreseen with normal diligence[36]. Indeed, in the field of non-contractual liability, the assessment of damages is made on the basis of the provisions of article 2056 of the Civil Code, a provision that expressly refers to articles 1223, 1226 and 1227.

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[34] *Ivi*

[35] See M. FORTINO, *La responsabilità del professionista (aspetti problematici)*, Giuffrè, 1984.

[36] AA.VV., *La responsabilità del medico. Responsabilità contrattuale o extracontrattuale: differenze e necessità di superamento della distinzione www.ilcaso.it.*

Compensation arising from non-contractual liability, therefore, must include both the damage arising and the loss of profit in so far as they are the immediate and direct consequence of the non-performance, in the absence of proof of the precise amount of the damage the court may proceed to an equitable assessment and the reduction of the compensation in the event of contributory negligence on the part of the injured party and the exclusion of damage which the latter could have avoided by using ordinary diligence.

However, Art. 2056 does not refer to Art. 1225 of the contractual law, which provides that where there is no fault or negligence on the part of the obligor, damages are limited to those that could have been provided at the time the obligation arose. The criterion of predictability of the damage therefore does not apply to non-contractual liability.

Finally, another difference concerns the limitation period, as an action for contractual liability is time-barred in ten years whereas an action for tort liability is time-barred in the shorter term of five years.

A combination of the two forms of liability is possible, with the consequent accumulation of legal actions, which will give the injured party the possibility of requesting a single compensation for each title[37]. In fact, doctrine and jurisprudence are engaged in a continuous attempt to overcome the distinction in question and, from this point of view, in order to limit unjustified differences between cases deserving of equal protection, the concurrence of the two types of liability has been considered possible (Cass., 19 January 1996, no. 418). 19 January 1996, no. 418) in the sense that if both types of liability (extra-contractual and contractual) are possible, the injured party can take both actions alternatively or concurrently (Cass., 23 June 1994, no. 6064, Cass., 22 November 1993, no. 11503).

Liability for a wrongful act is otherwise known as civil liability as opposed to criminal liability, which is incurred by the perpetrator of a crime. Criminal liability is that which deals with certain actions or omissions that constitute an offence in our penal code, and more specifically a crime or a contravention. Its main peculiarity, as defined by Article 27 (1) Const. is personality, which means

[37] See, for example, the contract of carriage and injury of the person carried, where the contractual duty of protection, Art. 1678 of the Civil Code, is combined with the autonomous Aquilian liability of the injured party's interest in personal safety.

that only the agent, the person who personally committed the offence, is liable for the commission of an offence, crime or contravention[38].

Since one and the same fact is susceptible to several legal qualifications, it is possible, and not infrequent, that the same event may entail both civil and criminal liability for the perpetrator.

In addition to the general rule provided for and governed by Article 2043 which is based, as we have just seen, on the principle of fault, our legal system contains, in the Civil Code and in certain special laws, typical cases of liability in which the subjective element of fault is disregarded, known as objective liability, or in which the criterion for attributing the damage is never directly the fault. But in those cases, in addition to the person who has carried out the damaging conduct, a third party is also liable, due to its particular position of responsibility for certain activities, persons or things.

In such cases, liability is based only on the existence of a causal link, whereby one is liable for the damage caused as a direct and immediate consequence of one's own conduct. In order to be exempt from liability, it is necessary to prove the lack of a causal relationship between the conduct and the event, which is proved differently in the various cases of strict liability[39].

According to more recent doctrine, the basis for this form of liability should be sought in general in the need to extend strict liability, because the traditional system, based on fault, has a social cost that is too high to bear in societies where the means of production are often sources of danger and where, by entrusting the outcome of liability judgments to the difficult task of proving the fault of the agent, the victims are not guaranteed secure compensation[40].

In the following section we will analyse the various cases of strict liability.

3.2 SPECIAL CASES OF LIABILITY FOR UNLAWFUL ACT

Well, if now we want to briefly analyse the various cases of strict liability typified by the codicil legislator[41], let us begin with Article 2047 of the Civil Code, which states that in the event that a

[38] D. LA MARCHESINA *Responsabilità civila e responsabilità penale: peculiarità e differenze, in il diritto.it, 2013.*
[39] F. GALGANO, *Trattato di Diritto Civile,* Cedam, 2014.
[40] *Ibidem.*
[41] For more details see ALPA-BESSONE-ZENO ZENCOVICH, *I fatti illeciti*, in *Trattato di diritto privato,* directed by P. Rescigno, 14, Turin, 1995, p. 336.

person who is incapable of understanding and deciding has caused damage to third parties, the person who was responsible for supervising him shall be liable for such damage, unless he proves that he could not prevent the fact. The person who is incapable of understanding is not liable for damages precisely because of his particular condition, which greatly limits his will to the point of eliminating the imputability of the unlawful act to him[42].

Often incapacitated persons are entrusted to the supervision of caregivers who also work to prevent the incapacitated person from causing damages not only to himself but also to third parties. If the incapacitated person causes damage to third parties, the person responsible for their supervision will be liable for the damage caused by the incapacitated person because he or she failed to provide adequate supervision[43].
Therefore this is a case of direct liability caused by an omission in the form of a lack of supervision, while the damage caused by the incapacitated person is considered in the same way as that provided for and governed by Article 2043 of the Civil Code. The liability of the supervisor is presumed, and, to avoid it, he must prove that he could not have prevented the event due to a fortuitous event or force majeure or that he used normal diligence.

Also Article 2048 of the Civil Code provides for a hypothesis of "*culpa in vigilando*", stipulating that parents and guardians are liable for damages caused as a result of the wrongful act of minor children who have not been emancipated and of persons subject to their guardianship and cohabiting with them. Parents**,** who are jointly and severally liable, must prove that they have adequately educated and supervised the child in order to be exempt from liability[44].

Tutors and teachers of the arts are similarly liable for the unlawful acts of their pupils and apprentices for the period during which they are under their supervision. The persons required to supervise are indicated by the code as tutors or those who teach a trade or an art, but, in reality, the intention is to indicate all those who teach a minor, including sports instructors, for whom the proof of release consists precisely in having adequately supervised their pupils[45].

[42] CIAN-TRABUCCHI, *Codice Civile commentato, Breviaria Iuris* CEDAM, 2020 edition.
[43] P. FRANCESCHETTI, *Danno cagionato dall'incapace*, in Altalex.it, 2017.
[44] A. D'AGATA, *La responsabilità dei genitori e dei tutori* (art. 2048 Civil Code)
[45] A. FIGONE, Responsabilità civile dei genitori dei tutori, degli insegnanti e dei maestri d'arte o mestiere, in Ambientediritto.it, 2018.

Art. 2049 of the Civil Code, on the other hand, provides for a different type of liability from those analysed above, stating that principals are liable for wrongful acts committed by their person in charge in the performance of the duties entrusted to them. In fact, it concerns all those cases in which there is a relationship of preposition, which occurs when a person uses and disposes of the work of others.

This case constitutes a case of strict liability, since it is not necessary to investigate the fault of the principal, since it is necessary for the injured party to prove the relationship of principal and injured party as well as the causal relationship between the fact and the event[46].

In this case, the principal, in order to be exempt from liability, will have to prove the absence of a supervisory relationship as well as the causal link between the damage and the work performed by the supervisor[47].

Article 2050 of the Civil Code also provides for another case of presumed liability on the part of the person carrying out a certain type of activity defined as 'dangerous' by its nature or by the nature of the means used, who must compensate the damage caused, unless he proves that he has taken all appropriate measures to avoid it .
This point has long been the subject of discussion in doctrine and case law. both on the exact identification of the requirement of dangerousness and on the content of the exonerating evidence.

According to the majority interpretation of case law, a dangerous activity is any activity that by its very nature or the characteristics of the means used entails the significant possibility of harm occurring due to its marked offensive potential[48]. Following this approach, jurisprudence has deemed activities relating to hunting, the production and distribution of liquid gas, ski racing, etc. to be dangerous. [49]

On the other hand, with regard to the proof of release, the unavoidable presupposition is the ascertainment of the causal link between the dangerous activity and the damage suffered, the proof of which is the responsibility of the injured party, since it is not possible to attribute to the agent an

[46] On this point, Cass. 7403/2013; Cass. 789/2012.
[47] G. MORINI, *La responsabilità della banca. Per. Fatto illecito del dipendente,* in diritto.it, 2019
[48]Thus *ex multis* Cass. Civ., section III, 01/04/05, no. 6888, in *Resp. Civ.*, 2005, 661; Cass. Civ., section III, 12/09/00, no. 12025, in *Mass. Giur. It.*, 2000; Cass. Civ. Sec. III, 29/01/03, 1273, in *Gius*, 2003, 11, 1223;
[49] Cass. Civ., Sec. III, 24/09/98, no. 9581, in *Mass. Giur. It.*, 1998; Tribunale di Brescia, Sez. I, 23/10/03, in *Mass. Tribunale di Brescia*, 2004, 205; Tribunale di Milano, 29/06/00, in *Riv. Giur. Polizia*, 2002, 375; Tribunale di Brescia, Sez. I, 14/10/03.

event that is not attributable to him. In substance, there must be a direct relationship between the damage and the specific risk of the dangerous activity or the means used, since, otherwise, the damage caused can only be recognised on the basis of the general criterion of Article 2043 of the Civil Code, provided that the conditions for its application are met[50].

The causal link must be 'adequate', i.e. there must be a 'constant' sequence relationship between the antecedent (exercise of the hazardous activity) and the consequences (damage), according to a calculation of statistical regularity so that the event appears as a normal consequence of the antecedent[51].

It must also be ascertained that the antecedent itself is not neutralised, at the etiological level, by the occurrence of a fact that is in itself capable of causing the event. In this case, even in the hypothesis in which the operator of the dangerous activity has not adopted all the appropriate measures to avoid the damage, thus creating a situation that is abstractly suitable for establishing his liability, the efficient cause that has arisen that has the requirements of chance - exceptionality and objective unpredictability - and is capable, on its own, of causing the event, sever the etiological link between the latter and the dangerous activity, producing liberating effects[52].

Another hypothesis of strict liability typified in our code concerns whoever has one or more things in custody, who is held liable for damage caused by them. Article 2051 of the Italian Civil Code presumes the liability of the custodian, who according to the majority doctrine is any person who has actual power over the thing, i.e. the owner but also, instead, the possessor and even the holder[53] .

Therefore, according to one doctrine[54], in order to be exempt from liability, the custodian must demonstrate the lack of a causal link between the thing and the damage, since the article in question is a case of strict liability, since the investigation of the agent's fault is not required.

Always according to other doctrine, on the other hand, the custodian should prove the absence of fault. From this point of view, the content of the exonerating evidence would be the demonstration that the damage, although occurring due to the thing being guarded, derives from an event involving

[50] Thus *ex multis* Cass. Civ., Sec. III, 21/10/05, no. 20359.
[51] W. GIACARDI**,** *La responsabilità per l'esercizio di attività pericolose,* in Altalex.it, 2019. Thus also Civil cassation, section III, 10/03/06, no. 5254.
[52] Cass. Civ., Sec. III, 04/06/98, no. 5484.
[53] C. CASTRONOVO, *Responsabilità civile,* Giuffrè, 2018**,** p. 459.
[54] G. CHINÈ, A. ZOPPINI, *Manuale di diritto civile*, *Nel diritto* ed., 2019, p. 2148.

it, which could not have been predictable or overcome by using due diligence in relation to the thing being guarded[55].

The owner of an animal, or the person who uses it and for the time it is in use, shall also be liable for any damage that the animal may cause to third parties, even if it escapes or is lost. The rule applies to any kind of animal, without any prior verification of its dangerousness.

First of all, there must be a causal relationship between the fact of the animal and the damage, while among the liable parties, article 2052 of the Civil Code clearly indicates the owner, whoever uses the animal and, according to some, also whoever looks after it in any capacity[56].

On the content of the releasing proof, the doctrinal question already analysed with regards to the liability for things in custody comes up again. According to some, this liability is configured as an objective liability and, therefore, the releasing proof would consist in demonstrating the absence of a causal link between the damage and the event[57]. According to others, on the other hand, the article in question presupposes a liberating proof with which the subject demonstrates the absence of fault or the occurrence of the event due to a fortuitous event of force majeure[58].

Another hypothesis of strict liability envisaged by the legislator concerns the owner of a building or other construction for damage caused by their ruin. Art. 2053 refers to "ruin" which may be total or even partial, as when rubble falls from a building. On the other hand, it is debatable whether breakdowns and malfunctions of the building, such as damage caused by the electrical system or the fall or malfunction of a lift, fall under Article 2053[59].

The owner is liable for damages, but it is believed that liability can be extended cumulatively to those who have a right in rem to use the property, while there is no liability for persons who rent the property[60].

With regards to exonerating proof, Article 2053 provides for two distinct hypotheses, the latter only admitting it when it is demonstrated that the ruin is not due to a defect in maintenance or construction

[55] G. CASCELLA, *Se il guard-rail rispetta le prescrizioni di legge, il custode non risponde dei danni*, Note to Cass. III, 01 February 2018, no. 2480, in *Ridare.it*, 2 May 2018.
[56] ALPA-BESSONE-ZENO ZENCOVICH, *I fatti illeciti*, in *Trattato di diritto privato,* directed by P. Rescigno, 14, Turin, 1995, p. 336 e ss;
[57] L. CORSARO, *Tutela del. Danneggiayo e responsabilità civile*, Giuffrè Editore. Milan, 2003.
[58] G. CASCELLA, *ult. op. cit.*
[59] Cass. 4202/2011.
[60] Cass. 19657/2014.

defect. In the first case, therefore, the owner will be exempt from liability when he proves that he has diligently maintained the property. Thus, any liability will be aggravated liability for fault.

If, on the other hand, ruin occurs because of a defect in construction, the owner is nevertheless liable, even if the defect is not due to the owner's fault. This is therefore a case of strict liability. However, liability may be avoided where the event occurs by accident or force majeure.

Finally, the last hypothesis of strict tort liability concerns the case provided for by Art. 2054, according to which *"The driver of a vehicle without a rail is obliged to compensate the damage caused to persons or property by the circulation of the vehicle, unless he proves that he did everything possible to avoid the damage"*.

Generally, there must be a causal relationship between damage and traffic, but this is not limited solely to collisions between vehicles or between vehicles, persons and other things, since it is sufficient for there to be a causal relationship that the circulation of the vehicle as such has caused damage, as happens for example in so-called disturbance claims[61].

The persons liable are commonly identified as the driver of the vehicle and jointly and severally with him the owner or, in his place, the usufructuary or the purchaser with reservation of title.

As for the driver, he must demonstrate that he did everything possible to avoid the damage, and therefore, in order to be exempt from liability, the driver must demonstrate that he behaved diligently, respecting all the legal rules, such as those of the highway code and those dictated by common experience. The owner, or whoever is liable for him, must prove that the circulation took place against his will and that he diligently took care of the vehicle in order to prevent others from using it. In addition, the driver and owner shall be liable for damage resulting from a defect in the construction or maintenance of the vehicle.

It is possible to conclude by recalling that the second paragraph of Article 2054 states that in the event of a collision between vehicles, it is presumed that the drivers of the vehicles are 50% at fault for the damage caused to each other. This is a relative presumption, since it can be proved that only one driver is responsible, or that more than half of the responsibility for the damage is involved[62].

[61] Most recently Court of Cassation VI Civil Section, Order No 19115 of 15 September 2020-.
[62] ALPA-BESSONE-ZENO ZENCOVICH, *I fatti illeciti*, in *Trattato di diritto privato,* directed by P. Rescigno, 14, Turin, 1995, p. 336 e ss;

3.3 MEDICAL LIABILITY AND COVID-19

The epidemiological emergency in progress aggravates, above all, on the performance of healthcare workers, who have been subjected to strong pressure generated by the exponential increase in admissions to intensive care and, more generally, by the overall stress to which all hospital structures have been subjected. The pandemic may give rise to contractual and non-contractual civil liability claims against them, in all cases where a medical error was committed against a patient suffering from Covid-19.

Medical liability is currently regulated by Law no. 24 of 8 March 2017, known as the Gelli Bianco Law, in force since 1 April 2017, which states in Article 5 that "... *healthcare professionals working in the preventive, diagnostic, therapeutic, palliative, rehabilitative and forensic medicine sectors shall, without prejudice to the specifics of the case, comply with the recommendations set out in the guidelines published pursuant to Article 3.... In the absence of the aforementioned recommendations, healthcare professionals shall follow good clinical and care practices*.

In addition, Article 6 of the aforementioned law introduced Article 590 *sexies* into the Criminal Code, which provides that if the event occurred as a result of malpractice, punish ability is excluded when the recommendations set out in the guidelines or, failing that, in good clinical and healthcare practice are complied with, *'... provided that the recommendations set out in the aforementioned guidelines are appropriate to the specific nature of the case'*.

On the basis of the provisions of the law, the hermeneutic interpretation made by the Supreme Court has specified that the health care professional is liable on the basis of fault, for death or personal injury if the event occurred due to negligence or imprudence, due to inexperience when the concrete case is not regulated by the recommendations or guidelines or good clinical-assistance practices. Also from inexperience in the identification and choice of guidelines or clinical-assistance practices that are not appropriate to the specific nature of the concrete case, for "serious" negligence by inexperience in the implementation of recommendations of guidelines or good clinical-assistance practices taking into account the risk to be managed and the difficulties of the medical act[63].

[63] On this point, we cannot fail to mention the historic judgment of the Court of Cassation - United Sections no. 8770/2018;

Having briefly outlined the contours of medical liability, it is now necessary to investigate how this liability behaves in relation to the fact that to date there is a lack of recommendations and good practice accredited by the majority of the scientific community concerning the specific characteristics of Covid-19, a disease that has a very high level of spread and an extreme speed of contagion.

We have seen that the Gelli law and subsequent case law, in describing the criminal liability of the doctor, refer to culpable liability for death or personal injury in healthcare, exonerating him only in the case of malpractice when the recommendations provided by the guidelines or, failing that, by good clinical and care practices are complied with, provided that the recommendations provided by the aforementioned guidelines are appropriate to the specific nature of the case.

The specificity of the Covid-19 case must be punctually typified by the legislator, and the reference to malpractice requires the indication of all the hypotheses and circumstances that may occur in the context of the diagnosis of the pandemic. The criminal conduct of the doctor is not described in terms of wilful misconduct, with all its declinations, but is punished in the case of negligence to be understood as negligence or imprudence.

In the context of the pandemic, it is clear that the identification of intentional malicious conduct on the part of the doctor provides the patient with a greater guarantee, given that the probability of error on the part of the doctors is very high. The identification of subjective acts of wilful misconduct on the part of the doctor, and the introduction of specific obligations to provide information should be taken into consideration in order to ensure that doctors have a *'level of diligent preparation appropriate to the contingent difficulty'*[64].

The question arises, in particular, as to what conduct is actually required from the doctor and what type of protection can be offered to him in a context characterised by the novelty of the pathology and by the lack of scientific studies on the subject. The context gets more aggravated by a massive and generalised lack of organization, both with regards to the availability of therapies suitable for combating the virus and with regards to the lack of instruments and individual protection devices, all combined to a not adequate number of intensive care beds and medical staff.

According to a large part of the doctrine, the provisions of Article 2236 of the Civil Code, which excludes the liability of the service provider for damage caused in the performance of a service

[64] R. LUCEV, *'La responsabilità penale del medico dopo la Legge Gelli-Bianco: riflessioni sull'art. 590 sexies c.p.'*, in Rivista Giurisprudenza penale, 2017, 9.

involving *"the solution of technical problems of special difficulty"*, would apply in this case, except in the case of fraud or gross negligence.

The contexts in which the provision has been deemed applicable concern cases that are necessarily extraordinary and exceptional, in cases where they have not been adequately studied by science and tested by practice, or characterised by the fact that there are still different and incompatible debates in medical science on the correct diagnostic and therapeutic systems among which the doctor must make a choice[65]. It is indeed a rule that entails a limitation of liability.

It is also the standard of care required in the performance of healthcare obligations in cases such as the Covid-19 pandemic.

The Coronavirus, in fact, as a global pandemic that has never been studied by the scientific community and spread in Italy before the rest of Europe, undoubtedly constitutes an exceptional case under Article 2236 of the Civil Code[66]. This rule can therefore be applied when the chosen therapy has not led to recovery due to the absence of guidelines or good practices, but also to justify the inexperience of non-specialised doctors or doctors with specialisations not related to infectious diseases who, having been recruited to make up for staff shortages in the emergency context, have ignored, not for fault of their own, the *leges artis of* the case in question[67].

[65] M. FACCIOLI, *Il ruolo dell'art. 2236 c.c. nella responsabilità sanitaria per danni da covid-19*, in Rivista Responsabilitàmedica.it, 2020.
[66] In NICODEMO, *La responsabilità medica: un Quadro storico e la recente giurisprudenza'*, Review Salvis Juribus, 2019.
[67] M. FACCIOLI, *Il ruolo dell'art. 2236 c.c. nella responsabilità sanitaria per danni da covid-19, cit.*

FINAL PERSONAL CONSIDERATIONS

The issues addressed in this paper are currently a major topic of discussion and generate complex problems and trends that are difficult to overcome.

Globalization now appears to be an irreversible phenomenon that has entered human history, changing it and distorting it to such an extent that it has radically subverted values, traditions, habits and cultures throughout the world. The progressive and inexorable computerisation of every single fragment of daily life, linked to an increasingly preponderant dominance of computerised markets, has perhaps definitively eroded the power of states, calling into question democratic rights that seemed to have been acquired.

The pandemic that has been shocking the world for a year and a half now, if at first time it has strongly affected the exchange of goods, so dear to those who advocate neo-liberal theories, has subsequently led to a rearrangement of the global political and economic balance to the benefit of private entities, mostly stateless platforms with no substance, which, in defiance of all legal precepts, are able to do as they please on the world economic scene.

These upheavals must lead to a profound reflection on the role of law and of institutions such as medical liability, given the substantial ineffectiveness of state legislation, towards phenomena of worldwide reach. A civil liability with transnational connotations, with a sanctioning as well as a reparation function, could be, in the opinion of writer, a first timid step towards the re-appropriation of a democratic space that is now increasingly removed from the power of the States.

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