

Asbestos Cases in the Italian Courts: Duelling with Uncertainty

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Abstract

The article investigates Italian civil Courts case-law on asbestos damages, focusing mainly on the issues of causation and fault. The diseases caused by asbestos exposure are often multifactorial diseases, to which the test of condition sine qua non cannot be applied to ascertain causation. The analysis of Italian case-law reveals a lack of uniformity in the criteria adopted to affirm the causation, contrasted by the uniformity of the criteria used to held the fault of the defendants. Such situation generates uncertainty in the protection of the rights of both the petitioners and the defendants. The lack of homogeneity in the criteria applied to establish the existence of causation is not exclusive of asbestos compensation cases, but is a constant characteristic of Italian civil case law, only lately reversed. Lastly, the author suggests some criteria that could be applied to ascertain causation in asbestos cases and other multifactorial diseases.

Keywords: Asbestos litigation, multifactorial diseases

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1. *The asbestos emergency in Italy*

In Italy, asbestos has been widely used and manufactured for many years. For a long time only a few people, mainly the doctors and epidemiologists who studied asbestos related diseases, and some owners and managers of the asbestos factories, were conscious of its inherent dangers, while asbestos workers were unaware of the risks involved in their occupational activities.

Indeed it was not until the 1980s that news of the dangers of asbestos fibres reached the broader public, mainly thanks to the first criminal trials for death or personal injuries as a consequence of asbestos exposure and the fights of unions and asbestos victims associations for acknowledgment and compensation for injuries suffered by the asbestos workers and their families.

Today, everyone in Italy knows the destructive power of asbestos, especially those living where that poisonous substance was produced and manufactured. The towns of Casale Monferrato and Monfalcone will no doubt long remain in national memory due to the many people, both workers and common citizens who never worked in the asbestos industries who died or were injured as a result of asbestos exposure.¹

After a first law, the D.P.R. 24 maggio 1988 n° 215,² limiting the marketing of asbestos products, Italy definitively banned asbestos mining, production, importation, exportation and marketing with the Legge 27 marzo 1992, n° 257.³

Even if those laws were enacted long before the Directive of the European Commission 1999/77/CE dated 26 July 1999, which banned the asbestos use in every European Union Member State by 1 January 2005, nonetheless in Italy the number of people suffering from illnesses caused by asbestos exposure is still increasing.

The ISTISAN 02/12 Report on mesothelioma death rates in the Italian municipalities states that in the years 1988 to 1997, 9094 people (5942 men and 3152 women) died as a result of mesothelioma.⁴

¹ Some of the personal histories of these people can be found in ROSSI, *La lana della salamandra*, Roma, 2008; BULLIAN, *Il male che non scompare. Storia e conseguenze dell'uso dell'amianto nell'Italia contemporanea*, Trieste, 2008, and in COVAZ, *Le abbiamo fatte noi. Storie dei cantierini e del cantiere di Monfalcone*, Pordenone, 2008.

² Published in G.U. 20 giugno 1988, n° 143.

³ Published in Supp. Ord. n° 64 to G.U. 13 aprile 92, n° 87.

⁴ The Report can be found at the following web address for the Istituto Superiore di Sanità <http://www.iss.it/binary/publ/publi/0212.1109318481.pdf>, last visited the 5 July 2009.

The previous Reports were ISTISAN 00/09, *Esposizione ad amianto e mortalità per tumore maligno della pleura in Italia (1988-1994)*, in <http://www.iss.it/binary/publ/publi/0009.1109841874.pdf>, last visited the 5 July 2009 and Rapporto ISISTAN 96/40 *La mortalità per tumore maligno della pleura in Italia negli anni 1988-1992 e lo studio di AA.VV., Distribuzione territoriale della mortalità per tumore maligno della pleura in Italia*, in *Annali Istituto Superiore Sanità*, 1992, 28 (4), 589-600.

That same Report notes that the number of cases of mesothelioma increased during the 90s, most likely because of the widespread dissemination of asbestos in the 50s and 60s. An analogous increase in the number of cases is reported in other European countries.

The mesothelioma disease is indeed characterised by a very long latency, as it may occur twenty or even thirty years after exposure to asbestos. Therefore the increase in deaths over the last decade could result from an increase in the general amount of exposure dating from the middle of the last century.

However, the same epidemiological research also reports an upsurge of mesothelioma in municipalities with no previous history of asbestos diseases resulting from professional activities, that is, where the asbestos could be traced in the environment or from some productive activity.

To this day, asbestos is one of the principal causes of professional cancers in Italy,⁵ and the human, social and economic costs of the asbestos epidemic are very high. It was, for example, estimated that it cost the National Social Insurance for the compensation of workers' injuries and diseases (I.N.A.I.L.) 152 million Euros between 1998 and 2006 to compensate the injured workers of Eternit, one of Italy's primary asbestos manufacturers.⁶

Asbestos exposure can be the cause of different diseases.⁷ The first disease recognised as resulting directly from asbestos dust was asbestosis. This is the scarring of lung tissue following prolonged exposure to asbestos, resulting in shortness of breath and, in some cases, respiratory failure. Asbestosis is a cumulative illness; that is to say that a certain amount of exposure is needed for the illness to occur, and the seriousness of the disease increases in conjunction with increases in exposure. Generally, the disease becomes apparent after 10 to 15 years of exposure.

A second major disease which may result from asbestos exposure is mesothelioma, a lethal cancer that is commonly located in the pleura, but may also occur in the peritoneum or pericardium.⁸

⁵ And in Europe, as well. Researchers state that asbestos is the main single cause of professional cancer and the first occupational cancerogenic in Europe. See BOFFETTA and MERLER, "Occupational cancer in Europe", *Environmental Health Perspectives*, 1999, 197 (suppl. 2), 227-303.

⁶ The estimation of the amount was made by the Procura della Repubblica di Torino, source La Repubblica, 23 marzo 2007, sezione Torino, 7.

⁷ I will only outline these diseases. For further details, please see, among others, MURRAY, "Asbestos: a Chronology of its Origins and Health Effects", *Brit. J. of Industrial Medicine*, 1990, 47, 361-362; BROWNE, *Asbestos-related disorders*, in *Occupational Lung Disorders*, Parkes, London, 3th ed., 1994, 449-459; CASTLEMAN, *Asbestos. Medical and Legal Aspects*, New York, 4th ed., 2005; DOLL & PETO, "The causes of Cancer: Quantitative Estimates of Avoidable Risks of Cancer in the United States Today", *National Cancer Institute*, 1981, 66, 1191-1308; SELIKOFF & LEE, *Asbestos and Disease*, New York, 1978, 20.

⁸ This disease is almost exclusively caused by asbestos exposure, but in a very limited number of cases can be caused by asbestiform fibres, which can be found naturally occurring in the rocks in some places (Cappadocia, Sicily among them). For an interesting report on the CAPPADOCIA cases of mesothelioma, read CARBONE, EMRI,

Due to its long latency, the illness generally occurs 20 or 30 years after the asbestos exposure, but most patients will die only 12 to 24 months from the date of diagnosis.

There is a lack of scientific certainty regarding the pathological process which leads to mesothelioma, even if most scientists affirm that the disease is caused by chemical changes induced by asbestos fibres present in the lungs.⁹ Once the pathological process has begun, further exposure does not contribute to the illness, but recent research suggests that a reduction in exposure levels reduces the risk of the insurgence of the disease.¹⁰

Exposure to asbestos may also be the cause of some other cancers. There is a discernible connection between asbestos exposure, smoking habits and the occurrence of lung cancer, for example.¹¹ Generally, lung cancer latency is some 15 to 20 years from the date of the asbestos exposure.

DOGAN, STEELE, TUNCER, PASS & BARIS, "A Mesothelioma Epidemic in Cappadocia: Scientific Developments and Unexpected Social Outcomes", *Cancer*, 2007, 7, 147.

⁹ For further information see: CASTLEMAN, *Asbestos. Medical and Legal Aspects*, New York, 4th ed., 2005; BARRET, "Cellular and molecular mechanism of asbestos carcinogenicity: Implications for biopersistence", *Environmental Health Perspectives*, 1994:102, S5: 19-23; BIANCHI C., BIANCHI L., BROLO, GIRELLI, RAMANI, "Asbestos exposure in malignant mesothelioma of the pleura: a survey of 557 cases", *Industrial Health*, 2001, 39: 161-167; PETO, SEIDMAN & SELIKOFF, "Mesothelioma mortality in asbestos workers: implications for models of carcinogenesis and risk assessment", *British Journal of Cancer*, 1982, 45:124-135; TERRACINI, "The role of asbestos fiber dimensions in the prevention of mesothelioma", *International Journal of Occupational and Environmental Health*, 2007, 13, 64-69.

¹⁰ On this issue read: PETO, "Dose-response relationships for asbestos-related disease: implications for hygiene standards. Part II. Mortalità", *Ann. N. Y. Acad. Sci.* 1979, 330, 195-203; MERLER, "L'incidenza del mesotelioma diminuisce parallelamente alla diminuzione o interruzione dell'esposizione ad amianto: una conferma della relazione dose-risposta, non priva di implicazioni preventive", *Epidemiol. Prev.*, 2007, 4 Suppl., 46-52; SEIDMAN, SELIKOFF, "Decline in death rates among asbestos insulation workers 1967-1986 associated with diminution of work exposure to asbestos", *The Annals of the New York Academy of Sciences*, 1990, 609: 300-317; SELIKOFF, "The case of asbestos: dose-response and latency", *The Annals of the New York Academy of Sciences*, 1989, 572: 4-5.

¹¹ Some epidemiological studies indicate that the risk of lung cancer for non-smokers exposed to asbestos is 5 times greater than in the general population; the same risk is 50 times greater if the exposed to asbestos are smokers: HAMMOND, SELIKOFF, SEIDMAN, "Asbestos exposure, cigarette smoking and death rates", *Annals N.Y. Acad. Sci.*, 1979, 330:473-490. For further research on this subject see MUSCAT, STELLMAN, WYNDER, "Insulation, asbestos, smoking habits, and lung cancer cell types", *American Journal of Industrial Medicine*, 1995, Volume 27 Issue 2, 257-269; ERREN, JACOBSEN, PIEKARSKI, "Synergy between Asbestos and Smoking on Lung Cancer Risks", in *Epidemiology*, Vol. 10, No. 4 (Jul., 1999), 405-411; HILT, LANGÅD, ANDERSEN, ROSENBERG, "Asbestos exposure, smoking habits, and cancer incidence among production and maintenance workers in an electrochemical plant", *Ann. occup. Hyg.*, 2004, Vol. 48, No. 5, 459-462; BERRY, LIDDELL, "The Interaction of Asbestos and Smoking in Lung Cancer: A Modified Measure of Effect", *Ann. occup. Hyg.*, 2004, Vol. 48, No. 5, 459-462; GUSTAVSSON, NYBERG, PERSHAGEN, SCHÉELE, JAKOBSSON, PLATO, "Low-Dose Exposure to Asbestos and Lung Cancer: Dose-Response Relations and Interaction with Smoking in a Population-based Case-Referent Study in Stockholm, Sweden", in *American Journal of Epidemiology* 2002, Vol. 155, No. 11: 1016-1022; LIDDELL, "The interaction of asbestos and smoking in lung cancer", *Ann. occup. Hyg.*, 2001, Vol. 45, No. 5, 341-356; LEE, "Relation between exposure to asbestos and smoking jointly and the risk of lung cancer", *Occup Environ Med* 2001;58:145-153; MUSCAT, WYNDER, "Cigarette Smoking, Asbestos Exposure, and Malignant Mesothelioma", *Cancer Research*, 2001 51, 2263-226.

Asbestos is also suspected to be one of the possible causes of other cancers (including larynx and gastro-intestinal cancer), but in those cases is very difficult to establish if asbestos was one of the direct causes of the illness.

2. *The Italian compensation system*

In Italy, there exist many different systems for those seeking compensation for asbestos related illness. Under a compulsory insurance system financed by employers and managed by I.N.A.I.L., social security provides compensation in the form of an indemnity for those asbestos workers suffering physical and economic damage due to an injury or an illness that is the consequence of their professional activity.¹² The system protects employers from civil liability, with the only exception of the cases in which they are condemned for a criminal violation against the rules protecting workers' safety and health.

In theory, every illness resulting from asbestos exposure can be compensated, but while in cases of asbestosis and mesothelioma (because there is a presumption that it was caused by a victim's professional activity) the worker or his dependants need only prove the existence of the pathology and the exposure to asbestos, in other cases the victim must prove that the disease was caused by professional exposure.

The indemnity compensates the worker for their temporary or permanent inability to work, the expenses for medical and surgical care, including clinical investigations, and the cost of prosthesis, where necessary. In cases of death, the dependants of the worker are entitled to an annuity and a lump sum. In addition to economic losses, the worker can ask for compensation of the *danno biologico*, that is to say the physical damage alone, with its socio-relational consequences, and without any regard for economic consequences.¹³

It must be highlighted that the scope of the indemnity provided by I.N.A.I.L. is proportionate compensation of damage and not reparation for the entire injury.¹⁴ However, since the Italian

¹² This system of public insurance is covered by Decreto 30 giugno 1965, n. 1124, "Testo unico delle disposizioni per l'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali", published in G.U. of 13 October 1965 - Suppl. ord, n. 257.

For further bibliographical references see DE MATTEIS & GIUBBONI, *Infortuni sul lavoro e malattie professionali*, Milano, 2005 and MARANDO, *Responsabilità, danno e rivalsa per gli infortuni sul lavoro*, Milano, 2003.

¹³ Following D.lgs. 20 febbraio 2000, n° 38, art. 13, published in G.U. n. 50, 1 marzo 2000.

¹⁴ On the issue, see the cases App. Torino, 29 novembre 2004, in *Foro it.*, 2005, I, 1911; Trib. Cagliari, 20 febbraio 2003, in *Riv. infortuni*, 2003, II, 65, with note by PLAISANT; Cass., sez. lav., 13 aprile 2002, n. 5354., in *Mass. Giust. civ.*, 2002, *Rep. Foro It.*, 2002, voce Infortuni sul lavoro [3560], n. 81; Cass., sez. lav., 08 marzo 2001, n. 3363, in *Foro it.*, 2001, I, 1531, *Arch. civ.*, 2001, 749, *Giust. civ.*, 2001, I, 2105, *Riv. critica dir. lav.*, 2001, 804, *Dir. e giustizia*, 2001, fasc. 12, 54. See also ALIBRANDI, *Infortuni sul lavoro e malattie professionali*, Milano, 2002, 114 ff. and particularly 140 ff.

Corte Costituzionale held that the indemnity does not exclude the right to ‘complete compensation’,¹⁵ the worker or their dependants can always seek, in a civil court, payment of the difference between the entire damage and the indemnity compensation (*danno differenziale*) from the employer.

A worker and their dependants can also, if they so choose, sue the employer for compensation of the so-called *danni complementari*, or non-economic damage (moral damage and *danno esistenziale*, that is to say damage to the ‘personal sphere of the person’)¹⁶ which are not included in the

¹⁵ Corte Cost., 18 aprile 1996, n° 118, in *Foro it.*, 1996, I, 2326, with note by PONZANELLI, ““Pochi, ma da sempre”: la disciplina sull’indennizzo per il danno da vaccinazione, trasfusione o assunzione di emoderivati al primo vaglio di costituzionalità”; *Cons. Stato*, 1996, II, 640, *Giust. civ.*, 1996, I, 1879, *Danno e resp.*, 1996, 573, with note by COMANDÉ; for decisions of lower Courts, read for ex. Trib. Pinerolo, 27 aprile 2004, in *Orient. giur. lav.*, 2004, I, 462, *Rep. Foro It.* 2004, voce *Lavoro (rapporto)* [3890], n. 1445 e Trib. Torino, 17 settembre 2005, in <http://www.giurisprudenza.piemonte.it/civile/lavoro/003217092005.htm>; on the subject of the differences between social security compensation and judicial compensation please read, amongst others, ROSSETTI, “Il danno da lesione della salute tra sistema indennitario e sistema risarcitorio: punti di contatto e questioni irrisolte”, *Riv. inf. mal. prof.*, 2001, I, 1035; GIUBBONI, “Le “contraddizioni” dell’assicurazione obbligatoria contro gli infortuni sul lavoro, tra vecchio e nuovo diritto”, in *Dir. lav.*, 2001, 93; MARANDO, *Responsabilità, danno e rivalsa per gli infortuni sul lavoro*, Milano, 2003, 392, 451 e 468 ff.; LA PECCERELLA, “Principi generali del nuovo sistema di indennizzo”, *Riv. inf. mal. prof.*, 2001, I, 1047; VITTORIA, “Il D.lgs.n. 38/2000 e la responsabilità civile”, *Riv. inf. mal. prof.*, 2001, I, 1075.

¹⁶ Cass., 8 febbraio 1993, n° 1523, in *Not. giur. lav.*, 1993, 352, *Rep. Foro It.*, 1993, voce *Lavoro (rapporto)* [3890], n. 1190.

The debate on the type of damages has been for a long time central to Italian case law and scholarly dispute. A solution was finally found with a series of decisions of the Corte di Cassazione, Cass., 12 maggio 2003, n. 7281, in *Foro it.*, 2003, I, 2272, with note by LA BATTAGLIA & NAVARRETTA, “Danni non patrimoniali: il dogma infranto e il nuovo diritto vivente”; Cass., 12 maggio 2003, n. 7282, in *Resp. civ. e prev.*, 2003, 676; Cass., 12 maggio 2003, n. 7283, in *Foro it.*, 2003, I, 2272; Cass., 31 maggio 2003, n° 8827, in *Resp. civ. e prev.*, 2003, 676, con note di CENDON, “Anche se gli amanti si perdono l’amore non si perderà. Impressioni di lettura su Cass. 8828/2003”; BARGELLI, “Danno non patrimoniale ed interpretazione costituzionalmente orientata dell’art. 2059 c.c.” e ZIVIZ, “E poi non rimase nessuno”; in *Danno resp.*, 2003, 816 with note by PROCIDA MIRABELLI DI LAURO, “L’art. 2059 c.c. va in paradiso”, PONZANELLI, “Ricomposizione dell’universo non patrimoniale: le scelte della Corte di Cassazione” and BUSNELLI, “Chiaroscuri d’estate. La Corte di Cassazione e il danno alla persona” and a decision by the Corte Costituzionale, Corte Cost., 11 luglio 2003, n. 233, in *Giust. Civ.*, 2003, I, 2019; in *Giur. it.*, 2003, 1777, with note by CENDON e ZIVIZ, “Vincitori e vinti (...dopo la sentenza n. 233/2003 della Corte costituzionale)”; in *Resp. civ. e prev.*, 2003, 1041, with note by ZIVIZ, “Il nuovo volto dell’art.2059 c.c.”, *Foro it.*, 2003, I, 2201, with note by NAVARRETTA, “La Corte Costituzionale e il danno alla persona in fieri”. In those cases it was stated that only two categories of damage exist: economical and non economical damage. Consequently, all the different categories of damage, elaborated by the case law or the legal scholars must be qualified either as economic or non-economic damage, depending upon their distinguishing qualities.

However, debate on the subject lingers on; see for example the decisions Cass. SS.UU. 24 marzo 2006, n° 6572, in *Corr. Giur.*, 2006, 6,787, with note by MONATERI, “Sezioni unite: le nuove regole in tema di danno esistenziale e il futuro della responsabilità civile” and Cass. Sez. III, 12 giugno 2006, n° 13546, in *Danno e resp.*, 2006, 843, with note by PONZANELLI, “Il danno esistenziale e la Corte di Cassazione” and, lastly, Corte di Cassazione, SS.UU. 11 novembre 2008, n° 26972 in *Resp. civ. e prev.* 2009, 1, 38; *Giust. civ. Mass.* 2008, 11, 1607, *Giust. civ.* 2009, 4-5, 913, commented, among the others, by ZIVIZ, “Il danno non patrimoniale: istruzioni per l’uso”, *Resp. civ. e prev.* 2009, 1, 94; POLETTI, “La dualità del sistema risarcitorio e l’unicità della categoria dei danni non patrimoniali”, *Resp. civ.*

indemnity, and any physical or economic damage that is not compensated by I.N.A.I.L. Further, they may be entitled to sue for compensation for the entirety of the damage, where an application to the National Insurance indemnity is time-barred.

Those who are not insured by the compulsory National Insurance can seek compensation for injuries resulting from asbestos exposure in either a civil or a criminal court.

In the Italian judicial system, where a person is prosecuted in a criminal trial and convicted of causing either malicious or non-malicious injury or death as a result of an illness occurring by way of exposure to asbestos dust, they can be liable to pay compensation if the victim requests it.

Alternatively, a victim and their dependants have the option of applying for compensation in a civil court.

The choice a victim faces between the civil and the criminal courts is not an easy one.

First of all, it must be noted that most offences concerned with asbestos exposure are automatically prosecuted in criminal courts, because Italian public prosecutors are under a legal obligation to prosecute offenders.¹⁷

The criminal trial process saves the victims from the onerous duty of collecting evidence of the liability of the defendant. That onus is especially burdening in cases of asbestos damages, where expensive scientific and medical experts are required and many documents must be collected by the petitioners. Furthermore, the costs of the proceeding can be reduced by joining more criminal proceedings together, whereas this is not possible for a civil action. Criminal trials are also reported more broadly in the media, and so they may often offer a tactical advantage to the victims and their lawyers. And, last but not least, in Italian collective psychology, a criminal sentence is always considered more satisfactory than mere monetary compensation; when a court convicts the defendant 'justice is served'. For these reasons, there are a high number of criminal prosecutions for asbestos damage in the Italian system.

One notable case is the current criminal trial being conducted in Turin, where two former stakeholders of a large asbestos manufacturing enterprise have been charged with causing death or physical injury to an incredible 2969 victims as the alleged consequence of asbestos exposure.¹⁸

e prev. 2009, 1, 76; NAVARRETTA, "Il valore della persona nei diritti inviolabili e la complessità dei danni non patrimoniali", *Resp. civ. e prev.* 2009, 1, 63 and MONATERI, "Il pregiudizio esistenziale come voce del danno non patrimoniale", *Resp. civ. e prev.* 2009, 1, 56.

¹⁷ Only non-malicious injuries that are not the consequence of professional exposure are not subject to compulsory prosecution in Italian criminal courts.

¹⁸ As this proceeding is current, I invite the reader to visit the archive section of the major Italian newspapers, such as La Stampa, at www.lastampa.it; Repubblica, at www.repubblica.it, and Il Corriere della Sera, at www.corriere.it.

But if criminal trials for asbestos damage are by now the majority in Italy, nonetheless the judicial chronicles still report some civil cases, because this procedure can sometimes offer some advantages, mainly where issues of causation are at stake.

As is commonly known, the requirements for proof of causation in criminal and civil cases can differ, mainly because the two procedures have different purposes and aims. Generally, proving the causal link between asbestos exposure and injury is less strict in civil proceedings, where the defendant is simply asked to pay monetary compensation, than it is in criminal cases, in which the accused can be sentenced to a deprivation of their liberty.

Furthermore, while in cases of non-contractual liability the petitioner must, because of article 2043 of the Civil Code, prove the damage, the causal link and the fault of the defendant; in cases in which the petitioner can already prove the existence of a contractual relationship with the defendant (as in cases of workers exposed to asbestos by the employer) article 1218 of the Civil Code simply requires the petitioner to prove the damage and state that it is the consequence of a breach of the defendant's contractual duty. In those cases the liability of the defendant is *prima facie* established unless they can prove that the damage was not the consequence of their actions.

Besides, the civil courts allow petitioners to jointly ask for compensation for both contractual and non-contractual liability, where the action of the defendant violated at the same time rights arising from both a contractual and a non-contractual source ("*cumulo delle azioni*").¹⁹ This facility is predominantly utilised by petitioners in cases of damage that is the consequence of a violation of rules for the protection of the health and safety of workers,²⁰ such as the asbestos cases.²¹

¹⁹ See for example: Cass., sez. un., 10 giugno 2003, n. 9219., in *Foro it.*, 2004, I, 185; Cass., 25 maggio 2001, n. 7127, in *Mass.*, 2001, *Rep. Foro It.*, 2001, voce *Responsabilità civile* [5760], n. 151; Cass., 09 gennaio 1997, n. 99, in *Vita not.*, 1997, 306.

For an historical survey of the general principle admitting the joint action please read MONATERI, *La responsabilità civile*, Torino, 1998, 686 ff.

For further details on the two types of liability, see MONATERI, *La responsabilità civile*, cit.; DI MAJO, *La responsabilità contrattuale*, Torino, 1997, 89; VISINTINI, *Trattato breve della responsabilità civile*, Padova, 1996, 223; GIARDINA, *Responsabilità contrattuale e responsabilità extracontrattuale. Significato attuale di una distinzione tradizionale*, Milano, 1993; ROSSELLO, *Responsabilità contrattuale ed extracontrattuale*, in ALPA & BESSONE, *La responsabilità civile*, Torino, 1987, 317; MONATERI, *Cumulo di responsabilità contrattuale ed extracontrattuale*, Padova, 1989; SACCO, "Concorso delle azioni contrattuale ed extracontrattuale", in VISINTINI, *Risarcimento del danno contrattuale ed extracontrattuale*, Milano, 1984, 155; SCOGNAMIGLIO, "Responsabilità contrattuale ed extracontrattuale", in *Noviss. Dig. It.*, XV, Torino, 1968, 670.

²⁰ For examples of joint action in cases of professional injuries or illnesses see Cass., 06 agosto 2002, n. 11766, in *Mass.*, 2002, *Orient. giur. lav.*, 2002, I, 816; Cass., sez. lav., 25 settembre 2002, n. 13942, in *Dir. e giustizia*, 2002, fasc. 37, 32, with note by GRASSI; Cass., sez. lav., 08 aprile 1995, n. 4078, in *Not. giur. lav.*, 1995, 88, *Rep. Foro* 1996, voce *Lavoro (rapporto)* [3890], n. 1072.

²¹ For example Trib. Barcellona Pozzo di Gotto, Sez. Lav., 15 aprile 2004, n° 501; Trib. Barcellona Pozzo di Gotto, Sez. Lav., 11 novembre 2004, n° 1557; Trib. Barcellona Pozzo di Gotto, Sez. Lav., 11 novembre 2004, n° 1558, in *Giur. It.*, 2005, 1168.

In such cases, the courts do not generally treat the contractual and non-contractual liability as distinct, so that the contractual rules concerning the proof, more favourable to the petitioner, are generally applied even to the non-contractual liability issues.

3. The causation and fault issues in multifactorial and asbestos damage

The general rule in civil liability provides that the defendant can be held liable for damage when the existence of a link of causation between the action of the defendant and the harm can be proved.²² The onus of that proof generally lies with the petitioner.

In cases of multifactorial diseases, that is to say in cases in which many different pathogenic substances or many different exposures to the same pathogenic substance, eventually together with other causal factors, may have caused the illness, the task of proving causation can be particularly difficult.²³

For example, it is common knowledge that cancers or cardio-vascular diseases can be the product of different factors, such as genetic predisposition, the exposure to certain substances, or lifestyle. Illnesses that may be the consequence of asbestos exposure such as mesothelioma, lung cancer and other cancers often fall within this category of multifactorial diseases.

In such cases, the proof of causation is particularly problematic, mainly because of the difficulties concerning the cause and effect relationship between the pathogenic substance and the illness.

In cases of multifactorial disease, it is generally impossible to prove that *only one* factor caused the illness and thereby to exclude the possibility of another factor being so responsible. In fact, in those cases medical science cannot state with certainty if the illness was caused by only one of the pathogenic substances, or by a single exposure to a pathogenic substance, or by other factors.

All that medical science can positively conclude is that a certain cancer *may* be the consequence of the joint effect of different factors, such as working exposure to asbestos, genetic factors or lifestyle habits.

In those cases where science cannot effectively give a certain and definitive answer on the causes of the disease it becomes impossible to effectively use *conditio sine qua non* (or the '*but for*' test) to determine the issue of causation, because it becomes impossible to hold that a certain exposure was the necessary cause of the illness for which compensation is sought.

²² For an exhaustive comparative study of the problems concerning natural causation read KOCH, KOZIOL, WINIGER, ZIMMERMANN, *Essential Cases on Natural Causation*, Wien-New York, 2007.

²³ An investigation of the problems related to the ascertainment of liability in cases of uncertain causation, taking a law and economics perspective, was made by PORAT & STEIN, *Tort Liability Under Uncertainty*, Oxford, 2001.

Applying a *conditio sine qua non* test to cases of multifactorial damage, and to the majority of asbestos cases among them, would make it impossible to determine the liability of those responsible for the pathogenic exposure and, as a consequence, to compensate the injured persons. Given this, the other possible choice in such cases is to use 'probabilistic' rules of causation, but their application requires those rules to be generally agreed upon and respected by all the parties.

It must be noted that if liability is imposed because the illness is the possible consequence both of the exposure caused by the defendant and other factors, intuitive principles of justice would forbid a finding of the liability of the defendant for the entire damage. In such cases, no single one of the multiple factors was the sole cause of the illness; or at the least it is not possible to scientifically ascertain that it was its only cause; but each of them possibly contributed to the pathological process. There is not, as such, a relationship of causation between the single agent, but rather a relationship of augmentation of the risk of causation of the illness.

This scenario presents two alternatives: the joint and several liability of those who are responsible for the pathogenic exposure for the whole amount of damages, because they augmented the risk of the illness, or individual liability, proportionally determined to accord with the augmentation of risk that each individual actor created.

The application of probabilistic rules, or of rules taking into account the contribution to the risk of the occurrence of the disease, can certainly compensate a larger number of petitioners in multifactorial cases than if a *condition sine qua non* test is applied. But it must be considered that such rules can impose liability upon the defendants even in cases in which their exposure of the petitioner to the pathogenic substance may not have been the actual cause of the illness.

Furthermore, in cases in which all the defendants are jointly and severally liable, and some of them ceased to exist or bankrupted, those who did not cause the injury or that only partially contributed to it can be held liable for the entire amount of compensation. But if the choice is made to impose proportionate liability on the defendants, the injured person could recover only partial compensation, and sometimes very limited compensation at that, because during the long latency of the disease some or most of the defendants can disappear or become insolvent²⁴.

²⁴ A third alternative could be the attribution of liability proportional to the market share (*market-share liability* or *industry-wide liability*) of the defendants. The market-share liability was firstly adopted by the Supreme Court of California in the DES cases, see *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980), in a notorious DES case, but the Courts refused to apply it to succeeding cases, and among those to asbestos cases. For example, in the case *Starling v. Seaboard Coast Line R.R.* 533 F. Supp. 183 (S.D. Ga. 1982), in which the petitioners were unable to prove which of the many defendants produced the asbestos that caused the disease, the Ninth Circuit District Court held that *market share liability* or *industry-wide liability* criteria could not be applied, because they would change every defendant into the insurer of all the other defendants.

On the subject see GEISTFELD, "The Doctrinal Unity of the Alternative Liability and Market-Share Liability", *University of Pennsylvania Law Review*, 155, 2006, 447 and ROSTROM, "Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products", *UCLA Law Review*, Vol. 52, 2004.

In these multifactorial cases, even the ascertainment of the defendants fault can be problematic.²⁵ This is due to the difficulty in verifying whether the defendant who exposed the victims to asbestos was conscious, or at least should have been conscious, of its inherent dangers.

The state of general scientific knowledge regarding asbestos at the time of the exposure, both in the research and professional fields, and the precautionary measures taken by the defendant to limit or eliminate the possible consequences of dangerous exposure, must then be investigated.

As already noted, injuries resulting from asbestos exposure, particularly mesothelioma or other cancers, are highly representative of multifactorial diseases, so that they can be considered as paradigmatic of the entire category.

The following cases consider the issues relating to multifactorial diseases; the only exception being multiple asbestos exposures resulting from different sources and defendants, in different places and times. Traditionally, in fact, the Italian working system was characterised by low mobility, so that most petitioners spent the vast majority of their working life in the same enterprise.

4. Italian civil cases on asbestos damages

The first impression given by Italian civil case law on asbestos damage is a lack of uniformity concerning the causation issue.

Starting with asbestosis cases, in which causation is usually a minor problem, because medical science affirms the direct and unequivocal relationship between asbestos dust exposure and the occurrence of the disease, the liability of the defendant can be simply held when it is proved that they negligently exposed the petitioner to asbestos. However, in some cases, Italian tribunals have required the defendant to pay compensation even in the absence of evidence of exposure.

In one case in which a large number of workers of a Sicilian factory had suffered physical injuries or had died as a result of asbestosis, and it was certain that the same petitioners had been exposed to asbestos dust, the Corte di Cassazione confirmed the judgments of the inferior courts, which had held that it was sufficient that a large number of workers or ex-workers of the defendant had previously sought compensation for asbestosis to establish a link of causation between the defendants activities and the occurrence of the illness.²⁶

²⁵ An interesting analysis of the problems relating to fault ascertainment in these types of cases can be found in CAFAGGI, *Profili di relazionalità della colpa: contributo ad una teoria della responsabilità extracontrattuale*, Padova, 1996.

²⁶ Cass., sez. lav., 19 agosto 2003, n. 12138, in *Giust. civ. Mass.* 2003, f. 7-8 ed in *Rep. Foro it.*, 2003, voce *Lavoro (rapporto)*, n. 1353. The first and second degree decisions are Pret. Barcellona P.C., sez. dist. Milazzo, 13 aprile 1999, n. 121, unpublished and Trib. Barcellona Pozzo di Gotto, 25 novembre 1999, n° 170, unpublished.

In the judgment of the trial judge, the statistical data which demonstrated the large number of workers, undertaking the same enterprise, suffering from asbestosis, an illness not easily found among other groups of people, would be in fact enough to confirm the relationship between the illness (effect) and the working activity (cause).

As for the fault of the employer, the decision of the Corte affirmed that they had violated art. 2087 c.c., which prescribes the duty of the employer to protect the employee from harm, adopting the necessary measures as required by the job, the experience and the technical knowledge.

No distinction was made by the Courts between the contractual and non-contractual liability of the defendant. Their fault was determined on the basis of the unhealthy working conditions, and inferred from the workers declarations, the large number of workers suffering of asbestosis, the dangerous working conditions, the inadequate medical visits, and the many violations to the rules on the health protection of the workers.

In the opinion of the judges the defence of the employer alleging the weak scientific knowledge of the dangers of asbestos at the time of the exposure, was inadmissible, and in any case was not sufficient to justify the unhealthy and dangerous working conditions in which the workers were required to operate.

The same “statistical” criterion was later applied in other decisions.²⁷

As a result, in cases of compensation for asbestosis, proof of causation is not always required by judges to find the defendants liable for compensation. In some cases, the judges apply an inductive reasoning, which assumes that a significant number of workers suffering from the same illness, together with proof of a working dust exposure is sufficient to found the liability of the employer for violation of their statutory duty.

But the same Italian courts, when confronted with claims for compensation for mesothelioma, undisputedly face more difficult problems, firstly because there is no scientific certainty on the aetiology of that particular illness. The consequence is that different criteria will be applied in the

²⁷ Trib. di Barcellona Pozzo di Gotto, 20 agosto 2001 n° 1453, unpublished; Tribunale di Barcellona Pozzo di Gotto, 6 maggio 2002, n° 737, unpublished; Trib. Barcellona Pozzo di Gotto, Sez. Lav., 15 aprile 2004, n° 501; Trib. Barcellona Pozzo di Gotto, Sez. Lav., 11 novembre 2004, n° 1557; Trib. Barcellona Pozzo di Gotto, Sez. Lav., 11 novembre 2004, n° 1558, in *Giur. It.*, 2005, 1168, with note by COGGIOLA, “Il giudice e la statistica: attività lavorative, esposizione all’amianto ed asbestosi (ovvero quando il numero di morti e malati fa la prova nel processo)”.

These are only some of the numerous decisions held by that particular Court, against the same employer, on the same compensation issues.

Of the same opinion, in a criminal case, Pret. Bergamo, 3 aprile 1997, 3 aprile 1997 in *Foro it.*, 1998, II, 484, with note by TRAMONTANO, “Ancora in tema di morte per intossicazione da amianto: brevi rilievi problematici sulla «ri-descrizione dell’evento» nella verifica del nesso causale”.

assessment of the causation issue; often based more on 'intra-case' considerations than on general principles of law.

The criteria can be roughly distinguished as follows.

The first criterion is what I would call "*the exclusion of other causal factors*", whereby the Italian courts can make a finding of the liability of the defendant excluding the possibility that the same disease could be caused by another factor. Such reasoning can be easily applied where the only known poisonous exposure was that caused by the defendant.

This was the reasoning of the Tribunale di Venezia,²⁸ in a case in which it held the existence of a causal link between the professional exposure to asbestos and the death of the worker as a consequence of a mesothelioma. The medical experts involved attested that the illness could be caused even by an occasional or low asbestos exposure, and that the deceased had not been exposed to any other sources of asbestos.

The court excluded the possibility of other exposure, but that due the defendant and consequently stated that given that the type of cancer was very rare, a significant relationship between it and the occupational exposure could be established.

The second criterion is that which I would call "*high probability*", where judges have found the existence of a link of causation where there is a high probability that a dangerous exposure was the cause of the mesothelioma. This criteria has been used in cases in which the existence of other possible causes of the disease (different from the exposure caused by the defendant) could not be excluded with certainty.

The application of this criterion can be seen in the decision of the Tribunale di Trieste²⁹ deciding a case concerning a worker exposed to asbestos dust by a single employer. The Tribunale determined that it was impossible to find the defendant liable for the exposure with any certainty, as there was not dependency close enough causal relationship between the asbestos exposure and the occurrence of the mesothelioma. Since asbestos was widely spread in the environment at the date, it was impossible to ascertain if the exposure was occupational or not.

However, the court held, on the basis of two expert medical opinions, that the lethal mesothelioma could be attributed with "*high probability*" to the occupational exposure of the worker.

²⁸ Trib. Venezia, 21 maggio 2003, n° 1791, unpublished.

²⁹ Trib. Trieste, 25 febbraio 2004, n. 103, in *Giur. it.*, 2005, 497, with note by COGGIOLA, "L'esposizione alle polveri d'amianto ed il nesso di causalità di fronte al giudice civile".

In fact the first medical expert, had declared that on the basis of his professional experience, almost all mesothelioma cases concerned workers exposed to asbestos as a result of their professional activity, particularly workers of shipyards, such as the injured person in that case.

The second medical expert stated that those workers who are directly or indirectly exposed to asbestos have a much higher probability of contracting an asbestos-related cancer than the average population and that if there is a genetic predisposition to the disease, there is also a relevance of even low asbestos exposure in the aetiology of the disease. Furthermore, if the occurrence of the disease is to be deemed independent from the exposure, a long period of exposure augments the possibility of coming into contact with the particular small dose able to start the disease process.

On the basis of these expert opinions and the scientific studies on the issue, the Tribunale held that the illness of the worker was caused "*with very high probability*" by previous asbestos exposure and that there was a "*high probability*" that the disease was the consequence of the occupational exposure due to the defendant employer.

Finally, the third criterion which can be applied by Italian courts in mesothelioma cases to ascertain causation is that which I would call "*the omitted reduction of the risk*".

This rule states that causation exists between asbestos exposure and mesothelioma where the defendant failed to provide security measures sufficient to reduce the risk of the occurrence of the disease. This reasoning concentrates not on the relationship between the action or omission of the defendant and *occurrence* of the harm, but between the action or omission of the defendant and either the *increase or reduction of the risk* of the harm.

'Probabilistic' criteria are then applied to verify a possible link between the omission of reliable protection measures and the increase in the risk of the disease occurring.

This test was twice used by the Italian Corte di Cassazione. Both cases concerned an action for compensation of cases of mesothelioma occurring in workers who had not contracted asbestosis.

In the first case, both the trial judge and the appellate court denied compensation, because in the reasoning of the judges the place where the petitioner used to work, his occupational duties and his minimal exposure to asbestos dust (because he didn't show any sign of asbestosis) were not sufficient to prove either dusty working conditions or an omission of the defendant to undertake precautionary measures to reduce that same dustiness.³⁰

The same judges also added that it was not proven that adopting further precautionary measures would prevent the occurrence of the disease, because the only certain way to prevent the harmful event would to entirely stop the use of asbestos.

³⁰ Trib. Reggio Emilia, 08 maggio 1995, unpublished.

The Corte di Cassazione, with decision 4721 dated 9 May 1998,³¹ reversed those judgments, holding that an employer is liable for compensation of mesothelioma damages not only where they do not adopt all the measures prescribed by the technical regulations, but even where they do not undertake *all* of the actions that the provisions of article 2087 of the Civil Code have deemed useful.³² Those actions are not only the ones able to render asbestos inoffensive, but even those simply capable of reducing the risks related to its exposure.

The Court stated that since at the time of the exposure the dangers of asbestos fibres in the workplace was well known, preventative measures had to be taken because of that intrinsic risk of damage. As a consequence, the ascertainment of the link of causation between the workplace exposure and the cancer must be examined in light of the measures taken by the defendant to reduce the risk of harm.

The same reasoning was used by the Corte di Cassazione in a subsequent case, dated 23 May 2003.³³ In that decision the Court upheld the judgment of the appellate court,³⁴ stating that on the basis of probabilistic judgement the use of all the possible protective devices, particularly those concerned with the reduction of smokes, dangerous dusts and other like risks, would have reduced the risk to the worker of being exposed to the dose that gave rise to the disease.

Lastly, the same Corte di Cassazione, with decision n. 644 dated 14 January 2005,³⁵ was confronted with a case of cancer of the lungs, which could have been caused by different pathogenic factors, and occurred in a smoker.

In that case it was held that a link of causation can be established where, on the basis of contemporary scientific knowledge, it cannot be excluded that there is a risk of lung cancer due to dangerous exposure, although that same exposure is limited.

³¹ Cass., sez. lav., 9 maggio 1998, n. 4721, in *Orient. giur. lav.*, 1998, I, 651; *Giust. civ.*, 1999, I, 539 ed in *Foro it. Rep.*, 1999, voce *Lavoro (rapporto)*, n. 1448.

³² The broader application of article 2087 of the Civil Code is common in Italian case law, as that article is used as a "general tool", able to provide general rules when detailed regulations are lacking. See, among the others, Cass., sez. lav., 19 aprile 2003, n. 6377, cit.; Cass., 12 dicembre 1997, n. 12604, in *Rep. Foro it.*, 1997, voce *Lavoro e previdenza (controversie)*, n. 39, *Mass. Giust. civ.*, 1997; Cass., 16 agosto 1996, n. 7636, in *Riv. infortuni*, 1996, II, 85, *Rep. Foro it.*, 1997, voce *Infortuni sul lavoro*, n. 102; Cass., 5 aprile 1993, n. 4085, in *Rep. Foro it.*, 1993, voce *Lavoro (rapporto)*, n. 1189, *Mass. Giust. civ.*, 1993; Cass., 26 gennaio 1993, n. 937, in *Rep. Foro it.*, 1993, voce *Infortuni sul lavoro*, n. 136, *Mass. Giust. civ.*, 1993; Cass., 6 settembre 1991, n. 9422, in *Riv. infortuni*, 1992, II, 13, *Rep. Foro it.*, 1992, voce *Infortuni sul lavoro*, n. 273.

³³ Cass., sez. lav., 23 maggio 2003, n. 8204, in *Foro it., Rep.*, 2003, voce *Infortuni sul lavoro*, n. 1358, *Mass. Giust. civ.*, 2003, *Arch. civ.*, 2003, 1281 e Cass., sez. lav., 9 maggio 1998, n. 4721, in *Orient. giur. lav.*, 1998, I, 651, *Giust. civ.*, 1999, I, 593 ed in *Foro it, Rep.*, 1999, voce *Lavoro (rapporto)*, n. 1448.

³⁴ Trib. Bergamo, 25 gennaio 2000, unpublished.

³⁵ Cass. Sez. Lav., 13 dicembre 2004, n° 644, in *Giur. It.*, 2005, 1390, with note by COGGIOLA, "Il risarcimento dei danni da esposizione ad amianto: dall'utilizzo del concetto dell'aumento del rischio all'inversione dell'onere della prova sul nesso di causalità", *Giust. civ. Mass.* 2005, 1, *Orient. giur. lav.* 2005, I, 123.

This kind of presumption had already been used by the Corte di Cassazione, when the violation of the rules imposed by article 2087 of the Civil Code was, on the basis of a normal series of events, able to cause the injuries complained by the worker.³⁶ In Italian law this causal relationship is called “causalità normale o adeguata”, meaning that the final harmful event is the natural conclusion to a series of previous actions.

It must, however, be stressed that only in this particular case concerning asbestos damage did the Court apply that test not to the actual occurrence of the harmful event, but to the mere augmentation of the risk of the occurrence of the harm.

It was held that the occupational asbestos exposure should be considered a sufficient factor giving rise to the occurrence of the illness, without the need to consider the smoking habits of the petitioner, because it exposed the worker to the risk of inhaling asbestos dust. It was not possible to exclude the existence of a risk of lung cancer, even with low asbestos exposure levels, and it was proven that the worker was constantly exposed to asbestos while undertaking his daily duties.

In that decision causation was established by an inversion of the onus of proof, with a methodology analogous to that normally used to determine the existence of the fault of the defendant, under article 2087 of the Civil Code in cases in which the employer failed to provide the relevant measures to protect the safety of the workers.³⁷

As a consequence, the rule applied by the Corte is that the employer will be held negligent if he cannot demonstrate that he provided every possible means of protection of the workers' health, on the basis of the scientific knowledge and technical capacity at the time of the exposure. The same defendant is deemed to be the cause of the injury, even if the asbestos exposure he was responsible for was very low, unless he can disprove this chain of causation.

As for the fault of the defendant, it must be noted that all the examined decisions made a finding of negligence because of a violation of the provisions of article 2087 of the Civil Code. All the judges stated that the risks related to asbestos exposure were known from the start of the Twentieth century, or in any case for a period long preceding the exposure, and that the employer should have adopted the precautionary measures imposed by article 2087 of the Civil Code.

³⁶ For some examples of the application of this criterion, see, among others, Cass., sez. lav., 3 gennaio 2002, n. 5, in *Danno e resp.*, 2002, 509, with note by DI GIORGI, “«Stress lavorativo»: nuove prospettive della nozione di nesso causale”; Trib. Milano, 19 maggio 2001, Ragazzi c. ATM, in *Orient. giur. lav.*, 2001, I, 540; Cass., sez. lav., 18 febbraio 2000, n. 1886, cit.

³⁷ For example, see Corte Cass., sez. lav., 18 febbraio 2000, n. 1886, in *Arch. circolaz.*, 2000, 388, *Notiziario giurisprudenza lav.*, 2000, 45.

As a result of the contractual duty owed to the worker, the defendant must prove the adoption of *all* suitable preventive measures. On occasions, the employer has been held liable, despite respecting the dust exposure limits, where it was demonstrated that other remedies that could have further reduced exposure levels were not taken.³⁸

Lastly, the employer may be found liable where the relevant fault was a failure to provide other systems of health and safety precautions for the workers, such as medical inspections, alterations of the role of the worker, remove him from dust places, after he underwent lung surgery, and so on.

Even in such cases, the fault of the defendant is upheld when it is proven that they knew or ought to have known about the dangers of asbestos dust, but failed to provide the relevant safety measures.

But it must also be noted that in the decision of the Corte di Cassazione, dated 14 January 2005,³⁹ a finding of fault is made not only on the basis of a defendant's violation of duties to protect workers' health, but where the defendant was a large enterprise with extensive financial resources and its own health service at its disposal, and it failed to use these resources to protect its employees' health and safety.

Such reasoning introduces an element of evaluation of the defendant as an organisation and its economic power, and poses the risk of introducing the idea that smaller enterprises owe their employees lower levels of care, at least proportional to their limited economical and organisational capacities.

In that decision the ascertainment of fault is not based on objective criteria of diligence and conformity to technical regulations,⁴⁰ but upon the evaluation of the economic force of the defendant, in relation to the adoption of the preventative safety measures.

Such reasoning is in stark contrast to Italian constitutional principles on workers' protection, the right to health and the principle of equal treatment, because the defendant's fault cannot surely depend upon economic or organisational issues, but should comply with constitutional principles; economic and entrepreneurial freedom must always respect the duty to protect health and safety.⁴¹

³⁸ Cass., sez. lav., 23 maggio 2003, n. 8204, cit.; Cass., sez. lav., 9 maggio 1998, n. 4721, cit.; Cass., sez. IV, sez. IV, 20 marzo 2000, n. 3567, in *Ragiusan*, 2000, f. 198, 108.

³⁹ Cass. Sez. Lav., 14 gennaio 2005, cit.

⁴⁰ For an overview of those criteria see CAFAGGI and IAMICELI, "La colpa", in CENDON *La responsabilità civile*, IX, *Responsabilità extracontrattuale*, Torino, 1998, 196.

⁴¹ Cfr. among others: Cass., sez. III, 17 febbraio 1995, in *Riv. giur. ambiente*, 1996, 83; Cass., 15 dicembre 1989, in *Riv. pen.*, 1990, 1078 (m); Cass., 8 marzo 1988, in *Riv. pen. economia*, 1990, 149, with note by CIANNELLA, "Inosservanza delle misure di tutela dell'integrità fisica e della personalità morale dei lavoratori", *Riv. pen.*, 1989, 1236 (m); Cass., 05 maggio 1986, in *Riv. pen.*, 1987, 597 (m).

5. Some critical considerations

The first impression given by the examination of these civil decisions on asbestos injuries is that of a uniformity of the criteria used to ascertain the fault of the defendants, contrasted by a great diversity of the criteria applied when the causation issue is at stake.

No doubt such a situation generates uncertainties in the protection of the rights of those who were injured by asbestos exposure. The absence of clear and shared rules concerning the ascertainment of causation inevitably hamper the protection in civil suits of those injured by asbestos exposure, and provide a reason for the harmed party to seek protection in the often more comfortable criminal procedure.

That results in a diminution of the rights offered by the Italian system to the injured parties, because there is a lack of certainty on the rules that will be applied to find out the existence of a causation between asbestos exposure and occurrence of the disease and, consequently, the prospective petitioners are discouraged from seeking civil compensation and are unable to profit from the advantages of a civil procedure.

On the other hand, a fast-track mechanism of civil judicial compensation for asbestos exposure, based on shared rules of causation, would often be advantageous to those seeking restoration for damage, when compared to the uncertainties that a criminal proceeding (prescription of the crime, death of the prosecuted, strict rules on causation, and so on) presents.⁴²

Similar but specular problems are faced by the defendants and their insurers that, because of the uncertainties on the causation criteria, are unable to predict the outcome of the civil proceedings, and consequently the measure of their future financial obligations.

The lack of homogeneity in the criteria applied to establish the existence of causation is not exclusive of asbestos compensation cases, but is a constant characteristic of Italian civil case law.

It is particularly remarkable, when contrasted with the reasoning developed in Italian criminal case law.⁴³ The rules concerning the application of statistical data to ascertain the existence of a

⁴² My personal ideal of a "fast mechanism of civil resolution" is that used in England, applying the rules of the Fast Track to mesothelioma cases. On the functioning, problems and results of the Fast Track in mesothelioma cases read the articles written by: WHITAKER, "The Mesothelioma "Fast Track"", *NLJ* 13 December 2003, 153.7108(1860) and WHITAKER, "Three Years On - The "Mesothelioma Fast Track" at the Royal Courts of Justice", in *J.P.I. Law*, 2005, 2, 173-174. For further procedural information on the Fast Track visit the site of Her Majesty's Court Service, at <http://www.hmcourts-service.gov.uk>.

The English system also provides, starting from December 2003, a *Pre-action Protocol for Illness and Disease Claims*, whose aim is to avoid, when possible, the judicial claim, by a settlement. For more details on the Protocol, visit the http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_dis.htm

⁴³ For a first approach to Italian civil theories on causation see, among the others, CAPECCHI, "Il nesso di causalità materiale e il concorso di cause", in VISINTINI, *Risarcimento del danno contrattuale ed extracontrattuale*, Milano, 1999, 301; GERI, "Il rapporto di causalità nel diritto civile", *Resp. civ. e prev.*, 1983, 187; CARBONE, "Il rapporto di

link of causation in a criminal judgment were clearly set out in 1990 in the case of *Bonetti*,⁴⁴ of the Corte di Cassazione. Those principles were followed in subsequent criminal sentencing.⁴⁵

But no civil decision of comparable clarity, on the application of scientific rules to the establishment of causation, could be found before or after that criminal decision. At most, only some reference to that criterion is made.⁴⁶

A further step was then taken by the Sezioni Unite della Cassazione in the case of *Franzese*,⁴⁷ in which the Italian Supreme Court detailed the conditions under which causation in criminal cases of medical malpractice could be ascertained.

causalità", in *La responsabilità civile - Aggiornamento 1988-1996*, a cura di ALPA e BESSONE, Torino, 1997, 51; FORCHIELLI, *Il rapporto di causalità nell'illecito civile*, Padova, 1960; REALMONTE, *Il problema del rapporto di causalità nel risarcimento del danno*, Milano, 1967; TRIMARCHI, *Causalità e danno*, Milano, 1967; VALCAVI, "Intorno al rapporto di causalità nel torto civile", in *Riv. dir. civ.*, 1995, II, 489.

⁴⁴ Cass., Sez. IV, 6 dicembre 1990, *Bonetti*, in *Foro it.*, 1992, II, 35 ed in *Cass. pen.*, 1992, 2726; of the same opinion Cass., 27 maggio 1993, *Rech*, in *Foro it. Rep.*, 1994, voce *Incolunità pubblica* (reati e sanzioni) nn. 14-16.

It must be noted that before that decision, between the years 1950 and 1990, the dominant theory held that the ascertainment of the causation was to be obtained by way of the judge's subjective intuition: "*accertamento del rapporto causale affidato all'intuizione, al fiuto, all'imperscrutabile apprezzamento soggettivo del singolo giudice*". On the subject read D'ALESSANDRO, "La certezza del nesso causale: la lezione "antica" di Carrara e la lezione "moderna" della Corte di Cassazione sull'"oltre ogni ragionevole dubbio"", *Riv. it. dir. proc. penale*, 2002, 743.

Given the starting point of departure, no surprise that the decision *Bonetti* was defined "revolutionary" by STELLA, in CRESPI, STELLA, ZUCALÀ, *Commentario breve al codice penale*, Padova, 1999, pp. 39 e 47.

⁴⁵ For a list of the most significant criminal decisions applying the criteria elaborated in the *Bonetti* decision in years 1990-2000, see STELLA, *Leggi scientifiche e spiegazione causale nel diritto penale*, cit., 415 ff., to whom we made reference for further readings on the issue.

⁴⁶ See CAPECCHI, "La causalità materiale e il concorso di cause", in VISINTINI, *I Fatti illeciti. III. Causalità e danno*, Padova, 1999, 38.

The cases cited by the author are Corte Cass., 12 maggio 1975, n. 1842, in VISINTINI, *I Fatti illeciti. I. Ingiustizia del danno*, Padova, 2° ed., 1996, 70 e 245; Corte Cass., 23 giugno 1980, n. 3622, in VISINTINI, *I Fatti illeciti. III. Causalità e danno*, cit. 76 and Corte Cass., 16 novembre 1993, n. 11287, in *Mass. Giust. civ.*, 1993 e *Rep.*, *Foro it.*, 1993, voce *Responsabilità civile* [5760], n. 56.

For other decisions making reference to the use of statistical laws, see Corte Cass., sez. lav., 20 dicembre 1986, n. 7801, in *Giust. civ. Mass.* 1986, fasc. 12, *Riv. it. dir. lav.*, 1987, II, 578, con nota di MEUCCI, "Sistematico disconoscimento datoriale di meriti e diritti e danno alla salute psichica del lavoratore", *Dir. lav.*, 1987, II, 229; Corte Cass., sez. III, 20 gennaio 1983, n. 567, in *Giust. civ. Mass.* 1983, fasc. 1, *Foro it.* 1983, I, 1624, *Dir. economia assicur.* 1983, 443 (n).

For a recent list of civil decisions concerning the causation issue see CAPUTI, "Il nesso di causalità nella responsabilità civile: un problema irrisolto o sopravvalutato?", *Riv. Crit. Dir. Priv.*, 2007, 169.

⁴⁷ Cass., SS.UU., 10 luglio 2002, n. 30328, *Franzese*, in *Foro it.*, 2002, II, 601, with note by DI GIOVINE, "La causalità omissiva in campo medico-chirurgico al vaglio delle sezioni unite"; in *Dir. pen. proc.*, 2002, 1357; in *Dir. e giust.*, 2002, 21, with note by PEZZELLA; in *Danno e resp.*, 2003, 195, with note by CACACE, "L'omissione del medico e il rispetto della presunzione d'innocenza nell'accertamento del nesso causale".

That case produced a clear statement on the rules to be applied in such cases, further adding that the same principles should be used in comparable civil cases. But, again, while the *Franzese* principles have been followed in subsequent criminal decisions,⁴⁸ there is no evidence the same occurred in civil courts.

The reasons underlying this silent refusal are probably rooted in the attitude of the Italian civil judges, not least those of the Corte di Cassazione.

The civil branch of the Corte di Cassazione is generally reluctant to deal with the issue of the cause-in-fact test to be applied in the decisions, because in its opinion such an investigation, concerning the mere facts of the case, lies within the exclusive competence of the lower courts and should not be criticized by the Cassazione, as long as the lower court judges reasoning is clearly articulated.⁴⁹

This attitude of the Corte di Cassazione does little to limit the lack of uniformity and the multiplication of the criteria applied by the lower courts to ascertain causation, and the consequent difficulties in providing an effective remedy for the injured parties.

Furthermore, it cannot be ignored that Italian scholars had not been able, until now, to establish a common solution not only on the civil causation issue, but even on the terminology to be adopted to define the different concepts of causation.⁵⁰

⁴⁸ See, among the others, the following decisions, all concerning cases of professional liability for fault: Cass., 21 maggio 2003, n. 22341, Marinari, unpublished; Cass., 2 maggio 2003, n. 20065, *Gugliemi*, unpublished; Cass., 19 aprile 2003, n. 18786, Cinque e a., unpublished; Cass., 14 aprile 2003, n. 17386, *Cardillo e a.*, unpublished and the decisions Cass., sez. IV pen., 9 maggio 2003, cit. e Cass., sez. IV pen., 11 luglio 2002, cit.

⁴⁹ See Corte Cass., sez. III, 16 maggio 2003, n. 7637, in *Giust. civ. Mass.* 2003, f. 5; Corte Cass., sez. III, 11 marzo 2002, n. 3492, in *Giust. civ. Mass.* 2002, 435, *Guida al dir.*, 2002, fasc. 24, 24, con nota di DE PAOLA; Corte Cass., sez. III, 29 aprile 1996, n. 3939, in *Giust. civ. Mass.* 1996, 642, *Enti pubblici*, 1997, 64, *Resp. civ.*, 1996, 1183; sez. III, 6 agosto 1987, n. 6759, in *Rass. avv. Stato* 1987, I, 343; Corte Cass., sez. lav., 17 novembre 1984, n. 5882, in *Giust. civ. Mass.* 1984, fasc. 11, *Informazione prev.*, 1985, 383; Corte Cass., sez. III, 28 febbraio 1983, n. 1504 in *Giust. civ. Mass.* 1983, fasc. 2; Corte Cass., sez. III, 15 marzo 1980, n. 1748, in *Arch. civ.* 1980, 670, *Giust. civ. Mass.* 1980, fasc. 3.; Corte Cass., sez. lav., 5 luglio 1979, n. 3861, in *Giust. civ. Mass.* 1979, fasc. 7.

⁵⁰ See for example the different use of the expression “*causalità giuridica*” (legal causation) in REALMONTE, *Il problema del rapporto di causalità nel risarcimento del danno*, cit., 12, meaning the principles of the law that determines the value of the causal sequence already ascertained under the che cause-in-fact rules and in TRIMARCHI, *Causalità e danno*, cit., 2, using the same terminology to indicate the harmful consequences of a certain action, while decisions Corte Cass., 17 luglio 1980, 170, unpublished, and Corte Cass., 24 febbraio 1987, n. 1937, in *Arch. Circ.*, 1987, 471, think that the terms “*causalità giuridica*” e “*causalità efficiente*” are synonymous. Cfr. CAPECCHI, “La causalità materiale e il concorso di cause”, cit., 46.

Recently on the problem BELVEDERE, “Causalità giuridica?”, *Riv. dir. civ.*, 2007, I, 7, that scrutinize attentively the relationship between cause-in-fact and legal causation.

Strangely, the importance of the problem seems underestimated in the scholarly debate, although we all know that the common understanding and agreement on the terminology and the ontological significance of the words used is the only real departing basis for every further scientific progress.

That uncertainty leads to misleading scholarly interpretations of the courts' decisions and reasoning, so that the same statement will be interpreted by some as an application of the theory of *condition sine qua non*,⁵¹ by others as the theory of "causalità adeguata"⁵² and by others as an oscillation between the two,⁵³ leaving the judges alone and substantially free to reason without regard to scholarly opinion.

Only lately has the Corte di Cassazione decided to play an active role in the debate on the civil causation issue. The first step was taken in the cases concerning damages arising out of infected blood transfusions and blood products. Despite the large number of victims and, consequently, of the civil actions seeking compensation, the decisions of the Italian civil courts had been for a long time contradictory, sometimes finding the defendants' liable and sometimes not.

Conscious of the severe situation of the case law and the jurisprudence, the Corte di Cassazione finally decided to thoroughly investigate the causation issue in its official Report, n° 35 dated 21 March 2007,⁵⁴ in which both the scholars' opinions and the case law were taken into account. The final aim of the Report was to elaborate principles on the ascertainment of causation in civil compensation cases concerning infected blood and blood products. Those principles were later clearly stated in its decision, held with Sezioni Unite, that is to say with joined chambers, on 11 January 2008.⁵⁵

⁵¹ TORRENTE SCHLESINGER, *Manuale di diritto privato*, 18° ed., Milano, 2007, 819 ff.; TRIMARCHI, *Istituzioni di diritto privato*, 16° ed., Milano, 2005, 140 ff., even if the author starts from *condition sine qua non* but ends with the theory of the purpose of the violated rule.

⁵² GALGANO, *Diritto privato*, 5° ed., Padova, 1988, 345 ff.; TRABUCCHI, *Istituzioni di diritto civile*, 26° ed., Padova, 1983, 203 ff.

⁵³ MONATERI, *La responsabilità civile*, cit., 161 ff.

⁵⁴ The Report is available at http://www.cortedicassazione.it/Documenti/Relazione%2035_07.htm.

⁵⁵ Cass. SS.UU., 11 gennaio 2008, cases from 576 a 585. Those cases were largely published and commented, see among others Cass. SS.UU., 11 gennaio 2008, n. 576, in *Foro amm.-Cons. Stato*, 2008, 76; Cass. SS.UU., 11 gennaio 2008, n. 577, in *Foro it.*, 2008, I, 455, with note by PALMIERI, *Giur. it.*, 2008, 1653, with note by CIATTI, "Crepuscolo della distinzione tra le obbligazioni di mezzi e le obbligazioni di risultato; La responsabilità civile", 2008, 397, with note by CALVO, "Diritti del paziente, onus probandi e responsabilità della struttura sanitaria"; Cass. SS.UU., 11 gennaio 2008, n. 580, *Giur. it.*, 2008, 1646, with note by VALORE, "Danno da emotrasfusione e decorrenza del termine di prescrizione"; Cass. SS.UU., 11 gennaio 2008, n. 581, in *Foro it.*, 2008, I, 453, with note by PALMIERI, *Resp. civ.*, 2008, 827, with note by GRECO, "Le sezioni unite ed il limite prescrizione nel danno da emotrasfusioni infette"; Cass. SS.UU., 11 gennaio 2008, n. 582, in *Foro it.*, 2008, I, 453, with note by PALMIERI; Cass. SS.UU., 11 gennaio 2008, n. 583, in *Giur. it.*, 2008, 1695 (m), with note by TERLIZZI, "Il dies a quo della prescrizione tra tutela del danneggiato e certezza del diritto"; Cass. SS.UU., 11 gennaio 2008, n. 584, in *Foro it.*, 2008, I, 451, with note by PALMIERI.

Meanwhile, the Corte di Cassazione also investigated the problems of establishing causation in cases of medical malpractice.⁵⁶

The Court clearly stated that the investigation of causation in civil cases follows paths and rules that are different from those of criminal cases. From that assertion it could be inferred that the *Franzese* principles are no longer applicable in civil cases.

But in neither case did the Court establish a general rule regarding causation in civil cases, so that today the problems concerning the establishment of causation in cases of asbestos damage are still waiting for a definitive answer.

Two possible suggestions could be made, tracing some paths already indicated by the Corte di Cassazione in two cases.

The first is to hold the existence of a link of causation between asbestos exposure and occurrence of the disease if the same exposure enhanced the risk of occurrence of the illness.⁵⁷

The second possible choice is to presume the existence of causation between asbestos exposure and the disease when that same exposure was negligent, if the risk that it caused the illness cannot be excluded.⁵⁸

The first criterion clearly distinguishes between fault and causation, presuming the first but requiring causation to be demonstrated, even if that be merely an increase in the risk of damage. The second criterion instead presumes both the existence of the fault and that of the chain of causation.

Presuming fault and causation in asbestos compensation cases certainly favours the petitioners, because the defendant has the burden of proving that the disease was caused by a pathogenic factor different than the asbestos exposure they caused. But such a solution could be quite severe for the defendants that are responsible for only a small amount of the asbestos exposure.

Neither criterion excludes the liability of the defendant in cases in which the petitioner was exposed to other pathogenic substances, or to the same substance by other persons, or even where there are other possible causes of the disease.

⁵⁶ Cass., III° Sez., 16 ottobre 2007, n° 21.619, in *Danno e resp.*, 2008, 43, with comment by PUCELLA; *Corr. giur.*, 2008, 1, 35, with note by BONA, "Causalità civile: il decalogo della Cassazione a due "dimensioni di analisi"", affirming that the different approach is evident even with regards to the probation issue.

⁵⁷ Cases Cass., sez. lav., 9 maggio 1998, n. 4721, cit. and Cass., sez. lav., 23 maggio 2003, n. 8204, cit.

⁵⁸ See Cass. Sez. Lav., 14 gennaio 2005, cit.

The evident limits of both the criteria is that there can be no “absolute certainty” regarding causation, that is to say that it is ascertained on the basis of statistical data, not on the basis of *condition sine qua non*.

In such asbestos cases the defendant will always be found liable where there is a violation of health and safety regulations; the foreseeability of the harmful event is always presumed.

While generally compensation is sought for both contractual and non-contractual fault, the decisions and reasoning of the courts do not treat those issues separately.

In theory, however, the two types of liability are different.

In cases of contractual fault the infringement of the provisions of article 2087 of the Civil Code constitutes a violation of the contractual duties of the employer, and is as such a compensable damage. Whereas in cases of non-contractual fault the same article 2087 of the Civil Code can only be used to ascertain the violation of the general *neminem ledere* principle that is provided by article 2043 of the Civil Code.

In reality, judges will ascertain if there was a violation of the provisions of article 2087 of the Civil Code, without considering the type of fault. Consequently, in both cases the fault of the defendant is presumed, and they bear the onus of proving that they are not liable for any violation.

Regarding article 2087 of the Civil Code, it must be noted that this rule belongs to a category of rules known as “norme vaghe”; that is to say rules that give a very general description of the prescribed obligations. This particular rule simply states that the employer must adopt every necessary measure to protect the physical and moral integrity of the worker, on the basis of the kind of work, experience and technique, without outlining any detailed parameters of the obligation.

Therefore, the actual measures to be adopted must be determined each time by the judge and the technical experts, applying the standards and general rules that were common or required at the time. However, sometimes the long period between the date of the exposure and the time of the trial can induce the judges to apply knowledge only lately acquired to previous periods of time. In such cases the onus is on the defendant to demonstrate their lack of fault and rules of strict liability could actually be applied.

Lastly, concerning the foreseeability of the harmful event, generally Italian courts have held that the defendant is liable if they could foresee, as a possible consequence of the asbestos exposure, the occurrence of the disease, or any other asbestos related disease, even one which is different or less serious than that which actually arose.

6. Conclusion

Asbestos is a serious and relevant problem in Italy, due to the large number of people suffering from asbestos diseases. The economic, personal and social costs of this epidemic are high, and no system of general compensation has been as yet put into force.

The National Insurance system only partially provides compensation, and only to those who were professionally exposed. Neither are criminal proceedings always the best option.

However, at the same time, the Italian civil courts do not offer an high standard of protection of the petitioners' interests.

Asbestos cases are not easy to deal with, mainly because medical science is not able to provide a definitive answer on the issue of causation and consequently, on the liability of the defendant or its proportion of liability.

They are also not easy to deal with because they normally concern single individuals, exposed to asbestos because of their occupation, their familiar relationships or the places they used to live in, by large industries, often multinationals, which knew or should have known the dangers of asbestos, but failed to provide the due protective measures or, stop the use of asbestos..

Modern sensitivity requires asbestos victims to be compensated, because it seems contrary to equity that the damage remains with the victims, while the profits of the asbestos industry had been very high for many years.

There is always an accepted balance between a particular risk and its economic advantages. That balance was surely tipped in asbestos cases, because the dangerous exposure greatly outweighs any economic advantages asbestos production provided. Law must now restore that balance.

The asbestos case is paradigmatic of all cases of technological development, in which, the law must seek to create an equilibrium between the technological development and the society in which it develops.

In such cases lawmakers must realise that science can contribute only so much,⁵⁹ and that they must adopt their own criteria to ascertain the liability of the defendants. Those criteria will provide the rules for establishing causation, fault, and deciding who bears the onus of proof.

A first possible solution, for cases of mesothelioma, or multifactorial diseases that may be the consequence of asbestos exposure, in which the defendant negligently violated a duty of

⁵⁹ On the relationship between science and law, read JASANOFF, *Science at the Bar*, Cambridge, Mass.- London, 1997. For a comparative perspective, see the articles in COMANDE' and PONZANELLI, *Scienza e diritto nel prisma del diritto comparato. Atti del convegno dell'Associazione Italiana di Diritto Comparato. Pisa, 22-24 maggio 2003*, Torino, 2004 and LECLERC, *Le juge et l'expert*, Paris, 2005 (on the French system).

protection owed to the petitioner, is to establish a link of causation between the exposure and the occurrence of the disease, when that exposure increased the risk of the occurrence of the illness.⁶⁰

Another possible solution would be to impose on the defendant the onus of proving that the alleged damage is not the consequence of the exposure, so that the defendant bears the risk of their incapacity to prove the existence of other causes of the disease which would prevent a finding of their liability.⁶¹

Certainly there is not only one possible solution, but those outlined above are probably those which would work best in the Italian civil courts, and perhaps ought to be considered by other European jurisdictions.

⁶⁰ That's substantially the choice of the English system, for cases of mesothelioma consequence of multiple exposures. That choice was first elaborated in the *Fairchild Case* (*Fairchild v. Glenhaven Funeral Services Ltd and others* [2002] 3 W.L.R. 89, [2002] 3 All. E.R. 305 (H.L.), [2002] UKHL 22), reaffirmed by the same House of Lords in *Barker v. Corus plc and others* ([2006] UKHL 20; 2006 WL 1078944; (2006) 103(20) L.S.G. 27; (2006) 156 N.L.J. 796; [2006] N.P.C. 50; Times, May 4, 2006) and subsequently made law with the Compensation Act, 22 July 2006, available at http://www.opsi.gov.uk/acts/acts2006/ukpga_20060029_en.pdf#search=%22compensation%20act%202006%22.

The *Fairchild case* was largely commented, among others read FORDHAM, "Causation in the Tort of Negligence -- a Dispensable Element?", *Sing. J. Legal Stud.*, 2003, 285; MILLER, "Judicial Approaches to Contested Causation: *Fairchild v. Glenhaven Funeral Services* in Context", *Law, Probability and Risk*, 2002, 1, 119; KNUITSEN, "Ambiguous Cause-in Fact and Structured Causation: a Multi-Jurisdictional Approach", *Tex. Int. L.J.*, 2002, 38, 349; WOODS, "Causation of Damage in Negligence: *Fairchild v. Glenhaven Funeral Services Ltd*", *Adv. Q.*, 2003, 26, 486 and "Establishing Causation in Negligence: The House of Lords Speaks Again", 25 *Adv. Q.*, 2003, 25, 471; MERKIN, "Insurance Claims and *Fairchild*", *L.Q.R.*, 2004, 120(APR), 233; PORAT, STEIN, COHEN, "Indeterminate Causation and Apportionment Of Damages: An Essay on *Holtby, Allen and Fairchild*", *O.J.L.S.*, 2003, 23(667), and DUGDALE and JONES, *Clerk & Lindsell on torts*, 19th ed., London, 2006, 70-80.

The *Barker case* was also largely commented, among others read ANDERSON, "Disease Causation and the Extent of Material Contribution", *S.L.T.*, 2006, 15, 87, KRAMER, "Smoothing the Rough Justice of the *Fairchild* Principle", *L.Q.R.* 2006, 122(OCT), 547, PLOWDEN and VOLPE, "*Fairchild* and *Barker* in MRSA Cases: Do *Fairchild* and *Barker* Provide an Argument for a Relaxation of Causation Principles in Claims for Hospital Acquired MRSA", *J.P.I.L.* 2006, 3, 259 and COGGIOLA, "L'accertamento del nesso di causalità nei casi di mesoteliomi conseguenti ad esposizione ad amianto: una nuova pronuncia della House of Lords", *Resp. civ. prev.*, 2006, 1782. That decision actually triggered the statutory response set forth in the Compensation Act 2006, because it held the right of the defendants in mesothelioma cases to apportion the damages.

For a first comment on the Compensation Act 2006, please read HERBERT, "The Compensation Act 2006", *J.P.I.L.* 2006, 4, 337.

⁶¹ That choice, we have seen, was made in some Italian decisions. GRUBB e LAING, *Principles of Medical Law*, 2nd ed., London, 2004, 449, think that's the better option, because in their opinion the *Fairchild* test would ingenerate uncertainties for both the defendant and the petitioner.

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