

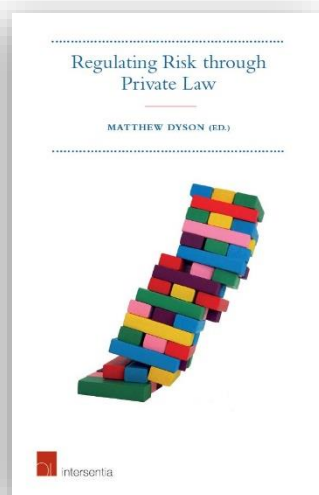


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REGULATING RISK  
THROUGH PRIVATE LAW

*Edited by*  
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## Regulating Risk through Private Law

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# CHAPTER 5

## RISK AND ITALIAN PRIVATE LAW

Nadia COGGIOLA and Bianca GARDELLA TEDESCHI\*

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The Italian Civil Code (c.c.), the main source of law for extracontractual liability (for present purposes, equivalent to ‘tort’), does not specify risk-taking or -producing as a source of extracontractual liability. On the other hand, risk has long been well known to specialists of contract law, as it was the main component of ‘aleatory contracts’, that is, contracts that have as their main goal to shift risk from one party to another. We can therefore find in Italian contract law detailed provisions on risk shifting and disclosure of information from the insured party to the insurer (arts. 1882–1914 c.c.), and some provisions about the aleatory contract of sale (art. 1472, paragraph 2). After World War II, the thinking about risk has extended to extracontractual liability. This has been driven primarily by scholars and judges, building risk into the Civil Code provisions on extracontractual liability. The result is that ‘liability for risk’ is now well established in its substance in Italian law.<sup>1</sup> The result is not a clear-cut

---

\* Bianca Gardella Tedeschi wrote sections 5.1–5.3, 5.8; Nadia Coggiola wrote sections 5.4–5.7.

<sup>1</sup> The word *rischio* (risk) does not appear in the table of contents of a recent work on extracontractual liability: A Diurni, A Negro, M Sella and A Venchiarutti, *Commentario al*

category of ‘risk’, but nonetheless legal actors are able to reason in respect of ‘risk’, and not only of fault, when ascribing liability.

This chapter is divided into two sections. In the first, we will show how the concept of risk entered into the field in extracontractual liability through two main devices: negligence and liability for dangerous activities. In the second section, we will address more specific liability for dangerous activities, questions related to civil procedure and liability for endangerment.

## 5.1. RISK IN THE EXTRA CONTRACTUAL DOMAIN

The Italian Civil Code was enacted in 1942; it shows strong French roots, but the drafters of the Code took a substantively new approach on issues regarding extracontractual liability. This was in part because the industrial revolution was only just beginning in Italy, but also because they sought to incorporate developments from decades of case law. The result for extracontractual liability was one very basic article – article 2043 – that illustrates the conditions for establishing liability, coupled with original and specific articles on special liabilities.

Article 2043, which sets out the basis of tort liability, reads:

*‘Qualunque atto doloso o colposo che causa ad altri un danno ingiusto obbliga colui che ha commesso il fatto a risarcire il danno.’*

One viable translation of this would be:

‘Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.’<sup>2</sup>

The formula is similar to the provision in the French Civil Code on extracontractual liability, except for the requirement of *danno ingiusto*, meaning ‘unlawful damage’, which was read for a long while as setting a limited list of protected interests, but which is no longer so read.<sup>3</sup>

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*codice civile. Artt. 2043–2053, fatti illeciti* (Giuffrè, Milan 2008). In G Alpa, *Trattato di diritto civile, La responsabilità civile* (Giuffrè, Milan 1999), the word *rischio* refers to a chapter in the book that deals with Calabresi’s cost of accidents. But in both works, risk and liability are then addressed in the chapters on dangerous activities. The category of risk is well known to comparative law academics who imported into Italy the economic analysis of R Cooter, U Mattei, PG Monateri, R Pardolesi and T Ulen (eds.), *Il mercato delle regole. Analisi economica del diritto civile* (Il Mulino, Bologna 1999).

<sup>2</sup> M Beltramo, GE Longo and JH Merryman, *The Italian Civil Code* (Oceana, New York 1991), from which all the translations of articles are drawn. As a caveat, we should warn the reader that this is not a perfect translation of the original Italian provision.

<sup>3</sup> B Gardella Tedeschi, *L’interferenza del terzo nei rapporti contrattuali* (Giuffrè, Milan 2008), 284.

Besides article 2043 c.c., the Italian Civil Code contains articles delineating special liabilities:

- dangerous activities (art. 2050);
- things (art. 2051);
- animals (art. 2052);
- collapsing buildings (art. 2053); and
- motor vehicle circulation (art. 2054).

In the mind of the legislator, the overarching paradigm for extracontractual liability has always been liability for fault, as illustrated by article 2043: these special cases are not actually demonstrating liability without fault, but liability where fault is presumed. In other words, the mechanism chosen by the legislator in order to help the victims recover damages is not strict liability but instead a reversal of the burden of proof.

Other articles deal with cases of vicarious liability: liability of parents, guardians and teachers for the acts of their children and pupils (art. 2048), and liability of employers for damages caused by their employees (art. 2049), thus including *employee truck driver* (case 3). In these instances, the paradigm of liability is still fault, but the employer was liable for failing to choose his employees well (*culpa in eligendo*) or for failing to supervise them adequately (*culpa in vigilando*), whereas parents and teachers are liable only for lack of supervision, and they have the burden of showing they took appropriate care.

For each case of special liability, the Code establishes how to rebut the presumption of fault. For most cases, the presumption is rebutted when the defendant can prove force majeure. There is only one exception: the employer's liability for damages caused by employees (art. 2049), where there is no possibility of rebutting the presumption: the employer is always liable toward third parties and the employer will have a recourse action, if appropriate, against the employee.<sup>4</sup>

It has to be noted that none of these articles specifically addresses issues of risk, or risk-taking, as a parameter for ascribing liability. Risk does not exist as an autonomous category in the taxonomy of extracontractual liability. However, scholars and judges have been inclined to craft rules that make liable those who create a risk for others. In effect, Italian law applies a rule of thumb imposing liability when a person is involved in an activity imposing risk on others and damage actually occurs. There are two main features that allow the

<sup>4</sup> The recourse action lies when the employee acts with malice or intention or recklessness. Case law on art. 2049, liability of employers for damages caused by employees, is conspicuous. For an introduction, see M Franzoni, *Trattato della responsabilità civile. L'illecito* (Giuffrè, Milan 2010), 760–843.

decision-maker to account for risk in assessing liability. The first is an objective understanding of fault; the second is the theory of 'liability for risk' that was developed at the scholarly level and then employed by judges in deciding cases.

## 5.2. OBSCURING THE CATEGORY OF RISK: *COLPA IN SENSO OGGETTIVO*

*Colpa*, meaning fault or negligence, was historically conceived in Italian case law with a strong reference to the subjective view of the wrongdoer. It was under the first Italian Civil Code of 1865 that a more modern interpretation of fault, necessary to ground an extracontractual liability in case of damage, moved from a subjective interpretation to an objective one, *colpa in senso oggettivo*.<sup>5</sup> This means that the assessment of the individual's fault is carried out by comparing the defendant to an external standard, like the reasonable person, rather than through asking solely what the defendant was thinking. It is the judge who will decide which precautions the agent should have taken and in so doing will deploy an *ex ante* analysis. This conceptualisation of fault is typical of contract law, where it is traditional to distinguish between *culpa in concreto*, where the interpreter takes into consideration previous behaviour of *that* debtor, and *culpa in abstracto*, where the interpreter has to consider how a reasonable and diligent debtor would have acted in the same situation. With the Civil Code of 1942, the reception of *culpa in abstracto* from contract law into tort law actually took place against resistance from some scholars.<sup>6</sup>

It is through the abstract interpretation of *culpa* that case law requires everyone to follow standards of conduct, in order to minimise both damage and, to some extent, the risk of damage.<sup>7</sup> In a way, anyone who performs an action in a negligent way is implicitly assuming the risk of his or her own actions. This is particularly clear when negligence amounts to a violation of a statutory provision, as the wrongdoer is liable for all the consequences of his/her noncompliance with the provisions of the law violated, regardless of how foreseeable they were.

By operating under the objective reading of negligence, judges and scholars are stressing the deterrence function of liability. Extracontractual liability is being used to prevent harm, together, of course, with the necessary compensatory function of liability. At the same time, this deterrence does not feature the idea

<sup>5</sup> GP Chironi, *La colpa nel diritto civile odierno* (Fratelli Bocca, Turin 1887; 2nd ed. Fratelli Bocca, Turin 1903); M Graziadei, 'Liability for Fault in Italian Law. The Development of Legal Doctrine from 1865 to the End of the Twentieth Century' in N Jansen (ed.), *The Development and Making of Legal Doctrine* (Cambridge University Press, Cambridge 2010), 126–163.

<sup>6</sup> G Visintini, *Trattato della responsabilità civile* (CEDAM, Padua 2005), 83.

<sup>7</sup> G Alpa, above n. 1, 138.

of punishment or contempt for the wrongdoer: there is no ethical or moral judgement associated with the wrongdoer's activity. In effect, it is assumed that his/her *activity* is lawful, or else the activity per se, not doing it with fault, would have been prohibited, but nonetheless that activity may cause harm to others. The message sent by this reading of the fault requirement is that the actor has to organise his/her activities according to standards of conduct, in order to avoid causing harm.

Strictly speaking, an objective interpretation of negligence cannot do the work of liability for risk. It is nonetheless clear that if we look at the economic basis of liability, as well as its function, an objective interpretation of fault seeks to attribute liability to the person who actually has control over the process that ends in damage and who could have actually prevented that damage by taking all the necessary precautions. Ultimately, it would not be going too far to say that, by failing to abide by standards of careful conduct, the wrongdoer creates a risk for which he/she should be liable.

### 5.3. LIABILITY FOR RISK: A SCHOLARLY TAXONOMY

The second way that Italian law incorporated risk concepts was through technological developments creating greater everyday risk of harm to consumers. With the economic boom of the 1950s and 1960s, damages caused by products were increasing in occurrence and dimension. Pietro Trimarchi, one of the finest Italian private law scholars of the period, sought to develop a single taxonomy that could tie liability to production and risk. He recognised the existence in the Civil Code of several cases of special liabilities that certainly favoured the victim; he also acknowledged that the usual interpretation of fault, which made reference to the actions taken by a diligent person (*bonus pater familias*) in that same situation, assisted victims. But Trimarchi's endeavour was to show that all these elements could be bundled together as instances of a wider notion, that of liability for risk. This effort crystallised in the 1960s and risk began to affect reasoning on extracontractual liability.

Trimarchi's seminal book of 1961 bore a very significant title: *Rischio e responsabilità oggettiva*; in English, 'Risk and objective extracontractual liability'.<sup>8</sup> Trimarchi was working in a period of Italian legal history once some of the dust of fascism had settled and attention could turn from overarching constitutional questions to wider concerns like extracontractual liability. He questioned the very idea that extracontractual liability could depend on fault in all cases involving economic production. Trimarchi's view was based on the dictum *cujus commoda, ejus etiam incommoda*: everybody who profits from an economic activity should pay for the harm that activity generates. It is predicated

<sup>8</sup> P Trimarchi, *Rischio e responsabilità oggettiva* (Giuffrè, Milan 1961).

upon a basic cost–benefit analysis, in which we have to take into account all the costs, not only the cost of workers and materials, but also harm to third parties and the public that may occur in order to compare it to the benefits of that activity. Through this reasoning, Trimarchi introduced into the tort vocabulary the term risk: those who profit and, even more importantly, who can exercise full control over the economic activity should bear the risk of any damage that the activity may cause.

Trimarchi's attempts to prove this thesis began with the Code articles creating special liabilities. The first step was to show that the presumed fault understanding of these provisions was flawed. He started with article 2049, which sets out the employer's vicarious liability for torts committed by his or her employees. The established basis, as we saw, was presumed fault, but Trimarchi objected that presumed fault could not in fact explain the rules. One basis for such fault in vicarious liability was *culpa in vigilando*, but Trimarchi objected that even very meticulous surveillance by the employer of his employees cannot avoid liability for all harm the employee might do. The same is true if the basis for vicarious liability was *culpa in eligendo*: the employer may choose the best employee, but even the best employee, technician or specialist can make a mistake in the course of employment and that mistake would make the employer liable (and hence, again, the employee's failure to disclose his medical condition in *employee truck driver* (case 3) does not change the fact that the employer is liable). His conclusion was that fault in this case is a juridical fiction and employer's liability must have a different justification.

Trimarchi followed the same line of reasoning to show that all the cases of special liability, even though each had been reconnected to fault in some way, were in fact cases of strict liability. The law was deciding a priori who the subject was who – according to his or her activity, the control that he or she can exert on the process of production, or the benefit that he or she will earn from the activity – will be liable for any damage that occurs.

The next step was for Trimarchi to show that there was a better explanation than presumed fault. He argued that, although the Code does not mention in these articles a profitable economic activity, those articles will be even more relevant if the damage occurs in the course of production, as everyone who will profit from the activity should bear the costs to the community that his activity produces.

While article 2049 was of help in order to move beyond from a system of fault liability, Trimarchi had to go further for his theory to work, and to do this he used article 2050, on the liability arising from the exercise of dangerous activities:

‘Whoever causes injury to another in the performance of an activity dangerous by its nature or due to the means employed is liable to pay compensation, unless he proves that he has taken all suitable measures to avoid the injury.’

The *Relazione al Re*,<sup>9</sup> the text that explained the Italian Civil Code at the moment of its enactment in 1942, at §795, clearly spells out the importance of this article: in particular, it applies to situation where there is a higher likelihood of damage being caused: ‘the foreseeability is *in re ipsa*’. Despite the importance of article 2050 in the minds of the codifiers, the potential revolutionary force of this article in a country that was about to leave behind agriculture as the main economic factor to join the most industrialised countries was not totally realised until Trimarchi’s work. Trimarchi saw in the wording of the article and of the *Relazione* a clear indication that the decision to carry out a dangerous activity implies the assumption of the risk of any damage caused. This leap helped Trimarchi to demonstrate that the tort law system set out in the Code actually included the liability for risk as an overarching paradigm, expressed in specific individual instances found in the Code.

Trimarchi’s book was widely read in Italy and became part of the Italian legal consciousness. Assumption of risk as a factor in assigning liability spread easily thanks to the manual of private law that Trimarchi himself wrote for first-year law students. This manual was for a long time among the most widely adopted manuals by law faculties and among the most widely used in preparation for the bar exam. In his manual, §91 is titled ‘Function of strict liability for risk’ (*La funzione della responsabilità oggettiva per rischio*) and it remained stable, in that location and with that title and content, throughout subsequent editions. In this paragraph, read by tens of thousands of students over a period of 30 years, one can read that the justification of liability for risk is linked to the economic distribution of costs and profits, and that it is clear that a business should be strictly liable for the risk, as the business’ choices are determined by economic cost–benefit analyses. Among the costs, the firm should take into account not only the costs connected to workers and materials, but also damages inflicted on third parties. The legal system should therefore hold the firm liable for all these costs. It is through this ‘formant’, to draw on Sacco’s theory on formants and comparative law,<sup>10</sup> that liability for risk became part of Italian extracontractual liability.

As a general statement, case law followed Trimarchi. Rebutting the burden of proof in cases of special liability became more and more difficult. Liability for dangerous activities expanded to encompass many activities that a reasonable person would not classify as intrinsically dangerous, as will be explained in the second part of this chapter. By comparison, for quite a long time after its enactment, article 2050 was seldom applied, and when it was, only to cases that

<sup>9</sup> Relazione del Ministro Guardasigilli Dino Grandi al Codice Civile, 4 April 1942.

<sup>10</sup> R Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)’ (1991) 39 *Am J Comp L* (*American Journal of Comparative Law*) 1, 22; R Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)’ (1991) 39 *Am J Comp L* 293, 397–401.



were potentially highly dangerous, but not very relevant for their economic and social impact.<sup>11</sup> These cases concerned activities which were in fact subject to further regulations on public safety, and included cases of industries manufacturing explosives, running mills, operating boilers or dangerous ways of production and similar. The change came around the end of the 1970s and the beginning of the 1980s, when the categories of dangerous activities were widened by courts to include those activities that, although not labelled as dangerous, are intrinsically risky or dangerous because of the means used.<sup>12</sup> This expansion was partly the consequence of the growth in cases where damage was being caused by activities that could be classed as dangerous. It was also partly the consequence of the growing trend towards better protecting injured parties. But in large part, it was Trimarchi's doctrine that was percolating in the Italian legal system through university teaching. As a result, article 2050, initially introduced after the industrial revolution as merely a further ground of regulation, is today one of the pillars of tort law in Italy. That being said, even today, not many scholarly manuals consider article 2050 to be particularly important, as it is still a case of special liability, and most continue to consider only article 2043 to be 'the' article on extracontractual liability.

The reception of the category of liability for risk was reinforced when comparative lawyers (such as Alpa,<sup>13</sup> Pardolesi and Mattei)<sup>14</sup> brought to Italy the economic analysis of law that had developed in the United States and cost-benefit analysis. At this point, it became clear that there was a strong economic link between tort law and risk and that the very idea of taking risk should imply accepting the correlative liability for any damage caused.

Still, risk-based liability is not an established part of Italian law for those loyal to the Civil Code's taxonomy. Many works on extracontractual liability do not have a paragraph on liability for risk, especially when they follow word for word the Civil Code's table of contents.<sup>15</sup> In some other works, the paragraph or chapter on liability for risk is mainly a collection of foreign experiences,

<sup>11</sup> M Cinelli, 'Contributi e contraddizioni della giurisprudenza in materia di responsabilità da attività pericolose', *Riv. dir. civ. (Rivista di diritto civile)*, 1970, II, 162; G Visintini, *La responsabilità civile nella giurisprudenza* (CEDAM, Padua 1967), 387.

<sup>12</sup> See for example Cass., 29 May 1989, no. 2584, *Giust. It. (Giustizia italiana)*, 1990, I, 234; Cass., 7 May 2007, no. 10300, *Foro it. (Foro italiano)*, 2007, I, 1685; Cass., 10 February 2003, no. 1954, *Arch. civ. (Archivio civile)*, 2003, 933; Cass., 20 July 1990, no. 7571, *Mass. Foro it. (Massimario Foro italiano)*, 1990; Cass., 11 November 1987, no. 8304, *Arch. civ.*, 1988, 822; Cass., 2 February 1983, no. 908, *Dir. prat. assic. (Diritto e pratica delle assicurazioni)*. For other references to case law and scholars' opinions please see V Di Martino, *La responsabilità civile nelle attività pericolose e nucleari* (Giuffrè, Milan 1980), 416.

<sup>13</sup> G Alpa, R Pulletini, S Rodotà and F Romani, *Interpretazione giuridica e analisi economica* (Giuffrè, Milan 1982).

<sup>14</sup> R Cooter, U Mattei, PG Monateri, R Pardolesi and T Ulen, above n. 1.

<sup>15</sup> For a list of more recent works that do not treat risk as a separate category in ascribing liability, see above n. 1.

especially legal scholarship from the United States, rather than an explanation of the category of risk in Italian civil law. Nonetheless, it is beyond doubt that the category of risk is in fact fully integrated into the Italian legal system.

The cutting edge of reasoning on liability for risk can now be found in article 2050 c.c. on dangerous activities. In particular, there are two lines of interpretation of the article. First, courts are willing to broaden the concept of ‘dangerous activity’ in order to attract as many cases as possible into a regulatory regime that is characterised by its pro-victim rules. Second, courts have been narrowing defences and other mechanisms to avoid liability once an activity has been classed as a ‘dangerous activity’.

## 5.4. LIABILITY FOR DANGEROUS ACTIVITIES

### 5.4.1. ARTICLE 2050 C.C.

The importance of being able to classify an activity as dangerous is obvious: the victim can avoid having to prove negligence or fault. There has been a trend towards interpreting ‘dangerous activity’ to include as many activities as possible to make it easier for the victim to claim damages. The vague wording of article 2050 c.c. certainly assists courts and scholars in doing this. The sole limitation is that the responsible person must act directly, even with the help of employees or an assistant, in the risky situation, and not delegate it to a totally independent agent. The cases where article 2050 c.c. is applied range from the organisation of someone else’s dangerous activities, such as car rallies or football matches,<sup>16</sup> orders given to an inexperienced person to light fireworks made by the president of a celebration committee,<sup>17</sup> all the way through to hunting activities, even if pursued for leisure.<sup>18</sup>

Article 2050 c.c. is qualified by the objective element of the dangerousness of the activity, which must arise from its nature or from the means employed. Therefore, to make the risk-taker liable, it is necessary to prove dangerousness per se, of the activities themselves, without reference to the behaviour or conduct of person carrying it out. Nevertheless, it should be noted that there are cases where an activity which is not generally considered dangerous is deemed to be so because of the dangerous or abnormal conditions in which it takes place. For example, while aviation is generally considered a non-dangerous activity, in some

<sup>16</sup> Trib. Ascoli Piceno, 13 May 1989, *Riv. dir. sport. (Rivista diritto sportivo)*, 1989, 496, annotated by A Manfredi.

<sup>17</sup> Trib. Rossano, 10 April 1965, *Arch. resp. civ. (Archivio della responsabilità civile)*, 1967, 142, annotated by G Greco.

<sup>18</sup> Trib. Cagliari, 27 April 1985, *Riv. giur. sarda (Rivista giuridica sarda)*, 1986, 500; Cass., 19 June 1980, *Riv. pen. (Rivista penale)*, 1981, 82.

cases it has been held to be a dangerous one due to the conduct of the agent. Instances include where a car was damaged by being hit by a road sign moved by the air generated by a helicopter,<sup>19</sup> or to the fact that the motor used was not suitable for aviation,<sup>20</sup> or because of the atmospheric conditions, flight plans, or safety conditions.<sup>21</sup> In practice, there is not a clear theoretical distinction between dangerous and not dangerous activities in Italian law, but it falls to the courts to make that distinction on a case-by-case basis. Scholars have attempted to categorise when the courts should do so, and have come up with two criteria:<sup>22</sup>

1. First, an activity is dangerous when it creates a relevant probability of or a high potential for creating damages compared to the average, on the basis of statistical and technical elements and common knowledge.<sup>23</sup> Therefore, the dangerousness of an activity is the result of an empirical evaluation, which takes into consideration how risky a certain activity is, under a quantitative profile.
2. Second, according to the likelihood and seriousness of the harm that the activity can produce.

In fact, some scholars argue that although some activities can be the cause of a large number of injuries, they cannot be considered dangerous, while others, such as nuclear activities, pollution or toxic waste management, can potentially cause widespread damage and are therefore considered dangerous activities, even if the probability of the eventuation of that harm is low.<sup>24</sup>

#### 5.4.2. DEVELOPMENTS IN THE INTERPRETATION OF ARTICLE 2050 C.C.

The category of dangerous activities is relative. It is affected by prevailing opinions and knowledge in society. Activities that were once considered dangerous may

<sup>19</sup> Cass., 19 July 2002, *Danno resp.*, 2002, 1214.

<sup>20</sup> Trib. Roma, 22 May 2002, *Dir. trasporti (Diritto dei trasporti)*, 2003, 953, annotated by A Antonini; Trib. Torino, 18 February 2002, *Dir. trasporti*, 2003, 941, annotated by A Gaggia.

<sup>21</sup> Cass., 18 March 2005, no. 5971, *Nuova giur. civ. (Nuova giurisprudenza civile)*, annotated by N Muccioli.

<sup>22</sup> D De Martini, 'Responsabilità per danni da attività pericolosa e responsabilità per danni nell'esercizio di attività pericolosa', *Giur. it. (Giurisprudenza italiana)*, 1973, I, 2, 967 and M Franzoni, above n. 4, 412.

<sup>23</sup> M Comporti, *Esposizione al pericolo e responsabilità civile* (Edizioni Scientifiche Italiane, Naples 1965), 291; G Pacchioni, 'Rischio, pericolo e pericolosità', *Rass. giur. circ. strad. (Rassegna giuridica della circolazione stradale)*, 1943, 43; G Gentile, 'Responsabilità per l'esercizio di attività pericolose', *Resp. civ. prev. (Responsabilità civile e previdenza)*, 1950, 97; E Bonasi Benucci, 'In tema di attività pericolosa (art. 2050)', *Temì*, 1956, 473; V Geri, *La responsabilità civile da cose in custodia, animali e rovina di edificio* (Giuffrè, Milan 1974), 161.

<sup>24</sup> M Franzoni, above n. 4, 413.

not be seen as dangerous today due to technological or scientific advances, or vice versa.<sup>25</sup> Similarly, the same activities can entail relevant risks depending on contingent conditions, such as the weather, the place, the circumstances and the physical condition of the person involved. Examples include sporting activities such as sport fishing, skiing, or sport driving or riding, which we will consider in greater detail later.

In addition to the perception and reality of risk changing over time and in different background conditions, the legal construction of the context can be particularly important. One important example in Italy is where the dangerous activity is performed either with the authorisation of the state or directly by the state.

In the first case, there has been a slight evolution. Case law had always held that the authorisation given by a public authority entails the exclusion or diminution of the authorised person's liability for a dangerous activity.<sup>26</sup> This used to be so even if the authorisation was illicit, because it had generally been held that the supremacy of the public administration overrode any protection for the third party.<sup>27</sup> That attitude did not last forever. There has been a judicial and legislative trend, inspired by Italian scholars, that has transformed the relationship from one where the state rules its citizens to a more egalitarian partnership. Following this trend, the Italian *Corte di Cassazione* has recognised the right to the protection of the legitimate interests of third parties,<sup>28</sup> and therefore in cases of illicit authorisation of dangerous activities, the public administration can be held severally and jointly liable for damages with the authorised person.

Where the dangerous activity has been directly performed by the state itself, a major evolution has occurred. First, to set the scene, Italian law was somewhat inconsistent, favouring the state only with regard to article 2050, not other articles. Although Italian scholarship had always argued that the public administration must be held liable for the damage caused by its dangerous activities,<sup>29</sup> for a very long time the Italian courts refused to hold the state liable. The exact reasons given varied, but all of them related to the administration's position of supremacy over the individuals and the presumption that all acts

<sup>25</sup> See for example Cass., 2 December 1997, no. 12193, *Danno resp.*, 1998, 567, annotated by P Laghezza.

<sup>26</sup> Cass., 10 November 1971, no. 3213, *Mass. Foro it.*, 1971; Cass., 31 January 1966, no. 371, *Mass. Foro it.*, 1966.

<sup>27</sup> Cass., 17 May 1958, no. 1608, *Foro it.*, 1958, I, 1103.

<sup>28</sup> Starting with the notorious decision Cass. SS.UU., 22 July 1999, no. 500, *Foro it.*, 1999, I, 2487.

<sup>29</sup> Among others, read E Casetta, *L'illecito degli enti pubblici* (Giappichelli, Turin 1953), 91; R Alessi, *La responsabilità della pubblica amministrazione* (Giuffrè, Milan 1972), 220; M Comporti, *Esposizione a pericolo e responsabilità civile* (Morano, Naples 1965), 328; G Duni, *Lo Stato e la responsabilità patrimoniale* (Giuffrè, Milan 1968), 580; G Alpa, *Responsabilità civile e danno* (Il Mulino, Bologna 1991), 319.

of the public administration are lawful acts.<sup>30</sup> However, this reasoning was, on the contrary, not applied to all the other cases where there could be argued to be an assumption of risk: damage caused by animals, things in custody, collapse of buildings or circulation of vehicles. Probably this different treatment found its roots in the fact that article 2050 was generally seldom applied, unlike all the other provisions imposing liability for specific dangerous activities, so there was thought to be no need for the courts to extend it. In any case, the evolution in article 2050's application to the state came in the 1980s and the changes were incremental. First, it was affirmed that that article could be applied to the production of high-voltage electrical energy,<sup>31</sup> then it was applied to management of the national railway company<sup>32</sup> and of roadworks undertaken by the local authorities,<sup>33</sup> and lastly it was affirmed that the management of low-voltage electrical cables was a dangerous activity under article 2050 c.c.<sup>34</sup>

As a result of these developments, article 2050 can now be applied without any distinction between public and private entities, with the obvious exception of those activities which lie at the core of public functions, such as police activities.<sup>35</sup> This development is interpreted by legal scholars as the expression of the general tendency to think of private law as a general law, which must be applied to every case except when explicitly excluded by a special rule, justified by some special reasons.<sup>36</sup> This modern trend is in stark contrast to the traditionally protective attitude taken to the position of the state.

#### 5.4.3. THE APPLICATION OF ARTICLE 2050 C.C.

We can choose from quite a large array of cases to provide actual examples of how article 2050 c.c. has been applied by Italian courts. Among the activities that have been classed as 'dangerous' are: the management of electrical cables

<sup>30</sup> For an articulate exposition of these different reasons, see Cass. SS.UU., 23 February 1956, no. 507 and no. 509, *Foro it.*, 1956, I, 507 and the list of cases cited by G Visintini, above n. 11, 430.

<sup>31</sup> Cass., 27 January 1982, no. 537, *Foro it.*, 1982, I, 674; *Resp. civ. prev.*, 1982, 370, annotated by PG Monateri; *Riv. giur. circ. trasp.* (*Rivista giuridica della circolazione e dei trasporti*), 1982, 538, annotated by G Alpa; *Riv. dir. comm.* (*Rivista del diritto commerciale*), 1982, II, 95, annotated by M Bessone.

<sup>32</sup> Cass., 27 February 1984, no. 1393, *Foro it.*, I, 1280, and 1985, I, 1497, annotated by M Comporti; *Dir. giur.* (*Diritto e giurisprudenza*), 1985, 484, annotated by V Nunziata.

<sup>33</sup> Cass., 24 November 2003, no. 17851, *Danno resp.*, 2004, 1223, annotated by A Giordo.

<sup>34</sup> Cass., 29 May 1989, no. 2584, *Giur. it.*, 1990, I, 1, 234, the case concerned an electrical low-voltage pipeline that did not respect the rules on the distances between electrical low-voltage pipelines and buildings provided for by a regulation on the construction and management of external aerial pipelines.

<sup>35</sup> Cass., 30 November 2006, no. 25479, *Danno resp.*, 2007, 679, annotated by I Confortini.

<sup>36</sup> On the issue, F Galgano, *Trattato di diritto civile* (CEDAM, Padua 2009), I, 22 and M Franzoni, above n. 4, 410.

(even those with low voltages),<sup>37</sup> the activity of construction,<sup>38</sup> all the activities of loading and unloading in harbours,<sup>39</sup> hydroelectricity generation,<sup>40</sup> the management of the national railways,<sup>41</sup> the management of an amusement park in respect of an injury suffered on a roller coaster,<sup>42</sup> the management of a hotel with a lift,<sup>43</sup> and many others.<sup>44</sup> It would seem highly likely that *out-of-control go-kart* (case 2) would be described as a dangerous activity.

Article 2050 c.c. has also frequently been applied to cases of product liability, sometimes even instead of the provisions on product liability introduced by Directive 85/374/EEC. A classic example is the liability for manufacturing and distribution of gas cylinders,<sup>45</sup> where in fact the manufacturer was held liable jointly with the guardian of the cylinder, the manufacturer on the basis of article 2050 c.c. and the guardian on the basis of article 2051 c.c., thus providing, as we shall see later, for the liability of the keeper for damages caused by things in his custody.<sup>46</sup> Article 2050 c.c. was also always applied instead of the European legal regime to cases concerning the production or marketing of pharmaceutical products<sup>47</sup> and of blood products,<sup>48</sup> as both were held by Italian courts to be

<sup>37</sup> Cass., 16 January 1997, no. 389, *Foro it.*, 1997, I, 1169; Cass., 29 May 1989, no. 2584, *Giur. it.*, 1990, I, 1, 234.

<sup>38</sup> Cass., 3 November 1995, no. 11452, *Dir. econ. ass.*, 1996, 637; Cass., 3 November 1995, no. 11452, *Mass. Foro it.*, 1995.

<sup>39</sup> Cass., 1 July 1987, no. 5764, *Mass. Foro it.*, 1987.

<sup>40</sup> Pret. Foligno, 2 November 1984, *Arch. civ.*, 1985, 624.

<sup>41</sup> Cass., 1 April 1995, no. 3829, *Giur. it.*, 1996, I, 1, 222; Cass., 27 February 1984, no. 1393, above n. 32.

<sup>42</sup> Cass., 27 July 1990, no. 7571, *Arch. civ.*, 1991, 46.

<sup>43</sup> Cass., 5 May 1982, no. 2826, *Foro it.*, 1982, I, 2499.

<sup>44</sup> For a more complete list see M Franzoni, above n. 4, 416–419.

<sup>45</sup> Cass., 4 June 1998, no. 5484, *Giur. it.*, 1999, 707; Cass., 24 November 1988, no. 6325, *Mass. Foro it.*, 1988; Cass., 13 January 1982, no. 182, *Resp. civ. prev.*, 1982, 746, annotated by PG Monateri; Cass., sez. III, 17 July 2002, no. 10382, *Dir. econ. assic.*, 2003, 261; Cass., sez. III, 2 April 2001, no. 4792, *Foro it. Rep. (Foro italiano Repertorio)*, 2001, *Responsabilità civile* [5760], n. 337.

<sup>46</sup> Cass., sez. III, 4 June 1998, no. 5484, *Giur. it.*, 1999, 707; *Resp. civ. prev.*, 1999, 115, annotated by C Medici; Cass., sez. I, 19 January 1995, no. 567, *Giur. it.*, I, 1, 276.

<sup>47</sup> Trib. Roma, 20 June 2002, *Foro it.*, 2002, I, 3225; *Danno resp.*, 2002, 984, annotated by L La Battaglia; *Dir. giust. (Diritto e giustizia)*, 2002, fasc. 23, 58, annotated by AG Cianci; *Resp. civ. prev.*, 2002, 1103, annotated by U Carnevali; Cass., sez. III, 27 July 1991, no. 8395, *Giur. it.*, 1992, I, 1, 1332, annotated by A Barengi; App. Roma, 17 October 1990, *Giur. it.*, 1991, I, 2, 816, annotated by G Tassoni. Those decisions were criticised by some scholars who affirmed that they overly enlarged the boundaries of the liability of pharmaceutical products manufacturers; see R Cooter, U Mattei, PG Monateri, R Pardolesi and T Ulen, above n. 1, 443.

<sup>48</sup> Trib. Ravenna, 28 October 1999, *Danno resp.*, 2000, 1012; Cass., sez. III, 27 January 1997, no. 814, *Foro it. Rep.*, 1997, *Responsabilità civile* [5760], n. 211; Cass., sez. III, 1 February 1995, no. 1138, *Discipl. comm. (Disciplina del commercio)*, 1995, 592; Cass., sez. III, 20 July 1993, no. 8069, *Foro it.*, 1994, I, 455; *Resp. civ. prev.*, 1994, 61, annotated by A Busato; *Giust. civ.*, 1994, I, 1037, annotated by A Barengi; Cass., 15 July 1987, no. 6241, *Foro it.*, 1988, I, 144, annotated by D Caruso; *Resp. civ. prev.*, 1988, 421, annotated by G Tassoni.

dangerous activities. But this trend has its limits. The same courts have always denied that article 2050 c.c. could be applied to those (like the Italian Ministry of Health) who have a statutory obligation to supervise and control dangerous activities, such as the production and marketing of blood and blood products, even though they do not perform them directly. In that case, in fact, the liability of the Ministry of Health was affirmed under article 2043 c.c.<sup>49</sup>

Sport is a complicated category of risk. Some sports can be considered risky and therefore be treated as dangerous activities under article 2050 c.c.<sup>50</sup> These include hunting, water skiing and water sports in general, riding when the rider is a beginner unable to control the horse (even if he was assisted by a helper of the manager), hockey, and recreational flight. The organisation of sporting *events* is sometimes included in the category of dangerous activities, such as the organisation of a motorbike race on a road open to traffic, a car gymkhana, a go-kart race without due protection at the side of the circuit, football matches, and a bobsleigh race.<sup>51</sup> Nevertheless, many sporting activities are held not to be dangerous, and are therefore excluded from the application of article 2050 c.c. Examples include much of the everyday sports lessons that happen in schools, such as football and basketball, local traditional sports, gymnastics without the use of equipment, the organisation of a boat race, and the teaching of windsurfing.<sup>52</sup>

The list of what is included or excluded from the application of article 2050 c.c. is clearly determined through a case-by-case analysis conducted by the courts. The division is so blurred that in some cases the legislators have intervened, enacting laws providing special liability for activities

<sup>49</sup> Cass., sez. III, 31 May 2005, no. 11609, *Danno resp.*, 2006, 269, annotated by M Capecchi; *Foro it.*, 2006, I, 793, annotated by S Corongiu; *Resp. civ. prev.*, 2006, 294, annotated by N Coggiola. The decision was also commented in English by N Coggiola, 'The Italian Ministry of Health Held Liable for the Damages Arising out of Contaminated Blood and Blood Products' (2007) 15 *ERPL (European Review of Private Law)* 451; Cass. SS.UU., 11 January 2008, cases 576–585, all of them largely published and commented. See among others Cass. SS.UU., 11 January 2008, no. 576, *Foro amm.-Cons. Stato (Foro Amministrativo-Consiglio di Stato)*, 2008, 76; Cass. SS.UU., 11 January 2008, no. 577, *Foro it.*, 2008, I, 455, annotated by A Palmieri; *Giur. it.*, 2008, 1653, annotated by A Ciatti; *Resp. civ. (La responsabilità civile)*, 2008, 397, annotated by R Calvo; Cass. SS.UU., 11 January 2008, no. 580, *Giur. it.*, 2008, 1646, annotated by P Valore; Cass. SS.UU., 11 January 2008, no. 581, *Foro it.*, 2008, I, 453, annotated by A Palmieri; *Resp. civ. prev.*, 2008, 827, annotated by F Greco; Cass. SS.UU., 11 January 2008, no. 582, *Foro it.*, 2008, I, 453, annotated by A Palmieri; Cass. SS.UU., 11 January 2008, no. 583, *Giur. it.*, 2008, 1695 (m), annotated by G Terlizzi. In general, on liability for transfusion and blood products, M Dragone, 'Il danno da trasfusione' in P Cendon (ed.), *La prova ed il quantum nel risarcimento del danno* (UTET, Turin 2014), 849.

<sup>50</sup> For detail see M Franzoni, above n. 4, e.g. 412.

<sup>51</sup> Cass., 13 February 2009, no. 3528, *Resp. civ. prev.* 2000, 1551, annotated by A Sesti. B Gardella Tedeschi, 'Ripensando la responsabilità per le società sportive' in R Lombardi, S Rizzello, FG Scoca and MR Spasiano (eds.), *Ordinamento sportivo e calcio professionistico: tra diritto ed economia* (Giuffrè, Milan 2009).

<sup>52</sup> For a first reference to some of these cases, please see M Franzoni, above n. 4, 412.

considered dangerous. That is the case of the management of ski resorts and the non-competitive activity of skiing. While it was generally undisputed that the managers of the ski stations were liable for damages by the force of the application of article 2050 c.c., as running such stations was considered a dangerous activity,<sup>53</sup> the rule providing for the liability of skiers has been long debated by Italian scholars and courts. Some supported the thesis of the general liability ex article 2043 c.c., others preferred the liability for dangerous activities ex article 2050 c.c. or for custody of a thing ex article 2051 c.c., and a minority held the opinion that an analogy existed with the rules on car accidents in article 2054 c.c.<sup>54</sup> Law 363 of 24 December 2003 put an end to all these disputes, providing at article 19 that in the case of a collision between skiers, there is a presumption of the fault of both skiers in causing the damage, analogous to the rule provided in the second paragraph of article 2054 c.c. on the collision of cars. The *ratio* of the rule, as in the case of car collisions, is to overcome the difficulties of ascertainment of each skier's liability. In keeping with the traditional Italian approach, this presumption is always rebuttable if one of the parties can prove the other party's fault in the collision.<sup>55</sup>

Even today, the law frequently encounters new challenges because of the spread of increasingly risky sports, such as mountaineering, kite-surfing, free-ride skiing and so on, or simply because of the increased number of persons engaging in sports without the necessary abilities and knowledge. These new challenges are perhaps not always satisfactorily met by the application of the provisions of article 2050, either because they sometimes have distinctive features, such as the role of consent or difficulties of proof, and/or because of a lack of uniform case law on the issue.

## 5.5. OTHER PROVISIONS DEALING WITH RISK

Article 2050 c.c., and the other articles already mentioned, are actually not the only provisions of Italian law that deal with risk, in particular because other articles of the Code and other rules can sometimes be interpreted in a way which features risk reasoning.

<sup>53</sup> On the issue, S De Bassa, 'In tema di responsabilità del gestore di impianti di risalita e di tutela dell'utente', *Riv. giur. circ. trasp.*, 1989, 762, and the decision of Trib. Torino, 23 April 1987 there annotated.

<sup>54</sup> See for example the contrasting decisions of Pret. Porretta, 20 June 1968, *Resp. civ. prev.*, 1968, 495 and App. Bologna, 26 February 1972, *Giur. it.*, 1973, I, 2, 946, annotated by A De Martini. Among the scholars, C Bretzel, 'Prospettive per la migliore tutela delle vittime da incidente sciatorio', *Resp. civ. prev.*, 1976, 454; L Geraci, 'La responsabilità civile da attività sciatoria', *Riv. dir. sport.*, 1975, 352; M Pogliani, 'Ma lo sciatore è veramente conducente di veicoli?', *Resp. civ. prev.*, 1976, 452.

<sup>55</sup> M Franzoni, above n. 4, 575, 617. More on the subject in M Sesta and L Valle (eds.), *La responsabilità sciistica* (Bolzano University Press, Bolzano 2014).



Among these rules are articles 2051, 2052 and 2053 of the Civil Code, which provide for strict liability of the owner and sometimes also the custodian, for the damage caused, respectively, by a thing, an animal or the collapse of a building. The basis of these rules is to hold the owner or custodian liable because of his relationship with the thing, animal or building that causes harm. This means that the liability is still for the harm that was caused, and it need not refer to the risk those objects themselves engendered. For instance, under article 2051, harm caused by a slippery supermarket floor<sup>56</sup> can become a source of an obligation to compensate.

On the other hand, article 2054 c.c.,<sup>57</sup> on the damage caused by the circulation of vehicles which are not guided by rails, exists precisely because of the dangerousness of these vehicles. The rule applies only to cases of circulation, stopping or parking of the vehicle in a public or private area normally used for traffic<sup>58</sup> and not to vessels or airplanes.<sup>59</sup> It is important to notice that the article presumes the liability of the driver of the vehicle, which can be rebutted only if he can demonstrate that he did everything he could to avoid the accident. Furthermore, the owner of the vehicle, or the person with the exclusive right to use it, is jointly and severally liable with the driver, unless he can show that the vehicle was being driven against his will. Moreover, on the basis of the provisions of article 2054 c.c., the owner is strictly liable for any defect in the construction or maintenance of the vehicle. This strict liability rule is the consequence of the reputed dangerousness per se of these vehicles,<sup>60</sup> and obliges the owner to also compensate those damages that are the consequence of defects he is generally not able to detect or prevent. Therefore, a stricter liability rule applies to the owner of this category of vehicles compared to the general fault rule provided for by article 2043 c.c., which generally applies to all other vehicles. This difference is neatly shown in *brakeless lorry* (case 4), which would be governed by strict

<sup>56</sup> App. Milano, 15 May 1998, *Nuova giur. civ.*, 1998, I, 898, noted by D Chindemi.

<sup>57</sup> Art. 2054: 'Circulation of vehicles. The operator of a vehicle which is not guided by rails is liable for the damage caused to persons or to property by operations of the vehicle unless he proves that he did all that was possible in order to avoid the damage.

In the case of collision of vehicles, it is presumed, until proof to the contrary is offered, that each operator contributed equally toward causing the damage suffered by each vehicle.

The owner of the vehicle, or in his place the usufructuary, or purchaser with reservation of ownership, is liable *in solidum* with the operator of the vehicle, unless he proves that the vehicle was being operated against his will.

In any case, the persons indicated in the preceding paragraph are liable for damage arising from defects in the manufacture or maintenance of the vehicle.'

<sup>58</sup> App. Genova, 16 March 1989, *Assicurazioni*, 1989, II, 2, 83, excluded for example that the rule could be applied to an incident happened in a garage.

<sup>59</sup> T Langostena Bassi and L Rubini, *La responsabilità civile nella circolazione dei veicoli* (Giuffrè, Milan 1972), 60; and M Franzoni, above n. 4, 574.

<sup>60</sup> More on the issue in M Franzoni, above n. 4, 643.

liability under article 2054 if the accident happens on a road, whereas a boat with a similar problem would instead be governed by fault-based liability under article 2043.

To conclude this short survey, we might also note some special regulations, enacted to guarantee the compensation of the injured person in some special cases. First of all, as in the rest of the European Union, there is legislation on defective products: D.lgs. 6 September 2005, no. 206 on the liability of the producer, implementing EC Directive 374 of 25 July 1985.<sup>61</sup> This law provides for the strict liability of the producer when his product is defective, because it is 'unsafe' in relation to all the circumstances of the case for the consumer, and that defect causes a harm to the same consumer. Although it cannot be disputed that these rules offer some procedural advantages to the claimants, in comparison to articles 2043 and 2050 c.c., as they do not require the injured person to demonstrate the fault of the defendant or that an activity by the defendant was dangerous, it should be pointed out that they are not actually extensively used by lawyers, who frequently prefer to use the Civil Code provisions instead.<sup>62</sup> Then there is article 15 of the D.lgs. 30 June 2003, no. 196, concerning the privacy of data, providing for the strict liability of the person responsible for the processing of personal data, on the basis of the application of the rules of article 2050 c.c. In effect, the processing of personal data is considered a dangerous activity and any damage caused by that treatment must be compensated. Finally, there are special rules providing the strict liability of the owner of an airline (art. 965 *Codice della navigazione*) or of the owner of a mine (R.D. 1443 of 29 July 1927), for the damage caused by their activity, both of which are based on the dangerous activity of the airline or mine operator.

With reference to the concept of risk in law, we should finally underline that, although not mentioned in the Italian Civil Code, the defences of 'consent' and 'acceptance of risk' are valid in Italian tort law. These defences can cover a range of different situations, from the licit usage and processing of personal data to the acceptance of the possible harms which can be suffered because of a dangerous sporting activity, provided that the person who caused the harm adhered to the rules of the game played.<sup>63</sup> This defence would most probably apply to the *Crazy Garden Elixir* (case 8), as C agreed to drink the cocktail made by D even though he knew that D had no special knowledge of plants. A classic example is the 'informed consent' required from a patient in a medical context.

<sup>61</sup> Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

<sup>62</sup> For a first account on the issue, N Coggiola, 'The Development of Product Liability in Italy' in S Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press, Cambridge 2010), 192–233.

<sup>63</sup> Cass., 8 August 2002, no. 12012, *Foro it.*, 2003, I, 168, annotated by G Fanelli.

The requirement of the informed consent of the patient, although not explicitly provided for in any Italian law, is nevertheless considered by courts and legal operators to be binding. The requirement seems to flow from national and European regulations, as well as the Oviedo Convention on the Protection of Human Rights and Dignity in the medical field and the moral code of practice for doctors. The doctor must therefore inform the patient of the possible risks of the medical treatment. If the doctor acquires informed consent from the patient, he shall not be liable to compensate harm caused by those risks if they actually eventuate. If, on the other hand, the doctor does not inform the patient of the possible risks of the medical treatment, and those risks eventuate, causing harm to the patient, the doctor shall be liable for the compensation of the damages suffered by the patient if, had the patient known the risks, he would have not chosen to have the medical treatment.<sup>64</sup> The only exception is if the treatment was in a state of necessity.<sup>65</sup> Thus *2% risk information* (case 1) would lead to liability for the doctor, only where the claimant would not have had the surgery if warned.

## 5.6. FEARING THE RISK OF HARM

What if the risk is not the problem, but rather the alleged harm is the fear of the risk of the eventuation of damage? That issue was at the centre of the notorious Icmesa case. In July 1976, the explosion of some boilers belonging to Icmesa, a chemical factory, polluted a large portion of Seveso, a small town in Northern Italy, with dioxin.

The criminal court held the managers and the technical staff of the factory responsible for the accident and for the consequent injuries to the health of a large number of individuals.<sup>66</sup> Moreover, the government and the region set up a repayment plan, with public funding, for the damage to the town's population.<sup>67</sup> In two separate civil cases, some of the inhabitants of the town

<sup>64</sup> App. Milano, 2 May 1995, *Foro it.*, 1996, I, 1418, annotated by S Fucci.

<sup>65</sup> More on the issue in M Graziadei, 'Il consenso informato e i suoi limiti' in L Lenti, E Palermo Fabris and P Zatti, *I diritti in medicina* (Giuffrè, Milan 2011), 191–288.

<sup>66</sup> Trib. Monza, 24 September 1983, *Riv. giur. lav.*, (*Rivista giuridica del lavoro*), 1983, IV, 458, annotated by C Piergallini; *Riv. giur. lav.*, 1985, IV, 19, annotated by S Canestrari; *Riv. giur. lav.* 1984, IV, 381, annotated by E Carletti; *Riv. giur. lav.* 1984, IV, 3. The decision was confirmed by App. Milano, 13 May 1985, *Giust. pen.* (*Giustizia penale*), 1986, II, 171, annotated by AA Sammarco; and lastly by Cass., 23 May 1986, *Cass. pen.* (*Cassazione penale*), 1988, 1250; *Riv. it. med. leg.* (*Rivista italiana di medicina legale*), 1989, 652.

<sup>67</sup> D.L. 10 August 1976, no. 542 converted with some modifications by L. 8 October 1976, no. 688. The government and the region even decided to subrogate the responsible persons and to settle with the companies liable for the accidents, to avoid any controversy on the issue. For more details, see F Salerno, 'La Givaudan risarcisce i danni prodotti dall'Icmesa', *Riv. dir. int.* (*Rivista diritto internazionale*), 1980, 888.

sought compensation for the harm caused by the accident: not only the injuries to their health, but also non-material damages (*danno morale*), which included inter alia damages for psychological sufferings due to the fear of the risk of developing illnesses, and the expenses to compensate for the trouble related to follow-up screening.

The *Corte di Cassazione* rejected the claims of the parties in its decisions no. 4631 of 24 May 1997<sup>68</sup> and no. 5530 of 20 June 1997,<sup>69</sup> holding that non-material damage (*danno morale*) arising out of an environmental accident could not be compensated, because the parties were not able to prove their personal physical and psychiatric injuries.<sup>70</sup> This solution was strongly criticised by many scholars, not because it was actually flawed from a legal point of view, but because it failed to remedy a clearly unjust situation. However, this was not the end of the story. A few years after the same issue was again examined by the same *Corte di Cassazione* in its decision no. 2515 of 21 February 2002 with all the chambers of the Court hearing the case as a joint panel.<sup>71</sup> In that case, the Court held that the *danno morale* was compensable even when no physical or psychological harm existed and even though no economic loss could be proved. This decision was clearly dictated by policy reasons; in fact, the award was only for four million lira (a little more than 2,000 euros, quite a small amount of money) for every claimant, with interest from the date of the decision. The case might be restricted to its particular facts, a feature of the special situation and the large public debate that arose around the Icmesa case.

In fact, more recently, the same court denied a claim for compensation for the fear of the risk of contracting an illness, evidenced by physical and psychological suffering, claimed by some employees exposed to asbestos dust by

<sup>68</sup> Cass., sez. III, 24 May 1997, no. 4631, *Corr. giur. (Corriere giuridico)*, 1997, 1172, annotated by G De Marzo; *Resp. civ. prev.*, 1997, 1059 annotated by D Feola; *Giur. it.*, 1998, I, 2, 1363, annotated by M Bona.

<sup>69</sup> Cass., sez. III, 20 June 1997, no. 5530, *Foro it.*, 1997, I, 2068, annotated by A Palmieri; *Danno resp.*, 1997, 711, annotated by B Pozzo; *Resp. civ. prev.*, 1997, 1059, annotated by D Feola; *Giur. it.*, 1998, I, 2, 1363.

<sup>70</sup> The decisions of the *Corte di Cassazione* were, in its words, based on two decisions of the *Corte Costituzionale*, no. 184 of 14 July 1986, *Foro it.*, 1986, I, 2053, annotated by G Ponzanelli; *Foro it.*, 1986, I, 2976, annotated by PG Monateri; *Giur. it.*, 1987, 392, annotated by A Pulvirenti, and *Corte Costituzionale*, no. 372 of 17 February 1994, *Foro it.*, 1994, I, 1326, annotated by D Poletti and by C Castronovo and *Corte Costituzionale*, 27 October 1994, no. 372, *Resp. civ. prev.*, 1994, 976, annotated by G Scalfi, G Giannini and E Navarretta; *Giust. civ.*, 1994, I, 3029, annotated by FD Busnelli; *Foro it.*, 1994, I, 3297, annotated by G Ponzanelli; *Giur. it.*, 1995, I, 406, annotated by A Jannarelli.

<sup>71</sup> Cass. SS.UU., 21 February 2002, no. 2515, *Foro it.*, 2002, I, 999, annotated by A Palmieri; *Giur. it.*, 2002, 775; *Corriere giur.*, 2002, 461, annotated by G De Marzo; *Giust. amm. (Giustizia amministrativa)*, 2002, 254; *Arch. civ.*, 2002, 547; *Ambiente*, 2002, 775, with note by L Prati; *Resp. civ. prev.*, 2002, 384; *Resp. civ. prev.*, 2002, 726 (m), with note by D Feola; *Dir. giust.*, 2002, fasc. 11, 23, annotated by A Cianci; *Danno resp.*, 2002, 499, with observations by G Ponzanelli and B Tassone.

their employer. The *Corte di Cassazione* in fact rejected their claims<sup>72</sup> because they were not able to prove the existence of the psychiatric damage. This decision is not surprising, as traditionally in Italian tort law risk can be considered a source of compensable damages only if it eventuates into a material injury, that is to say an actual damage, and not of itself.

The consequence of this approach is that, in cases such as *first exposure chemical* (case 6), the person that caused the first exposure to a chemical will be held liable for compensation only if the claimant can prove the existence of actual damage. Italian courts are willing to see loss of a chance of avoiding harm as a loss, at least in medical cases. The claimant must prove the existence of actual damage, in respect of years of life lost or probability of recovery.<sup>73</sup> Thus, in *loss of a 17% chance* (case 7) the claimant would be able to recover 17% of the loss, if that loss is proven.

## 5.7. PROCEDURAL ISSUES AND UNCERTAIN CAUSATION

All the articles of the Civil Code concerning dangerous activities or which entail the liability of the defendant on the basis of his relationship with the cause of the damage (animals, things, cars and so on) provide as a general rule that the victim must prove the link of causation, while the burden of proof relating to the exonerating evidence is on the defendant. Despite the possibility of seeking compensation within a collective action in cases of damage suffered by consumers, those actions are actually seldom used, mainly because the procedural rules do not in fact advantage collective redress and legal actors are not always familiar with them.

Generally, case law and scholars agree that the dangerousness of the activity cannot be decided on the basis of the amount of harm actually caused. Therefore, the ascertainment of the dangerousness of a certain activity must always be viewed from an *ex ante* perspective,<sup>74</sup> even if it is possible to find decisions of

<sup>72</sup> Cass., 7 November 2006, no. 23719, *Resp. civ. prev.*, 2007, 1648, annotated by N Coggiola. A discussion of the case, in English, can also be found in N Coggiola, 'The Johnston Case, the Compensation of Pleural Plaques and Psychiatric Harm in Italian Tort Law (comment to House of Lords, Johnston v. NEI International, 17 October 2007)' (2009) 17 *ERPL* 239. Refer to these comments for further cases and authorities on the issue of the compensable damages in Italian law.

<sup>73</sup> Cass., 4 March 2004, no. 4400, in *Resp. civ. prev.*, 2005, 461, with note by S Landini.

<sup>74</sup> See e.g. Cass., 30 October 2002, *Nuova giur. civ.*, 2004, I, 103, annotated by E Boeri; Cass., 30 August 1995, no. 9205, *Giur. it.*, 1996, I, 1, 466. Among the scholars, M Comperti, *Esposizione a pericolo e responsabilità civile* (Morano, Naples 1965), 296–297; P Ziviz, 'Le attività pericolose', *Nuova giur. civ.*, 1988, II, 179; E Bonasi Bennuci, 'In tema di attività pericolosa (art. 2050)', *Temi*, 1956, 475; E Bonvicini, *La responsabilità civile* (Giuffrè, Milan 1971), II, 704.

trial courts that took into consideration *ex post* the amount of harm done in order to categorise the activity as dangerous.

Deciding that an activity was dangerous is exclusively the task of trial courts<sup>75</sup> and must be done on a case-by-case basis, using an understanding of danger commonly held by the population at large.<sup>76</sup> In cases where the special liability rules of the Italian Civil Code apply, the claimant must demonstrate the causal link between the dangerous activity of the defendant and the damages suffered, that is to say that the dangerous activity was the cause of the injuries suffered.<sup>77</sup>

Italian law has not set out specific procedural rules devoted to uncertain causation or risk. It is treated as a matter of fact, and article 191 of the Code of Civil Procedure permits judges to ask for the help of a *consulente tecnico*, that is, an expert witness, in cases where an expert advice is needed. The opinions of the expert witness are not binding on the judge. The problem of uncertain causation and risk in private law has often arisen in Italian law, but there is not yet a clearly defined set of rules established by the civil section of the *Corte di Cassazione* dealing exclusively with legal issues on the matter.

In fact, although the *Sezioni Unite della Cassazione*, in the *Franzese* case,<sup>78</sup> detailed the conditions under which causation could be ascertained in criminal cases of medical malpractice, so providing a clear statement on the rules to be applied in such cases and, by its explicit declaration, in all other comparable civil cases, those rules were not followed by all civil courts. The reasons underlying this silent refusal are manifold. It must be pointed out that the civil branch of the *Corte di Cassazione* is generally reluctant to deal with the issue of the cause-in-fact test to be applied in its decisions, because in its opinion such investigations, concerning the mere facts of the case, lie within the exclusive competence of the lower courts and should not be criticised by the *Corte di Cassazione*, as long as the reasoning of the lower court judges is clearly articulated.<sup>79</sup> This attitude was partly reversed with the decision of the *Corte di Cassazione* in the cases concerning

<sup>75</sup> Cass., 29 May 1998, no. 5341, *Mass. Foro it.*, 1998; Cass., 21 November 1984, no. 5960, *Mass. Foro it.*, 1984; Cass., 21 June 1984, no. 3678, *Arch. civ.*, 1984, 1302; Cass., 2 February 1983, no. 908, *Dir. prat. ass.*, 1983, 569, annotated by M Antinozzi.

<sup>76</sup> Cass., 3 March 1969, no. 687, *Resp. civ. prev.*, 1970, 307; Cass., 2 February 1983, no. 908, *Dir. prat. assic.*, annotated by M Antinozzi; Cass., 18 December 1979, no. 6573, *Mass. Foro it.*

<sup>77</sup> Cass., 10 March 2006, no. 5254, *Mass. Foro it.*, 2006; Cass., 17 December 1973, no. 3420, *Mass. Foro it.*, 1973.

<sup>78</sup> Cass. SS.UU., 10 July 2002, no. 30328, *Foro it.*, 2002, II, 601, annotated by O Di Giovine; *Dir. pen. proc.*, 2002, 1357; *Dir. giust.*, 2002, 21, annotated by V Pezzella; *Danno resp.*, 2003, 195, annotated by S Cacace.

<sup>79</sup> See Cass., 16 May 2003, no. 7637, *Giust. civ. Mass.*, 2003, fasc. 5; Cass., 11 March 2002, no. 3492, *Giust. civ. Mass.*, 2002, 435; Cass., 29 April 1996, no. 3939, *Giust. civ. Mass.*, 1996, 642; *Resp. civ. prev.*, 1996, 1183; Cass., 17 November 1984, no. 5882, *Giust. civ. Mass.*, 1984, fasc. 11; Cass., 28 February 1983, no. 1504, *Giust. civ. Mass.*, 1983, fasc. 2; Cass., 15 March 1980, no. 1748, *Arch. civ.*, 1980, 670; *Giust. civ. Mass.*, 1980, fasc. 3; Cass., 5 July 1979, no. 3861, *Giust. civ. Mass.*, 1979, fasc. 7.

damages arising from infected blood transfusions and blood products. There, the *Corte di Cassazione* thoroughly investigated scholars' opinions and the case law on the issue of causation in its official Report, no. 35 dated 21 March 2007,<sup>80</sup> in order to set out the principles on establishing causation in civil compensation cases concerning infected blood and blood products. It later clearly stated those principles in its decision, held with joined chambers, of 11 January 2008.<sup>81</sup> Around the same time, the *Corte di Cassazione* also investigated the problems related to the establishment of causation in cases of medical malpractice,<sup>82</sup> and stated that the investigation of causation in civil cases follows paths and rules that are different from those of criminal cases. But in neither case did the Court establish a general rule regarding causation in civil cases.

Given this decision not to follow rules elaborated in the criminal context, one must look to a modern and exceptional area of law, exceptional in many legal systems, to find some guidance for uncertain causation and risk: asbestos.

One of the criteria, even if not the only one, applied by Italian courts in mesothelioma cases is in fact what we could call 'the omitted reduction of the risk'. This rule states that causation exists between asbestos exposure and mesothelioma where the defendant failed to provide security measures sufficient to reduce the risk of the disease's occurrence. This reasoning concentrates not on the relationship between the action or omission of the defendant and occurrence of the harm, but between the action or omission of the defendant and either the increase or reduction of the risk of the harm. 'Probabilistic' criteria are then applied to verify a possible link between the omission of reliable protection measures and the increase in the risk of the disease occurring. The rules governing these probabilistic criteria may change from case to case. For example, the *Corte di Cassazione*, in its decision no. 4721 of 9 May 1998,<sup>83</sup> held that the employer is liable for the compensation of mesothelioma damage suffered by his employees not only where he does not adopt all the measures prescribed by the technical regulations, but even where he does not undertake all of the actions that the provisions of article 2087 c.c., the rule providing for liability of the employer for his employees' health and safety, have deemed useful.<sup>84</sup>

<sup>80</sup> The Report is available at <[http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/RelazioneCivile\\_35\\_2007.pdf](http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/RelazioneCivile_35_2007.pdf)> last accessed 29 March 2017.

<sup>81</sup> Cass. SS.UU., 11 January 2008, cases 576–585, above n. 49.

<sup>82</sup> Cass., 16 October 2007, no. 21.619, *Danno resp.*, 2008, 43, with comment by R Pucella; *Corr. giur.*, 2008, 1, 35, annotated by M Bona, affirming that the different approach is obvious even with regard to the probation issue.

<sup>83</sup> Cass., 9 May 1998, no. 4721, *Orient. giur. lav.*, 1998, I, 651; *Giust. civ.*, 1999, I, 539; *Rep. Foro it.*, 1999, voce *Lavoro (rapporto)*, no. 1448.

<sup>84</sup> The broader application of art. 2087 c.c. is common in Italian case law, as that article is used as a 'general tool', able to provide general rules when detailed regulations are lacking. See, among the others, Cass., 12 December 1997, no. 12604, *Rep. Foro it.*, 1997, *Lavoro e previdenza (controversie)*, no. 39; *Giust. civ. Mass.*, 1997; Cass., 16 August 1996, no. 7636, *Rep. Foro it.*, 1997, *Infortuni sul lavoro*, no. 102; Cass., 5 April 1993, no. 4085, *Rep. Foro it.*, 1993,

Those actions are not only the ones able to render asbestos harmless, but even those simply capable of reducing the risks related to its exposure. Therefore, in the opinion of the Court, the ascertainment of the link of causation between the workplace exposure and the cancer had to take into consideration the measures adopted by the defendant to reduce the risk of harm.

The same reasoning was adopted by the *Corte di Cassazione* in its case of 23 May 2003.<sup>85</sup> The Court stated that, on the basis of probabilistic judgement, the use of all the possible protective devices, particularly those aimed at the reduction of fumes, dangerous dusts and other similar risks, would have reduced the risk to the employee of being exposed to the dose that gave rise to the mesothelioma. The defendant employer was therefore held liable for the compensation of the damages suffered by the worker as a consequence of the development of the mesothelioma.

Lastly, the same *Corte di Cassazione*, in its decision no. 644 of 14 January 2005,<sup>86</sup> stated in a case concerning a case of lung cancer, which could have been caused by different pathogenic factors and occurred in a smoker, that a link of causation can be established where, on the basis of contemporary scientific knowledge, it cannot be excluded that there is a risk of lung cancer due to dangerous exposure, even if that same exposure is limited. It must be underlined that this kind of presumption had already been used by the *Corte di Cassazione* in cases of violation of the rules imposed by article 2087 c.c. In those cases it was held, on the basis of the so-called *causalità normale o adeguata* rule, that is to say of a normal series of events, that the actions or omissions of the employer were the cause of the injuries complained of by the worker.<sup>87</sup> However, in this particular case, the Court applied that test not to the actual occurrence of the harmful event, but to the mere augmentation of the risk of the occurrence of the harm. In fact, it was held that the occupational asbestos exposure should be considered a sufficient factor giving rise to the occurrence of the illness, even without taking into consideration the smoking habits of the claimant, because the exposure subjected the worker to the risk of inhaling asbestos dust. On the facts, it was therefore not possible to exclude the existence of a risk of lung cancer, even with low asbestos exposure levels.

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*Lavoro (rapporto)*, no. 1189; *Giust. civ. Mass.*, 1993; *Cass.*, 26 January 1993, no. 937, *Rep. Foro it.*, 1993, *Infortuni sul lavoro*, no. 136; *Giust. civ. Mass.*, 1993; *Cass.*, 6 September 1991, no. 9422, *Rep. Foro it.*, 1992, *Infortuni sul lavoro*, no. 273.

<sup>85</sup> *Cass.*, 23 May 2003, no. 8204, *Foro it.*, *Rep.*, 2003, *Infortuni sul lavoro*, no. 1358; *Giust. civ. Mass.*, 2003; *Cass.*, 9 May 1998, no. 4721, *Giust. civ.*, 1999, I, 593; *Rep. Foro it.*, 1999; *Lavoro (rapporto)*, no. 1448.

<sup>86</sup> *Cass.*, 13 December 2004, no. 644, *Giur. it.*, 2005, 1390, annotated by N Coggiola; *Giust. civ. Mass.*, 2005, 1.

<sup>87</sup> For some examples of the application of this criterion, see, among others, *Cass.*, 3 January 2002, no. 5, *Danno resp.*, 2002, 509, annotated by P Di Giorgi; *Trib. Milano*, 19 May 2001, *Ragazzi c. ATM*, *Orient. giur. lav.*, 2001, I, 540; *Cass.*, sez. lav., 18 February 2000, no. 1886, *Arch. circolaz.*, 2000, 388.



No case of *single exposure by multiple tortfeasors* (case 5) has apparently been discussed yet in an Italian court. The reason is most probably that Italian workers, until quite recently, often used to work for the same employer for their entire working careers. The normal rule is that the claimant must prove who caused him harm, but it is unclear what the courts would do when faced with this kind of injustice.

Lastly, we must remember that article 700 of the Italian Code of Civil Procedure provides that when there is a danger of immediate and irreparable injury and no provisional specific remedy is available, the party can ask the judge to grant the ‘urgent relief’ most appropriate under the circumstances, to ensure a subsequent judgment on the merits. Italian courts have given this rule a wide interpretation, and it has been often used in cases where the amount of time needed for judicial proceedings on the merits would have endangered the rights of the claimant because of the risk of those rights being damaged before the court is able to make its final decision.<sup>88</sup> Thus, in *lung injunction* (case 9), Italian courts could provide a remedy through article 700.

## 5.8. CONCLUSION

Italy considers the creation of risk to be a criterion to ascribe liability when damage occurs. This doctrine is oddly ambiguous: it was clear to the drafters of the Civil Code, who set out in their *Relazione al Re* that those who create danger with their activities should bear the cost of accidents; however, it was nonetheless not spelt out in the Code’s provisions themselves. The 1942 Code preferred to use the more traditional negligence and intent to define the tortfeasor’s fault in extracontractual liability. This is then supplemented by specific cases where the victim does not have to prove fault or intent, the burden instead being on the wrongdoer to show that the incident could not have been prevented. The article that allowed risk to enter into the Italian language of torts is article 2050 c.c. on dangerous activities. Through this article, Pietro Trimarchi showed that in the Italian legal system there is a general principle, that of risk, whose role is to make those – firms in particular – that carry out dangerous activities liable for the harm that they cause. Trimarchi based his reasoning on a basic cost–benefit analysis, where costs had to be not only the cost to produce but also the costs inflicted upon society.

Article 2050 began to be interpreted by judges rather favourably towards the victim: the activity does not need to be dangerous in itself, but the conditions in

<sup>88</sup> On the issue, G Stella Richter and P Stella Richter, *La giurisprudenza sul codice di procedura civile coordinate con la dottrina. Libro IV Dei procedimenti speciali* (Giuffrè, Milan 2011), 179.

which the activity takes place can influence the dangerousness of the activity. At the same time, it became very difficult for the wrongdoer to rebut the presumption of liability. Both interpretations led to the expansion of this kind of liability in order to cover as many cases as possible and help the victims to recover. Other options might have been taken but were less effective. For instance, the same result could only be achieved by considering fault in an objective way, that is, by comparing the wrongdoer's conduct to a standard of conduct. However, this would be less effective because, according to the general rule of tort law (art. 2043 c.c.), the victim has to prove the wrongdoer's negligence. Clearly, the use of risk-reasoning has promoted the compensation of those who suffer harm and encouraged those pursuing dangerous activities to factor in the cost of any harm they might cause, leading to greater safety, or at least to greater preparedness to provide compensation.

While risk does not belong to the language of the Code, it is part of the legal reality in Italian courts. Still, many academic texts do not address it in much detail within extracontractual liability and have a more conservative attitude, as they tend to follow the language of the Code. As databases of Italian case law – let alone the rest of this chapter – prove, searching for *rischio* certainly yields interesting results.