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Italian Case Note on Heneghan

Nadia Coggiola*

1. The Issue of the Henegan Case

In the *Henegan* case, the English Court of Appeal was asked to decide on a case concerning the damages that were the consequence of the death, due to a lung cancer, of Mr James Henegan.

The deceased was a smoker and he had been, during his working career, exposed to asbestos dust by six different subsequent employers. Although the medical evidence could not determine which, if any, of the distinct exposures actually triggered the insurgence of the disease, epidemiological evidence stated that it was possible to determine the amount of risk increase of contracting the disease caused by the exposure attributable to each defendant.

The petitioner, representing the estate of the deceased, affirmed that each defendant had materially contributed to the disease and therefore was liable for the full compensation of the damages.

The defendants, on the contrary, held instead that the so-called *Fairchild exception* applied, and therefore they should be held liable only in proportion to the increase in risk to cause the cancer for which each of the defendants was responsible.

This latter opinion was shared by the High Court, in the person of Jay J.

The case was of general importance because for the first time the Court of Appeal had to consider whether the *Fairchild exception* could be applied to cases of multiple exposures leading to lung cancer, as opposed to mesothelioma.

The medical experts stated that the risk of lung cancer of the deceased was increased by smoking and asbestos exposure and that, on the balance of probabilities, Mr Henegan would not have developed the lung cancer if he had not been exposed to asbestos. In general, they affirmed that the risk of lung cancer increases with the increase of smoking and asbestos exposure, although the developed cancer is not affected by the same exposures, and that the carcinogenesis of an asbestos-related lung cancer involves a multiple factor mechanism.

The Court of Appeal applied the 'doubles the risk test' to held that the asbestos exposure was the cause of the lung cancer. That test is often used by English courts in cases where medical science is unable to determine with certainty the link of causation between agent and injury. The 'doubles the risk test' provides

* Assistant Professor of Civil Law, Department of Management, Università di Torino. Email: nadia.coggiola@unito.it..

that where statistical evidence shows that a tortfeasor more than doubled the risk that the victim would suffer the injury, it could be affirmed that it is more probable than not that the same tortfeasor caused the injury.

Nevertheless, it could not be proved, on the basis of the same test, that any of the defendants caused the development of the lung cancer. But, as all the four factors identified in the *Fairchild* case were also existing in the present case, the Court of Appeal decided that also in this case the *Fairchild exception* should be applied, and therefore the liability of the defendants had to be apportioned in proportion to the augmentation of the risk of developing the lung cancer that each of them caused.

To investigate the issue of the compensation of the damages that are the consequence of a lung cancer following the exposure to asbestos dust in Italian law, it is important to pinpoint that the central problem of the Henegan case is that of the compensation of the damages which are the consequence of diseases which could be caused by a multiplicity of different factors.

In these cases, there is always a clash between the inability of medical science to ascertain, among different potential causes, the one or the ones that actually caused the disease and the legal search for a responsible person, among those who negligently exposed the petitioner to one of the potential causes of the disease.

The pendulum of the judges is therefore constantly swinging between the plain application of medical evidence and traditional *condition sine qua non* (or *but for*, depending from the legal system) rules on the ascertainment of the causal link, from one side, and the application of rules based on policy reasons, on the other side.

The Henegan case is probably a perfect example of the prevalence of policy reasons on juridical coherence and scientific knowledge.

To affirm that the case under scrutiny was 'not materially different' from the one in Fairchild, and therefore that a case of lung cancer is 'truly analogous' to a case of mesothelioma, of which it has the same 'unusual features'[1] are in fact declarations on which physicians and epidemiologists can maybe frown upon. Nevertheless, the judges of the Court of appeal applied to a case of a lung cancer that could be caused by different agents, among them but not only asbestos exposure, the *Fairchild exception,* where the reasoning of the judges on the case was probably largely dependent on the fact that mesothelioma is always and only caused by asbestos exposure.[2]

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1 Paras 48 and 49 of Henegan.

2 For a critic approach to exceptions to traditional rules of causation ascertainment in England please read S. Steel, 'Causation in English Tort Law: Still Wrong After All These Years', in *UQLJ (University of Queensland Law Journal)* 2012, p 243; S. Steel, 'Justifying Exceptions to Proof of Causation in Tort Law', 78. *MLR (Modern Law Review)* 2015(5), p 729.

2. The Italian Case Law on Issues of Compensation of Damages Caused by Lung Cancers Developed by Persons Exposed to Asbestos: General Remarks

Lung cancers and other tumours are so called 'multifactorial diseases', because they may be the consequence of a multiple range of exposures to different pathogenic agents, which could be caused by distinct potential defendants, eventually together with other factors, such as genetic, lifestyle and so on.

They are therefore completely different in their aetiology from mesothelioma cancers, which are exclusively caused by asbestos exposures, although the risk of their development can be augmented by smoking.

The chances that the disease could be the consequence of many different agents generally entails the impossibility to ascertain the existence of a link of causation between the agents and the outcome of the disease on the basis of the standard *condition sine qua non* rule.

On the other end, it is often assumed that when a person was injured as a consequence of a negligent act of a defendant, and this latter had a duty to protect the victim against that same damage, he should be entitled to some kind of compensation, even if it is impossible to prove with absolute certainty the existence of a link of causation between the action or omission of the defendant and the insurgence of the damages. That occurs especially in cases of asbestos exposure, because asbestos is generally deemed to be a factor of augmentation of the risk to develop a number of other cancers.

Therefore, in cases of lung cancers developed by persons exposed to asbestos, it is quite common to use probabilistic criteria to ascertain the link of causation between the asbestos exposure and the insurgence of the disease, instead of the *condition sine qua non* rule.

The investigation on Italian law shall take in examination both civil and criminal courts decisions, because most of the cases of damages compensation for asbestos exposures in Italy are actually debated in front of a criminal court. If so, the victims of the crime can choose among three different paths to ask judicial compensation.

They can claim compensation by appearing as *parte civile* before a criminal court, taking active part to the criminal court proceedings; they can decide not to take part to the criminal trial but to rely on the findings and the records of the criminal court, whose judgment shall be *res judicata* in this respect in subsequent civil proceedings to recover damages; and finally they can start a parallel and independent civil proceedings, completely independent from the criminal one, which may eventually lead to different and conflicting outcomes.[3]

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3 For a first approach, please refer to M. Chiavario, 'Private Parties: The Right of the Defendant and the Victim', in M. Delmas-Marty & J.R. Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University press 2002), p 541 ff.

Appearing as *parte civile* in the criminal trial entails in practice many advantages for the victims, such as the fact that in those trials the court provides and pays the often needed, but expensive, scientific and medical expert opinions, although the petitioner retains powers such as to bring evidence to the criminal court, inspect documents and cross-examine witnesses, present his own conclusions to the court and nominate his own scientific and medical experts. As a consequence, in those cases the victims are generally likely to ask the compensation of the damages they suffered in criminal trials, acting as *parte civile.*[4]

Therefore, as Italian public prosecutors are generally obliged to bring a criminal action against the defendants in cases of manslaughter, or personal injuries which are the consequence of the violation of the rules on workers' safety and health, most of the cases of asbestos exposures are today examined by a criminal court.

Moreover, cases with multiple defendants are quite rare in Italian law, because in force of economic and social reasons, most of the workers exposed to asbestos were often employed only by one single employee.

As we shall see, Italian case law does not adopt a single criteria for the ascertainment of the causal link between the asbestos exposure and the insurgence of a lung cancer.

Rather, we can detect some swinging criteria, none of them prevailing on the others.

The impression is, overall, more of a case by case search for a solution than of a pragmatic attempt to individuate a single common ratio to be applied to all the cases.

3. The Italian Civil Courts Criteria of the 'Impossibility to Exclude the Risk Even in Cases of Very Low Exposure Levels'

First of all we can recall those cases in which the liability of the defendant was based on the criteria that it was impossible to exclude the risk of the development of a lung cancer, even when the exposure to the asbestos levels was very low.

In a case in which the petitioner was a smoker, exposed to asbestos dust by the defendant employer, the Italian Corte di Cassazione upheld the decision of the Court of Appeal, stating that the defendant was liable for the compensation of the damages caused to the defendant by the lung cancer, because the asbestos exposure

4 For a very famous criminal case concerning asbestos damages, the so-called Eternit Trial, who saw more than 3.000 *parti civili* claim for a compensation, please read N. Coggiola & M. Graziadei, 'The Italian "Eternit Trial": Litigating Massive Asbestos Damage in a Criminal Court', in W. van Boom & G. Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (Berlin/Boston: De Gruyter 2014), pp 23–45.

attributable to the employer was to be deemed an exclusive and sufficient factor for the development of the cancer, apart from smoke.[5]

In the opinion of the Court, the existence of the causal link could be held when it is proved that the worker was continuously exposed to asbestos, because it could not be excluded, on the basis of the existing knowledge, the risk of the development of a lung cancer, also when the exposure levels are extremely low.

Moreover, the Court also held that the existence of the causal link between the exposure to asbestos and the insurgence of the disease can be affirmed when the defendant is not able to prove that, in the case, the exposure for which he was responsible did not cause the lung cancer. The Corte di Cassazione so inverted the general rule of probation, which requires the petitioner to prove that the injury is the consequence of an action or omission of the defendant.

The same Court had already exploited the legal subterfuge of the inversion of the rule of probation in some previous similar cases, where the employer who had violated his duties of protection of the health and safety of his employees was held liable for the compensation of the damages suffered by a worker.[6] But it should be underlined that in those former cases, the court held that the existence of the causal link could be deemed existing, on the basis of what normally happens in similar cases, with regard to the actual development of a disease, while in the present case it affirmed the existence of the causal link in force of the augmentation of the risk to develop a disease.

It is easy to infer that if a similar rule would be applied in following cases, the ascertainment of the causal link between the asbestos exposure and the insurgence of lung cancer will allow to oblige all those employers that exposed their employees to asbestos, or other pathogen substances, to compensate the damages occurred because of the development of diseases in their workers, even if those same workers were exposed to other pathogen agents, by other employers or in other non-occupational occasions.

There would therefore be an automatic ascertainment of the link of causation every time a possible risk factor, which is potentially able to cause the disease, is found. As a consequence, the liability of the defendant would be held even in cases where he was responsible for very low levels of exposure.

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5 Corte di Cassazione 13 December 2004, n. 644, in *Giurisprudenza italiana (Giur. it.)* 2005, p 1390, with note by N. Coggiola, 'Il risarcimento dei danni da esposizione ad amianto: dall'utilizzo del concetto dell'aumento del rischio all'inversione dell'onere della prova sul nesso di causalità'; *Massimario di Giustizia civile (Mass. Giust. civ.)* 2005, p 1; *Orientamenti di giurisprudenza del lavoro* (*Orient. giur. lav.)* 2005, I, p 123. Of the same opinion Corte di Cassazione 12 August 2009, n. 18246, in DeJure.

6 See e.g. Corte di Cassazione, 3 January 2002, n. 5, in *Danno e responsabilità (Danno resp.)* 2002, p 509, with note by P. Di Giorgi, 'Stress lavorativo: nuove prospettive della nozione di nesso causale'; Corte di Cassazione 18 February 2000, n. 1886, in *Notiziario di giurisprudenza del lavoro (Notiz. giur. lav.)* 2000, p 452.

4. The Italian Criminal Law Criteria of the 'Risk Augmentation'

Another criteria, quite common in criminal cases, is the one which bases the finding of the link of causation on the existence of an augmentation of the risk of development of the disease, as a consequence of the exposure.

We can recall as an example of this criteria a case in which the Italian judges were called to pronounce on the death of 11 workers, who used to repair and manufacture train wagons. Six of the deaths were attributable to mesothelioma, five to other lung cancers. Among these last workers, four were smokers and the fifth worker was a clerk.

The first degree judge stated that, as it was proved that asbestos dust was everywhere in the plant, the causal link between asbestos exposure and the insurgence of the cancer in the clerk could not be excluded. Furthermore, regarding the four other workers, he held that although it could not be ascertained with certainty or an high degree of certainty if asbestos or smoke had a prevailing or exclusive role in the insurgence of the disease, nevertheless it could be admitted that both the risk factors had had a causal action on the insurgence of the disease. Hence, the causal effect of asbestos could be affirmed even in these cases.[7]

Therefore, in the opinion of the judge, if it was not possible to rule out the causative effect of asbestos, it had to be taken into account that it has a synergic effect, which multiplies the risk caused by smoking.

Finally, while stating the liability of the defendant, the judge also held that in the case, as the defendant had an obligation to protect the workers' health and life, the employer was required not only to prevent the injury, but also not to augment or diminish the risk of the same event.

The decision of the trial court was upheld by the Court of Appeal[8] and by the Corte di Cassazione.[9] This latter affirmed that if the defendant had fulfilled his obligations toward the workers, the exposure would have been severely limited and it would have been consequently highly probable a reduction of the risk of insurgence of the disease, or at least a greater latency time.

In the opinion of the court, the causal relationship is deemed to be existing not only when the exact causal chain is proved in detail, but also when the final event could somehow be linked to the negligent action of the defendant, even if using different possible explications.

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7 Pretura Padova 3 June 1998, in *Rivista trimestrale di diritto penale dell'economia (Riv. trim. dir. pen. econ.)* 1998, p 720; *Foro italiano (Foro it.)* 2002, II, p 601, with note by O. Di Giovine, 'La causalità omissiva in campo medico-chirurgico al vaglio delle sezioni unite', *Danno resp.* 2003, p 195, with note by Cacace, 'L'omissione del medico e il rispetto della presunzione d'innocenza nell'accertamento del nesso causale'.

8 Corte di appello Venezia 15 January 2001, in *Riv. trim. dir. pen. econ.*, 2001, p 439.

9 Corte di cassazione, 11 July 2002, in *Foro it.* 2003, II, p 324, with note by R. Guariniello, 'Tumori professionali da amianto e responsabilità penale'.

It must be underlined that the application of this criteria actually changes the rules on the ascertainment of the causation, because the defendant is not anymore held liable when his omission was the cause of a deadly disease, but also when his omission was the cause of a shortening of the latency time of an existing or not yet existing disease.

This decision was later followed by other sentences of the same Corte di Cassazione, as well concerning asbestos related diseases.[10]

5. The Italian Criminal and Civil Courts Criteria of the 'Same Relevance of Every Pathogenic Factor'

Lastly, we should remember that in some cases the defendant liability was affirmed on the holding that every pathogenic factor have had the same relevance in the insurgence of the disease, following the provisions of Article 41 of the Italian Criminal Code.

In a notorious case involving the National Railway Service, the criminal lay judge held the defendants liable for the insurgence of cancers different from mesothelioma, holding that the Italian law provides a general principle of 'equivalence of all the causes'. In force of this principle, every factor is a *condition,* that is to say a cause of the event, unless it could be proved that one single factor, exceptional and unforeseeable, was alone able to cause the injury.

Therefore, even if all the victims were smokers, the judge stated that asbestos exposure augmented the chances of insurgence of the cancers and the shortening of its latency time and that causing one of the many factors in a multifactorial disease is not to be considered as less efficient than causing the only factor in a single factorial disease.[11]

The Court of Appeal and the Corte di Cassazione upheld that decision.[12] In their opinion, there is a causal link between asbestos exposure and insurgence of the disease also in those cases in which the same disease could be caused by non-occupational factors, such as smoking, as there is a synergy in the joint action of asbestos and smoke, and science affirms that they have a multiplicative effect on the insurgence of cancers. Therefore, the continuous asbestos exposures of the workers must be considered, for the law, as important as the first exposure, because they augmented the probability of development of the cancer and accelerated the process leading to its insurgence.

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10 See e.g. Corte di Cassazione 4 July 2007, n. 25528, and Corte di Cassazione 1 February 2008, n. 5117, both in IusExplorer.

11 Pretura Torino 5 November 1997, unpublished.

12 Corte di appello Torino 21 May 1999, *Camposano,* unpublished and Corte di Cassazione 30 March 2000, n. 683, in *Foro it.* 2001, II, p 278, with note by R. Guariniello, 'Dai tumori professionali ai tumori extraprofessionali da amianto'.

The same reasoning was adopted by some criminal courts in other cases[13] and also by some civil courts.

Among these latter we can for example mention a case concerning the death for lung cancer of a worker, a smoker, who was likewise exposed to asbestos by his employer. In that occasion the Corte di Cassazione affirmed the occupational nature of the disease, also holding that smoke and asbestos dust have a synergic effect.[14]

The same Corte di Cassazione, shortly after, in a case concerning a worker, smoker and exposed to asbestos dust, lead dust and other dangerous substances, similarly held that the principle of 'equivalence of all conditions', provided for by Article 41 of the Criminal Code, should be applied to affirm that the disease suffered by the employee was caused by his working activity, because it did not exist any external fact able to interrupt that causal relationship.[15]

This line of reasoning is apparently becoming quite popular with the Italian Corte di Cassazione, as other similar decisions followed.[16]

Nevertheless, it should be underlined that recently the same Corte di Cassazione had the occasion to better shape the limits within which the rule of the 'equivalence of conditions' should be applied.[17] The case concerned, again, a worker with smoking habits, which was exposed to levels of asbestos that, in the opinion of the scientific experts, were lower of the minimum limit statistically significant to have a rule in the insurgence of the lung cancer that affected the worker.

The Corte di Cassazione held, on the basis of the declaration of the scientific experts which affirmed the 'absolute negligibility' of the existing level of asbestos exposure in the insurgence of the lung cancer in the worker, that that factor could be excluded from the possible causes of the disease. In the opinion of the Court, in fact, the link of causation could be affirmed only on the basis of at least the probability (or better a 'qualified probability'), if not the certainty, that a single factor was the cause of the injury.

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13 Corte di Cassazione 2 July 1999, in *Foro it.* 2000, II, p 260, with note by R. Guariniello, 'Malattie professionali, tumori da amianto, asbestosi'; Corte di cassazione 9 May 2003*, Foro it.* 2004, p 69, with note by R. Guariniello and Corte di cassazione 16 March 2001, in IusExplorer.

14 Corte di Cassazione 12 May 2004, n. 9057, in *Rivista di giurisprudenza del lavoro (Riv. giur. lav.)* 2005, p 199, with note by G. Sacconi, 'La prova del nesso di causalità nelle malattie multifattoriali: l'importanza del criterio epidemiologico'.

15 Corte di Cassazione 9 September 2005, n. 17959, in *Riv. giur. lav.* 2006, p 359, with note by S. Assennato, 'Multifattorialità: nesso causale e obbligo di protezione. Quale rapporto?'. Of the same opinion Corte di cassazione 3 July 2007, n. 15002, in DeJure.

16 Corte di Cassazione 26 March 2015, n. 6105, in IusExplorer; Corte di Cassazione 27 June 2014, n. 14615, in IusExplorer; Corte di Cassazione 26 October 2012, n. 18472, in IusExplorer.

17 Corte di Cassazione 30 July, n. 2013, n. 18267, in IusExplorer.

6. Conclusions

The compensation of multifactorial diseases is a common problem that courts are increasingly asked to deal with, which always requires a shift from the traditional rules, such as the *conditio sine qua non* rule of civil law countries, to some new rules, more apt to these cases.

Unfortunately, the elaboration of these new rules is not an easy task, primarily because the science is not able to give lawyers the necessary help. As we all know, in fact, in all the cases of multifactorial diseases medical science can generally only affirm the existence of a link of causation between a certain factor and the insurgence of the disease in term of possibility or probability, never with certainty. On the other end, these cases generally entail delicate policy issues, as often involve weak petitioners, such as workers and other people exposed to dangerous substances without their consent and knowledge, and negligent defendants, such as employers or companies, which are often only partly liable for the exposures of the petitioners to dangerous substances.

It is on this unstable terrain that lawyers are called to build a reliable rule of ascertainment of the legal causation in cases of multifactorial diseases, which should be able to satisfy both equity reasons and policy reasons.

The analysis of the case law of Italian courts on the issue of the ascertainment of the causal link in cases of lung cancers developed in persons who were both exposed to asbestos dust and smoke, shows very clearly some of the different tentative paths that courts can elaborate in this search.

None of the examined rules developed by the Italian courts are definitive and prevailing, even because of the non-binding effects of the decisions of the Corte di Cassazione on lower courts in Italy, and of the lack of a general agreement on the issue, but all of them represent a perfect example of the efforts that courts are today making in trying to combine policy reasons, equity and positive legal rules.

What will happen next in Italy is difficult to guess, because the subject is at the centre of different and contrasting interests and approaches. The only certainty is that most probably there is not a solution that could be held as definitive and that could be entirely approved by everyone involved in this delicate field of the law.