The Impact of Organisational Factor on Negligence Offences in Italy

Federico Consulich*

Abstract

In contemporary criminal law the negligent offense is frequently the poisoned fruit of improper planning of a complex activity and of a defective coordination of means and people. In short, crime is increasingly understood as a systemic error of an organizational nature. In recent years, Western regulators have started to understand this trend and have often contemplated the liability of the organization, basing it on the failure to prevent and correct dangerous behavior engaged in by its directors, officers, and employees. But how can we separate the misconduct of the individual from the negligence of the organization? The paper aims to identify the distinctive features of these two reproaches so as to understand their peculiar attributes.

I. Aim of the Study: An Attempt to Update Negligence Liability in Italian Criminal Law

For a long time in Italian criminal law, the definition of negligence was calibrated to the individual and defined by Art 43 of the Criminal Code.[1] Scholars have now adopted a shared interpretation of it from a normative rather than psychological perspective, whereby the term is to be understood as a violation regarding the rules of caution (formalised in rules or the result of collective experience), the compliance of which would have prevented precisely the kind of harmful event that occurred.

Therefore, the negligence of the individual does not have psychological connotations, except in the particular case of conscious negligence, where the agent acknowledges the existence of a risk underlying his or her action and the injurious event that may result from it, but nevertheless does not desire its realisation.

This interpretation may have been common until the end of last century, but today this is no longer the case.

Italian criminal law has not yet gained full awareness of the deep rupture occurred over time, since the entry came into force of the regulations regarding

* Full Professor of Criminal Law, University of Torino.

[1] Art 43 of the Italian Criminal Code: 'The offence...is negligent, or against intent, when the event, even if foreseen, is not intended by the agent and occurs due to negligence or carelessness or inexperience, or due to failure to comply with laws, regulations, orders or disciplines'.

the liability of entities with decreto legislativo 231/2001 within a negligence liability. In fact, the liability for offences of the legal person depends on the existence of organisational negligence upon the entity and consists of the failure or inadequacy of internal procedures aimed at preventing the commission of intentional and negligent offences perpetrated within the organization, in its interest or to its advantage, by employees or organs.

In particular, case law continues to employ the term negligence without making a distinction between whether the defendant is a natural or legal person, using it indifferently to qualify the failure to comply with rules of conduct directed at the individual and dangerous procedures existing within an organisation.

Thereby, terminologies, evidentiary schemes, and argumentative solutions that have been developed since 2001 with reference to organisational negligence in order to ground the punishment of the legal person, have been transited into the grounds of convictions of individuals, involved in trials for adverse events related to the performance of complex activities (particularly serious work accidents, environmental contamination, environmental disasters, railroad disasters, construction collapses and so on).

Often in the Italian context, negligence liability, especially in respect to macro-events such as those above mentioned, does not rest on an isolated person, but on a group of individuals who found themselves acting in the same context as the event which occurred and who should have better coordinated their actions in an effort to avoid it.

The regulatory mechanism used in case law to reprimand individuals involved in the chain of decisions or conduct that led to the harmful event, is the institution of negligent cooperation; governed by Art 113 of the Criminal Code.[2] This is a typically Italian instrument, which does not exist in Common Law countries or in German-speaking legal systems. Through it, the person who causally participated in the act by violating some rule of prudence or failed to prevent or correct the negligent conduct of the person who materially produced the damage is also punished as the perpetrator of the negligent act.

The application of negligent cooperation in Italy has issue: behind the use of the individual regarding a concept of negligence that should only be valid for entities where there has been hidden an underhand and irrefutable hypothesis of strict liability; the individual is blamed for failing to behave diligently (mostly for failing to prevent the damaging event), but in reality only the legal entity could have achieved this, being the only entity with the necessary means and capabilities.

Recently, the Italian Supreme Court has apparently begun to recognise the need to distinguish between the negligence of the individual and the negligence

[2] Art 113, para 1, of the Italian criminal code: 'In negligent offence, when the event was caused by the cooperation of more than one person, each of them shall be subject to the punishments established for the offence itself'.

of the organization,[3] but it is a barely consolidated interpretation that needs much more strengthening.

The current paper starts from this present situation and tries to give a definition of the two types of negligence, and then focuses on how the liability *of the individual within the organisation* works, finally attempting to provide the conceptual tools aimed at preventing the reproach *of the complex structure* from being assimilated and superimposed on that aimed *at the individual*.

In order to reach such a result, although ambitious, the correct method requires distinguishing semantically and systematically the overlapping notions of negligence in practice, then analysing scholars and case law expended on the subject in recent years.

II. The *Individual* vs *Collective* Dichotomy as a Key to Interpreting Contemporary Criminal Negligence

Criminal law has come to terms with the organisational variable as a decisive factor in the causation of negligent offences:[4] increasingly however the aforementioned, especially those economically connoted, involves coordination of people and resources. The adverse event most often derives from defective planning of a complex activity, in particular in the form of an inadequate (or perhaps even missing) division of tasks and liabilities, sometimes at the moment when planning the intervention with other persons, other times at the moment of its material implementation.[5]

The imagination of criminal lawyers is certainly not so unbridled and so the reflection on the collective dominant in negligent offence has started within the label of *organisational negligence*.

However, we are discussing an ambiguous concept that requires a plurality of clarifications and a preliminary field selection. It is indeed necessary to decide from the very outset whether one intends to refer to the concept of liability regarding solely the entities or to the attribution of the event to the natural person.

[3] For a clear conceptual distinction between the two semantic areas Corte di Cassazione-Sezione penale IV 10 May 2022 no 18413, *Giurisprudenza penale web*, 11 May 2022, which on the subject of criminal liability related to occupational accidents states verbatim: '…the requirement that the mentioned negligence of organisation be strictly proven and not confused or overlapped with the negligence of the (employee or director of the entity) responsible for the offence'.

[4] With specific regard to intentional offences, but with reasoning that can also be extended to negligent ones, it notes that on an empirical level there is 'an impulse of the general organisation, also implemented through conclusive behaviour, an act of encouragement to others illicit activity' N. Selvaggi, *La tolleranza del vertice d'impresa tra 'inerzia' e 'induzione al reato'* (Napoli: Edizioni Scientifiche Italiane, 2012), 24.

[5] On the fundamental principles of the organisation see the recent study by G. Morgan, *Images. Le metafore dell'organizzazione* (Milano: Franco Angeli, 2020), 44.

In the first case we are faced with the general criterion for ascribing the liability of the organization, while in the second case the term becomes more confused, by referring to a morphology of non-compliance related to particular agents, who tend to be in a hierarchical or functional position of super-ordination, who are the physical perpetrators of a negligent offence. In the latter case, we are dealing with a concept that is instrumental in deciphering contributory negligence. Therefore, the lemma is used with respect to a multi-personal phenomenon, but while for entities it rests on the attribution of the fact to a single subject (collective but legally unitary), for individuals it becomes a mechanism for ascribing the offence to a plurality of individuals within a contributory perimeter.

The terminology, therefore, must not lead to a confusion of levels.

III. *Organizer* Negligence vs *Organisational* Negligence: Terminological Clarifications

With regard to the issue of negligence in complex activities, one is induced, almost unconsciously, to qualify the imprudence of those who negligently plan the structural set-up of a company or an articulated behavioural procedure as *organisational negligence*.[6] It is a dangerous summons, which depends on the suggestive, but inaccurate, semantic meaning of the term. This word, on the other hand, must be defined with precision, in order not to import in the field of

[6] Regarding which, by way of example, only in the immense doctrinal production, it is important the reference to the works of prof Paliero, essential pages about that in C.E. Paliero, 'Colpa di organizzazione e persone giuridiche', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 64; Id, 'La colpa di organizzazione tra responsabilità collettiva e responsabilità individuale' *Rivista trimestrale di diritto penale dell'economia*, 175, (2018); Id, 'La personalità dell'illecito tra 'individuale' e 'collettivo", in G. De Francesco and A. Gargani eds, *Evoluzione e involuzioni delle categorie penalistiche: atti del Convegno di Pisa (8-9 maggio 2015)* (Milano: Giuffrè, 2017), 101; Id, 'La società punita: del come, del perché, e del per cosa' *Rivista italiana di diritto e procedura penale*, 1516, (2008); Id, 'Das Organisationsverschulden', in U. Sieber et al eds, *Strafrecht und Wirtschaftsstrafrecht. Dogmatik, Rechtsvergleich, Rechtstatsachen. Festschrift für Klaus Tiedemann zum 70. Geburtstag* (Köln-München: Heymann, 2008), 503; C.E. Paliero and C. Piergallini, 'La colpa di organizzazione' *La Responsabilità amministrativa delle società e degli enti*, 167 (2006). In addition see the writings of C. Piergallini, 'La colpa di organizzazione e di impresa', in M. Donini and R. Orlandi eds, *Reato colposo e modelli di responsabilità. Le forme attuali di un paradigma* classico (Bologna: Bononia University Press, 2013), 161; Id, 'Paradigmatica dell'autocontrollo penale', in M. Bertolino et al eds, *Studi in onore di M. Romano* (Napoli: Jovene, 2011), 2049; A. Fiorella, 'La colpa dell'ente per la difettosa organizzazione generale', in F. Compagna ed, *Responsabilità individuale e responsabilità degli enti negli infortuni sul lavoro* (Napoli: Jovene, 2012), 267; G. De Simone, '*Societates* e responsabilità da reato. Note dogmatiche e comparatistiche', in M. Bertolino et al eds, *Studi in onore di M. Romano* (Napoli: Jovene, 2011), 1883; G. De Vero, 'La responsabilità penale delle persone giuridiche. Parte generale', in C.F. Grosso et al eds, *Trattato di diritto penale* (Milano: Giuffrè, 2008), 63; V. Mongillo, *La responsabilità penale tra individuo ed ente collettivo* (Torino: Giappichelli, 2018), 435; A.F. Tripodi, ' "Situazione organizzativa" e "colpa in organizzazione": alcune riflessioni sulle nuove specificità del diritto penale dell'economia' *Rivista trimestrale di diritto penale dell'economia*, 482 (2004).

individual criminal law, in particular in the context of a contributory negligence pursuant to Art 113 of the Italian criminal code, incriminating mechanisms that are certainly valid for the entity, but improper (if not unconstitutional *tout court*) for the natural individual, as inconsistent with the principle of culpability based on the fact.

Nomina sunt consequentia rerum, *sed etiam in iure res sunt consequentia nominum*: a clear distinction is therefore required when it comes to the breach ofprecautions by individuals invested with organisational power within a structure.

The organisational negligence is a concept that has long been developed by scholars, first German then Italian, in close functional connection with the criminal liability of legal persons.[7] It has a well-defined perimeter of reference valid, as regards the Italian scenario, within the framework of decreto legislativo 231/2001.

The conspiracy of persons and the liability of the entity are different and independent teleological perspectives, although both possess the characteristic of binding a plurality of actions united by non-compliance with a rule of conduct.

i. The *negligence* of the individual who organises the activities of others (what we can trivially call the *organiser negligence*) reproaches the omitted elimination or reduction of *factual risks*, relating to adverse events criminally relevant pursuant to a specific incriminating case (accidents, damage to environment, offences to public safety and so on); the precautions aim at coordinating, managing, prudently directing third parties and the interaction between their sphere of action and field of action of the person who has the power of coordination;

ii. the *organisational negligence* has a preparatory nature and no immediate precautionary purpose;[8] it censures the omitted neutralisation of *regulatory risks* relating to the commission of a class of offences by bodies and employees of a collective entity.[9] It consists in the violation of the very general rule which requires the entity to organise itself in order to prevent the commission of offences by bodies or employees. Scholars[10]believe that it does not have a strictly precautionary nature, rather a projectual or planning one. In fact, the broken rule is not functional to the prediction of a specific type of event, as in the case of the precautionary rules that give rise to the negligence of the individual. Here we are in a planning phase of defining roles, organisation charts, general relationships, divided by types and regulated by procedures,

[7] On the birth of the concept of *Organisationsverschulden* in relation to § 30 of the *Ordnungswidrigkeitengesetz*, the German law on administrative violations, dedicated to the liability of legal persons and associations, the reference goes to K. Tiedemann, *Die Bebußung von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftkriminalität*, in *NJW*, 1988, 1169. In Italy, it is essential the reference to C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 167.

[8] ibid 178.

[9] Similarly D. Castronuovo, 'Fenomenologie della colpa in ambito lavorativo. Un catalogo ragionato' *Diritto Penale Contemporaneo*, III, 216, 235 (2016).

[10] C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 176.

designed to make the activity of bodies and employees controllable and set up obstacles and disincentives to the commission of illegal acts.

The duty to properly organize the legal person provided by decreto legislativo 231/2001 acts as a condition of pre-existence of the precautionary rules and its transgression places the entity in the position of not being able to run in the prevention of the risk of committing offences. It is therefore a concept that has no point of tangency with negligence as a systematic category of the criminal law referred to natural persons, because it cannot be correlated with specific events; it therefore does not respect the fundamental criminal law axiological constraint in the matter of negligence, which requires reference to a single event, in order to verify whether an alternative behaviour would have prevented it.[11]

The conduct of the entity that does not adequately address the risk of offence is therefore completely different from individual negligence due to the nature of the model agent (the organisation), the type of risk (identifiable by classes and not by individual cases),[12] as well as the type of event, which in the case of Italian decreto legislativo 231/2001 is the predicate offence legally prequalified; in the case of the individual it is a naturalistic and harmful fact not yet pigeonholed into legal references. The diversity of the two reprimand models is a direct consequence of the type of rule by which the non-compliance is based and subsequently the risk to be countered.

The *organiser's* negligence is therefore quite distinct from *organisational negligence*. In fact, the organiser is a natural person placed at the top of a complex structure (not necessarily the administrator of a company, but also the general manager or the head of human resources in a multinational company) or acting as the planner of a multi-stakeholder activity consisting of several procedural steps (such as the coordinator of a team dedicated to organ transplants). This is a rather problematic decision relating to project and programmatic carelessness. In this aspect it can be assimilated with organisational negligence, but in the case of the natural person the specific correlation with the adverse event is required, in order to reconstruct a precautionary rule which, even if indirectly, concretely has a connection of risk with the specific unwanted fact.

Within a complex structure, in which the activities of several people are coordinated, the duty of supervision, control and coordination of top management gradually becomes impossible as a task to be carried out personally. It assumes the forms of the obligation with regard to the correct organisation of work, but

[11] On the subject see the reflections of A. Gargani, 'Posizioni di garanzia nelle organizzazioni complesse: problemi e prospettive' *Rivista trimestrale diritto penale dell'economia*, 508, 510 (2017). Possibility on the useful application of the negligence of the organisation scheme with respect to individual negligence A. Massaro, 'Omissione e colpa', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 875.

[12] On the point, see C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 182; C. Piergallini, 'Colpa (diritto penale)' *Enciclopedia del diritto* (Milano: Giuffrè, 2017), Ann. X, 262.

even when it distances itself greatly from the adverse event, it never becomes abstract and general: it always has a connection to a specific event due to insuperable constitutional constraints concerning criminal responsibility.[13] It would be illegitimate, facing non-small structures, to punish top management for the immediate failure to fulfil the tasks in preventing adverse events: this is an evolution imposed by compliance with the principle of guilt, by the prohibition of liability for the acts of others and by the effectiveness of the protection of the legal asset.

It is true that the one who possesses such power is usually a guarantor, but the criminal liability that can affect this individual is in reality rarely omissive: adverse events result from the incorrect planning of the conduct of others in connection with one's own or others' conduct, ie, from choices, decisions and directives.

The underestimation profiles of organisational and relational risks regarding organisational negligence most often manifest themselves before the adverse event and they need to be updated and implemented by subordinate subjects, placed to the next level in the procedural chain. This scenario generates a particular phenomenon of occurrence of the negligence in a markedly anticipated form with respect to the causation of the adverse event by the material author of the fact. This is a mismatch that only negligent cooperation can rationalize.[14] In fact, a mono-subjective (individual) view of negligence would not be able to coherently formalise the risk connection activated by the organiser, that is clouded by the temporal latency and the interference of self-responsible conduct of various subjects. In complex contexts it actually tends to mitigate the relevance of the representation of the risk for the various subjects involved in the procedural chain and blurs, at least with respect to most of them, *Anlass*, ie, the possibility of grasping the non-observant nature of one's conduct and the precautionary link with the final event.

If from a *chronological* point of view it is quite possible that the precautionary violation of the manager takes place and ends before the realisation of the unlawful act from the material perpetrator of the negligent offences, it is different from the *logical* point of view: although the conduct may also be prior to the harmful fact, it is closely and immediately correlated to it in a significant and perceptible risk connection.[15]

[13] For a reflection in this sense, see also L. Cornacchia, 'Responsabilità penale da attività sanitaria in *équipe*' *Rivista italiana di medicina legale e del diritto in campo sanitario*, III, 1219, 1234 (2013).

[14] For a recent reflection on negligence in employment and the *Koinzidenzprinzip* D. Piva, 'Spunti per una riscoperta della colpa per assunzione' *Discrimen*, 9 September 2020.

[15] On the relationship between pre-culpability and the risk connection of verification of the subsequent offense, V. Militello, 'Modelli di responsabilità penale per incapacità procurata e principio di colpevolezza', in A.M. Stile ed, *Responsabilità oggettiva e giudizio di colpevolezza* (Napoli: Jovene, 1989), 495. For Donini, the 'risk link' should not be identified either with causality or with willful misconduct or negligence, since it would integrate a further and distinct link between the conduct and the result, in short, it would be a real constitutive element of the typical fact

The organisational negligence is a *culpa in causa*, that is to say a 'stem' negligence that directs the management of a complex activity on a wrong track and that determines the preconditions for the realisation of the adverse event, also misleading the activities of those who will have to enter the procedure or execute the directives in the capacity of subordinates and executors.

It constitutes a form of authentic negligence, whose peculiarity consists in being a prerequisite for non-compliance by others, since there is a conduct that induces errors in third parties. From a structural point of view, it is based on the violation of a precautionary 'meta-regulation' (a regulation of the regulation activity), that is a precautionary claim aimed at producing additional precautionary regulations referring to third parties.[16]

In turn, the organiser negligence is distinguished from the mono-subjective negligence for the content. It reproaches the causation of the adverse event *by means of others*, therefore the omitted coordination between one's own action and the conduct of whoever present in the context and subordinated to a power of direction; individual negligence (which may be the one of the material author himself, who in fact is already punishable) is based on the violation of the prohibition to independently cause the unwanted event.

The organiser negligence is clearly not the only form of negligence mediated by the non-observant behaviour of others; such is for example the negligence of the instigator of negligent conduct or even of the participant who cooperates in a dangerous activity without taking decisive action with respect to the fact (who supplies a restaurant with expired food that the cook then chooses to give to customers anyway, trusting that cooking will eliminate any parasites) or of the one who generates a dangerous situation then actualised by a third party: this is the case of those who leave to their friend, a well-known pyromaniac, the task of keeping highly flammable material for an afternoon, if he uses it promptly to set fire to abandoned cars for fun, thus starting (perhaps due to drought summer) to a forest fire.

All cases of indirect negligence, of course, but rare and scattered in a casuistry that cannot be reduced to predefined subjective figures of participants; it is only when we come across the organiser that we can find a model of agent (not a model agent) that embodies the paradigm of the unobservant participant. Therefore, the agent perfectly fulfils the function of 'test subject' to be subjected to an in-depth study in order to understand the meaning and limits of the

(see M. Donini, 'Imputazione oggettiva dell'evento' *Enciclopedia del diritto* (Milano: Giuffrè, 2010), Ann. III, 636); the Author himself considers the requirement of the avoidability of the event through legitimate alternative behavior an exclusive requirement of the negligent offense (Id, *Imputazione oggettiva dell'evento. "Nesso di rischio" e responsabilità per fatto proprio* (Torino: Giappichelli, 2006), 109.

[16] In the area of criminal labor law, it highlights the particular security duty imposed on the employer, a real meta-duty, as it is aimed at producing additional safety standards D. Castronuovo, n 9 above, 228.

negligent multi-subject matter.

1. The Blame on the Organisation

The difference between organiser negligence and organisational negligence can be clearly grasped if we look at the US regulatory scenario that has been dealing with it for the longest time. US experience inaugurated the concept of *corporate negligence*. In the US version, the organisational reproach was initially understood as *corporate mens rea*, concept immediately used as a transversal tool for criminal and civil liability,[17] although its application was not without criticism.[18]

We can perceive how this notion is alternative to any other category valid for individuals such as *mens rea*, *culpability* etc: on the contrary, the *corporate mens rea* is functional to ensure the application of the law when it is not possible to identify a natural person as the perpetrator of the offence or at least to prove his or her individual liability.[19]

But the gradual development, even overseas, of negligent criminal liability and the complex articulation of *public enforcement* on companies (with the use of extra-criminal sanctions) led to a progressive decline of the *corporate mens rea* as a general instrument of imputation,[20] with a correlative increase in *negligence* claims. Negligence, in fact, is considered a *species* of the *mens rea* itself, the

[17] V.S. Khanna notes it, 'Is the Notion of Corporate Fault a Faulty Notion?: the Case of Corporate Mens Rea'79 *Boston University Law Review*, 355 (1999), to which reference is also made for an excursus on the birth and historical development of the concept (360). Also from a historical perspective, see also the now dating work of K.F. Brickey, 'Corporate Criminal Accountability: a Brief History and an Observation'60 *Washington University Law Quarterly*, 393, 415 (1982). The bibliography on the concept of *corporate mens rea* is enormous and we only mention, by way of example, the first works that started the debate on the subject, such as the contribution of P.A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), 31-47, according to which the concept can establish a liability of the organisation for the deficient governance of internal processes; R.S. Gruner, *Corporate Crime and Sentencing* (Charlottesville: Michie, 1994), 198-203, 263-284, with regard to the imputation of the agent to the top management; as well as the famous document entitled 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' 92 *Harvard Law Review*, 1227 (1979), in particular, 1243, where various hypotheses for configuring the liability of the entity are addressed in the event of defects in the procedures and business practices that have led to the failure of the prevention of offences within the structure; also, B. Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' 56 *Southern California Law Review* 1141, 1197-1201 (1983), which argues that the requirement of the *corporate mens rea* could be satisfied by identifying a deficiency in the strategy to tackle offences by the entity; with particular reference to the plan for detecting the negligence of the entity W.S. Laufer, 'Corporate Bodies and Guilty Minds'43 *Emory Law Journal,* 647 (1994).

[18] V.S. Khanna, n 17 above, 359, which proposes to replace it either with a model of *strict liability* or, at most, of *negligence*.

[19] K.F. Brickey, n 17 above, 422; in the same sense, noting the correlation with the *identifiability problem*, J.R. Elkins, 'Corporations and the Criminal Law: An Uneasy Alliance' 65 *Kentucky Law Journal,* 73, 82-84 (1976), as well as on the issue of the relevance of the difficulty of proof as an element connected to the liability of the entity A.O. Sykes, 'The Economics of Vicarious Liability'93 *Yale Law Journal,* 1231, 1246-1252, 1254-1255 (1984).

[20] V.S. Khanna, n 17 above, 365.

extreme offshoot of a *continuum* that certainly has its peak in *intent* and then flows into the mere non-fulfilment of the duty of attention and prudence.[21]

For these reasons, new *standards* of reprimand of the entity have sprouted in the US debate:

i. scholars and jurisprudence spoke about the so-called *collective mens rea*, which combines awareness and actions of the individual agents that move within it, referable to a single supra-individual subject.[22] This allows the facing of situations in Court in which no director or employee has integrated the subjective element required but held isolated fragments of relevant information.[23] For instance, the instructions to the jury given in *Bank of New England* v *United States*: 'If employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all';[24]

ii. the *liability for negligent procedures and Policies*, outlined by scholars, considers accountable the *corporation* whose internal procedures and policies present elements of carelessness and superficiality. Each commentator provides its own version. For example, someone considers the liability integrated on the basis of a functional link between company policy and violation of the law by an employee or body acting in the interest of the entity,[25] or, similarly, in the event that the offence produced was the reasonably foreseeable result of company policies[26] or, again, in the event that there has been a negligent collection or management of relevant information connected to the production of a criminally significant damage.[27]

What emerges from a fleeting juxtaposition of the US experience is that the organisational reproach arises on a level that has nothing to do with the negligenceof natural persons, indeed it was created to replace it through a sort of arithmetic of precautionary non-compliance: the organisational negligence of the entity is a sum of many individual failures which in themselves would not assume legal significance.

[21] See in this regard W.S. Laufer, n 17 above, 722-724 according to which an entity acts negligently when it involuntarily creates a substantial risk that it should have avoided; S. Shavell, 'Strict Liability Versus Negligence' 9 *Journal of Legal Studies,* 1, 2 (1980), according to which liability for negligence requires agent to act with due care in his business.

[22] On this point R.S. Gruner, n 17 above, 263.

[23] See for example the cases *Kern Oil & Refining Co.* v *Tenneco Oil Co.,* 792 F.2d1380, 1387 (9th Cir.1986) and *United States* v *LBS Bank New York, Inc.,* 757 F. Supp.496, 501 n. 7 (E.D. Pa.1990). See also, on the subject of violations of the *Interstate Commerce Act, United States v. T.I.M.E.-D.C.,* 381 F. Supp. 730, 739 (W.D. Va.1974).

[24] *Bank of New England* v *United States*, 821 F.2d844, 855 (1st Cir. 1987).

[25] W.S. Laufer, n 17 above, 668. On the same line P.H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability'75 *Minnesota Law Review,* 1095, 1121 (1991) which considers the liability of the entity to be configurable in the event that the corporate ethos has somehow encouraged the criminal conduct of its employees.

[26] In this sense A. Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' 78 *California Law Review,* 1287, 1308 (1990).

[27] R.S. Gruner, n 17 above, 284.

Collective negligence of organisational and individual negligence of the organiser are therefore parallel tracks that never meet.

IV. The Value of the Organisation as a Decisive Factor in the Genesis of the Negligent Offence

After clarifying the scope of the reasoning and renouncing of any reference to organisational negligence, we now want to link our reflection to the subjective role of the one who violates the due caution within a multi-subjective context: the *organiser's negligence*, where the organiser is a 'strategic' subject in the framework of coordinating the activities of others in a complex procedure or structure.

The study of the precautionary non-observance of this individual is essential; the cases relating to damage due to product, safety at work, safety and public health or the environment, just to stay in the main fields, are all understandable only with the lens of systemic organisational error.[28]

Depersonalisation and reiteration of production processes trigger addiction and distraction mechanisms, as well as excesses of confidence that can become a source of risks. Adverse outsources are added to the harmful potential that arises from the activity itself, well known by *legal* and so-called *permitted* risk.[29] When the organisational or executive error increases the tolerated risk beyond the permissible limit provided for by law, it makes the previously permissible activity unlawful *tout court*.

The conduct of the individual, once placed in the overall organisational context, deserves an autonomous code of interpretation by criminal law, which produces an effective but guaranteed way to charge with the offence. In fact, it is common, not only in criminal law, that the operations carried out within a complex structure can take on a particular meaning (and evaluation) within the institution; different from the one given by the rest of the community.[30] It cannot be hidden that culpable cooperation within an organization is often

[28] On which sociology, in particular sociology of organisation, has been carrying out very in-depth studies for some time, see for example M. Catino, *Da Chernobyl a Linate. Incidenti tecnologici o errori organizzativi* (Milano: Bruno Mondadori, 2006) 251.

[29] On which is permitted the reference to F. Consulich, 'Rischio consentito', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 1102.

[30] This is a sociological acquisition dating back, just think of M. Weber, *Economia e società* (Milano: Edizioni di Comunità, 1961) 212; and M. Crozier and E. Friedberg, *Attore sociale e sistema. Sociologia dell'azione organizzata* (Milano: Etas, 1978), 42; and, in Italy, M. Magatti ed, *Azione economica come azione sociale. Nuovi approcci in sociologia economica* (Milano: Franco Angeli, 1991), 56. In the criminal law literature, by way of example, see B. Schünemann, *Unternehmenskriminalität und Strafrecht* (Köln: Heymann, 1979), 9, 30 and G. Forti, 'Il crimine dei colletti bianchi come dislocazione dei confini normativi. «Doppio standard» e «doppio vincolo» nella decisione di delinquere o di *blow the whistle*', in Centro nazionale di prevenzione e difesa sociale ed, *Impresa e giustizia penale. Tra passato e futuro. Atti del Convegno (Milano, 14-15 marzo 2008)* (Milano: Giuffrè, 2009), 173.

facilitated by a push to maximise productivity even at the expense of possible damage or even non-compliance within the sector regulation.

Constitutional guarantees prevent the use of any type of collective imputation; the causal contribution to the fact cannot become conspiracy simply by belonging to a group regardless of the degree of personal and subjective adhesion to the complex procedure;[31] the axiological, cultural and environmental conditioning that membership determines on individual behaviours must be considered, especially when they are devoid of an antagonistic will to the legal system and produce the offence not autonomously, but by combining with one another.[32]

From a morphological point of view, the negligence of the members of an organisation looks like a chain of anomalies, which remain hidden for a long time both because they are not immediately able to determine the event without several errors and the complexity of the decision-making and operational systems of a multi-member structure, makes the shortcomings unclear until they explode into adverse events. Behind this lack of transparency there may be no mystifying intent from management; it is within certain limits inherent to the plurality of subjects involved and this condition may persist even beyond the fact until the trial, where it becomes difficult to identify individual liabilities.[33]

Faced with this kind of scenario, consequences on criminal law are immediate. The complexity of the organisational and procedural phenomena encourages us to consider negligent offences not as real conducts, but as breaches of duties and failures to achieve targets. In a nutshell, negligence is a non-compliance with a role rather than empirically graspable action, so the classic distinction

[31] It is a question of retracing, *mutatis mutandis*, the path traced in international criminal law, which required the reorganisation of the assignment of liability according to a collective logic, but always within the constraint of proportion while avoiding forms of position liability. On this point, see, among others, the reflections of G. Werle, *Diritto dei crimini internazionali* (Bologna: Bononia University Press, 2009), 133; S. Manacorda, *Imputazione collettiva e responsabilità personale. Uno studio sui paradigmi ascrittivi nel diritto penale internazionale* (Torino: Giappichelli, 2008), 113.

[32] V. Torre, 'Organizzazioni complesse e reati colposi', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 894 notes how the culture of the organisation affects individual choices, if not eroding spaces of self-determination, influencing individual choices, and decreasing their personal profile.

[33] On this point, the research conducted by D. Vaughan remains essential, *Controlling Unlawful Organisational Behaviour. Social Structure and Corporate Misconduct* (Chicago: University of Chicago Press, 1983), 73; Id, 'Rational Choice, Situated Action, and Social Control of Organisations' 32 *Law & Society Review*, 23 (1998), indicating a fall in the general-preventive capacity of the law with respect to organisations; J. Reason, 'Understanding Adverse Events: Human Factors' 4 *Quality in Health Care,* 80 (1995); Id, *Managing the Risks of Organisational Accidents* (London: Ashgate, 1997), 11; and in Italy by M. Catino, *Miopia organizzativa. Problemi di razionalità e previsione nelle organizzazioni* (Bologna: il Mulino, 2009); Id, *Capire le organizzazioni* (Bologna: il Mulino, 2012); A. Bianco Dolino and M. Catino, 'Teoria sull'eziologia degli incidenti nelle organizzazioni' 130 *Sociologia del lavoro,* 33 (2013); Id, 'Organizational accidents theories', in R. Dahlberg et al eds, *Disaster Research. Multidisciplinary and International Perspectives* (London: Routledge, 2015) 195.

between acting and omitting is out of date.[34] Following this approach, behaviours that would appear *prima facie,* simple inertias without meaning, are read again as violations of the duties of the role covered within the multi-member structure and then qualified as essential contributions in the dynamics of the offence.[35]

The method can be agreed upon in large parts. It is evident that the mere omission should not be considered as a moment detached from the context in the framework of a fragmentation of the fact. In the manner of the Divisionists of the late nineteenth century, the social meaning of the conduct can be correctly understood only if it is inserted into the complex of activities previously carried out by the same corporate body[36]or into the rules of the organisation. If within a board of directors or a medical team the rule that dissent must be expressly manifested is valid and shared by everybody, silence must be understood, unambiguously, as a positive adhesion to the resolution.[37] The civil law doctrine of the last century had already admitted the possibility that a conduct could assume a different meaning due to its repetition over time; for example, a simple inaction (or maybe even the decision not to give rise to sanctions, or even continue the promotion procedure as if nothing had occurred) in relation to the conduct of a subordinate can become an explicit authorisation, or a way of activating a psychic impulse to commit offences in case of the repetition of the illicit behavior.[38]

In conclusion, the organisation attributes a new meaning, essential for the criminal lawyer, to facts that would otherwise lack them or would have a one

[34] On the so-called omissive moment of negligence, for everyone, Arm. Kaufmann, *Die Dogmatik der Unterlassungsdelikcte* (Göttingen: Schwartz, 1958), 167; in Italy, much more recently, F. Giunta, *Illiceità e colpevolezza nella responsabilità colposa* (Padova: CEDAM, 1993), 92; F. Angioni, 'Note sull'imputazione dell'evento colposo con particolare riferimento all'attività medica', in E. Dolcini and C.E. Paliero eds, *Studi in onore di Giorgio Marinucci* (Milano: Giuffrè, 2006), II, 1287.

[35] K. Volk, 'La delimitazione tra agire e omettere. Aspetti dommatici e problemi di politica criminale', in K. Volk ed, *Sistema penale e criminalità economica* (Napoli: Edizioni Scientifiche Italiane, 1998), 67; C.E. Paliero, 'La fabbrica del *Golem*. Progettualità e metodologia per la «Parte Generale» di un Codice penale dell'Unione Europea' *Rivista italiana di diritto e procedura penale*, 466, 483 (2000). On the impossibility of making a distinction between action and omission, which would instead be closely related from an axiological and empirical point of view, at the beginning of the 1980s, G. Arzt, '*Zur* Garantenstellung beim unechten Unterlassungsdelikt' *Juristische Arbeitsblätter*, 553 (1980). Also, from the point of view of the criminal liability related to the role and the disappointment of expectations regarding the proper management of one's own sphere of competence, the conduct can manifest itself indifferently as an action or omission, as noted by G. Jakobs, *Die strafrechtliche Zurechnung von Tun und Unterlassen* (Opladen: Westdeutscher, 1996), 36.

[36] For example, on the subject, see C. Piergallini, *Danno da prodotto e responsabilità penale* (Milano: Giuffrè, 2004) 241.

[37] In relation to the jurisprudential experience gained with respect to decisions in the context of criminal associations (for example of the so-called excellent murders), N. Selvaggi, n 4 above, 90.

[38] E. Betti, Teoria generale del negozio giuridico, in F. Vassalli, Trattato di diritto civile (Torino: UTET, 1960), XV-2, 77.

somewhat different, completely misleading with respect to comprehension the events.

V. The Negligence of the Individual Operating in a Complex Organisation: The Failure or Deficiency in Coordinating the Activities of Others as a Reason for Criminal Prosecution

The organiser, heading a structure or leading a procedure, plays a decision-making role, which is practiced sometimes in full autonomy, other times in common with others. Sometimes it is a power originally held, on other occasions it derives from a total or partial proxy received from others.[39]

The reprimand of such an individual mainly relates to the breach of duty to acquire knowledge concerning the risks of the organisation and, consequently, to gain information regarding the best techniques for removing or reducing them.[40] The individual in question must then follow up on the assumption of knowledge in relation to safety hazards and techniques within his or her own organisation by taking appropriate preventive measures (ie, Art 28 of Decreto legislativo 81 of 2008).

One might be led to believe that the organiser and guarantor might match up and therefore that there is no need to build a specific rule book for the organiser, since it is possible to resort to the guarantor.

However, assimilation between the two notions would be hasty, as the coincidence is limited and even random at times. It may represent a mistake to identify those responsible using a static perspective of the structure:[41] the planned areas of expertise do not correspond to the actual divisions, since they are blurred by the dynamics of practices, complicities and conflicts of interest that outline quite a different reality from the record.

First of all, the criminal liability of the organiser is mostly active: the reproach, in fact, does not concern the failure to provide for this or that supervision or coordination procedure, but the construction of an organisation that causes damage. Therefore, we are dealing with an active paradigm.

Secondly, it is possible to identify the one who organises the activity of

[39] For a critical reflection on the evolution of the discipline of delegation of functions, recently, G. Morgante, 'La ripartizione volontaria dei doveri di sicurezza tra garanti 'innominati': la delega di funzioni', in M. Catenacci et al eds, *Studi in onore di Fiorella* (Roma: Roma Tre-Press, 2021), II, 1715.

[40] It is known, in fact, that the majority doctrine, followed by case law, has assumed a connotation of informed negligence upon the adoption of the maximum technologically available security, with consequent reduction to a minimum of risks, in the wake of what is claimed by G. Marinucci, 'Innovazioni tecnologiche e scoperte scientifiche: costi e tempi di adeguamento delle regole di diligenza' *Rivista italiana di diritto e procedura penale,* 29, 40 (2005); in the same sense also D. Pulitanò, *Diritto penale* (Torino: Giappichelli, 2021), 322.

[41] V. Torre, n 32 above, 900.

others only on a factual level and not for a legal quality recognised on the basis of formal procedures. The organiser may also have no impeding power but simply have factual possibilities to interfere in the legal sphere of others. The *ratio* of his punishment lies in the misrule of this practical prerogative.

There can certainly be a connection between organiser and guarantor. In fact, the guarantor is often the one who holds the organisational power[42]but not always.

He or she may not even exercise this power, since the individual is just a *straw man* behind other individuals. Those persons concerned may have preferred to delegate the power to others (it opens the scenario of the delegation of functions, that adds further guarantors to the original one; this hypothesis is not particularly relevant for our purposes). Finally, he or she may have exercised the power by defining general lines of action that are not self-applicable and therefore must be implemented through other subjects. In fact, the choices of top management become concrete only through more specific organisational decisions and detailed operations taken by employees, assistants, and other workers. In this case, in particular, the delegate does not even receive a derivative position of guarantee, but the individual still holds a portion of organisational power: his negligence could well imply his liability in case of adverse events.

Briefly, 'the organiser' is a factual role, while the 'guarantor' is a legal qualification. In addition, organisational power is not identified with a top position within an organisation chart, since it has a more complex and transversal connotation:

a) it has a variable scope, from the definition of the most general and important operational choices of a company to those that are merely occasional and refer to elementary level interventions of an artisan enterprise, although it should involve coordination of the activities for at least one other person;

b) it can be placed at any level of an organisational structure of any type,[43]

[42] The notion of employer is a completely independent notion from that of the entrepreneur pursuant to Art 2082 of the Italian Civil Code: 'employer', pursuant to Art 2, lett. b) of decreto legislativo 9 April 2008 no 81, is not only the 'subject holding the employment relationship with the worker', but the 'subject who, according to the type and structure of the organisation in which the worker carries out his activities, has the liability of organisation itself or of the production unit as it exercises decision-making and spending powers'. See E. Scaroina, 'Le posizioni di garanzia nelle organizzazioni complesse', in M. Catenacci et al eds, *Studi in onore di Fiorella* (Roma: Roma TrE-Press, 2021), II, 1844.

[43] The negligence of the organiser, for example, was used to formulate the criminal reproach of the medical director of a private nursing home, analysing the management powers of the facility and the duties of supervision and technical coordination associated with this role. For the Corte di Cassazione, the liability of the top takes on an organisational consistency: 'può affermarsi che al direttore sanitario di una casa di cura privata spettano poteri di gestione della struttura e doveri di vigilanza e organizzazione tecnico-sanitaria, compresi quelli di predisposizione di precisi protocolli inerenti al ricovero dei pazienti, all'accettazione dei medesimi, all'informativa interna di tutte le situazioni di rischio, alla gestione delle emergenze, alle modalità di contatto di altre strutture ospedaliere cui avviare i degenti in caso di necessità e all'adozione di scorte di

but also outside it. It is possible to organise the activities of other people even extemporaneously, without particular form constraints: think of a charity event (a bike ride) by an amateur association in which a volunteer works to coordinate the security service along the route in order to prevent motorists from create a danger to participating amateur cyclists.

Once this factual condition is found in the hands of one or more of the subjects involved in a multi-personal context, the duties of diligence are modulated in very diversified forms, more or less intense depending on the greater or lesser organisational power expressed concretely in the situation given by the subjects involved. The duties of prudent organisation of a complex activity can therefore be multiple: alongside the 'primary' ones, that is to say general and pertaining to the overall structure and coordination of all the participants, there are 'secondary' ones, depending on the divisions of internal skills as defined by the organiser of the first type.[44]

VI. Case Law: The Risk Management as a Key to Interpreting the Individual Negligence in Complex Organisations

Leading on from the unwanted event, the chain of decisions that preceded it gradually passes from *individuals* who have materially acted to *roles* that have contributed to a decision or have not exercised their skills correctly. At the same time, the risk connection between the violation of caution and event seems to be rarefied,[45] since the prudential program is increasingly general and indeterminate, merely instrumental and preparatory to other rules of conduct. Currently, case law gives a more factual reinterpretation of the position of guarantor, by orienting it along areas of competence according to the *cliché* of the risk manager: the person responsible for the adverse outcome in an organisational situation is identified by imputing to him or her a mismanagement of powers to

sangue e/o di medicine in caso di necessità (…). Il conferimento dei suindicati poteri comporta l'attribuzione al direttore sanitario di una posizione di garanzia giuridicamente rilevante, tale da consentire di configurare una responsabilità colposa per fatto omissivo per mancata o inadeguata organizzazione della casa di cura privata, qualora il reato non sia ascrivibile esclusivamente al medico e/o ad altri operatori della struttura'. Corte di Cassazione-Sezione penale IV 19 February 2019, no 32477, *Guida al Diritto*, 44, 95 (2019). See also G. Vetrugno et al, 'Il *risk management* e la «colpa di organizzazione» tra diritto penale e medicina legale', in M. Caputo and A. Oliva eds, *Itinerari di medicina legale e delle responsabilità in campo sanitario* (Torino: Giappichelli, 2021), 293.

[44] On the different levels between the in Italian so called 'guarantee positions' (duty to avoid damages to one or more definite interests) within the company, D. Pulitanò, n 40 above, 389.

[45] In reality, the open nature of negligent offences in general has been denounced for decades, in Italy as in Germany, see F. Giunta, *Illiceità e colpevolezza* n 10 above, 16; Id, 'La normatività della colpa penale: lineamenti di una teorica' *Rivista italiana di diritto e procedura penale*, 86, 90 (1999); G. Forti, *Colpa ed evento nel diritto penale* (Milano: Giuffrè, 1990), 136; C. Roxin, *Offene Tatbestände und Rechtsplichtmerkmale* (Hamburg: Cram, de Gruyter & Co., 1959), 53.

control the sources of the danger.[46]

Nevertheless, these are not violations of lesser value than those of the person who personally commits the negligent act. Greater power corresponds to greater liability and from this point of view the law follows the most stringent social expectations connected to the peculiar socially disengaged role.[47]

Obviously, the combination between imputation and role refers back to the *Jakobsian* universe, where liability is based on the lack of organisation and framed in the perspective of an action by the impersonal structure rather than by the single individual: the key to understanding the fact is institutional, enough to overcome even the value of the distinction of the individual between doing and omitting.[48]

This observation captures an undeniable feature of any complex activity; the fragmentary naturalistic qualification of the single action is not singularly important in order to establish the real distinction between criminally relevant or irrelevant participation. Rather, to recognise a negligent participant, it is essential to compare the set of actions concretely performed by the agent in a given period of time within the structure and the normative standards of safe and cautious execution of the specific tasks that the aforementioned individual had.

Thus, the notion of role, is an important part in the context of negligence: indeed, it allows to reduce the complexity of the relationship between agent and caution and to prevent the predictable defence argument concerning the impossibility of consciously accessing cautionary precepts that are often highly technical and specific. Faced with technical rules that appear *prima facie,* ungovernable and shapeless, the judge has a simpler task, by referring to peculiar positions of individuals with prominent roles in a structure or procedure. These tools greatly simplify not only the selection of possible perpetrators, but

[46] On the notion of risk manager, see the jurisprudential overview offered by S. Dovere, 'Giurisprudenza della Corte suprema sulla colpa', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 586. Naturally, the most significant precedent on this notion is represented by Corte di Cassazione-Sezioni unite penali 24 April 2014, no 38343, *Rivista italiana di diritto e procedura penale*, 1925 (2014). Whether or not it was a sought-after result, the acceptance of the guarantor as a risk manager also alleviates the problems of ascertaining omissive causality, as noted by V. Torre, n 32 above, 896. Criticism of the notion of competence as a key to interpreting the contributory negligence L. Risicato, *Cooperazione colposa,* in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 332, since one of the two: either the competitor is not a guarantor and therefore precautions aimed at preventing the offence of others against him are not conceivable, or the 'guarantee position' (duty to avoid damages to one or more definite interests) exists and it will therefore be the latter to interact with Art 113 of the Italian Criminal Code.

[47] Here the reference to G. Jakobs is essential, *Der strafrechtliche Handlungsbegriff* (München: Beck, 1992), 31.

[48] G. De Francesco, 'Brevi riflessioni sulle posizioni di garanzia e sulla cooperazione colposa nel contesto delle organizzazioni complesse' *Legislazione Penale*, 3 February 2020, 5 notes that in the context of culpable cooperation it is not easy to draw a boundary between action and omission and the distinction, if it can still be useful, must be sought on a functional and teleological level. On the liability for organisation failure G. Jakobs, *Die strafrechtliche Zurechnung von Tun und Unterlassen* n 35 above, 21, where the founding role of the concept of risk is used also to distinguish the competence of the agent, the victim or third parties.

also the proof of *mens rea*.

In fact, the judge can presume the accessibility and compliance of the precautionary precepts, because there is a connection between the specific role in the organisation and the technical norms and standards: this is the so-called *negligence by assumption*. The performance, even as a mere matter of fact, of a complex activity presupposes the relevant awareness among the agent and, where this is not the case, negligence consisting of tackling a technically connoted task in the absence of the necessary training is considered *ex se* integrated.

It is a common experience that negligent offences are certainly not all proper offences (*reati propri*), but, in any case, the perpetrator is identified even when within a narrow range of subjects. There is nothing innovative in such an observation, not only because scholars, including the Italian scholars,[49] clarified this some time ago, but above all because everyone, consciously or not, has always reasoned 'by roles'. After all, the use of the model agent is nothing more than the result of a functionalist pre-understanding, which links the criminal reprimand to the position contingently assumed by the person in the reference context.[50]

However, the concept of role can also be abused by using it when it is found to be misleading with respect to the understanding of reality and observance of principles: this occurs when, from a mere exegetical support, it becomes an exclusive mechanism for ascribing negligence.

First of all, the systematic use of the aforementioned weakens its selective scope. For each situation, new roles can always be constructed, even after the fact, and for good measure, by which the concrete case can be reinterpreted in order to direct the criminal charge; in particular, this is possible because there is almost never a legal definition of the criminally relevant roles, except in the particular case of the 'guarantee positions' (in Italian: *posizione di garanzia*, ie duties to avoid damages to one or more definite interests).

In short, the role cannot ensure the conclusions of the interpreter but only serve as a mere prerequisite in the application of criminal law. The recognition

[49] In Germany, G. Jakobs, 'Das Strafrecht zwischen Funktionalismus und alteuropäischem Prinzipiendenken' *Zeitschrift für die gesamte Strafrechtswissenschaft*, 843 (1995); Id, *Norm, Person, Gesellschaft* (Berlin: Duncker&Humblot, 1999); as well as, Id, *Die strafrechtliche Zurechnung* n 35 above, 30; in Italy, for all, L. Cornacchia, *Concorso di colpe e principio di responsabilità per fatto proprio* (Torino: Giappichelli, 2004), *passim* and above all, 565.

[50] On the connection between entering a circle of relationships and the consequent evaluation of subsequent behaviors according to the standard already connected to it, decades ago, G. Marinucci, *La colpa per inosservanza di leggi* (Milano: Giuffrè, 1965), 194. *Homo eiusdem* is the most sociological of penal concepts and in fact represents a shadow that detaches itself from the physical person operating in a given context, becoming the externalised representation of the criminally relevant role, a projection that ends up tyrannising the agent, based on the social expectations of reference. On the theory of 'reference groups', first R.K. Merton and A.S. Kitt, 'Contributions to the Theory of Reference Group Behavior', in R.K. Merton and P.F. Lazarsfeld eds, *Continuities in Social Research: Studies in the Scope and Method of the American Soldier* (Glencoe: The Free Press, 1950) then Id, *Social Theory and Social Structure* (New York: The Free Press, 1968), 279.

of a particular position with respect to the facts, the event and the other co-agents does not allow any presumption of liability,[51] but rather requires stringent checks on the type of precautionary rules that had to be respected.

Thus, it may be the case that in the organisation a dissociation arises between the negligence of the individual member of the structure and the collaborators who are supposed to assist him or her, even though they may be placed in a position of hierarchical subordination. Certainly, we can run into gross negligence of the subject qualified by a position of primacy, compensated by the virtuousness of the employees who make up for his superficiality, but also in the opposite case, finding a perfect precautionary fulfilment of the organiser, which, however, is thwarted by the failures of the employees who do not comply with his or her directives. In short, the occurrence of the adverse event must never be inexorably indicative of negligence on the behalf of the individual who would also have an abstract 'competence' to oversee the risk; later translated into harm against an interest in accordance with the 'role' held.

Liability of position, disconnected from the fact. These are the risks underlying the nouvelle vague of competence for risk and prompting a preference for the not-yet-exhausted tradition of the risk nexus between specific rule of prudence and type of event in assessing whether there has been and when the moment of crisis in a precautionary system has been realised.

VII. Negligent Organisational Conduct as the Basis of Blame for Individual

The practice brings out how liability can rest on the one who did not materially cause the adverse event, but rather did insufficient efforts to preestablish the safe conditions in which others should have acted. The form of contribution to the negligent act of others assumes the consistency of the *organisational conduct*.

[51] As noted by N. Pisani, *La "colpa per assunzione" nel diritto penale del lavoro* (Napoli: Jovene, 2012), 3, 6. On the subject, see also the considerations of A.F. Tripodi, n 6 above,483. Previously, on the difficulties of reconciling the model agent with complex structures, so much so that perhaps we have to configure a collective notion of them, V. Attili, 'L"agente modello' nell"era della complessità': tramonto, eclissi o trasfigurazione' *Rivista italiana di diritto e procedura penale*, 1240, 1258 (2006). The regulatory parameter underlying the notion is however inevitably also present in the legal systems of other countries, with the German *Maßfigur*, on which H. Welzel, *Fahrlässigkeit und Verkehrsdelikte* (Karlsruhe: Müller, 1961) 15; la *persona sensata y prudente* in Spagna, su cui M.A. Rueda Martìn, 'La concreciòn del deber objetivo de cuidado en el desarollo de la actividad médico-quirùgica curatìva' *InDret*, IV, 48 (2009); the literature on the *reasonable person* in *common law* is endless, also because it is not strictly related to *criminal law*; an overview in M. Chamallas, 'Who Is the Reasonable Person? Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases' 14 *Lewis &Clark Law Review,* 1351 (2010); however, it should be noted that even overseas there is a certain disenchantment towards this concept. See the epigrammatic notation of K.W. Simons, 'Dimensions of Negligence in Criminal and Tort Law' 3 *Theoretical Inquiries in Law*, 283 (2002), 311: 'The "reasonable person" formulation then adds nothing of substance to the content of negligence test'.

The contribution is therefore a poor or completely absent coordination conduct with the activities of other subjects, which obviously includes the person who commits the fact described by the law, if the offence has a constrained form (*forma vincolata*), or the immediate causal conduct of the adverse event, if the offence has a free form (*forma libera*).

Organisational conduct can take a double form, also concomitant with the practical act:

i. the *decision* of one or more subjects who hold the power, in fact or by law, to direct the activities of others, by coordinating them in a manner that does not generate illicit risks;

ii. the *realization* of the decision *sub* i) into more analytical patterns of action wherein, in a second step, will be located the individual executive actions that lead to the adverse event in a specific case.

It is certainly in the complex structures that the multiform phenomenology of the organisational fact finds its elective concretisation as a hypothesis of participation in contributory negligence. However, as repeated many times, the non-observing organisational conduct, ie the phenomenal substrate of negligent cooperation, is not necessarily a fact that occurs in a hierarchical context, for example in the framework of a business activity, in a health facility or in a public administration, since it can occur in any collective activity that is carried out with a rudimentary coordinated interaction between several people and that generates an unauthorised risk (from hunting conducted without the necessary safety measures, to clandestine car races, to hiking in the mountains without the necessary equipment and so on).

Organisational conduct certainly includes the old features of *culpa in eligendo* and *in vigilando* (ontologically that implies a plurality of concepts[52]) and their modern transfiguration of omitted or incorrect risk assessment and failure to supervise compliance with internal procedures; To these ancient formulas must also be juxtaposed that series of active conduct designed to coordinate the activities of others and the risks involved.[53] In short, the *culpa in vigilando atque eligendo* is the progenitor of an organisational reproach that today draws on those who inefficiently exercise a power to shape the behaviour of others.[54]

[52] As pointed out by M. Romano, 'La responsabilità amministrativa degli enti, società o associazioni: profili generali' *Rivista delle Società*, 393 (2002).

[53] Also noted by D. Piva, *La responsabilità del "vertice" per organizzazione difettosa nel diritto penale del lavoro* (Napoli: Jovene, 2011) 38, according to which there is a substantial correspondence between the traditional paradigms of the *culpa in vigilando* and *in eligendo* and the organizational negligence (282).

[54] On organizational negligence such as the negligence of the top or the sub-top manager (in the field of criminal labor law), D. Castronuovo, n 9 above, 234; D. Piva, *La responsabilità del "vertice"* n 53 above, 100. The enhancement of the organisation as a task of those in a superordinate position allows at the same time to refine these two dating patterns of negligence caused by others, preventing them from conveying position liability. The correct organisation, in particular, can act as a tool for defining, subject to adaptation to the specific case, the diligent

These are certainly not original notations. In fact, a general distinction has now been established between a liability deriving from structural deficiencies due to choices and omissions on the company organisation, for which the top management is responsible,[55] and individual, episodic and occasional deficiencies that concern a sector or a branch of the business, in which – given certain conditions – the liability lies with the persons in charge or even with individual employees.[56]

For the criminal lawyer, this implies that the obligations of the primary level organisation lie with those who have the power to carry out the necessary extraordinary spending actions and have the possibility to define basic choices regarding company policy that exceed power possibly delegated to others, who as subordinates to the top management are not merely operational subjects but still have margins of decision-making autonomy and therefore may be burdened with secondary organisational duties.[57]

VIII. Negligent Offences in Organisations as Offences Based on Positive Conducts

The organiser is often a guarantor, but the guarantor is not always an organiser and, above all, not always, indeed almost never, the liability of the organiser is omissive and this makes it useless to think in terms of the obligation in preventing the adverse event, in the face of an actively procured causation.

The presence of a factual power to coordinate the actions of others does not require a 'guarantee position', which cannot arise as a matter of practice.

This is particularly significant in a cultural *milieu* in which case law often

behaviour that should have been followed within the specific structure. The reflection of A. Massaro moves in this direction, *La responsabilità colposa per omesso impedimento di un fatto illecito altrui* (Napoli: Jovene, 2013), 354. On the distorting use of the two Latin brocards in the context of organized structures, G. De Francesco, 'Il "modello analitico" fra dottrina e giurisprudenza: dommatica e garantismo nella collocazione sistematica dell'elemento psicologico del reato' *Rivista italiana di diritto e procedura penale,* 107, 116 (1991).

[55] Among the top management risks there is also that of interference with the activities of other organisations, since it is clear that coordination between structures can only be achieved through cooperation between those who hold the management levers. The obligation for the top management to establish a transparent organisation of competences is also thematised by German case law, see H. Achenbach and A. Ransiek, *Handbuch Wirtschaftsstrafrecht* (Heidelberg-München-Landsberg-Berlin: Müller, 2008), 51.

[56] This was already noted by D. Piva, *La responsabilità del "vertice"* n 53 above.

[57] It is therefore a question of 'non portable' task that entails mandatory criminal liability. The model in this sense is provided by the occupational health and safety sector, which demonstrates, through the formalisation of the risk assessment obligation, pursuant to the combined provisions of Arts 17 and 28 of decreto legislativo 9 April 2008 no 81, as the transparency of the organisation is a very personal duty of the top management. See Corte di Cassazione-Sezione penale IV 4 November 2020, *Guida al diritto,* 77 (2010); Corte di Cassazione-Sezione penale IV 28 January 2009 no 4123, *Cassazione penale* 3550 (2009), with note by A. Strata, 'Sugli obblighi del datore di lavoro in materia di prevenzione degli infortuni'.

neglects the principle of typicality of omissive liability, recognizing the presence of an anomalous (already conceptually) factual obligation to prevent the negligent offence of others:[58] the concrete management of the source of risk is enough to establish social contact, giving rise to the guarantee position.[59]

In the face of such a drift, organisational conduct must instead be understood as a form of commissive participation in the non-compliance of others, independent of a provision of law that establishes the criminally relevant obligation pursuant to Art 40, para 2, of Italian criminal code.[60]

In this context, the 'social contact' to which case law sometimes refers, more or less implicitly to recognise omissive criminal liability, can have a function in the

[58] See Corte di Cassazione-Sezione III penale 17 July 2019 no 50427, *Guida al diritto*, VIII, 112 (2020). On social contact as a mechanism for activating a guarantee position, Corte di Cassazione-Sezione IV penale 22 May 2007 no 2557, *Diritto penale processo* 748 (2008), with note by C. Piemontese, 'Fonti dell'obbligo di garanzia: un caso enigmatico, tra contatto e fatto'; on the unilateral assumption of the role of guarantor based on a social contact obligation, Corte di Cassazione-Sezione IV penale 29 January 2013 no 18569, *Diritto e Giustizia,* 29 April 2013; also, Corte di Cassazione-Sezione IV penale 16 December 2013 no 50606, *Giurisprudenza italiana*, 2026 (2014). More recently, A. Gargani, 'Lo strano caso dell'"azione colposa seguita da omissione dolosa". Uno sguardo critico alla sentenza "Vannini" ' *Discrimen*, 2, 18 November 2020, has ascertained the overcoming of the dogma of the legality of the source of the guarantee obligations with the recognition of positions assumed by way of mere fact. Indeed, it can be read in the ruling of the Court of legitimacy (Corte di Cassazione-Sezione I penale 6 March 2020 no 9049, *Giurisprudenza Penale Web*, 25, 6 March 2020) that the accused and his family members voluntarily assumed a duty of protection and therefore an obligation to prevent harmful consequences for his property, above all his life. On the same sentence, we also read the notations, regarding the factual foundation of the guarantee position, by R. Coppola, 'La posizione di garanzia nel rapporto di ospitalità: il caso Vannini' *Archivio penale* 11 October 2021; and the observations on the argumentative weaknesses of S. De Blasis, 'Precisa enucleazione della posizione di garanzia come criterio selettivo nel reato omissivo improprio' *Diritto penale e processo* 460 (2021); and S. Prandi, 'Alla ricerca del fondamento: posizioni di garanzia fattuali tra vecchie e nuove perplessità' *Diritto penale e processo*, 654 (2021) and F. Piergallini, 'Il "caso Ciontoli/Vannini": un enigma ermeneutico *'multichoice' Criminalia*, 609 (2019).

[59] In this regard, see the observations of D. Notaro, 'Le insidie della colpa nella gestione di attività pericolose lecite. La predisposizione delle pratiche ludico-sportive' *Criminalia*, 587, 593 (2019). This is a phenomenon that has been going on for some years and consists of a progressive ethic drift of the impediment duty, probably the result of the attenuation of the typological boundaries between the position of guarantee and the duty of prudence. Sometimes it seems that the case law understands the impeding duty as a simple variant of a generic duty to behave with the diligence and prudence suggested by common sense and common experience (basically this happens with regard to the failure to prevent the death of a temporarily cohabiting family member, accused by way of murder to those who had not promptly called medical assistance). In these terms the Corte di Cassazione 22 February 2005 no 9386, *Foro italiano,* II, 417 (2007). Even more recently we read in the motivation of the Corte di Cassazione-Sezione IV penale 8 April 2015 no 14145, Rv. 263143 – 01 that 'it can be said that the road user is responsible for traffic safety and therefore assumes a position of guarantee also towards third parties who come into contact with him, whenever his conduct leads to dangerous situations exceeding the normal risk connected to the road traffic'.

[60] On the guarantee function of the legality of the guarantee position F. Giunta, 'La posizione di garanzia nel contesto della fattispecie omissiva impropria' *Diritto penale e processo,* 620 (1999); in manuals see G. De Francesco, *Diritto penale* (Torino: Giappichelli, 2018), 224.

place that it is more appropriate, that is the construction of rules of diligence, and not in the construction *ex facto* in regard to duty of care. Rules of diligence, in fact, have always originated in the context of relationships between subjects who operate in the same context and who therefore must behave according to the prudence of the case and are precisely those that 'social contact' requires.

Moreover, caution is often not a legal rule, at least in all cases in which it is not acknowledged in a law or other formal source, so it can well arise from the fact without any attack on legality. In short, an obligation of behaviour without performance arises from social contact, as theorised by scholars of civil law,[61] who highlight the role the principle of good faith and mutual trust in the onset of a mandatory relationship.[62] The contact between two subjects generates duties and purely precautionary, therefore irrelevant pursuant to Art 40, para 2, of Italian criminal code: these duties concern the preservation, through negative conduct, of the reciprocal legal sphere of abstention from aggression to the interests of others, without being able to claim positive ones (as a phenomenon very different from the *de facto* contract).[63]

In fact, it should be remembered that from a precautionary point of view there are two distinct categories of hypotheses, which are relevant in terms of supervision regarding the actions of others:

i. on the one hand, there are precautionary charges placed within duty of care, which give content to the latter, indicating what the guarantor must do to prevent the adverse event;

ii. on the other hand, we recognise precautionary charges where the duty to take action to prevent or correct the error of others arises residually, when a risk arising from interaction with others is discernible. These are coordination duties that involve a bundle of prudent conduct, part of which also consists of taking action to neutralise the misbehaviour of others, without signifying obligations to prevent any offence.

Cooperating with others in the same context generates a change in the rules of prudent conduct and an increase in the level of caution, which passes from the general prohibition of *alterum non laedere* to the command which thereby implements the overall safety connected to the intervention, avoiding that collective action generates greater risks specifically due to the increased injurious capacities related to acting as a group.

The Italian Supreme Court (*Corte di Cassazione*), instead of grasping the mutation of duties of care, addresses these cases enucleating 'social contact'

[61] See the important study by C. Castronovo, 'Tra contratto e torto. L'obbligazione senza prestazione', in Id, *La nuova responsabilità civile* (Milano: Giuffrè, 2006), 443.

[62] Social contact is related to the assignment by C. Castronovo, 'Ritorno all'obbligazione senza prestazione' *Europa e diritto privato*, 679, 698 (2009).

[63] On the distinction between obligations deriving from a *de facto* contract and social contact liability F. Galgano, 'I fatti illeciti e gli altri fatti fonte di obbligazioni', in Id, *Trattato di diritto civile* (Padova: CEDAM, 2010), III, 301.

regarding the aforementioned by caring to analyse the distribution among agents of organisational power. Consider someone who encounters a group of hikers and offers to guide them through the valley using the snowmobile he or she is traveling upon and that subsequently certain members of the party are involved in an accident. According to the Italian Supreme Court, the person who offers to lead the descent becomes a guarantor, who assumes this quality in fact, because of the reliance aroused in others but also in an unclear nexus between social behaviour and law within the context of a contractual and gratuitous relationship.[64]

In cases such as these, however, it seems more correct to believe that there are no guarantors and the liability is not omissive, but negligent active-conduct, in function of a relationship that bases relational precautionary duties. They are ones that arise due to the reliance actively generated on hikers by those who offer to guide their return to the valley by flaunting their greater expertise and experience. With regard to these duties, criminally significant noncompliance is measured if there is careless conduct of the descent (excessive speed, poor lighting etc).[65]

This involves the construction of the conducts held by a subject who has a position of supremacy in the concrete event in an active key and not in an omissive one, with the related inescapable problems of atypicality and indeterminacy that the non-compliant conduct brings with it:[66] individual or group prompts, even for conclusive facts, other co-agents to assume an unauthorised risk that otherwise they would not have faced.

The theories of social contact and the consensual creation of the position of guarantee such as the earlier one that spoke of previous dangerous actions as a source of duty to avoidance, appear to be the result of an error of perspective which excessively fragments the complexity of reality. In fact, it is sufficient to broaden the gaze to understand that the supposed guarantor is just a subject who created or raised a situation of danger by generating improper reliance on

[64] Corte di Cassazione-Sezione IV penale 22 May 2007 no 25527, *Diritto penale processo,* 748 (2008), with note by C. Piemontese, n 58 above.

[65] The reasoning was conducted by the Corte di Cassazione in a similar way also in a subsequent case, with respect to the legal obligation to cooperate in the safety of a swimming pool by the owner of a catering company for the death by drowning of a boy in a hotel during a night party: in the motivation of the sentence we read the reference to multiple examples brought back by the Court to the issue of the occurrence of the guarantee position by consensus, mentioning 'the mountain guide, the members of a volunteer association of first aid, the neighbours who offer themselves without pay to accompany the inexperienced hiker, to transport the sick person to the hospital or to look after the child in the absence of the parents, with acceptance of the service by the beneficiaries'. According to the Court, 'situations can be placed in this context in which the assumption of the role of guarantor is based on a consensual basis'. See the Corte di Cassazione-Sezione IV penale 24 April 2013 no 18569, Rv. 255229 – 01.

[66] Detected by C. Piemontese regarding the construction of the guarantee position as a purely factual, n 58 above, 759.

the owner or in the real guarantor of the offended asset.[67]

The same occurs in complex settings, where the guarantor is sometimes blamed for failing to prevent an event when he or she positively created the preconditions for it by establishing a defective system for controlling an enterprise risk even though he or she may have remained inactive in practice on the occasion of the adverse event. Organisational conduct is active in itself.

IX. Synthesis. The Distinction Between Individual and Collective Negligence as a Barrier to the Uncontrolled Expansion of Criminal Liability for People Acting on Behalf of a Legal Entity

In conclusion, we can therefore state that there are two models of negligence in risk contexts in which multiple individuals act in cooperation with each other. The reference to organisation allows for a better understanding and focus of reprimand boundaries in the context of a possible multi-subjective offence, identifying a factual data that is easy to understand and judicially demonstrable.

On the one hand, *organisational negligence* applies only to legal entities and allows them to be blamed for failing to set up internal procedures able to prevent (or even make it more difficult) misconduct by individual employees or bodies that could represent an offence. Evidence that proper organisation would have prevented the offence of the individual is not required, but it is sufficient for the Public Prosecutor to prove that the internal disorganisation of the facility provided the occasion or facilitated the occurrence of the incident (in the case of negligent offences) or the wilful offence (in the case, not of interest hereto, in which the individual committed a wilful offence).

On the other hand, there is *the organisational negligence of the individual* who has to control and direct the activities of other subordinates to him or her. He is punished if he contributes, through failure or poor coordination of cooperators, to the negligent causation of the harmful event, although another subordinate person materially causes it.

These are the only conditions that allow the organiser, in regard to the activity of someone else, to be prosecuted as well, together with the person who materially caused the criminally relevant harm directly and immediately.

Systematically, these are limits referable to the nature of the concurrent negligent type, placed in two distinct areas.

First of all, there must be a common risk that is *not permitted (or no longer permitted),* which calls for the prudent action of several subjects, involved in the same context. It is not such a scenario in which someone or some people

[67] On the compatibility between ownership of coordination functions of a work organisation and the possibility of spending the principle of reliance on subordinate subjects, M. Mantovani, 'Il caso Senna fra contestazione della colpa e principio di affidamento' *Rivista trimestrale diritto penale economia*, 153, 176 (1999).

interrupt the risk connection: the causality started by the first agents, but a person who subsequently intervened in the same situation triggered a new etiological link that starts precisely in that moment. It is the so-called hypothesis of surpassing causality, wherein the first link is severed, in a way that the ones upstream of the breach are exonerated from any reproach: typically, this is what happens in the medical field, where the negligence of the second health care provider is likely to generate an autonomous causal process developing into the event. A risk *new* and *different* from that generated by the previous conduct is determined and not a *combined one* resulting from the conduct of all involved.[68]

Secondly, if we consider, as case law correctly does,[69] that negligent cooperation implies some form of *organisation*, even extemporaneous and poorly governed, then it is necessary to identify the *organiser*, ie, the one who holds the reins of such a multi-personal structure. Alongside the conduct of the negligent offender, there is a peculiar participant figure, the organiser, who must be placed alongside the 'classic' figures of the material or moral participant. However, in order to be able to charge this individual with the offence, it is necessary to identify an subject endowed with a factual power to determine and coordinate the activities of others, precisely of the one or those who later committed the causal precautionary violation, and based on a substantive hierarchy that may differ from the formal one, focusing on charismatic aspects, interactions between 'micro-powers' within the group, negotiating and transactional practices to maintain a balance in the relations between the components, and so on.[70]

Therefore, it is not enough to refer to an *a priori* role, an abstract competence, or a generic position of guarantee for liability to arise for negligent risk management.

It is the actual performance of coordinating conduct, before and regardless of the existence of an obligation to prevent the event, that gives the organiser an essential importance in the context of negligent cooperation, if possible even preeminent over the figure of the material author of the conduct immediately producing the adverse event. The organiser who badly coordinates the conduct of others without understanding the precarious scenario in which one operates is the real focus of negligent conspiracy today. The individual does not have to prevent anything; he or she is prohibited from causing harm by directing the activities of others.

[68] On the point, see V. Militello, *Rischio e responsabilità penale* (Milano: Giuffré, 1988), 246.

[69] Reference is made to the well-known arrest in which the Supreme Court correlated negligent cooperation with the pretence of prudent integration, when this is imposed by organisational needs related to risk management or by objectively defined contingencies, see the Corte di Cassazione, Sezione penale IV 2 December 2008, *Diritto penale e processo*, V, 571 (2009), with note by L. Risicato, 'Cooperazione in eccesso colposo: concorso "improprio" o compartecipazione in colpa "impropria" '.

[70] On the need to consider these elements in order to proceed with a realistic imputation in multi-subjective realities V. Torre, n 32 above, 897.