

Essays

The Influence of Foreign Legal Models on the Development of Italian Civil Liability Rules from the 1865 Civil Code to the Present Day

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Abstract

The development of Italian civil liability rules since the 1865 Civil Code to the present day is clearly marked by the influence of foreign models. This article tries to detect these foreign influences, starting from those of the French Code Napoléon on the 1865 Civil Code, moving on to those of Pandectist legal thinking on the 1942 Civil Code, and ending with the influences of the common law experiences and European legislation on some sectors of Italian tort law. The final results of this research is a much more complicated and nuanced picture than what is expected, as the Italian system has not only been a passive receptacle of ideas developed in other countries, but has also been able, throughout its history, to mould those foreign ideas with original concepts, so creating an original system, largely independent from its sources of inspiration.

I. Introduction

The purpose of this article is to give a brief account of the influence of legal foreign models on Italian civil liability law, starting from the 1865 Civil Code until the present day. This chosen starting date is closely linked to the year of the political unification of Italy, that is 1861, as before that date the territories that are part of Italy today were fragmented in a number of different political entities, with different legal models. Italian political unification entailed therefore also a legal homogenization.

The investigation shall hence start from the 1865 Civil Code, a code strongly influenced by the French Code Civil, which implemented in all the Italian courts a system of civil liability based on the liability for fault, while French case law and scholars' opinion generally largely influenced Italian judges and academics. Then we shall deal with the influence of the German Pandectist School on Italian scholars at the end of the 19th century.

The next step will concern the investigation of the civil liability rules provided for by the 1942 Civil Code. We shall try to understand which rules of the Code were the fruit of the influence of the German model, which continued to be inspired by the French model and which were instead an original production of

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the Italian legislator.

We will then concentrate our attention on the problems arising in the field of civil liability because of the widespread industrialization experienced by Italy after the second half of the last century, and on the rising interest of Italian scholars for foreign legal experiences and theories concerning this new field of damages. Due to the necessity to limit our investigation to a single sector of this field of damages, we shall subsequently examine the implementation of European rules on the compensation of product damages in Italy, leaving aside subjects such as that of the compensation of Environmental damages,¹ although it equally finds its roots in the European legislation and plays a relevant role in the Italian legal system. The issue of the compensation of damages caused by medical malpractice will be left out of this article as well, notwithstanding we can clearly trace in it the influence of foreign national models and of international conventions (an easy example of this can be found when considering the issue of informed consent), because it alone would require an entire article.² Not to mention some very specific fields, such as those of the compensation of the damages caused by the violation of privacy rights, of the competition rules, of the rules provided for the protections of clients in banking contracts and so on.

Lastly, we shall end our overview examining the overturn of Italian case law recently made by the Joint sessions of the Italian *Corte di Cassazione*, in a case concerning the recognition of foreign decisions awarding punitive damages.

II. The 1865 Italian Civil Code

Italy first came into contact with the rules of the French Civil Code, commonly also called *Code Napoléon*, when Napoleon's army entered the Italian territories at the beginning of the 19th century and, at his fall, with the enactment by some of the Italian states of civil codes modelled on the same Code Napoléon.³

¹ On the subject, please read, P. Perlingieri, *Il danno ambientale con riferimento alla responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1991) and B. Pozzo, *Il danno ambientale* (Milano: Giuffrè, 1998).

² On Italian medical liability, in english, P. Ricci et al, 'Medical Responsibility and Liability in Italy', in S. Ferrara et al eds, *Malpractice and Medical Liability* (Verlag Berlin Heidelberg: Springer, 2013), passim; A. Scarso and M. Foglia, 'Medical Liability in Italy', in A. Bernhard and A. Koch eds, *Medical Liability in Europe. A Comparison of Selected Jurisdictions* (Berlin Boston: De Gruyter, 2011), passim; C. Di Marzo, 'Medical Malpractice: The Italian Experience' 87 *Chicago Kent Law Review*, 53 (2012); A. Feola et al, 'Medical Liability: The Current State of Italian Legislation' 22 *European Journal of Health Law*, 347 (2015); A. De Luca, 'Compensation Schemes for Damages Caused by Healthcare and Alternatives to Court Proceedings in Italy' *Annuario di diritto comparato e di studi legislativi*, 89 (2018) and N. Coggiola, 'Medical Liability Law in Italy', in S. Taylor ed, 'La responsabilité médicale: perspectives compares' 23 *Journal du Droit de la Santé et de l'Assurance Maladie*, 45 (2019).

³ Codice per Regno delle Due Sicilie (1819); Codice per gli Stati di Parma, Piacenza e Guastalla (1820); Codice Civile per gli Stati di S.M. il Re di Sardegna e Codice Civile per gli Stati Estensi.

After the unification of the different territories under the Kingdom of Italy in 1861, the first Italian Civil Code was enacted in 1865. Although some territories of northern Italy were formerly exposed to the model provided by the Austrian Civil Code, when they were part of the Kingdom of Lombardy-Venetia,⁴ political reasons were probably critical in the decision to follow the French civil code model in the drafting of the new Italian code as France, contrary to Austria, actively supported the political unification of Italy.⁵

That French model of civil liability is based on the general rule of liability for fault which, as we all know, was largely built on Domat and Pothier legal thinking, and therefore on the writings of the seventeen and eighteen centuries natural law scholars and their forerunners.⁶ That model provides a general rule for the liability for fault, which can be used in every case where all the elements of the legal provision could be found, and some special liability rules, provided for cases where the defendant finds himself in a certain situation because of the existence of a link between the defendant and certain persons or thing.

In truth, the Italian 1865 Civil Code actually followed the French model so closely that most of the civil liability rules are actually a mere translation of the rules of the Code Napoléon, starting from the title of the book devoted to civil liability, which was literally translated from ‘*Des délits et des quasi-délits*’ in ‘*Dei delitti e dei quasi-delitti*’, that is to say ‘Of Delicts and Quasi-Delicts’.⁷

The two following articles, providing the general rule of the liability for fault, Art 1151 establishing ‘*Qualunque fatto dell’uomo che arreca danno ad altri, obbliga quello per colpa del quale è avvenuto, a risarcire il danno*’, and Art 1152, establishing ‘*Ognuno è responsabile del danno che ha cagionato non solamente*

⁴ On the issue G.P. Massetto, ‘Responsabilità extracontrattuale’ (diritto intermedio) *Enciclopedia del diritto* (Milano: Giuffrè, 1988), XXXIX, 1170-1171 and M.V. Simone, *Percorsi del diritto tra Austria ed Italia* (Milano: Giuffrè, 2006), passim.

⁵ P. Grossi, *Il diritto nella storia dell’Italia unita* (Napoli: Edizioni Scientifiche Italiane, 2012), 17 and A. Flamini, ‘Dei delitti e dei quasi delitti’, in R. Favale and C. Latini eds, *La codificazione nell’Italia postunitaria 1865-2015* (Napoli: Edizioni Scientifiche Italiane, 2016), II, 5.

⁶ On the subject F. Parisi, ‘*Alterum non Laedere: An Intellectual History of Civil Liability*’ 39 *American Journal of Jurisprudence*, 317 (1994) and G.P. Massetto, n 4 above, 1099. For a general overview of the development of tort law in Europe, please read C. Von Bar, *The Common European Law of Torts* (Oxford: Oxford University Press, 1998 and 2000), I and II, passim, and G. Alpa, ‘General Remarks on Civil Liability in the European Context’ 4 *The Italian Law Journal*, 47 (2018); for some interesting comparative insights on the subject, please read M. Bussani and A.J. Sebok eds, *Comparative Tort Law: Global Perspectives* (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2015), passim and M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), passim.

⁷ G. Valditara, ‘Dalla *lex Aquilia* all’art. 2043 del Codice Civile’, in F. Milazzo ed, *Diritto Romano e terzo millennio: Radici e prospettive dell’esperienza giuridica contemporanea* (Napoli: Edizioni Scientifiche Italiane, 2004), passim; P.G. Monateri, *La sineddoche: formule e regole nel diritto dei contratti e delle obbligazioni* (Milano: Giuffrè, 1984), passim; G. Alpa, ‘Unjust Damage and the Role of Negligence: Historical Profile’ 7 *Tulane European Civil Law Forum*, 147 (1994); M.F. Cursi, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano* (Milano: Giuffrè, 2002), passim.

per un fatto proprio, ma anche per propria negligenza o imprudenza, are as well the mere translation of the respective Arts 1382 and 1383 (now Arts 1240 and 1241) of the Code Napoléon, which dictate

‘Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer’ and ‘Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence’.

The translation from French into Italian is so literal, that we can use the *Legifrance* official English translation, which respectively says ‘Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it’ and ‘We are responsible not only for the damage occasioned by our own act, but also by our own negligence or imprudence’,⁸ to translate both the French and Italian rules. These rules therefore provided the liability and the consequent obligation to compensate the damages occurred, for every human fact which caused with fault an injury to another person.

It is important to point out that the fault of the defendant was translated into Italian with the word *colpa*, which encompassed the same meaning of the French word *faute*, as it denoted at the same time either the negligent and intentional wrongdoing and the wrongfulness of the action of the defendant. The roots of this tradition could be easily traced in Roman law and in *ius commune*, which equated *culpa* with *iniuria*.⁹

Also the rules on the vicarious liability of the parents, masters, employers, teachers and artisans, and on the liability for the damages caused by things, animals and buildings, provided for by Arts 1153, 1154 and 1155 were as well the product of the plain translation of Arts 1384, 1385 and 1386 of the Code Civil, building the civil liability on the fault of the tortfeasor, according to the French legal tradition.

The only novelty introduced in the 1865 Civil Code, in comparison with the rules of the French Code Civil, was Art 1156, providing the joint and several liability of the multiple tortfeasors, which was unknown in the French system.

The influence of the Code Napoléon on the Italian 1865 Civil Code was openly acknowledged both by the Italian drafters and scholars. Moreover, that influence did not fade after the enactment of the Code, as both Italian scholars and judges generally abided by the French scholarly writings and French case law, which always supported the idea that the only source of civil liability was that based on the fault of the defendant.¹⁰

⁸ French Civil Code, available at www.legifrance.gouv.fr.

⁹ M.F. Cursi, n 7 above, 68-69.

¹⁰ 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, *Liability for Fault* (Oxford: Oxford University Press, 2010), 126, 130. For a general overview of the influence of French and German

Nonetheless, that general principle of fault liability was soon challenged by some Italian judges and scholars, with reference to cases of vicarious liability. In fact, soon after the enactment of the 1865 Italian Civil Code, some of the then still existing five different ‘regional’ supreme courts applied the rules on the vicarious liability of the employer or on the liability for the damages caused by animals or things without taking into consideration the existence of the fault of the defendant, although others courts supported instead the traditional idea that the defendant could exonerate himself from the liability when he could prove that he was not at fault.

That same fault principle was also disputed by the majority of the Italian scholars, who held that the rules on the vicarious liability of the employers and of the owners or custodians of the animals were strict liability rules, when reasons of public order or social protection were at a stake.¹¹ Among these scholars, we could cite Nicola Coviello¹² who, influenced by the writings of Viktor Mataja¹³ and Josef Unger,¹⁴ held that the principle of *naeminem laedere* implied the liability of the tortfeasor when a right was violated and Venezian, who affirmed that, in cases of vicarious liability of the employers for the damages caused by their employees, the requirement of the fault of the employers was a fiction, as in those cases their liability was rooted on strict liability.¹⁵

Another exception to the general abiding of Italian judges and scholars by the French juridical and scholarly interpretation is represented by the scarce application of the first section of Art 1153, providing for the liability of the guardian for the damages caused by the things in his custody. In fact, contrary to the extensive use made by French courts of this rule, in every case of damages in which a thing was involved, on the basis of an interpretation which was strongly supported by Raymond Saleilles, Italian courts seldom used that rule.¹⁶

Moreover, in contrast to the French system tradition, that always held the

legal models on the Italian legal thinking and practice, please read A. Guarneri and A. Gambaro, ‘Italie’, in Association Henri Capitant, *La circulation du model juridique Français* (Paris: Litec, 1994), 77. For a complete list of foreign works translated into Italian in the XIX century, M.T. Napoli, *La cultura giuridica europea in Italia: Repertorio delle opere tradotte nel XIX° secolo* (Napoli: Jovene, 1986), 7.

¹¹ G. Cazzetta, *Responsabilità Aquiliana e frammentazione del diritto comune civilistico: 1865-1914* (Milano: Giuffrè, 1991), 327.

¹² N. Coviello, ‘La responsabilità senza colpa’ *Rivista italiana di scienze giuridiche*, 188 (1897).

¹³ V. Mataja, *Das Recht des Schadensersatz vom Standpunkte der Nationalökonomie* (Leipzig: Dunker und Humblot, 1888).

¹⁴ J. Unger, *Handeln auf eigene Gefahr, ein Beitrag zur Lehre vom Schadenersatz* (Jena: Fisher, 1893).

¹⁵ G. Venezian, *Danno e risarcimento fuori dai contratti* (Roma: Atheneum, 1918, first privately circulated after 1886).

¹⁶ For an investigation on the subject, L. Barassi, ‘Contributo alla teoria della responsabilità per fatto non proprio in special modo a mezzo di animali’ *Rivista italiana di scienze giuridiche*, XXIII, 3, 325 (September 1987); XXIV, 1 and 2, 174 (December 1897); XXIV, 3, 397 (February 1898); XXV, 1, 56 (April 1898).

public administration liable for the civil compensation of the damages occurred because of its fault, in Italy the public administration had for a long time been shielded from the application of the rules on civil liability, and therefore from any duty to compensate the damages caused by its negligence, in force of a restrictive interpretation of the categories of compensable damages. This limitation of the civil liability of the public administration was, interestingly, not only the consequence of the willingness to protect, for mere economic reasons, the public administration against civil actions but also the outcome of the efforts to establish, in the newly unitary Italy, an independent system of public administration, endowed of its own damages compensation mechanism.¹⁷

Nevertheless, under a systematic point of view, we should not forget that Italian lawyers adopted the French idea providing that the exercise of a right of the defendant could not be used as a shield against the liability for damages, in force of the traditional Roman formula *qui suo iure utitur naeminem laedit*,¹⁸ when there was on the part of the defendant an abuse of such a right.¹⁹ And that Francesco Carnelutti, an Italian leading scholar, adopted the theories of Marcel Planiol²⁰ when he stated that the general provision of Art 1151 of the Italian Civil Code of 1865 did not introduce new rights or duties in the legal system, but rather merely sanctioned the violation of already existing rights or duties, and therefore that rule had to be classified as a *secondary norm*.²¹

While the French Civil law tradition was spreading all its influence on Italian civil law in the days following the enactment of the 1865 Civil Code, at the turn of the century a new foreign model came onto the scene, that of the German BGB. That code, which entered into force on the 1 January 1900, as is known draws its inspiration from the theoretical elaborations of the German Pandectist School and differed in many ways from the French Civil Code, as well as on the issue of civil liability.

In those days, the majority of Italian scholars extensively read and commented the new German code and their German colleagues' writings, often with admiration but, in the end, the newly enacted BGB model did not actually immediately influence the interpretation of the 1865 Civil Code rules on civil liability, but

¹⁷ G. Cazzetta, n 11 above, 130 and 471; R. Caranta, 'Public Law Illegality and Governmental Liability', in D. Fairgrieve et al eds, *Tort Liabilities of Public Authorities in Public Perspectives* (London: British Institute of International and Comparative Law, 2002), 271; Id, *La responsabilità della pubblica amministrazione* (Milano: Giuffrè, 1993), passim.

¹⁸ Ulp. D. 50.17.155.1.

¹⁹ G. Giorgi, *Teoria delle obbligazioni nel moderno diritto italiano* (Firenze: Eugenio e Filippo Cammelli, 1882), V, 255 and G.P. Chironi, *La colpa nel diritto civile odierno* (Torino: F.lli Boca, 2nd ed, 1902), II, 500.

²⁰ M. Planiol, *Traité Élémentaire de Droit Civil* (Paris: Librairie Générale de Droit et de Jurisprudence, 4th ed, 1907), II, §§ 863, 865, 866, 868.

²¹ F. Carnelutti, 'La distinzione tra colpa contrattuale e colpa extracontrattuale' *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, II, 743, 744 (1912) and Id, *Il danno ed il reato* (Padova: CEDAM, 1926), 62.

with reference to the requirement of the unlawfulness of the act that caused the damages, to establish a case of liability for fault.

In truth, that requirement was already embedded in the French law, as it traces its roots in the ill-defined notion of *iniuria* which established, with other requirements, the delictual liability at the time of the *ius commune*,²² and which subsequently evolved in the distinction between the two autonomous concepts of *iniuria* and *culpa* made by natural law scholars.²³ For the drafters of the Code Civil it was in fact clear that, to establish the liability of the defendant, it was necessary to have a wrongful act, that is to say a violation of a right.²⁴ That idea was generally accepted without further discussion by the French scholars after the enactment of the same code.²⁵

When the 1865 Italian Civil Code introduced a system of civil liability closely modelled on the French Civil Code, the idea that a liability for fault could exist only when the defendant committed a wrongful act, violating a right, was transferred into the Italian legal system. Therefore, in the last two decades of the 19th century, when German scholars introduced their Italian colleagues to the concept that delictual liability requires the existence of the two distinct elements of fault and unlawfulness, the attitude of the latter on the point did not substantially change. Nonetheless, it should not be denied that in those days the Italian scholars started to devote more attention to the issue of the unlawfulness of the action of the defendant, which was identified by their German colleagues as *Rechtswidrigkeit* or *Widerrechtlichkeit*, and consequently stressed the importance of the element of what they labelled as *antigiuridicità* or *illiceità* for the coming into existence of the delictual liability of the defendant.²⁶

Moreover, the influence on Italian scholars of the German legal thinking can also be traced when dealing, in civil liability cases, with the nature of the right that must be violated in order to establish the liability of the defendant. In fact, some Italian scholars, in contrast with those colleagues which held that the violation of any right amounted to compensable damages,²⁷ adhered to the

²² Ulp. D. 47.10.1 pr; Ulp. D. 9.2.5.1; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 998, 1004.

²³ N. Jansen, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (Tübingen: Mohr Siebeck, 2003), 299, 327, 338; M.F. Cursi, n 7 above, 39-57; M. Graziadei, n 10 above, 126, 130.

²⁴ B. de Greuille, in P.A. Fenet ed, *Recueil Complet des Travaux Préparatoires du Code Civil* (Paris: Ducassois, 1827), XIII, 474 'toute individu est garant de son fait; c'est une des premières maximes de la société (...) Ce principe, consacré par le projet, n'admet point d'exception; il embrasse tous les crimes, tous les délits, en un mot tout ce qui blesse les droits d'un autre'.

²⁵ P.G. Monateri, 'La Synecdoque Française' *Revue Internationale du Droit Comparé*, 7 (1987).

²⁶ N. Jansen, 'Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability' 14 *Oxford Journal of Legal Studies*, 443, 461 (2004) and M. Graziadei, n 10 above, 126, 131 and 139 where the reader can find further details on the notion of unlawfulness in Italian law.

²⁷ C. Fadda, *Rapporti del conduttore coi terzi in tema di danni* (Torino: Unione Tipografica

German legal thinking and affirmed that only the violation of a right enforceable *erga omnes*, such as the right of ownership, could be a source of delictual liability. As a consequence, all the infringements of the so called *relative rights*, such as those rights arising out of a relationship between creditor and debtor, were not considered as compensable rights.²⁸

That interpretation was quick to become the common opinion, adopted by the majority of the Italian scholars and courts, even under the ruling of the following 1942 Italian Civil Code, until was fought and reversed at the end of the last century, as we shall shortly see. Nevertheless, it should also not be forgotten that some Italian scholars, probably influenced by the provisions of §1293 of the Austrian Civil Code,²⁹ held that there existed a ‘right to the integrity of the patrimony’, and that the violation of that right had to be considered a source of delictual liability,³⁰ so allowing the protection of the rights arising from the obligations.

Another fruit of the influence of the German legal thinking could be found in the distinction between intentional actions and negligent actions, unknown to the French legislator, which under the notion of *fault* covered both the negligent and intentional wrongdoing and also the wrongfulness or *iniuria*. Therefore, by the end of the 19th century, also the Italian jurists started to draw a distinction between the negligence (or culpability) of the defendant, called *colpa*, which referred to the same concept of the German word *Verschulden*, and was employed for cases of lack of care, in line with the German notion of *Fahrlässigkeit*, and the intentional wrongdoing, called *dolo*.³¹ We shall find that distinction in the provisions of the 1942 Italian Civil Code.

Closely linked to the requirement of the *colpa* or *dolo* for the finding of civil liability, was the precondition of the free will of the defendant when the action or omission was made. That concept, elaborated by *natural law* legal thinking under the Latin name of *imputativitas*, was subsequently translated into Italian with *imputabilità*, when it is adopted in the 1942 Civil Code under the influence of the German Pandectists.

Approaching the end of the century, the hurdles to access compensation by the victims of injuries consequence of industrial accidents, caused by the requirement of the fault of the defendant, were becoming more and more evident.

Editrice, 1891), 100-101.

²⁸ C. Ferrini, ‘Delitti e quasi-delitti’ *Digesto Italiano* (Torino: UTET, 1887-1889), I, 727, 732; R. de Ruggiero, *Istituzioni di diritto privato* (Milano: Principato, 6th ed, 1934), II, 495-6, §126; V. Polacco, *Le obbligazioni* (Milano: Athenaeum, 2nd ed, 1915), I, 26, 502; F. Carnelutti, ‘Appunti sulle obbligazioni’ *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, I, 533, 544 (1915). On the issue, A. Guarneri, *Diritti reali e diritti di credito: valore attuale di una distinzione* (Padova: CEDAM, 1979), 100.

²⁹ M. Graziadei, n 10 above, 126, 133-134.

³⁰ A. Giovene, *Il negozio giuridico rispetto ai terzi* (Torino: Unione Tipografica Editrice, 2nd ed, 1917), 85-86.

³¹ M. Graziadei, n 10 above, 126, 139-140.

That situation was harshly criticized by some scholars, as it was an undisputable advantage for the employers.³² Some courts tried to protect the injured workers holding that the employer liability could be affirmed, in those cases, even when he or she had acted with *culpa levissima*, that is to say when the fault was a minor fault, usually not considered a legal basis for compensation.³³ Others tried instead to compensate the workers stating that their damages arose out of a contractual relationship, and therefore the employer had the burden to prove that he was not liable for the injuries of his or her employees, on the basis of the rules on the contractual liability.³⁴

In the end, ten bills were introduced in the Italian Parliament from 1878 to 1898, aimed at modifying the rules on the liability of the employers for cases of industrial accidents. Those bills all provided for the compensation of the damages occurred to the employees, but for the cases where the injuries were the consequence of the same employee's acts or omissions or of causes outside the control of the employer. They were in practice trying to introduce a no fault system of liability in cases of industrial accidents, inspired by the German law of 7 June 1871 on the compensation of deaths and injuries caused by train operations, but they were constantly rejected affirming that they infringed the principle of equality of arms in civil litigation and that fault was an essential element for the compensation of damages.³⁵

In the end, the introduction of the Workmen's Compensation statute of 7 March 1898, establishing a compulsory workers' insurance for all the damages suffered as a consequence of their professional activity, provided a sometimes limited but nevertheless prompt protection of the injured workers, and therefore stopped all the attempts to introduce no fault liability rules in the Civil Code in those cases.³⁶ That statute was clearly inspired by other European examples, above all the German Workers' Compensation Law of 6 July 1884, promoted by Otto von Bismarck, but also the similar law of Austria of 1887, and those enacted by Norway in 1894 and by Finland in 1897.³⁷

³² F. Schupfer, *La responsabilità dei padroni per gli infortuni sul lavoro* (Roma: Botta, 1883); G.P. Chironi, 'Della responsabilità dei padroni rispetto agli operai e della garanzia contro gli infortuni sul lavoro' *Studi Senesi*, 127, 231 (1884). For an historical perspective on the issue, please refer to L. Gaeta, *Infortuni sul lavoro e responsabilità civile: alle origini del diritto del lavoro* (Napoli: Edizioni Scientifiche Italiane, 1986), 102.

³³ Corte di Appello di Firenze 26 January 1895, *Filangieri*, 360 (1865).

³⁴ Corte di Cassazione 6 December 1895, *Giurisprudenza Italiana*, I, 76 (1896) and Corte di Cassazione 26 April 1896, *Foro italiano*, I, 601 (1896). For a contrary opinion, Corte di Cassazione 26 March 1896, *Foro italiano*, I, 608 (1896).

³⁵ G. Cazzetta, n 11 above, 166-173.

³⁶ *ibid* 409-469; G.G. Balandi, 'Un caso di archeologia giuridica: ciò che resta oggi del "rischio professionale"' *Rivista giuridica del lavoro e della previdenza sociale*, 93 (1976); C. Castronovo, 'Alle origini della fuga dal Codice. L'assicurazione contro gli infortuni tra diritto privato generale e diritti secondi' *Jus*, 338 (1985).

³⁷ G. Ricca Salerno, 'L'assicurazione degli operai' *Annuario delle scienze sociali e politiche*, 380 (1883).

III. The 1942 Italian Civil Code

In 1942, the new Italian Civil Code was enacted. In that Code we can see the sign of the emerging autonomy of Italian law toward foreign influences, as even if it is easy to identify in it French and German legacies, it is also nonetheless possible to find some original solution, exclusive to the Italian system.³⁸

The structure of the 1942 Italian Civil Code is in fact inspired by the French Code Civil, either in the general partition and organisation, and in the part of the code devoted to the issue of civil liability. Regarding this latter point, it is important to underline that the drafters of the 1942 Italian Civil Code firmly excluded the idea to introduce in the new code a system of typical liability, that is to say a liability typified for every single case of wrongdoing and injury, on the model provided for by the rules of the BGB. In fact, § 823(1) of the BGB states that

‘a person who wilfully or negligently injures the life, body health, freedom, property, or other rights of another contrary to law is bound to compensate him for any damage arising there from and the same obligation attaches to a person who infringes a statutory provision intended for the protection of others’,

and other sections of the same BGB provide other liability rules aimed to protect important interests.

The refusal of the drafters of the 1942 Civil Code to follow the German model was explicitly and sharply justified in the preparatory works, stating that they rather preferred ‘not to get lost in a punctilious case system’.

But, although the drafting of civil liability rules of the 1942 Civil Code was generally inspired by the French model, and the liability for fault was based on a system of atypical liability, nonetheless the influence of the German legal thinking, which as we saw before already influenced Italian jurists under the ruling of the 1865 Code, in the last decades of the 20th century, deeply permeated some features of the new Civil Code.

In the first place, the heading of the chapter devoted to civil liability was changed, from ‘Of Delicts and Quasi-Delicts’ into ‘Of illicit facts’ (*Dei fatti illeciti*), under the influence of the thinking of Puchta and of the German model. This

³⁸ For an insightful introduction to the rules of Italian civil liability, read P. Perlingieri, ‘Le funzioni della responsabilità civile’ *Rassegna di diritto civile*, 115 (2011) and Id, ‘Constitutional Norms and Civil Law Relationships’ 1(1) *The Italian Law Journal*, 17 (2015) (originally ‘Norme costituzionali e rapporti di diritto civile’ *Rassegna di diritto civile*, 95 (1980)). For an overview in English of the rules on civil liability of the 1942 Italian Civil Code and their implementation by Italian courts, please read M. Graziadei and D. Migliasso, ‘Italian Report’, in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Natural Causation* (Wien-New York: Springer-Verlag, 2007); M. Graziadei et al, ‘Italian Report’, in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Damages* (Wien, New York: Springer-Verlag, 2011); M. Graziadei et al, ‘Italian Report’, in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Misconduct* (Berlin-Boston: De Gruyter, 2018).

change is certainly the expression of the willingness of the drafters to distance the Italian rules from the French traditional distinction between delicts and quasi-delicts, and to adopt instead the German idea that a damage can be compensated only if the fact that caused it was *non jure*, that is to say if it infringed a third person rights and the tortfeasors were not entitled to that infringement.

Moreover, the articles devoted to civil liability of the 1942 Code are no longer a prone translation of the articles of the Code Napoleon, as under the 1865 Civil Code, but are instead an original elaboration of the French and German legal thinking, when not a completely autonomous legal elaboration.

A clear illustration of the syncretism between the French and German influences is represented by Art 2043 of the 1942 Civil Code, which states:

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

The English translation of that rule is a burdensome task, as many of the terms used in it have juridical implications which render the English translation almost impossible. To our purposes, we can point out that the generally used translation of that rule is that provided for by Mario Beltramo, Giovanni Longo and John Henry Merryman, which is, by now, the only English translation of the entire 1942 Italian Civil Code, providing

‘Compensation for illicit facts. Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages’.³⁹

However, a probably more accurate translation, involving a deep consideration on the meanings and sources of the terms used by the drafters, is that proposed by Michele Graziadei, which states

‘Any intentional or negligent act, which causes unlawful harm to another, oblige the person who committed the act to provide compensation’.⁴⁰

The first novelty of this rule, when compared to the general rule on the liability for fault of the 1865 Italian Civil Code and of the *Code Napoléon*, consists in the addition of a title to the article, which underlines the existence of an added requirement for the damage to be compensated, that the fact that caused the injury was an ‘illicit’ fact. Moreover, the article not only rephrases the original French rule on the liability for fault, but also introduces an additional element, that of the *danno ingiusto*, that is to say the requirement of an *unlawful harm* or *unjustified injury*, or *wrongful damage*, depending on the preferred translation,

³⁹ M. Beltramo et al, *The Italian Civil Code* (New York: Oceana, 1991).

⁴⁰ M. Graziadei, n 10 above, 126 and 141.

that is to say the requirement that compensation for an extra contractual injury can be asked for only where that same injury is contrary to the law.

The roots of this idea of the requirement of the unlawfulness, in Italian *antigiuridicità*, may be found in the Italian translation of the second French edition, by Charles Aubry and Frédéric-Charles Rau, of the '*Handbuch des französischen Civilrechts*', published in 1868. In this work the various elements of the delictual liability are clearly separated, and it is explicitly stated that civil liability always requires the action or omission that caused the damages to be unlawful, that is to say *illicita*.⁴¹ Later, the Latin word *iniuria* was translated by Bernhard Windscheid in his *Lehrbuch des Pandektenrecht* with the German word *Widerrechtlichkeit* and that word, in turn, translated into Italian with *ingiustizia*⁴² and shortly after with *antigiuridicità*.⁴³

In any case, the additional requirement of the unjustified injury was interpreted by the Italian courts, for many years, as it provided a list of protected interests, analogous to that provided for by § 823 BGB, so that the compensation of the damages was only possible when one of the enlisted rights was infringed, with a serious limitation of the number of cases in which the compensation was awarded. That interpretation was largely upheld by the leading Italian scholars at the times of the enactment of the 1942 Civil Code, who supported this thesis on the basis of the limited number of protected interests under the *Lex Aquilia* in Roman Law,⁴⁴ and firmly affirmed by the Italian Corte di Cassazione in the notorious *Superga case*.⁴⁵ That decision, which denied the liability of the tortfeasor for the damages that are not the direct consequence of his or her action, such as in the case of the infringement of the credit rights of a third toward the victim of the tortious action, was criticized by many Italian scholars, who in those days started to affirm that the compensation of delictual liability could not be framed in the narrow provisions of § 823(1) BGB, but should be expanded so as to include the violation of the rights arising from contracts.⁴⁶

That situation changed in 1971, when the Italian Corte di Cassazione held that also the infringement of the contractual rights by a third party constitutes a compensable damage.⁴⁷ This decision once more brought together the Italian and French attitudes toward the notion of compensable damages. The enlargement

⁴¹ F. Fulvio ed, *Corso di Diritto Civile Francese per C.Z. Zachariae* (Napoli: Rondinella, 1868), 69-70, paras 443, 444 and 446.

⁴² B. Windscheid, *Lehrbuch des Pandektenrecht* (Frankfurt: Rutten and Loening, 5th ed, 1882), vol 2711, para 455. Italian translation: B. Windscheid, *Diritto delle Pandette*, translated by C. Fadda and P.E. Bensa (Torino: Unione Tipografica Editrice, 1891), 759, para 455.

⁴³ G. Brunetti, *Il diritto civile* (Firenze: Bernardo Seeber, 1906), cfr title of § 8.

⁴⁴ A. De Cupis, *Il danno: Teoria generale della responsabilità civile* (Milano: Giuffrè, 1946), 286; A. Fedele, *Il problema della responsabilità del terzo per pregiudizio del credito* (Torino: Unione Tipografica Editrice, 1954), 132.

⁴⁵ Corte di Cassazione 4 July 1953 no 2085, *Foro Italiano*, I, 1087 (1953).

⁴⁶ A. Guarneri, n 28 above, 138-139.

⁴⁷ Corte di Cassazione-Sezioni unite 26 January 1971 no 174, *Foro Italiano*, I, 342 (1971).

of the categories of compensable damages was then lastly increased in 1999, when the same Italian Corte di Cassazione affirmed that the public administration was obliged to compensate the damages occurred as a consequence of the violation of the legitimate interests of the citizens.⁴⁸ Those decisions were supported by the majority of the Italian scholars, who had been affirming for a long time the open ended, indeterminate nature of the concept of *wrongful damage* in our Code. Today, it is therefore generally held that that concept includes every violation of a 'legally protected interest'.⁴⁹

Another novelty of the 1942 Code was the introduction in Art 2043 of the distinct terms of *colpa* and *dolo* to describe respectively the lack of due care and the intention in the action or omission of the tortfeasor. This distinction took the place of the undistinguished usage of *colpa* for both cases, inherited by the comprehensiveness of the definition of *fault*, which traditionally incorporates either the wilful acts of the tortfeasor and those which are the consequence of negligence or lack of care.

Moreover, although the rules on the liability for damages caused by things and animals and the collapse of buildings, provided for by Arts 2051, 2052 and 2053 of the 1942 Civil Code, were still inspired by the provisions of the Code Napoléon, their text was modified, to give space to the instances of those Italian courts and scholars who, as we saw before, held that in these cases the liability of the defendant is a strict liability or that the defendant's liability should be based on the presumption of his or her fault. Those rules were therefore rewritten, giving rise to a specific head of liability, based on the rigorous duty of care of the defendant, if not her or his actual strict liability.

The new formulation of these rules also consolidated the different application made by the French and Italian courts of the rule on the liability for things. As is known, in fact, starting from the famous *Jand'heur*⁵⁰ decision, the liability provided for by Art 1384 of the Code Civil traditionally applied also to cases of damages caused by things through human agency, so establishing a system of strict liability created by case law. In Italy, on the contrary, the analogous rule was only applied when the damages were caused by the thing itself or by unknown causes, and not to damages caused by things through human agency. That difference was most probably the consequence of the early adoption, in Italy, the 30 June 1912, of the statute on automobile accidents, that undercut the

⁴⁸ Corte di Cassazione-Sezioni unite 22 July 1999 no 500, *Danno e responsabilità*, 965 (1999) with notes by V. Carbone, P.G. Monateri, A. Palmieri, R. Pardolesi, G. Ponzanelli, V. Roppo; *Foro Italiano*, I, 2487 (1999) with notes by A. Palmieri, R. Pardolesi and *Foro Italiano*, I, 3201 (1999) with notes by R. Caranta, F. Fracchia, A. Romano, E. Scoditti.

⁴⁹ For a first detailed investigation on the issue, please read, among the others, M. Franzoni, 'L'illecito', *Trattato della responsabilità civile* (Milano: Giuffrè, 2010), 867; P.G. Monateri, *La responsabilità civile* (Torino: Unione Tipografica Editrice, 1998), 100; A. Fedele, *Il problema della responsabilità del terzo per pregiudizio del credito* (Torino: Unione Tipografica Editrice, 1954), 99-103; B. Gardella Tedeschi, *L'interferenza del terzo nel contratto* (Milano: Giuffrè, 2008), 284.

⁵⁰ Cour de Cassation, chambres réunies 13 February 1930, *Recueil Sirey* 1930.1.121.

need to expand the rule on the liability for damages caused by things to cases of traffic accidents.⁵¹ In any case, when the 1942 Civil Code was enacted, the Italian scholars interpreted the rules on the liability for the damages caused by things or animals as special cases of liability for fault,⁵² although today it is generally held that those rules are provisions of strict liability, which only requires the proof of causation.⁵³

On the contrary, the rules on the vicarious liability of the parents of the Italian 1942 Civil Code, largely changed from those set out by the French Civil Code and the 1865 Italian Civil Code, that provided the liability of the parents (and in Italy also of the tutors) in cases of damages caused by the minor of age children living with them, with the only exception of the cases in which the parents (or tutors) could prove that they were unable to prevent the harmful fact of the minor.

In fact, the 1942 Civil Code introduced with Art 2046 the idea that a person incapable of understanding and intending, that is to say without natural capacity, could not be held responsible for the compensation of the damages he or she caused under that condition. Art 2046 in fact provides:

‘Person not chargeable with injury. A person who was incapable of understanding or intending at the time he committed the act causing injury is not liable for its consequences, unless the state of incapacity was caused by his own fault’.⁵⁴

Therefore, to be a source of compensable damages, the harmful action of the tortfeasor must be an act of free and actual will.

Moreover, this distinction between cases where natural capacity exists and cases where it does not, was also applied to minors, with the consequent different treatment between minors who are naturally capable and minors who are not naturally capable.⁵⁵ That distinction was largely accepted by scholars and courts.⁵⁶ As a consequence, Arts 2047 and 2048 of the Italian Civil Code now respectively provide:

Art 2047

⁵¹ M. Cozzi, *La responsabilità civile per danno da cose: diritto italiano e francese* (Padova: CEDAM, 1935).

⁵² G. Comandè and G. Ponzanelli, ‘Italian Report’, in F. Werro and V.V. Palmer eds, *The Boundaries of Strict Liability in European Tort Law* (Durham: Carolina Academic Press, 2004).

⁵³ See, eg, Corte di Cassazione 11 January 2005 no 376, *Danno e responsabilità*, 1101 (2005).

⁵⁴ English translation by M. Beltramo, n 39 above.

⁵⁵ A. De Cupis, n 44 above, II, 140.

⁵⁶ Corte di Cassazione 18 May 1953 no 1812, *Foro Italiano* I, 1451 (1953); Corte di Cassazione 10 August 1964 no 2291, *Giustizia civile*, I, 2190 (1964); Corte di Cassazione 10 April 1964 no 1008, *Giustizia civile*, I, 2190 (1964); M. Pogliani, *Responsabilità e risarcimento da illecito civile* (Padova: CEDAM, 1969), 130; G. Alpa and M. Bessone, ‘I fatti illeciti’, in P. Rescigno ed, *Trattato di diritto privato* (Padova: CEDAM, 1982), 323; S. Patti, *Famiglia e responsabilità civile* (Milano: Giuffrè, 1984), 248.

‘Injury caused by person lacking capacity. If an injury is caused by a person incapable of understanding or intending, compensation is due from those who were charged with the custody of such person, unless they prove that the act could not have been prevented.

If the person injured is unable to secure compensation from the person charged with the custody of the person lacking capacity, the court, considering the financial conditions of the parties, can order the person who caused the injury to pay equitable compensation’.

Art 2048

‘Liability of parents, guardians, teachers and masters of apprentices: A father and mother or guardian, are liable for the damage occasioned by an unlawful act of their minor not emancipated children, or of persons subject to their guardianship who reside with them. The same provision applies to a parent by affiliation.

Teachers and others who teach an art or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices that are under their supervision.

The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act’.

Therefore, today, in cases of damages occurred in consequence of the actions of minors who are not able to intend and understand, parents and tutors must pay the compensation for the damages caused by the minor only if they are not able to prove that the harmful act of the incapable person could not have been prevented. If the victims cannot be compensated by the responsible person, the court, considering the financial situation of the parties, can order the minor who caused the injury to pay the victim an equitable compensation.

Instead, in cases of damages occurred in consequence of the actions of minors that are able to intend and understand, parents and tutors must pay the compensation for the damages caused by the minor only if they are not able to prove that they were unable to prevent the harmful act. Their liability for the compensation shall be joint and several with the liability of the minor.

That is to say that in the first case parents and tutors will be liable for not preventing the damages (so called *culpa in vigilando*), while in the second case they will be liable for not adequately raising and educating their children (so called *culpa in educando*).⁵⁷

⁵⁷ See for example Corte di Cassazione 13 February 1970 no 348, *Giurisprudenza italiana*, I, 1034 (1979) and Corte di Cassazione 1 April 1980 no 2119, *Massimario della Giurisprudenza italiana*, 531 (1980).

It is interesting to point out that the rule providing the exclusion of the liability of the naturally incapable person is the logical consequence of the general requirement, rooted as we underlined above in the French civil system, of the fault of the defendant to affirm his or her liability. Nonetheless, it must be stressed that the rule providing for the power of the judge to order the incapable person to pay an indemnity to the victims in cases where his or her parents or tutors were unable to pay for the compensation, or proved that they could not prevent the incapable person from causing the damage, clearly abandons the fault principle to favour strict liability. The origins of this equitable exception to the general requirement of imputability as a prerequisite of liability can be traced, thanks to the mention explicitly made by Art 76 of the 1927 Draft Italian Code of Obligations,⁵⁸ written by a French-Italian codification commission, in § 829 of the BGB and the Prussian Landrecht, which contemplated strict liability. It should however not be forgotten that, even if not mentioned, § 1310 of the Austrian Civil Code contained the same provisions.

The code of 1942 also introduced, with Art 2054, a long and detailed provision, devoted to the circulation of motor vehicles and, with Art 2050, a provision devoted to the compensation of the damages caused by a dangerous activity. Both diverted from the general fault rule of the Code Civil tradition, to protect the harmed victims by the means of strict liability or of the inversion of the onus of proof of the fault of the defendant.

Certainly the rules on the liability for traffic accidents were modelled on Art 2, regio decreto 31 October 1873 no 1867, concerning the damages caused by railways circulation, which was clearly inspired by the 1838 Prussian legislation on railways and on Art 5 of the above cited Italian law on traffic accidents of 1912, modelled on the German law of 1909 on traffic accidents. The provision on damages caused by dangerous activities may also be seen as a broadening of those same rules.⁵⁹

That latter rule, which provides:

‘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’,

was certainly very innovative in those days. In fact, it was aimed at protecting all those situations where a dangerous activity was involved, because of its same

⁵⁸ Commissione Reale per la riforma dei Codici, *Progetto di codice delle obbligazioni e dei contratti: testo definitivo approvato a Parigi nell'ottobre 1927* (Roma: Provveditorato generale dello Stato, 1928).

⁵⁹ M. Graziadei, n 10 above, 126 and 156-159. An overview of the evolution of the concept of fault in Italian law and court decisions could be found in M. Graziadei et al, ‘Italian Report’, in B. Winiger et al eds, *Digest of European Tort Law: Essential Cases on Misconduct* (Berlin Boston: De Gruyter, 2018), 40-42.

dangerousness, on the basis of criteria of no fault liability.

Actually, Art 2050 was probably too brave for the times, and in fact it was neglected by Italian scholars and judges for a long period, but for a few cases that were potentially highly dangerous. The rationale and usefulness of Art 2050 were nevertheless highly praised by Pietro Trimarchi, one of the leading Italian scholars of the times, who at the end of the 1970s held that the rule was indisputably a strict liability rule, contrary to those that held its nature of presumption of liability or fault liability.⁶⁰ The interpretation given by Trimarchi and the changing attitudes of Italian judges toward the rights of the victims of tortious cases entailed a new approach to Art 2050 starting from the 1970s, when it began to be used as a ductile tool for the protection of the victims of all those activities that, although not labelled as dangerous, are intrinsically risky or dangerous because of the means used.

IV. The Industrialization and the Emergence of the Issue of Defective Products

Starting from the 1950s Italy benefitted of a rapid and massive industrialization, with the consequent unavoidable rise of the number and entity of cases of damages caused by the new productive procedures, tools or defective products. This latter field, that is to say the domain of the compensation for damages caused by defective products, was especially relevant, because of the large amount of damages caused and victims involved.

Italian courts were therefore invested of a new range of problems, which Italian judges dealt with by using in innovative ways the traditional tools of the 1942 Civil Code. One of the remedies used was, as mentioned above, the widening of the cases where Art 2050 provisions could be applied, by the means of the enlargement of the concept of *dangerous activity*.

Another tool frequently used by the judges was the presumption of the fault of the defendant under the provisions of the general rule on the liability for fault, Art 2043, in cases where the defendant was a factory or an entrepreneur, and the petitioner was an individual who, because of his or her weaker position toward the defendant, was not able to prove their fault. That subterfuge was firstly used by the Italian Corte di Cassazione in 1964, in the famous Saiwa case, in which the court, given the impossibility for the consumer injured by a packet of spoilt biscuits to prove the negligence of the defendant producer, affirmed that in the case it could be presumed that the harm was caused by the producer's fault, and that therefore it was on the producer to prove that the damages were not the consequence of its fault.⁶¹

⁶⁰ P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961), passim. For a first information on the discussion on the nature of Art 2050, P.G. Monateri, n 49 above, 107.

⁶¹ Corte di Cassazione 25 May 1964 no 1270, *Foro Italiano*, I, 2098 (1965).

Not only that decision was often imitated by other Italian courts, where it was too onerous or impossible for the victim to prove the defendant's fault, and there was a disproportion of means between the petitioner and the defendant, but it also gave some leading Italian scholars the occasion to investigate some foreign experiences in similar cases. That court decision was in fact first largely commented by Federico Martorano,⁶² who examined the issue in a comparative perspective, under the light of common law experiences, and later by other scholars, such as Mario Bessone, who investigated the issue of producer liability with regard to German, French and, especially, North American experiences⁶³ and Guido Alpa, who approved the approach adopted by the judges of the Corte di Cassazione, holding that in those cases the fault of the defendant should be presumed.⁶⁴

To tell the truth, other scholars before them had already investigated the issue of defective products, under a comparative point of view, although they had more traditionally applied to the issue the rules provided for the liability of the seller. First of all, we should remember Gino Gorla, who started to examine the problem already under the rules of the 1865 Civil Code, and then published in the 50s two writings in which he offered some solutions inspired by the French case law and by the common law.⁶⁵ He pointed out, in fact, that, starting from the second half of the 19th century, some French courts affirmed that the seller was strictly liable (or almost strictly liable) for the damages caused by the defective products sold to the buyer, in force of the seller guarantee.⁶⁶ In those cases the words of Art 1646 of the Code '*frais occasionnés par la vente*' were in fact interpreted as allowing the courts to compensate all the buyer's losses consequent to the sale, with the only exception of the *lucrum cessans* (loss of earnings).⁶⁷ In truth, other more strict positions had been adopted by some French scholars⁶⁸ and judges, who hold that the seller, manufacturer or professional trader were liable for the loss arising out of defective products, because the guarantee of

⁶² F. Martorano, 'Sulla responsabilità del fabbricante per la messa in commercio di prodotti dannosi (a proposito di una sentenza della Cassazione)' *Foro Italiano*, V, 13 (1966).

⁶³ M. Bessone, 'Prodotti dannosi e responsabilità dell'impresa' *Rivista trimestrale di diritto e procedura civile*, I, 97 (1971).

⁶⁴ G. Alpa, *Responsabilità dell'impresa e tutela del consumatore* (Milano: Giuffrè, 1975), 58.

⁶⁵ G. Gorla, 'Considerazioni in tema di garanzie per i vizi redibitori' *Rivista trimestrale di diritto e procedura civile*, 1272 (1957); Id, 'Considerazioni sulla giurisprudenza francese in tema di garanzia per i vizi redibitori', in *Studi in onore di Francesco Messineo* (Milano: Giuffrè, 1959), 231.

⁶⁶ The first decision holding that interpretation seems to be Cour de Cassation 29 July 1847, *Recueil Sirey* 1848.1.705.

⁶⁷ The first decision in that sense was Cour de Cassation 21 October 1925, *Recueil périodique et critique mensuel Dalloz* 1926.19, containing the previous case law on the issue, with note by L. Josserand and *rapport* of B. Célice.

⁶⁸ R.J. Pothier, 'Vente', in Id, *Oeuvres* (Paris: Eugène Crochard, 1929-1934), no 213; J. Hamel, 'Vente', in M. Planiol and G. Ripert eds, *Traité pratique de droit civil français* (Paris: Librairie Générale de Droit & de Jurisprudence, 1956), X, 141; L. Josserand, note to Cour de Cassation 21 October 1925, *Recueil périodique et critique mensuel Dalloz* 1926.19.

the sale contract provided their liability for professional negligence and their strict liability for the loss. The existence of the fault of the seller was, pointed out Gorla, sometimes presumed by French courts, and his or her guarantee on the goods even extended to the loss suffered by the buyer *dans ses autres biens*.⁶⁹ In his opinion, the French case law was the outcome of the development of non-roman streams of *ius commune*, contrasting with the tradition adopted by the codes, which had the purpose to mend the new social and economic needs.⁷⁰

If Gorla could not approve the French case law on the issue of the sellers' liability, he nevertheless admitted to share its aims of protection of the consumers, when their contract of sale was entered with a professional seller, and concerned certain categories of goods. In his opinion, Italian Art 1494 of the 1942 Civil Code had to be interpreted as to requiring the professional negligence of the seller and therefore as to imposing him to prove he or she was not liable for the damages caused by the sold defective products.⁷¹

In the following decade, other scholars, such as Trimarchi and Stefano Rodotà, started instead to follow a new path, which tried to find in the civil liability rules the solution to the problems resulting from the growing Italian industrialization. In their opinion, in fact, those rules could be used as an efficient tool to allocate profits and damages between consumers and producers.⁷² Their innovative research led to the opening of a new field of research, that concerning the compensation of damages caused by defective products and the related producer liability. Among the scholars who devoted their efforts to these researches, three must be remembered as having the most influence on the Italian legal thinking on the issue.

First of all, it should be noted that in 1974 Ugo Carnevali published a book entirely devoted to the subject of producers' liability.⁷³ His research was deeply influenced by the French jurisprudence and by some American scholars, among them William Lloyd Prosser, Frederick Reed Dickerson and Friedrich Kessler.⁷⁴ Under the suggestion of their legal reasoning, he held that in cases of damages caused by defective products, the liability of the seller in force of his or her contractual liability for the defects of the product should be excluded, as it is costly and complex and as only the producer is actually able to control the productive system of the goods and their marketing. Therefore, he stated that in those cases only the producer should be held liable for the possible negative

⁶⁹ G. Gorla, 'Considerazioni in tema di garanzie' n 65 above, 281.

⁷⁰ G. Gorla, 'Considerazioni sulla giurisprudenza francese' n 65 above, 253.

⁷¹ G. Gorla, 'Considerazioni in tema di garanzie' n 65 above, 1288 and 1292.

⁷² P. Trimarchi, n 60 above, *passim*; S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), *passim*.

⁷³ U. Carnevali, *Responsabilità del produttore* (Milano: Giuffrè, 1974).

⁷⁴ W.L. Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)' 69 *Yale Law Journal*, 1099 (1960); F.R. Dickerson, *Product Liability and the Food Consumer* (New York-Westport: Greenwood Press, 1951); F. Kessler, 'Product Liability' 76 *Yale Law Journal*, 926 (1967); S. Simitis, *Grundfragen der Produzentenhaftung* (Freiburg: Mohr, 1965).

consequences of the products defects, on the basis of the rules of civil liability. The recourse to the civil liability of the producer was in fact, in his opinion, the only way to compensate the victim of the defective product, avoiding the short limitation time provided for the liability of the seller,⁷⁵ and as well sidestepping the lengthy procedures to recover damages in 'chain sales', which could not allow the compensation of the victim. He therefore proposed to establish a system of strict liability of the producers for all the damages caused by defective products, which could effectively protect the consumer providing the liability of the producer even in cases in which the harm was not the consequence of his or her negligence.

Another Italian scholar who strongly influenced the Italian debate was Guido Alpa, who in 1975 published a book devoted to the enterprise liability and the consumer protection, where he underlined the shortcomings of the protection of the consumers in Italy, in comparison with other foreign legal systems.⁷⁶ His inspiration was especially drawn from the North American common law experience, where the judges, he pointed out, had been able to establish a system of strict liability of the producers for the damages caused by the products put on the market, on the basis of the new theories on product damages allocation and economic analysis of law. That new system, he noticed, had been able to overcome the limited boundaries of negligence, fault and privity of contract and modify the 1964 version of § 402 of the Restatement of Torts. Furthermore, he also investigated the English, French and German systems, concluding that to provide an effective protection of the consumers, it was essential to hold the liability of the producers in any case in which the defect of the product could be attributed to the organisation of this latter.

Five years later the same Alpa edited a book, jointly with Mario Bessone, aimed at exploring the issue of product damages and producers' liability in a comparative perspective which, besides articles on the Italian experience, contained essays written by foreign scholars. John Spencer wrote in fact on the North American and English system, Wolfgang Marshall von Bieberstein on the German, Bill Dupwa on the Swedish, Ewoud Hondius on the Dutch, Philippe Malinvaud and Genevieve Viney on the French, Angel Rojo on the Spanish, and Jorge Barrera Graf on the Mexican, while the same Alpa took into examination the European Community projects on the consumer protection against defective products.⁷⁷ Moreover, Alpa also wrote in the book an essay which investigated

⁷⁵ In truth, the issue of the limitation time of the seller liability was at the centre of a heated debate among Italian scholars, see eg in favour of the application of the shorter terms of the guarantee action P. Greco and G. Cottino, 'Della vendita', in A. Scialoja and G. Branca eds, *Commentario del Codice Civile* (Bologna-Roma: Zanichelli, 1962), 224-225 and the contrary opinion supporting the application of the longer terms of the compensation action, A. De Martini, *Profili della vendita commerciale e del contratto estimatorio* (Milano: Giuffrè, 1950), 391; L. Mengoni, 'In tema di prescrizione della responsabilità del venditore per danni derivati dai vizi della cosa' *Rivista di diritto commerciale e di diritto generale delle obbligazioni*, II, 927 (1953).

⁷⁶ G. Alpa, *Responsabilità dell'impresa* n 64 above, 61.

⁷⁷ G. Alpa and M. Bessone, *Danno da prodotti e responsabilità dell'impresa* (Milano: Giuffrè,

the issue of producer insurance for the damages arising out of defective products, especially in no-fault systems, such as those recently introduced in cases of car accidents in some USA States and in cases of car accidents and working injuries in New Zealand. In that essay it is clear that Alpa was in those days influenced, in his research, by the writings of the American scholars Guido Calabresi, Walter J. Blum and Harry Kalven, Page W. Keeton and Jeffrey O'Connell, who he largely cites. His interest in the American experience also transpires in another essay, written by him and published in the same book, dealing with the North-American experience on the circulation of defective products.

Amid these scholars mainly influenced by the French and common law legal thinking, we should also mention Carlo Castronovo, who was instead largely inspired by German scholars.⁷⁸ On the basis of the influence of that foreign scholarship, Castronovo suggested that to cases of damages arising out of defective products the traditional rule on the liability of the seller be applied, provided for by Art 1494 of the Italian Civil Code, which states the contractual liability of the seller for the damages arising out of defective goods, jointly with the analogical application of Art 2049 of the same Code, providing the liability of the employer for the damages caused by the unlawful acts of his or her employees.⁷⁹

V. The Influence of the European Union Law

Starting from the end of the 1950s, the Italian legal system saw the introduction of a relevant novelty. In 1957, in fact, Italy, with France, Belgium, Germany, the Netherlands and Luxembourg, established the European Economic Community, which later evolved in today European Union, consisting of twenty-seven member states.

That supranational entity is endowed, among others, as long as we are concerned, of legislative powers in the field of the free circulation of goods and services among the member States, and aimed to protect the safety and health of its citizens and the rights of consumers. These powers were used by the European Commission, aware of the large number of cases of damages caused by defective products, to enact the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions

1980).

⁷⁸ F. Leonhard, *Die Haftung des Verkäufers für sein Verschulden beim Vertragsabschlusse* (Göttingen: Dieterich, 1986); D. Medicus, 'Vertragliche und deliktische Ersatzansprüche für Schäden aus Sachmängeln', in O. Bachof, E. Kern, *Tübinger Festschrift für Eduard Ker* (Tübingen: Mohr, 1968), 317; J. Esser, *Schuldrecht* (Heidelberg: Muller, 1969), II; W. Leisler, 'Schadensersatz wegen Sachmängeln. Rechtshistorisches zu § 463 BGB', in H. Hulbam and H. Hübner eds, *Festschrift für L. Schnorr von Carolsfeld* (Berlin: Carl Heymanns, 1972) are among the many German scholars he cited.

⁷⁹ C. Castronovo, *Problema e sistema nel danno da prodotti* (Milano: Giuffrè, 1979).

of the Member States concerning liability for defective products⁸⁰.

That Directive, in truth, provided Italian citizens with rules aimed at compensating the victims of damages caused by defective products which the Italian legislator, notwithstanding the lively research activities of some Italian scholars examined above, lacked to provide. And it certainly marked Italian law with its innovative approach to defective products damages compensation.

The European Directive was implemented in the Italian system by decreto del Presidente della Repubblica 24 May 1988 no 224 and its rules and following modifications are now part of the Italian Consumer Code, although their application is not limited to consumers, but may be used in every case of damages caused by a defective product. The novelty of the law consists in the establishment of a system of strict liability of the producer in cases of damages arising out of defective products, notwithstanding the existence of a contractual relationship between producer and consumer. The product is deemed to be defective, when it is 'unsafe' in relation to all the circumstances of the case for the user, and that defect caused harm to the same user. To ask for the compensation of the damages suffered, the victim of the defective product only has to prove that he suffered damages, and that those damages are the consequence of a defect of the product, but does not need to prove, as under the general rule for negligence of the Italian Civil Code, the fault of the producer.

It must be underlined that even if the new rules provided for by the European Directive clearly follow the model of strict liability of the producer offered by the United States experience, nevertheless they are, under many aspects, original in their approach and formulation, mainly because they rely on the reasonableness of the user and may be applied only when this latter used the product as it could reasonably be expected, in compliance with the warnings and instructions given by the producer.⁸¹

Notwithstanding the introduction of the European rules on products liability, it must be pointed out that Italian courts often preferred to continue to use Arts 2043 and 2050 of the Italian Civil Code in cases of product damages, although the application of the traditional rules implied the presumption of the negligence of the manufacturer, in place of the requirement of its probation by the petitioner.⁸² On the contrary, the same courts completely stopped applying

⁸⁰ 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.

⁸¹ For a first comparative approach, please read G. Howells, *Comparative Product Liability* (Aldershot: Dartmouth, 1993); D. Fairgrieve ed, *Product Liability in Comparative Perspective* (Cambridge: Cambridge University Press, 2005) and D. Fairgrieve at al, 'The Product Liability Directive: Time to get Soft?' 4(1) *Journal of European Tort Law*, 1 (2013).

⁸² U. Carnevali, 'Responsabilità del produttore e prova per presunzioni' *Responsabilità civile e previdenza*, 481 (1996); A. Palmieri, 'Dalla 'mountain-bike' alla bottiglia d'acqua minerale: un nuovo capitolo per un'opera incompiuta' *Foro Italiano*, I, 3664 (1998) and R. Pardolesi, 'La responsabilità per danno dei prodotti difettosi' *Nuove leggi civili commentate*, 650 (1989).

Art 1494, providing the contractual liability of the seller for the damages arising out of defects of the products sold, to cases of damages caused by defective products.⁸³

In truth, it should not be ignored that the application of Art 2043 Civil Code, providing the liability for fault, in cases of product damages, is actually often used by the courts as a tool to compensate the victims where the manufacturer cannot be identified, or the court prefers to hold severally and jointly liable the manufacturer and other persons, by reason of their vigilance duties to protect the buyer/consumer, or when it would otherwise be impossible to compensate the damaged persons on the basis of the European rules. A good example of this case law are the decisions of the Italian Corte di Cassazione in which the Italian Ministry of Health was held liable for the harm suffered by the petitioners following the contraction of HIV, hepatitis B and hepatitis C as the consequence of transfusions of infected blood or use of infected blood products.⁸⁴ In those cases, the liability of the defendant Ministry of health was held on the basis of Art 2043 Civil Code, because in the opinion of the judges it had negligently omitted to pursue its duties of monitoring and vigilance in the production and marketing of the blood and blood products. Those decisions were certainly motivated by policy reasons, as it would have been impossible to condemn the manufacturers of the defective blood and blood products on the basis of the Council Directive 85/374/EEC on defective products. In other cases, the joint application of Art 2043 and of the product liability provisions was used to hold both the seller and the producer jointly and severally liable.⁸⁵

Likewise, Art 2050 Civil Code was sometimes applied jointly or in place of the product liability provisions, in cases of damages that have traditionally been considered the consequence of dangerous activities, such as damages arising out

⁸³ After the entry into force of decreto del Presidente della Repubblica 24 May 1988 no 224, there is apparently only one published decision, of a first instance Court, Tribunale di Firenze 5 April 2000, *Archivio civile*, 208 (2001) and *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 210 (2001) applying the provisions of Art 1494 Civil Code, even if jointly to the provisions of decreto del Presidente della Repubblica 24 May 1988 no 224.

⁸⁴ Corte di Cassazione 31 May 2005 no 11609, *Responsabilità civile e previdenza*, 101 (2006), with note by M. Poto, 'Le emotrasfusioni infette, i nuovi traguardi della giurisprudenza di merito, la posizione della Cassazione'. The case was also commented by N. Coggiola, 'La Cassazione afferma la responsabilità del Ministero della Salute per i danni da sangue ed emoderivati infetti' *Responsabilità civile e previdenza*, 296 (2006) and in English 'The Italian Ministry of Health Held Liable for the Damages Arising out of Contaminated Blood and Blood Products' 3 *European Review of Private Law*, 451 (2007). It is interesting to point out that the decision of the Corte di Cassazione substantially confirmed the first and second instance decisions: Tribunale di Roma 27 November 1998, *Foro Italiano*, I, 313 (1999) with note by U. Izzo, 'Circa la responsabilità per danni da trasfusioni di plasma ed emoderivati infetti da HIV' and Corte di Appello di Roma 23 October 2000, *Danno e responsabilità*, 1067, (2001) with note by U. Izzo, 'La responsabilità dello Stato per il contagio di emofilici e politrasmusi: oltre i limiti della responsabilità civile'.

⁸⁵ Tribunale di Firenze 5 April 2000, *Archivio civile*, 208 (2001) and *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 210 (2001).

of gas cylinders⁸⁶ and the production or marketing of pharmaceutical products⁸⁷ and of blood products.⁸⁸

The judicial outliving of the application of the Italian Civil Code rules to cases now also ruled by the product damages provisions, and the limited recourse to the new rules by courts, lawyer and consumers, was labelled by some Italian scholars as a failure of the implementation of the European directives, due to cultural and organizational issues of the Italian legal system.⁸⁹ Other scholars underlined, instead, that the existence of dispute transactions in cases of product damages and the general augmentation of product safety should be taken into consideration in the assessment of the effects of the introduction of the new rules.⁹⁰

VI. By Way of Conclusion: The Recognition of Foreign Decisions Awarding Punitive Damages

A final mention should be made, as a sort of conclusion to this excursus on the foreign influences on Italian law, to a recent judicial decision of the Joint Sections of the Italian Supreme Court, because in my opinion that decision clearly depicts the relationship today between foreign influences and the Italian legal system.

The case concerned the recognition in Italy of a US decision awarding punitive damages, a category of damages which is not generally acknowledged

⁸⁶ Corte di Cassazione 17 July 2002 no 10382, *Diritto ed economia delle assicurazioni*, 261 (2003); Corte di Cassazione 2 April 2001 no 4792, *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 337 (2001); Tribunale di Perugia, 7 June 2000, *Rassegna giuridica umbra*, 699 (2000); Corte di Cassazione 4 June 1998 no 5484, *Giurisprudenza italiana*, 707 (1999); Corte di Cassazione 19 January 1995 no 567, *Giurisprudenza italiana*, I, 276 (1995).

⁸⁷ Tribunale di Roma 20 June 2002, *Foro Italiano*, I, 3225 (2002); *Diritto e giustizia*, 23, 58 (2002) with note by A.G. Cianci; *Responsabilità civile e previdenza*, 1103 (2002) with note by U. Carnevali, 'Farmaco difettoso e responsabilità dell'importatore-distributore'. Corte di Cassazione 27 July 1991 no 8395, *Giurisprudenza italiana*, I, 1332 (1992) with note by A. Barenghi, 'In tema di farmaci difettosi'; Corte d'Appello di Roma 17 October 1990, *Giurisprudenza italiana*, I, 816 (1991) with note by G. Tassoni, 'La produzione di farmaci tra l'art. 2050 c.c. ed i cosiddetti "development risks"'.

⁸⁸ Tribunale di Ravenna 28 October 1999, *Danno e responsabilità*, 1012 (2000); Corte di Cassazione 27 January 1997 no 814, *Foro Italiano Repertorio*, entry 'Responsabilità civile', 5760, no 211 (1997); Corte di Cassazione 1 February 1995 no 1138, *Disciplina del commercio e dei servizi*, 592 (1995); Corte di Cassazione 20 July 1993 no 8069, *Foro Italiano*, I, 455 (1995) and *Giustizia civile*, I, 1037 (1994) with note by A. Barenghi, 'Brevi note in tema di responsabilità per danni da emoderivati difettosi tra *obiter dicta* e regole giurisprudenziali'; Corte di Cassazione 15 July 1987 no 6241, *Responsabilità civile e previdenza*, 421 (1988) with note by G. Tassoni, 'Responsabilità del produttore di farmaci per "rischio da sviluppo" e art. 2050 c.c.'.

⁸⁹ G. Alpa, 'La dottrina sulla responsabilità del produttore. Il rischio d'impresa alle soglie del 1992' *Responsabilità civile e previdenza*, 645 (1988); A. Palmieri, 'Dalla "mountain-bike alla bottiglia d'acqua minerale" n 82 above, 3664; G. Ponzanelli, 'Responsabilità del produttore' *Rivista di diritto civile*, II, 215 (1995).

⁹⁰ F. Cafaggi, 'La responsabilità dell'impresa per i prodotti difettosi', in N. Lipari ed, *Trattato di diritto privato europeo*, (Milano: CEDAM, 2nd ed, 2003), IV, 536.

by the Italian legal system. That recognition had been previously traditionally excluded, lastly by two decisions of the Corte di Cassazione, which resolutely held that punitive damages were contrary to the Italian system of compensation and infringed Italian public policy, as the ideas of punishment and sanction remained external to the Italian system of compensation, which does not evaluate the conduct of the defendant for compensation purposes.⁹¹

But when the same issue was lately submitted again to the judgment of the Joint Sections of the same Supreme court, the Court reversed the previous case law with an innovative decision, no 16601 of 5 July 2017,⁹² in which it stated that, although punitive damages are not generally recognized by the Italian legal system, it is nevertheless possible to grant the exequatur to foreign decisions awarding punitive damages, provided that they comply with some requisites.

Leaving aside for reasons of space and consistency the detailed description

⁹¹ Corte di Cassazione 19 January 2007 no 1183, *Foro Italiano*, I, 1460 (2007) with note by G. Ponzanelli, 'Danni punitivi: no grazie' *Danno e responsabilità*, 1225 (2007), with note by P. Pardolesi, 'Danni punitivi all'indice' *Europa e diritto privato*, 1129 (2007), with note by G. Spoto, 'I punitive damages al vaglio della giurisprudenza italiana'; *Corriere giuridico*, 497 (2007), with note by P. Fava, 'Punitive damages e ordine pubblico: la Cassazione blocca lo sbarco'; *Giurisprudenza italiana*, 395 (2008), with note by A. Giussani, 'Resistenze al riconoscimento delle condanne al pagamento dei punitive damages: antichi dogmi e nuove realtà'; *Responsabilità civile e previdenza*, 188 (2008), with note by G. Miotto, 'La funzione del risarcimento dei danni non patrimoniali nel sistema della responsabilità civile and Corte di Cassazione'; Corte di Cassazione 8 February 2012 no 1781, *Foro Italiano*, I, 1449 (2012); *Danno e responsabilità*, 609 (2012), with note by G. Ponzanelli, 'La Cassazione bloccata dalla paura di un risarcimento non riparatorio'; *Corriere giuridico*, 1068 (2011), with note by P. Pardolesi, 'La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no!'. On the issue, in English, please read F. Quarta, 'Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto' 31 *Hastings International & Comparative Law Review*, 753 (2008).

⁹² Corte di Cassazione-Sezioni unite 5 July 2017 no 16601, translated in English by F. Quarta in 3(2) *The Italian Law Journal*, 593 (2017), with note by L. Coppo 'The Grand Chamber's Stand on the Punitive Damages Dilemma'. The decision was, obviously, largely commented, among the others by A. Palmieri and R. Pardolesi, 'I danni punitivi e le molte anime della responsabilità civile'; E. D'Alessandro, 'Riconoscimento di sentenze di condanna a danni punitivi: tanto tuono che piovve'; R. Simone, 'La responsabilità non è solo compensazione'; P.G. Monateri, 'I danni punitivi al vaglio delle Sezioni unite', all published in *Foro Italiano*, I, 2630, 2639, 2644 and 2648 (2017); A. Di Majo, 'Principio di legalità e di proporzionalità nel risarcimento con funzione punitiva' *Giurisprudenza italiana*, 1792 (2017); M.E. La Torre, 'Un punto fermo sul problema dei "danni punitivi"'; G. Corsi, 'Le Sezioni Unite: via libera al riconoscimento di sentenze comminatorie di punitive damages'; G. Ponzanelli, 'Polifunzionalità tra diritto internazionale privato e diritto privato'; P.G. Monateri, 'Le Sezioni Unite e le funzioni della responsabilità civile', all published in *Danno e responsabilità*, 421, 429, 435 and 437 (2017); M. Grondona, 'Le direzioni della responsabilità civile tra ordine pubblico e punitive damages' *Nuova giurisprudenza civile commentata*, I, 1392 (2017); A. Gambaro, 'Le funzioni della responsabilità civile tra diritto giurisprudenziale e dialoghi transnazionali'; P.G. Monateri, 'Le Sezioni Unite e le molteplici funzioni della responsabilità civile'; G. Ponzanelli, 'Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno', all published in *Nuova giurisprudenza civile commentata*, II, 1405, 1410 and 1413 (2017); C. Scognamiglio, 'Le Sezioni unite ed i danni punitivi: tra legge e giudizio' and A. Briguglio, 'Danni punitivi e delibazione di sentenza straniera: turning point nell'interesse della legge', both in *Responsabilità civile e previdenza*, 1109, 1597 (2017); Francesca Benatti, 'Benvenuti danni punitivi... o forse no!' *Banca, borsa e titoli di credito*, 575 (2017).

of the case and of the court reasoning to other scholars,⁹³ we can simply summarise here that the case concerned the compensation asked by a biker, following the severe brain injuries he sustained as a consequence of the crash that occurred while he was driving a motorcycle in a motocross practice race. The biker sued the American retailer of the helmet he was wearing and its Italian manufacturer, holding that the damages he suffered were caused by the defects of the helmet. The American retailer reached a settlement agreement with the injured biker, agreeing to pay him around one million dollars, and subsequently the District Court of Florida held that the Italian producer was obliged to pay back the American retailer for the money he paid following the settlement. As the Italian producer did not oblige the retailer, this latter brought the case to Italy, in front of the Corte di Appello di Venezia, which granted the exequatur of the Florida judgment in the Italian system. The Joint Sections of the Corte di Cassazione, to which the Italian producer appealed, ruled out the possibility that the Florida decision concerned the payment of punitive damages, but nevertheless decided to pronounce, *ex officio*, on the principle of law that should be affirmed in the case, stating that:

‘In the current legal system, the purpose of civil liability law is not just to make the victim of a tort whole again, since the functions of deterrence and punishment are also inherent in the system. The American doctrine of punitive damages is therefore not ontologically contrary to the Italian legal system. However, the recognition of a foreign judgment awarding such damages is subject to the condition that the judgment has been rendered in accordance with some legal provisions of the foreign law guaranteeing the standardization of cases in which they may be awarded (*tipicità*), their predictability, and their outer quantitative limits. The enforcing court must focus solely on the effects of the foreign judgment and on their compatibility with public policy’.⁹⁴

It is certainly interesting to investigate the reasons of the shift of the attitude of the judges of the Italian Corte di Cassazione from the denial of the possibility to award the exequatur of foreign courts decisions condemning the tortfeasors to punitive damages payments, to a position where that exequatur may be awarded, provided the existence of certain conditions, because we can

⁹³ In English, please read A. Venchiarutti, ‘The Recognition of Punitive Damages in Italy: A Commentary on Cass Sez Un 5 July 1917, 16601, AXO Sport, SPA v. NOSA Inc’ 9(1) *Journal of European Tort Law*, 104 (2018) and B. Pozzo, ‘The Enforcement of Foreign Decisions Concerning Punitive Damages’ 5 *European Review of Private Law*, 661 (2018) for a detailed examination of Italian substantive law, of the scholarly debate on punitive damages and on the Court reasoning, and E. D’Alessandro, ‘Recent Trends in Enforcing US Punitive Damages Awards in Italy’ 22 *Zeitschrift für Zivilprozess International*, 77 (2017) for the insightful description of the procedural issues of the case and the interesting comparative approach.

⁹⁴ Translation by F. Quarta, n 92 above, 604.

recognise in that shift the influence of a multiplicity of factors.

First of all, it should be remembered the influence of some precedents of the same Corte di Cassazione, as in cases of damages caused respectively by the unauthorized publication of a photograph⁹⁵ and by the violation of the copyright,⁹⁶ that Court held that the compensation system could also perform a sanctioning function. Shortly after, the Corte di Cassazione also affirmed, in a decision which recognized the exequatur of a Belgian court decision providing the compensation of damages, that in the Italian legal system the payment of the damages caused by the tortfeasor does not merely have the purpose of restoring the damages suffered by the victim, but may also have the secondary aims of sanctioning the tortfeasors and deterring them from tortious actions.⁹⁷

Secondly, the contribution of Italian scholars must not be undervalued, as for a long time a number of them have been debating, largely under the influence of foreign influential colleagues and courts decisions, especially but not uniquely from the United States⁹⁸ on the legitimacy and opportunity to enforce the civil liability functions of sanction and deterrence, and therefore also on the legitimacy and opportunity of the introduction of punitive damages in the Italian system.⁹⁹

⁹⁵ Corte di Cassazione 11 May 2010 no 11353, *Foro italiano*, I, 534 (2011), with note by P. Pardolesi, 'Abusivo sfruttamento di immagine e danni punitivi'.

⁹⁶ Corte di Cassazione 15 April 2011 no 8730, *Foro italiano*, I, 3073 (2011), with note by P. Pardolesi, 'Violazione del diritto d'autore e risarcimento punitivo/sanzionatorio'.

⁹⁷ Corte di Cassazione 15 April 2015 no 7613, with note by A. Mondini, "'Astreintes" ordine pubblico interno e danno punitivo' *Foro italiano*, I, 3966 (2015); with note by F. Benatti, 'Dall'astreinte ai danni punitivi: un passo ormai obbligato' *Banca borsa e assicurazioni*, 679 (2015); with note by A. Venchiarutti, 'Le astreintes sono compatibili con l'ordine pubblico interno. E i punitive damages?' *Responsabilità civile e previdenza*, 1899 (2015); with note by A. Mendola, 'Astreinte e danni punitivi' and by A. Di Majo, 'I confini mobili della responsabilità civile' *Giurisprudenza italiana*, 562 (2016); on the same issue, G. Ponzanelli, 'Novità per i danni esemplari?' *Contratto e impresa*, 1195 (2015).

⁹⁸ Among the others, G. Ponzanelli, 'I punitive damages nell'esperienza nordamericana' *Rivista di diritto civile*, I, 435 (1983); V. Zeno-Zencovich, 'Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai "punitive damages" di "common law"' *Giurisprudenza italiana*, IV, 12 (1985); G. Ponzanelli, 'I punitive damages, il caso texano e il diritto italiano' *Rivista di diritto civile*, II, 405 (1987); G. Ponzanelli, 'Punitive damages e due process clause: l'intervento della corte suprema Usa' (comment to US Supreme Court, 4 marzo 1991, *Pacific Mutual Life Insurance co v Haslip*) *Foro italiano*, IV, 235 (1991); Id, 'L'incostituzionalità dei danni punitivi grossly excessive' *Foro italiano*, IV, 421 (1996); A. Musy, 'Punitive damages e resistenza temeraria in giudizio: regole, definizioni e modelli istituzionali a confronto' *Danno e responsabilità*, 1121 (2000); G. Ponzanelli, 'La "costituzionalizzazione" dei danni punitivi: tempi duri per gli avvocati nordamericani' *Foro italiano*, IV, 356 (2003); P. Sirena, 'Il risarcimento dei danni c.d. punitivi e la restituzione dell'arricchimento senza causa' *Rivista di diritto civile*, I, 531 (2006); G. Ponzanelli, 'I danni punitivi sempre più controllati: la decisione Philip Morris della Corte Suprema Americana' *Foro italiano*, IV, 179 (2008); P. Pardolesi, 'Danni punitivi' *Digesto delle discipline privatistiche, Sezione Civile, Aggiornamento I* (Torino: UTET, 2007), 445; Francesca Benatti, *Correggere e punire. Dalla law of torts all'inadempimento del contratto* (Milano: Giuffé, 2008), 106; S. Patti, 'Pene private' *Digesto delle discipline privatistiche, sezione civile*, (Torino: UTET, 2004), XIII, 351; M.G. Baratella, *Le pene private* (Milano: Giuffrè, 2006), passim.

⁹⁹ On the issue, F.D. Busnelli and G. Scalfi eds, *Le pene private* (Milano: Giuffrè, 1985); P. Sirena, *La funzione deterrente della responsabilità civile, alla luce delle riforme straniere e*

Although it could not be affirmed that the majority of Italian scholars are favourable to the introduction of punitive damages in our system,¹⁰⁰ as a large number of them still hold a critical approach to the issue,¹⁰¹ it may certainly be inferred from the reading of the decision under discussion that the existing international academic and judicial debate on punitive damages has certainly found its way to the Italian judges seating in the Joint Panel of the Corte di Cassazione. A clear example of this inference can be found at point 7.1 of the decision, dealing with the issue of the United States case law on punitive damages.

Thirdly, the Italian system is not completely unaware of punitive damages, as it already knows a number of cases where the law provides for the payment of non-compensatory amounts of money where some legal rules are infringed,¹⁰² such as the cases of defamation by press, where the victim is entitled to receive a compensatory sum irrespective of the punishment of the offender and in addition to the compensation for the economic damages, compensatory sum which can amount to all the profits resulting from the defamation¹⁰³ or the cases of discrimination law, where the compensation to the victim may be based, to quantify it, on the act of discrimination as a retaliation against a judicial action or other activity of the victim aimed to comply with the principle of equal treatment.¹⁰⁴ In other cases, where the compensation of the damages suffered by the victim would not constitute an

dei Principles of European Tort Law (Milano: Giuffrè, 2011); and F. Quarta, *Risarcimento e sanzione nell'illecito civile* (Napoli: Edizioni Scientifiche Italiane, 2013). On the consequences of the conduct of the tortfeasors, P. Cendon, *Il dolo nella responsabilità extracontrattuale* (Torino: Giappichelli, 1974), and more P.G. Monateri et al, *Il dolo, la colpa e i risarcimenti aggravati dalla condotta* (Torino: Giappichelli, 2014).

¹⁰⁰ Among the scholars in favour of the recognition of foreign decisions awarding punitive damages, we can cite, G. Ponzanelli, 'Danni punitivi: no grazie' n 91 above; P. Pardolesi, 'Danni punitivi all'indice' n 91 above; G. Ponzanelli, 'La Cassazione bloccata' n 90 above; A. Giussani, *Resistenze al riconoscimento* n 91 above; A. Riccio, 'I danni punitivi non sono, dunque, in contrasto con l'ordine pubblico interno' *Contratto e impresa*, 859 (2009).

¹⁰¹ Among the scholars against the recognition of foreign decisions awarding punitive damages, please read C. Castronovo, 'Del non risarcibile aquiliano: danno meramente patrimoniale, c.c. perdita di chance, danni punitivi, danno c.d. esistenziale' *Europa e diritto privato*, 315 (2008); M. Barcellona, 'Funzione compensativa della responsabilità e private enforcement della disciplina antitrust' *Contratto e impresa*, 120 (2008); A. De Pauli, 'L'irricoscibilità in Italia per contrasto con l'ordine pubblico di sentenze statunitensi di condanna al pagamento dei danni 'punitivi' *Responsabilità civile e previdenza*, 2100 (2007). For a comparative investigation, please read R.A. Brand, 'Punitive Damages and the Recognition of Judgments' 43 *Netherlands International Law Review*, 143 (1996).

¹⁰² C. Scognamiglio, 'Danno morale e funzione deterrente della responsabilità civile' *Responsabilità civile e previdenza* 2485 (2007); A. Riccio, n 100 above, 859.

¹⁰³ Art 12 legge 8 February 1948 no 47; on the issue, M. Grondona, 'Danno morale da diffamazione a mezzo stampa e ambito di rilevanza dei danni punitivi' *Responsabilità civile e previdenza*, 836 (2010); P. Cendon, 'Pena privata e diffamazione' *Politica del diritto*, 149 (1979).

¹⁰⁴ Art 28, para 6, decreto legislativo 1 September 2011 no 150; on the issue G. Carapezza Figlia, *Divieto di discriminazione e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2013), 49; C. Troisi, *Divieto di discriminazione e forme di tutela. Profili comparatistici* (Torino: Giappichelli, 2012), 172.

actual economic punishment for the tortfeasor, because of the entities of his or her earnings due to the infringement of the legal provisions, the Italian law provides for the disgorgement in favour of the victims of the profits made by the tortfeasor. The main examples of this legal provisions are the rules today provided for, following the implementation of the Enforcement Directive, by Art 125, para 2, decreto legislativo 10 February 2005 no 30 (Industrial Property Code)¹⁰⁵ and Art 158, para 2, legge 22 April 1941 no 633 (Copyright Law).¹⁰⁶

Lastly, we should not forget to cite the equally probable influence of the case law of other European Courts. In fact, despite the foreclosure of a landmark decision of the German Federal Court of Justice (Bundesgerichtshof, BGH) in 1992, in a similar case,¹⁰⁷ decision which rejected the possibility to recognize in Germany a foreign court award of punitive damages, it should be pointed out that the courts of France¹⁰⁸ and Spain,¹⁰⁹ which belong to the same legal

¹⁰⁵ On the issue, among the others, L. Nivarra, 'L'enforcement dei diritti di proprietà intellettuale dopo la direttiva 2008/48/CE' *Diritto industriale*, 45 (2005); P. Pardolesi, 'Un'innovazione in cerca d'identità: il nuovo art. 125 codice proprietà industriale' *Corriere giuridico*, 1605 (2006); V. Di Cataldo, 'Compensazione e deterrenza nel risarcimento del danno da lesione di diritti di proprietà intellettuale' *Giurisprudenza commerciale*, 20 (2008); M.S. Spolidoro, 'Il risarcimento del danno nel Codice della Proprietà Industriale. Appunti sull'art. 125 C.P.I.' *Rivista di diritto industriale*, 153 (2009); G. Floridia, 'Risarcimento del danno e reversione degli utili nella disciplina del diritto industriale' *Rivista di diritto industriale*, 10 (2012).

¹⁰⁶ On the issue, among the others, G. Floridia, 'Proprietà intellettuale, illecito concorrenziale e risarcimento', in G. Floridia et al, *Il risarcimento del danno da illecito concorrenziale e la lesione della proprietà intellettuale. Atti del Convegno, Castel Gandolfo 20-22 marzo 2003* (Milano: Giuffé, 2004); A. Plaia, *Proprietà intellettuale e risarcimento del danno* (Torino: Giappichelli, 2005).

¹⁰⁷ Bundesgerichtshof 4 June 1992, *Neue Juristische Wochenschrift*, 3096 (1992); for comments on the decision, among the others, N. Jansen and L. Rademacher, 'Punitive Damages in Germany', in H. Koziol and V. Wilcox eds, *Punitive Damages: Common Law and Civil Law Perspectives* (Berlin Heidelberg: Springer Verlag, 2009), 75; P. Hay, 'The Recognition and Enforcement of American Money Judgments in Germany. The 1992 Decision of the German Supreme Court' 40 *American Journal of Comparative Law*, 729 (1992); E. D'Alessandro, 'Pronunce americane di condanna di punitive damages e problemi di riconoscimento in Italia' *Rivista di diritto civile*, I, 383 (2007).

¹⁰⁸ Cour de Cassation 10 December 2010 no 09-13303, *Bulletin civil* no 248 (2010); among the comments, please read V. Wester-Ouisse, 'La Cour de Cassation ouvre la porte aux dommages punitifs!' *Revue Responsabilité civile et assurances*, Etude no 5 (2011); J. Juvénal, 'Dommages-intérêts punitifs: comment apprécier la conformité à l'ordre public international?' 6 *Juris-Classeur périodique G*, 256 (2011); I. Gallmeister, *Recueil Dalloz*, 24 (2011); F.-X. Licari, 'La compatibilité de principe des punitive damages avec l'ordre public international: une décision en trompe-l'oeil de la Cour de cassation?' *Recueil Dalloz*, 423 (2011); P. Stoffel-Munck, *Juris-Classeur périodique G*, 435 no 11 (2011). In English, V. Wester-Ouisse and T. Thiede, 'Punitive Damages in France: A New Deal?' 3 *Journal of European Tort Law*, 115 (2012); B. West Janke and F.-X. Licari, 'Enforcing Punitive Damage Award in France after Fontaine Pajot' 60 *American Journal of Comparative Law*, 775 (2012).

¹⁰⁹ Tribunal Supremo, Sala de lo Civil, 13 November 2001, *Auto del Tribunal Supremo* 1803/2001. For comments on the decision, among the others, J. Carrascosa González, 'Daños punitivos: Aspectos de derecho internacional privado europeo y español', in M. J. Herrador Guardia ed, *Derecho de daños* (Pamplona: Aranzadi, 2013), 383; L.F. Reglero Campos, 'Conceptos generales y elementos de delimitación', in L.F. Reglero Campos and J.M. Busto Lago eds, *Tratado*

tradition of the Italian system, have in recent times granted the exequatur to foreign decisions awarding the victims the payment of punitive damages.

To conclude, it is my opinion that, on one hand, attention must be paid not to overestimate the impact of the decision of the Joint Sections of the Italian Corte di Cassazione no 16601 of 2017, mainly because that overruling is only theoretical and exclusively concerns the issue of the recognition of foreign decisions awarding punitive damages. That decision, in fact, only dealt with the issue of the exequatur of foreign decisions, and therefore only concerns the private international field, and certainly did not recognize the existence of rights to a compensation of punitive damages in the Italian system, but for the cases where the law explicitly provides for them.¹¹⁰

On the other hand, it is also important not to underestimate the possible impact of that decision on the Italian legal system and, last but not least, on the Italian economic system. In fact, not only does this decision allow, under certain conditions and when they are imposed by a foreign court, the enforcement of the obligations to pay punitive damages on persons and legal persons established or incorporated in Italy, but also deprives these latter of the legal shield that for a long time had been protecting them from their foreign creditors, causing substantial injustices toward their victims and relevant consequences for the markets and the reliability of the Italian legal and economic system. It is in fact not by chance that the Court stated, at point 7.1 of the decision, that

‘What counts is to reiterate that the recognition of a punitive damages award is always subject to an evaluation of the effects that the foreign decision may have in Italy’.¹¹¹

Therefore, it may be hinted that not only the Italian Corte di Cassazione undertook the *revirement* under discussion because of the influence of the foreign court decisions and of the foreign and Italian doctrine, but also out of a sense of economic reality, because denying the award of punitive damages in that case would mean protecting an Italian economic player to the detriment of the reliability of the Italian legal and economic system. In so doing, once again, the Italian legal operators, in this case the judges of the Corte di Cassazione, proved to be capable of moulding foreign legal influences and national original concepts in the field of civil liability into an original system, as they have always done in the past, starting with the 1865 Civil Code.

de Responsabilidad Civil (Pamplona: Thompson Reuter Aranzadi, 5th ed, 2014), I, 89. In English, P. del Olmo, ‘Punitive Damages in Spain’, in H. Koziol and V. Wilcox eds, *Punitive Damages: Common Law and Civil Law Perspectives* (Berlin Heidelberg: Springer Verlag, 2009), 137; S.R. Jablonsky, ‘Translation and Comment, Enforcing U. S. Punitive Damages Awards in Foreign Court. A Recent Case in the Supreme Court of Spain’ 24 *Journal of Law & Commerce*, 225 (2005).

¹¹⁰ Of the same opinion, A. Venchiarutti, n 93 above, 104.

¹¹¹ Translation by F. Quarta, n 92 above, 604.

