

## GUIDO CALABRESI ON TORTS: ITALIAN COURTS AND THE CHEAPEST COST AVOIDER

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### Abstract

Guido Calabresi proposed to replace the dominating paradigm of fault with simpler strict liability rules that put liability on the most appropriate actors (the cheapest cost avoiders). Assuming that the objective function of the tort system is the minimization of the sum of the injury and injury avoidance costs associated with accidents (primary costs), risk-spreading costs (secondary costs), and administrative costs (tertiary costs), he suggested that the adoption of strict liability, targeted to specified activities, would achieve the goal of cost minimization. The core of an extremely richer message was that the cheapest cost avoider test would abate the administrative costs of courts. Moreover, the manufacturers' ability to spread the costs of strict liability through the prices charged for their products would effectively insure product users against the risks of injury. This masterpiece of normative analysis has deployed an ever increasing influence on thinking about tort law, not only in the US but also in Europe. This paper aims to trace the impact of Calabresi's ideas on Italian case-law. After a brief introduction, section 2 outlines the methodology adopted in the research. The following sections, 3 to 13, present (and cursorily comment on) the

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opinions which display the influence of Calabresi's thinking. Section 14 summarizes and concludes.

## 1 Introduction

Guido Calabresi is recognised unanimously as one of the founding fathers of the Law and Economics (L&E) movement. His seminal articles and the derivative 'fresco' spelled out in *The Costs of Accidents* contributed significantly – with the parallel works of Ronald Coase, Gary Becker, Henry Manne, Richard Posner, and Pietro Trimarchi (to cite several of his esteemed peers<sup>1</sup>) – to the start of a new intellectual enterprise that has proven to be extraordinarily challenging.

Many studies aim to offer an apologetic scrutiny of developments in L&E, with the most recent including contributions authored by Francesco Parisi,<sup>2</sup> Eli M. Salzberger,<sup>3</sup> and Alessandra Arcuri.<sup>4</sup> Even more numerous are those authors who have volunteered to construct a dedicated opposition. Critics and criticisms have always been abundant, as have Cassandras, claiming that the edifice's foundation has long since disappeared into the sand (Ernest Weinrib<sup>5</sup>), that the movement has peaked (Morton Horwitz<sup>6</sup>), that L&E is sick and spreads sickness (Leonard Jaffee<sup>7</sup>), and that it is not an edifice at all, just sand (Anita Bernstein<sup>8</sup>). True is that, despite its intuitive appeal, the economic analysis of law is no less controversial than the underlying economic theory.

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<sup>1</sup> On the origins of the L&E movement cf., *ex multis*, A. Arcuri and R. Pardolesi, 'Analisi Economica del Diritto' (Economic Analysis of Law) in F. Parisi, *Enciclopedia Giuridica* (Milan: Giuffrè 2002) 7; and, for direct testimonies, F. Parisi and C.K. Rowley (eds.) *Origins of Law and Economics: Essays by the Founding Fathers* (Cheltenham: Edward Elgar Publishing 2005).

<sup>2</sup> F. Parisi, 'Positive, Normative, and Functional Schools in Law and Economics' in J.G. Backhaus (ed.) *The Elgar Companion to Law and Economics* (Cheltenham: Edward Elgar Publishing 2005) 58.

<sup>3</sup> E.M. Salzberger, 'The Economic Analysis of Law – The Dominant Methodology for Legal Research?!', *University of Haifa Faculty of Law Legal Studies Research Paper No. 1044382* (2007) available at <http://ssrn.com/abstract=1044382>.

<sup>4</sup> A. Arcuri, 'Eclecticism in Law and Economics' (2008) 1 *Erasmus Law Review* 60.

<sup>5</sup> E. J. Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485 at 487.

<sup>6</sup> M.J. Horwitz, 'Law and Economics: Science or Politics?' (1980) 8 *Hofstra Law Review* 905.

<sup>7</sup> L.R. Jaffee, 'The Troubles with Law and Economics' (1992) 20 *Hofstra Law Review* 777 at 779.

<sup>8</sup> A. Bernstein, 'Whatever Happened to Law and Economics' (2005) 64 *Maryland Law Review* 303.

Were the future to be bet on, it is possible we would be conditioned by the vivid perception that the basic tenet of the mainstream approach – rational choice, people acting to best obtain what they want, given what they believe about the circumstances – is under mounting attack. A large and growing body of empirical evidence reveals that people often fail to live up to the *homo oeconomicus* paradigm and they take actions that conflict with how standard economic theory predicts they would look after their interests.<sup>9</sup> Why bother then with models based on assumptions that do not reflect the main features of reality?

In a different but concurring vein, the problem is exacerbated by the rampant wave of L&E, composed of economists who bring with them sophisticated analytical tools while remaining intolerant towards ‘unstructured’ informal arguments. Today, a large and growing segment of L&E work involves formal modelling or technical empirical studies. However, this implementation risks severing the link with the origins and, even worse, with the legal component altogether. The implications are devastating, since economists might end up doing work substantially detached from that of legal institutions. One might wonder whether this path ultimately paves the way towards a process of divergence, which would be at odds with the original interdisciplinary inspiration of L&E, while shutting the door to further developments.<sup>10</sup> The worst-case scenario is a completely auto-referential endeavour, which identifies key research questions and hot topics in a totally independent way, instead of drawing inspiration from the desire to clarify legal practice.

Be that as it may, and leaving aside the troubling question of whether L&E is an aging giant whose time has largely passed, it should be borne in mind that, as Henry Manne reminds us:

The original approach was simply a marginal (jurisprudentially speaking) movement from what most legal realist-oriented law professors were already doing but, alas, doing very badly. They were trying to explain why one rule of law was better than another [...], but the focus was always on improving the law and not on showing the

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<sup>9</sup> For a general overview of the role of empirical analysis, see T. Ulen, ‘The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship’ (2004) 79 *Chicago-Kent Law Review* 403. With specific regard to the empirical debunking of the rational choice paradigm, citations appear superfluous: experiments in behavioral economics, since Daniel Kahneman and Amos Tversky founded the field with their seminal 1979 paper, ‘Prospect Theory: An Analysis of Decision under Risk’ 47 *Econometrica* 313, are almost countless.

<sup>10</sup> Cf. H.G. Manne and J. D. Wright, ‘The Future of Law and Economics: A Discussion’ (2008) *George Mason University Law and Economics Research Paper Series 08-35* available at <http://ssrn.com/abstract=1145421>.

methodological skills of the authors. This was the intellectual victory which revolutionized the law school world, and it was all because of [...] the power of economics, vastly greater than that of any other discipline, to resolve what had appeared to be purely normative issues in a positive way. It was the introduction to this kind of power that opened the eyes of many law professors back in the 1970s, and which I think still has the power to amaze people (including, alas, many economists) who are not familiar with economics' great analytical powers.<sup>11</sup>

This was the archetypical inspiration and the recipe for success in the past – and should be, we believe, the lighthouse for the future. Guido Calabresi was perhaps the most genuine prophet with regard to this inspiration, even though, from the standpoint of a supposed – but questionable – orthodoxy, his very belonging to the movement has sometimes been doubted. No matter what happens to L&E, his contribution to frame our understanding of law has been enormous. In fact, the origin of the field rested on a broader view than the one sponsored by the Chicago School, which – despite the widespread identification with the 'lunatic fringe' blossoming on the shores of Lake Michigan – was not the movement's only cradle. Regardless of whether New Haven should be considered just a geographical alternative,<sup>12</sup> Calabresi offers a different perspective. His writing

focuses on welfare without perceiving it as a prize-fighter that has beaten or should beat a straw man, hapless fairness. It draws readers in with its clarity and reason, never trying to exclude or intimidate anyone. It is a model, indeed, of what law and economics scholarship can contribute in the eras following refutation of its core tenets: a wide social science that invites participants to consider the common good.<sup>13</sup>

Calabresi does not endorse the efficiency criterion as the polar star and the overwhelming value, but confines himself to suggesting that, when it comes to shaping the application of legal discourse, welfare should be factored in together with justice and fairness. Such a caution has been often interpreted as reluctance, if not a rejection of the L&E 'philosophy', while it should be deemed no more than a lack of empathy towards a certain way of conceiving the economic analysis of law. We can agree with Keith Hylton that "he tells us early on that economics is good for solving certain problems, but not all problems, especially those involving basic questions of identity or morality,"<sup>14</sup> which urge the acceptance of the idea that the distribution of

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<sup>11</sup> *Id.*

<sup>12</sup> As advocated by N. Mercuro and S. G. Medema, *Economics and the Law* (Princeton: Princeton University Press 2006, 2<sup>nd</sup> ed.) 284 ff, despite the scepticism of the supposed adherents.

<sup>13</sup> Bernstein, above n. 8 at 308.

<sup>14</sup> K.N. Hylton, 'Calabresi and the Intellectual History of Law and Economics' (2005) 64 *Maryland Law Review* 85 at 89.

wealth, not only its nominal creation, does matter. Though performing an economic analysis at the highest level of sophistication, he always shows – as stressed by Frank Michelman<sup>15</sup> – an awareness of the machinery of law and government, and the limits of human rationality, which even the most pragmatic economists would lack.

After all, the very choice of topic in Calabresi's main work is revealing. Tort law was a pioneering field that had already been affected by economic insights, since the Learned Hand formula suggesting that negligence consists of the missed adoption of precautions that would cost less than the expected damage dated back to 1947.<sup>16</sup> The economic analysis of tort law makes it clear that legal rules establish the environment for human activity. As a consequence, it demonstrates that economic tools – though falling short of presenting unmistakable solutions – may promote a better understanding of the way the law develops its outcomes. It is worth noting, as proof of a conceptual design that was definite from the very beginning, that this task was to be accomplished 'in terms that are intelligible to law teachers, if not to lawyers, and without that suicidal desire of the economist to make his theory so pervasive and detailed that it is rendered utterly useless to the lawyer who lives in the real world of men, and even to the law teacher, wherever he lives.'<sup>17</sup>

In the course of his writing devoted to tort law, Calabresi basically proposed replacing the dominating paradigm of fault with simpler, more direct, strict liability rules that, on a statistical basis, would place liability on the most appropriate actors – called the 'cheapest cost avoiders'. Assuming that the objective function of the tort system is to minimise the sum of the injury and avoidance costs associated with accidents (primary costs), risk-spreading costs (secondary costs), and administrative costs (tertiary costs), he suggested that the adoption of strict liability for specified activities would have promoted the minimisation of the sum of the above costs considerably more than the alternative approach. The core of Calabresi's message, which is extremely profound, was that the cheapest cost avoider test would abate administrative costs. This would result in the court simply determining

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<sup>15</sup> F.I. Michelman 'Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs' (1971) 80 *Yale Law Journal* 647.

<sup>16</sup> The rule stated in *United States v. Carroll Towing Co.* 159 F.2d 169 (1947) by Judge Learned Hand is considered the first application of a cost-benefit analysis to the legal system. Though handed down in plain English, the rule boils down to the formula  $B < PL$ , where B represents the cost necessary to avoid the accident, L is the amount of the loss if the accident materialises, and P is the probability that it will take place. Therefore PL is the expected cost of the accident or, in other words, the expected benefit of avoiding it.

<sup>17</sup> G. Calabresi, 'Some Thoughts on Risk Distribution and the Law of Tort' (1961) 70 *Yale Law Journal* 499 at 500.

‘which of the parties is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made’,<sup>18</sup> without determining whether the injury should have been avoided (as required under negligence). Moreover – and here enters the distributional flavour – the manufacturers’ ability to spread the costs of strict liability through the prices charged for their products would effectively insure product users against the risks of injury.

This masterpiece of normative analysis has had an ever increasing influence on legal academia, and not only in the US.<sup>19</sup> European tort law has dropped the unpretentious role to which it was relegated, when compared to the conceptual scope and prestige of contract law doctrines. It has started to attract attention as never before. The spirited texture of *The Costs of Accidents* has also, we believe, helped to change the judicial attitude, once again not only in the US. For several reasons, short of the specific features of the *civil law* tradition, the echoes on this side of Atlantic have been less tangible. Nonetheless, they occasionally surface. This is also the case in Italy, where the book had been translated already in 1975, thereby paralleling the independent research by Pietro Trimarchi, who had also advocated, on economic grounds, a principle of strict liability for risk of enterprise in some special cases of tort liability.<sup>20</sup>

Notwithstanding the difficulties of detecting the influence of scholarly publications on adjudication, this paper aims to trace the impact of *Calabresian* teaching on Italian case-law. It is structured as follows: after this introduction, section 2 outlines the methodology adopted in the research; the following sections, from 3 to 13, present and briefly comment upon the opinions that, despite the formal prohibition of judges from quoting legal scholars under Italian law, display the influence of Calabresi’s thought; section 14 summarises and concludes.

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<sup>18</sup> G. Calabresi and J.T. Hirschoff, ‘Towards a Test for Strict Liability in Torts’ (1972) 81 *Yale Law Journal* 1055 at 1060.

<sup>19</sup> Though increasingly impressive, the European movement has not yet been able to replicate the astonishing success in the US. After all, traditional scholars continue to resist the suggestion to look at the law from outside, which is one of the most important pieces of wisdom introduced by L&E, especially in Calabresi’s version. The ‘inside’ perspective, rejuvenating the dogmatic approach of the past two centuries, invites one to consider ‘alien’ whatever rings of functionalism, economic analysis, and the like. See for example K. Grechenig and M. Gelter, ‘Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism’ (2007) *University of St. Gallen Law & Economics Working Paper* No. 2007-25, available at <http://ssrn.com>.

<sup>20</sup> P. Trimarchi, *Rischio e responsabilità oggettiva* (Milan: Giuffrè 1961).

## 2 Research Methodology

On the basis of recent studies, it appears that Italian judges are highly sensitive to L&E guidance, and often use it to decide interesting cases at any level of the judicial system. Ranging from the Constitutional Court to the Judges of Peace, decisions exist whose rationale is based on the achievements of the economic analysis of law.<sup>21</sup> Needless to say, L&E principles are embedded in the relevant judgments with various ‘weights’ and with different degrees of recognition, contributing to the final decision in extremely varied ways. We propose to group them into the categories presented below.

In certain rare judgments, the application of L&E principles is straightforward and clearly defines the *ratio decidendi* as followed by the court. Adopting traditional views would have led to a different outcome or would have been insufficient to reach that outcome.

Other courts acknowledge and approve of L&E principles, although their decisions are also grounded on the current interpretation of the law. Their importance is to show the correspondence of application of the relevant rules based on a paradigm of efficiency with the traditional interpretation. This also demonstrates the silent inclination of legal systems towards economically sound solutions.

Some judges are less brave, and abide by L&E principles without referring to them. Their reasoning and the arguments used cast doubts on the real role of economic analysis. Tacit adherence should not be overstated. Quite often, judges are simply unaware of L&E principles. Thus, it would not be correct to include these decisions within the group of those where L&E is actually working behind the scenes.

Sometimes courts use expressions such as ‘free market’, ‘apportionment of risk’, and the like, but an economic reasoning is either not developed, missing altogether, or has no bearing on the outcome of the dispute. A variation on the theme is offered by judges who pay tribute to L&E scholarship by fully recalling its doctrines, while issuing statements that are, at the end of the day, only ‘compensation’ for or that pay ‘lip service’ to the judgment. Again, such a use of L&E contributes nothing to the solution of the case.

As to the area of the law of torts, it is worth noting that many relevant decisions fall within the first two categories mentioned. They

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<sup>21</sup> See R. Pardolesi and B. Tassone, ‘*I giudici e l’analisi economica del diritto privato*’ (Bologna: Il Mulino 2003); Id., ‘*I giudici e l’analisi economica del diritto privato due anni dopo*’ in *Mercato concorrenza e regole* (Bologna: Il Mulino 2005) 579 ff.

underline the intense (or rather necessary) link between the law of torts and L&E principles. Many of these judgments elaborate on the cheapest cost avoider principle or otherwise express a significant reception of Calabresi's tenets. The following overview will highlight this influence by examining decisions already commented upon in Italian law journals as well as those that are unpublished and are offered here to the reader for the first time.

To stress how widespread and multi-faceted the influence of L&E and Calabresi's notions can be, we will not display the judgments pursuant to the 'ranking' proposed above but will follow the order of the Italian Civil Code (hereinafter c.c.). In this way we will be able to show the link between economic analysis and the traditional structure of tort law. Therefore, we will start with decisions dealing with the general clause of article 2043 c.c., then we will move to opinions applying the special liability provisions embodied in articles 2048-2054. We will conclude by discussing cases in which only the amount of damages is at stake.

Finally, as the reader will notice, many of the decisions that are going to be commented upon deal with highly debated issues, ranging from passive smoking litigation to medical malpractice, from exposure to toxic substances to motor-vehicle circulation. This shows, from a different angle, the kind of contribution that both L&E and Calabresi's school of thought can give to the social engineering carried out by the law of torts.

### 3 Function of the Law of Torts

A good starting point for our overview is offered by judgments that explicitly recall the economic function of the law of torts. In this regard, attention can be drawn to a remarkable decision of the Tribunal of Venice, issued on January 20, 2003, which relates to an accident that occurred in a school.<sup>22</sup>

The parents of a minor sued the Minister of Education because, while performing the scheduled physical exercise under the supervision of the teacher, their daughter fell heavily against the glass wall of the gym and was severely injured. The facts were fully proven at the trial, but the Court did not consider article 2051 c.c. applicable. This provision covers a specific hypothesis of liability for damages caused by things under custody. The causal relation between the 'thing' under custody and the damage was not demonstrated, because the child did not fall by stumbling into a specific object or because of a slippery floor.<sup>23</sup> Article 2048 c.c., which envisages a

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<sup>22</sup> *Id.* at 89 ff.

<sup>23</sup> Article 2051 c.c. reads as follows: 'Everyone is liable for injuries caused by things in his custody, unless he proves that the injuries were the result of a fortuitous event.' All translations of the Italian Civil Code provisions quoted in this paper are



specific hypothesis of liability of teachers for damage caused by pupils, was also held to be non-applicable, in line with the case-law of the Supreme Court, which requires that the injury be suffered by another person (even by another student) and not by the pupil himself.<sup>24</sup>

The defendant's liability for the said accident was grounded on the general provision of article 2043 c.c.,<sup>25</sup> considering that:

It has been ascertained that not only the lack of organization [*of the school*] according to the required standard of care but even the violation of the destination of the room planned in the project of the building. It would have been irrelevant if specific measures had been taken, but they had not, as the only precaution carried out consisted of moving away the sink previously installed under the windows, while unbreakable glass began to be used only after the accident. This fact itself proves that the accident was fully foreseeable and that the Public Administration was negligent.<sup>26</sup>

Furthermore, the judge elaborates his decision by arguing:

The decision is consistent with economic efficiency: that is, the balance between aggregated social benefits and costs, because the cost of the accident is borne by the one in the best position to control the risk and to invest in precautions apt to reduce it, without mentioning the possibility to apply for insurance. In this case, the cost of the accident would be spread among users because of the likely increase of the cost of the service, or among all people insured. Both solutions are much better than leaving the damage where it falls, also considering that in the case at stake the victim could not take any precaution or perhaps, overestimating the risk, she would give up the gymnastic class. In both cases the solution would be inefficient.

The application of article 2043 c.c. and the subsequent shift of risk are led, no doubt, by L&E insights. The cheapest cost avoider principle is explicitly referred to. It is worth noting that, in the case dealt with by the tribunal, the

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taken from S. Beltramo, *The Italian Civil Code* (Dobbs Ferry, New York: Oceana Publication 2007-2008).

<sup>24</sup> Article 2048 c.c. reads as follows: 'The father and mother, or the guardian, are liable for the damage occasioned by an unlawful act of their minor 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, trade, or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices while they 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.'

<sup>25</sup> Article 2043 c.c. reads as follows: 'Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.'

<sup>26</sup> All translations of passages of Italian judgments were made by the authors.

victim could not have taken any precaution on her own, apart from abandoning the involved activity and its related benefits. This implies that a decision leaving the prejudice on the victim would have missed the goal of minimising the sum of the primary costs (injury and avoidance) associated with the accident, and would have elicited undesirable consequences in terms of ‘signals’ – quite a fruitful activity for no other reason than a burden external to the activity itself – conveyed to society.

#### **4 Pure Economic Loss and Third-party Liability towards the Employer for Damages Caused to the Employee**

In the mid-1980s, the Supreme Court issued an important decision – No. 4550, dated August 26, 1985 – with regard to the claim brought by an employer against the person responsible for a car accident that resulted in one of his employees being unable to perform his duties for several months.<sup>27</sup>

The facts refer to a typical situation known as ‘tort protection of credit’ cases in Italian law. The employer cannot enjoy the employee’s activity but remains under the obligation to pay the monthly salary and social security.

After the claim was rejected by both the trial court and the court of appeal, the Supreme Court found that the cause of action was not grounded on the illicit interference by a third party (the car driver) with the employee-employer relationship, but rather on the ‘economic loss, represented by the payment of the salary without the corresponding performance of the employee.’ In short, the damage is directly caused to the employer, since

the issue is not the breach of the credit [*scil. of the employer towards the employee*], but the recovery of the economic loss, due to the payment of the salary without the corresponding performance of the employee. [...] Then the rule followed by this Court is not applicable, and according to which if a credit of one of the parties of the contractual relationship is breached by a third party, the right to compensation for damages set forth by article 2043 c.c. is limited – by the principle stated in article 1223 c.c. – to the damages that are an immediate and direct consequence of the wrong, pursuant to a strict nexus of causality.<sup>28</sup>

<sup>27</sup> In *Foro italiano* (1985) I, 2886, with a comment by R. Pardolesi, ‘Invalidità temporanea del dipendente, illecito del terzo, «rivalsa» del datore di lavoro (ovvero: l’analisi economica del diritto in cassazione).’

<sup>28</sup> Article 1223 c.c. reads as follows: ‘The measure of damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.’

Therefore, when the conduct of a third party affects an employment relationship it has to be determined in fact, case by case, whether the lack of performance of the employee – immediately and directly linked to the wrong – raised an effective need to replace the employee with another worker, with the subsequent economic burden, or the impossibility of replacement, having regard to the special nature and importance of the missing performance (definitively or temporarily), with the ensuing serious and irreparable damage.

In contrast, in the case at stake the employer asked for a decision against the tortfeasor only for the damages the company suffered in relation to the salary paid to the employee during the period of vacation due to the temporary physical inability.

The importance of the subtle distinction made by the Supreme Court can be fully understood only by examining the history of Italian case-law on the matter. This discussion would exceed the limits of this paper, however, so it should be sufficient to stress that the rationale of the decision is totally grounded on a typical economic reasoning:

Article 2110 c.c. sets forth the cases in which the employer has to pay the employee's salary notwithstanding the lack of performance.<sup>29</sup> This provision – concerning the lack of performance only within the contractual relationship between the employer and the employee – does not affect at all the right to compensation of the one who has to definitively bear the cost of the salary stemming from the missing performance and due to a fact pertaining to the sphere of action of a third party.

There is no doubt that the cost relating to an illness is to be paid by the employer when the illness is directly linked to the [*normal*] risk of the individual existence, but it can not be said with the same confidence that the cost is to be borne by the employer when the illness is the consequence of the conduct or an activity of a third party.

More in detail, the damage in question is the same as or part of that suffered by the employee and it is only shifted from the sphere of the employee to that of the employer because the latter continues to pay a salary to the former. [...] This clarifies the difference between the present dispute and the [*typical*] cases of violation of the credit.

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<sup>29</sup> Article 2110 c.c. reads as follows: 'In the case of accident, sickness, pregnancy or child-birth, if equivalent forms of security or assistance are not provided for in special laws or corporative norms, an employee is entitled to his remuneration or to an allowance in such amount and for such a period as are established by special laws, corporative norms, usage, or on an equitable basis. In the cases set forth in the preceding paragraph, the employer has the right to withdraw from the contract in accordance with Article 2118, after the lapse of the period established by the law, corporative norms, usage, or on an equitable basis. The period of absence from work for any of the aforesaid reasons shall be included in computing the employee's seniority.'

Following a heated debate in the *Meroni* case, L&E principles help to avoid the application of the precedent established.<sup>30</sup> Moreover, they are also used to shape the liability rule to be applied:

It is necessary to choose between the liability rule that disciplines the conduct of the third party, charging her with the cost of the violation, and the one embodied in article 2110 c.c., which bears on the employer. [...] The choice is to be made according to the criteria inferred by the system and that, arguably, the lawmaker would have made explicitly had the case been disciplined.

It is a matter of *analogia iuris*, which requires [*when no legal provision is applicable either directly or by analogy*] that the principles of the system be relied upon. The leading guideline of tort law is to charge with liability the subject that the lawmaker would consider in the best condition to evaluate the costs of the damage and to choose between the latter and the costs necessary to avoid it.

This principle has to be used to decide whether the cost of the wrong suffered by the employee [...] has to be borne by the employer or by the third party who caused it. [...] In the case at stake – through the ascertainment of the unlawfulness [*of the conduct of the third party*] – the system made its choice, identifying the tortfeasor as the one who has to pay the costs of the damages he caused [...].

The above costs [...] cannot include the social security duties paid during the vacation of the employee, since damage for lack of performance does not occur. Their payment [...] is no consideration for the tasks carried out by the employee [...], and it is due because of the mere existence of the employment relationship, even though the performance of the employee does not take place.

Again, the driving tool of the analysis is the cheapest cost avoider principle. As hinted by Calabresi, a choice – an educated guess, when there is no certainty<sup>31</sup> – must be made (by the legislator, the judge, or the interpreter) in order to focus on the subject, who is better placed to take precautionary measures. In the case at stake, the cheapest cost avoider is the third party, as the risk is mainly related to his/her conduct. The solution seems also consistent with the Learned Hand rule: if the employer were burdened with the cost of the accident, a situation of moral hazard would occur, inducing the third party to drop any investment in precautions.

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<sup>30</sup> In the *Meroni* case (decided by the Supreme Court, Joint Sessions, January 26, 1971, n. 174, in *Foro italiano*, 1971, I, 372), the Supreme Court stated that ‘the person who, by any fraudulent, malicious, or negligent act, causes the debtor’s death is obliged to pay the damages suffered by the creditor, if the death has provoked the extinction of the credit, together with a final and irrecoverable loss for the creditor’, specifying that such is the case, inter alia, whenever the debtor’s substitution is impossible or extremely costly.

<sup>31</sup> G. Calabresi, ‘Transaction Costs, Resource Allocation and Liability Rules - A Comment’ (1968) 11 *Journal of Law and Economics* 67 at 72.

It is worth noting that the reasoning of the Supreme Court is, in a sense, incomplete, since it does not consider the problems of insurance, which come into play when the employer is functionally regarded as an insurer against the risks referred to above.<sup>32</sup> A recent decision of the Tribunal of Venice, dated November 25, 2002 – issued in a case similar to the one dealt with by the Supreme Court – reaches exactly the same solution, explaining the following:

Tort protection of credit [*is*] aimed at stressing the more-than-bipolar relevance of the [*employment*] contractual relationship [...] and [*is*] justified by the difficulty in viewing people as assets protected by tort liability. This implies rejection of the “*pure economic loss*” principle, and also the inapplicability of the doctrine that considers the employer an insurer of the risk covered by article 2110 c.c. This leads, in turn, to the application by analogy of article 1916 c.c.

The technicalities evoked by this passage may render it obscure for the foreign reader, but the underlying idea is quite simple. The comparison between the professional insurer and the employer, obliged by law to act as an informal insurer, compels the conclusion that the former is better equipped to handle the risk of damages for the employee. However, the first paragraph of article 1916 c.c. states that the insurer, who has indemnified the insured, is left with a claim, up to the amount paid, against the third party *in lieu* of the insured, which permits preservation of the appropriate incentives. Therefore, this decision demonstrates how the trial court found an alternative path to reach the same solution devised (and supports the same L&E approach endorsed) by the Supreme Court, through the application of different rules.<sup>33</sup>

## 5 Passive Smoking and Government Liability

In a very recent and unpublished decision, dated June 6, 2008, the Tribunal of Venice had to deal with the following complex issue. An employee of the Public Administration sued the Italian Government and the Minister of Internal Affairs for not having drafted and put into force legal rules banning smoking in public premises other than those provided in article 1 of the law 584/1975, and for not having taken measures to actually enforce the ban already included in the statutory law. The facts of the case show that from

<sup>32</sup> For more details on the issues mentioned, see Pardolesi, above n. 27, at 2889 ff.

<sup>33</sup> One of the consequences stemming from the application of article 1916 c.c. is that the third party can raise against the insurer the same exceptions he could oppose to the insured, so that, for example, in motor-vehicle circulation cases the right is subject to a two-year statute of limitation.

childhood the plaintiff had suffered from serious allergic bronchial asthma resulting from any exposure to smoking. The negligent behaviour of the Italian public authorities caused both damage to his health and to his social life, since he had to avoid public places where people were in the habit of smoking, notwithstanding the ban.<sup>34</sup>

After dismissing the defendants' petition to drop the case for want of cause of action, the judge did not uphold the claims on their merits. As to the first one, the judge observed:

In the present case, a breach of an obligation to exercise the lawmaking power did not occur. In other words, this power is constitutionally attributed to the two Houses of the Parliament and it is exercised through the legislative initiative set forth by article 71 ff. of the Constitution. The Parliament, constitutionally endowed with one of the fundamental powers of the State through which people's sovereignty is exercised, cannot be compelled to adopt any legislative provision. Nevertheless, it cannot be excluded that the lack of consideration for certain interests of society, and the respective transposition into suitable bills, give rise to a political responsibility, though that problem is different from the one at stake.

Immediately following the argument grounded on constitutional law, the tribunal underlined:

The legislative way, namely, the adoption of a collective regulation, is not always the more suitable, as the regulation [*of interests*] can be left to the individual level: namely, to the contract. Alternatively, [*it is possible to*] opt for a liability rule when negotiations appear to be too complex and such as to imply very high burdens because of the amount of transaction costs.

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<sup>34</sup> After the facts at trial, Law 584/1975 was significantly revised by Law 3/2003. According to the text currently in force of article 1 of the Law 584/1975: '[I]t is forbidden to smoke: in hospital areas reserved for patients ]; in school rooms of any type and grade; in vehicles belonging to the government, to local public entities and to private enterprises that are entrusted with public transportation services of people; in subways; in waiting rooms of train, tram, maritime-harbor and airport stations; in train compartments reserved for no-smokers, which must be present in any coach of public trains and in any coach of train services entrusted with private enterprises; in train sleeper rooms, occupied by more than one person during the night service; b) in closed premises used for public meetings, in closed rooms for movies and theatrical entertainment, in dancing rooms, in betting rooms, in meeting rooms of academies, in museums, in libraries and in reading rooms open to the public, in picture galleries in public art galleries and galleries open to the public. The ban embodied in the previously quoted provision is also extended by article 51 of the Law 3/2003, which establishes that 'It is forbidden to smoke in closed premises, with the exception of: a) private premises not open to consumers or the public; b) premises reserved to smokers and indicated as such.'

The analytical frame thus provided corresponds to Calabresi's distinction between specific deterrence and general deterrence. Specific deterrence results from collective decisions laid down in *ad hoc* regulations, such as prohibitions whose cost-effectiveness can seldom be appreciated by individual actors. General deterrence relies on a market-based approach: spontaneous transactions are replaced by 'exchanges' forced by tort liability. The value of the exchanged good is fixed *ex post*, and will have a bearing on the decision to be taken *ex ante* whether to engage in a particular activity and the extent of precautionary measures. As suggested by Calabresi,<sup>35</sup> these options should not be pursued in their pure form but adapted in order to reach efficient outcomes.

With regard to the second claim, the judge reasoned as follows:

Besides the fact that the said law [No. 584/1975] placed on many addressees the duty to enforce the ban, and in particular to tenants of the places set forth in article 1, letter b), the claim tends to turn civil liability, through the mechanism of omissive behaviour, into an indemnity tool, based on the deep pocket of the Government, that is the society [...].

In this respect, the duty to ensure the applications of sanctions by public bodies cannot automatically result in a claim for damages arbitrarily raised by a party that complains about noncompliance. The limitation of the nexus of causality has to take into account the dimension of the obligation to act and respectively identify those damages which can be prevented with an *ex ante* evaluation. As the defendant has to bear the consequences that in a foreseeable (and reasonable) way could stem from his/her actions, it is necessary to begin from the extension of his duty to care. Therefore, it cannot be conceived (since it would be economically unfeasible, unless the country is 'militarised'), that compliance with the ban is to be ensured ubiquitously [...] or rather in any single place listed in article 1 of the Law No. 584/1975. In other words, the condition of the [*accident*] foreseeability provided for in article 2043 c.c. [...] would risk being wiped out if rules of conduct to be complied with by the potential tortfeasor [...] were extended to society as a whole [...].

As to the plaintiff's attempt to prove, during the trial, the specific situations in which he expressly asked for the intervention of the public authorities to sanction the violation of the ban, the court argued:

It gives the Minister of Internal Affairs the role of 'guarantor' because of its position of control over the risk's sources. In this regard, scholarship noted that the function of prevention that the Government exercises through the public authorities is not grounded on the assumption that citizens are reckless people, needing to be continuously controlled [...]. If this was the case, any function of deterrence by legal

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<sup>35</sup> Cf. Calabresi, above n. 31 at 70.

sanctions would fail, by assuming that individuals are unable to self-regulate their own conduct.

Furthermore, the tribunal went on to explain that:

The plurality of addressees, charged with the duty to ensure that the ban is complied with, [...] makes the alleged lack of initiative less significant, since the main omissions were those listed by article 2 of that law.

The references contained in the decision with regard to the ‘deep pocket method’ are clearly inspired by the rejection of this approach as the basic technique to cope with the primary costs of accidents. Actually, that method, together with the one based on loss spreading, represented the ‘state of the art’ with regard to the manner of allocating resources in the tort area at the time that Calabresi was beginning to build his conceptual structure.<sup>36</sup> Both perspectives, unworthy as allocative tools, would surface again, in the different guise of compensation, pertaining to the ‘fairness’ and ‘justice’ of the system (*i.e.* to the realm of secondary costs).<sup>37</sup> From this perspective, the decision appears remarkably sympathetic to the Calabresian model and shows a significant degree of analytical consciousness.

## 6 Robbery and Bank Liability

Another decision that explicitly mentions and uses the cheapest cost avoider principle is the one issued by the Tribunal of Vibo Valentia, Section of Tropea, dated July 9, 2001, concerning the liability of a bank for losses suffered by its clients in the event of a robbery.<sup>38</sup> After rejecting the traditional arguments, which had led many courts to dismiss similar claims in the past, and after examining the issue of liability by omission, the judge observed that the real issue is to ascertain whether the bank has an obligation towards its clients to prevent the accident.

This way of proceeding is not only necessary in order to answer the question about the causal nexus between the accident and [*the alleged*] negligent conduct but has also a justification in terms of efficiency of the rules. Before ascertaining whether a fact can be foreseen or avoided by the defendant, it should be asked whether he has

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<sup>36</sup> Calabresi, above n. 17.

<sup>37</sup> In Calabresi’s view, as already noted, fairness and justice do matter, no less than allocative efficiency. Cf., e.g. G. Calabresi, ‘The New Economic Analysis of Law: Scholarship, Sophistry or Self-Indulgence?’ (1981) 68 *Proceedings of the British Academy* 85.

<sup>38</sup> In ‘*Danno e responsabilità*’ (2001) at 1095, with a comment by F. Agnino, ‘Responsabilità della banca per danno al cliente’.



the duty to prevent it. From this perspective many issues surrounding the nexus of causality would be resolved or would be at least less dramatic. Let us assume that Tizio negligently causes serious injury to Caio with his car [*and that*] because of a fire [*the latter*] passes away in the hospital where he was brought [*after the accident*]. It makes no sense [...] to ask whether the conduct of Tizio is one of the causes of the death of Caio [...] as it is sufficient to raise the question of whether Tizio had or did not have an obligation to avoid the fire. [...] What really matters is that Tizio has no obligation to avoid the fire and this is enough to rescue him from the consequences stemming from it.

The doctrine endorsed by the court – against the approach to causation followed both by criminal and civil judges – is sustained by specific economic considerations.

Why has Tizio no obligation to avoid the fire in the hospital? It is clear that different criteria can be followed while creating duties [*for citizens*]. French legal interpreters, for example, ground them on ethical and social obligations [*the opinion alludes to the strict application of the 'but-for' causation theory, occasionally endorsed by the French jurisprudence*<sup>39</sup>]. However, undoubtedly the consideration pertaining to the capacity to prevent accidents has an influence on this choice. In the example used above, Tizio cannot be obliged to avoid the fire because he is not in the position to efficiently arrange prevention tools [...]. The ever-present problem of civil liability is to establish the rules according to which the damage suffered by one person has to be borne by someone else; paramount importance is to be attributed to the capacity to avoid the accident at the lowest cost. That is, the damage has to be borne by the one who had the possibility to prevent it efficiently, setting up the necessary measures with a cost lower than the harm.

From this perspective, it is not questionable that the bank can use alarm and defence tools, while clients cannot: [*the bank*] is then in the best position to prevent the accident [...] and a consideration of liability rules in terms of efficiency leads to the conclusion that the loss has to fall on [*the individual*] who was in the best position to prevent or avoid it. [...]

In practice, this means that the bank has the duty to arrange for alarm and safety tools suitable to prevent criminals from entering the premises. According to customary standards, these tools consist not only in recording on video what happens inside, or of a rudimentary “*detector*”, as in the case at stake, but even in hiring private guards. This measure has been adopted by almost all banks. [...]

In addition to this, it cannot be excluded that the bank has at least to warn clients when the prevention tools adopted are insufficient [...]. Otherwise, it creates the misleading belief that the premises can be entered safely, with a reliance whose violation is in turn a source of liability.

As well as the fact that also in the commented decision the reference to the cost avoider principle is self-evident, it is worth noting that such a principle

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<sup>39</sup> See for example Cour de Cassation 8/1/1964, in *D.* 1964, comm. 70.

does not always lead to upholding the damages claim of the victim. Under a negligence rule, the victim is only entitled to compensation if the precautionary investments to be taken by the injurer are less costly than the risk to be avoided, pursuant to the previously mentioned Learned Hand formula. In the case examined by the court, the bank had adopted only very basic and insufficient measures to manage the risk of a relevant and multi-party harm, so that its behaviour falls short of shielding it from exposure to liability.

## 7 Medical Malpractice

A recent judgment of the Tribunal of Venice, dated May 10, 2004, deals with a case of medical malpractice. This topic is heavily debated, and it calls for difficult policy decisions all over the world.<sup>40</sup>

The parents of a young child born with serious impairment to an arm alleged that the damage was caused by the negligent and untimely assistance at the delivery (questioning several aspects of the conduct of the hospital personnel). The hospital protested against all grounds of liability, but the court observed that in principle, when the plaintiff claims a breach of the contractual relationship, it is on the defendant to prove that its personnel was diligent and that the harm occurred for a cause independent of its personnel's behaviour.<sup>41</sup>

Nevertheless, the judge argued that, in the field of medical malpractice, the shifting of the burden of proof needs to be balanced against the circumstance that many medical activities give rise to an 'iatrogenic risk'. Moreover, it is necessary to establish whether the accident was effectively caused by reckless behaviour. In this perspective, the defendant's liability is established only when there are patterns of conduct to blame, in order to avoid 'an excessive over-deterrence'.

In the case at stake, none of the risk factors listed in the medical literature – which could have made the performance of the doctor and the obstetrician particularly complex – was present. However, the medical

<sup>40</sup> In *Danno e responsabilità* (2005) at 426 ff.

<sup>41</sup> The most recent Italian case-law reaches a certain degree of uniformity in deciding that both the liability of the hospital personnel and of the hospital itself originate from the breach of obligations pertaining to a contractual relationship. In general terms – but with all exceptions and nuances that medical malpractice offers (as the subsequent considerations in the text show) – also in this area it is standard procedure to apply the principle established by the decision of October 30, 2001, no. 13533, of the Joint Sessions of the Court of Cassation. According to this, when the creditor alleges the breach of an obligation, it falls upon the debtor to prove that he or she duly acted according to the contract (unless the obligation allegedly breached was a negative one, providing for something the debtor did not have to do).

records of the hospital gave little information about the actions of the personnel when difficulties in the birth became apparent, thus preventing any evaluation of their behaviour. It was up to the hospital to keep a record of, and to provide the documents related to, the conduct of its personnel immediately after the delivery, in order to show compliance with medical guidelines, whereas the victim had no serious opportunity to check that compliance and control the relevant sources of risk.

As a consequence,

the liability of the hospital is not grounded on a rule that infers a lack of diligence of the personnel on the basis of the scarcity of information available, but rather on the consideration that given the lack of information it is not possible to ascertain what has been done and then to discharge the debtor from liability.

The subsequent difference between the diligence required by the personnel and that required by the hospital, based on the possibility that the hospital is not only vicariously liable for the conduct of the personnel but also directly liable for poor organisation and the defective working of medical tools, is justified by the technical and scientific complexity of modern medical activity. This calls for, especially in specialised sectors, the presence of costly structures and devices of the kind that only public institutions can buy, even though in the case at stake it would have been sufficient to follow a higher standard of recording. However, the higher availability of human and economic resources on the part of public structures would justify, within a relational logic, the burden related to risks avoidable through the adoption of suitable investments in precautions.

The proverbial intricacies of the fault principle are thus discarded and the rationale adopted by the tribunal leaves no room for doubts. Poor organisation is wholly attributable to the hospital, which had the obvious opportunity to frame and to devise its activities in a more transparent way, in the interest of both the patients and itself. Basically, the opinion answers one question: who was in the best position to avoid costs, both primary and secondary? And the answer fits the Calabresian approach nicely. Moreover, it lines up with the widespread inclination to recognise that, since a large portion of the errors that occur in patient care are due to system breakdowns, much more attention needs to be given to the identification and improvement of the points in the system where errors are most common and less to the individuals who make the errors. Even when an injury appears to have been caused by an individual error, prevention of similar injuries in the future is often best accomplished by changing the system or environment in which individual doctors and nurses work.<sup>42</sup>

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<sup>42</sup> Cf. P.J. Peters, 'Resuscitating Hospital Enterprise Liability' (2008) 73 *Missouri Law Review* 369 at 379 f.

## **8 Liability for Accidents Occurring to Students: Burden of Proof**

The judgment commented upon in Section 3 – under the heading ‘function of the law of torts’ – can be coupled, to some extent, with a more recent decision of the Tribunal of Venice, dated June 20, 2006, which involves, again, liability for an accident that occurred to a student.

A young girl was playing with friends during recess and fell when a fellow-student pushed her during a game in which everybody was running after each other. The parents sued the Ministry of Education, alleging that when the accident occurred 210 students were present in the area and were being supervised by only eleven teachers. The defendant contended that the facts were different from those reported by the plaintiffs: namely, when one of the other children fell down, another stumbled into him and accidentally pushed the young girl. Hence, the accident was totally unforeseeable and unavoidable and the school personnel could not be blamed at all.

The way in which the facts of the case occurred was not proven during the trial and the court opined that plaintiffs were entitled to proceed on the presumption embodied in article 2048, second paragraph, c.c., as they demonstrated that the harm occurred during school hours, when their daughter was under the custody of the teachers. Therefore, it was for the defendant to show that notwithstanding the compliance with all precautions the accident could not be foreseen and avoided.<sup>43</sup> In short, the Minister of Education should have proven that the damage was due to a fortuitous event and not just to the unlawful conduct of another student.

The court then explained that:

A different solution would imply laying upon a person, not necessarily present when the accident occurs (as classes or the recess break cannot take place in front of parents), the heavy burden of proving [...] that the damage to the student was self-caused or that it was impossible to avoid the accident.

When the provision at stake sets forth a presumption of fault, it expresses the trend to charge with liability the one in the best position to manage the risk and to adopt precautions, if not to spread the risk through insurance at all. It follows that the burden of proof necessary to escape this presumption must cover the full dynamic of the facts, either to exclude the wrongful conduct of the third party or to demonstrate the impossibility of avoiding the accident.

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<sup>43</sup> The principle is often endorsed by the Italian Supreme Court, which asks the defendant to prove that the custody was as diligent as the one required to prevent the accident (see Court of Cassation of November 7, 2000, No. 14484) or all organisational measures necessary to the said end were taken (see Court of Cassation of February 3, 1999, No. 916; Court of Cassation of January 22, 1990, No. 318; Court of Cassation of March 27, 1984, No. 2027).

In a sense, the decision completes the one mentioned above, as L&E principles are not used to choose how to apply the general clause embodied in article 2043 c.c. but to construct a single element of a special provision: namely, that part of article 2048 concerning the burden of proof. While the statement demonstrates which refinements are possible through L&E, the ‘surgery’ carried out by the court over the provision at issue recalls Calabresi’s warning about the need to overcome the alternative between two extremes: perfect general deterrence on the one hand, and specific (or collective) deterrence on the other. These options cannot be pursued in their pure forms but should be accommodated in order to obtain the best outcome.

### 9 Exposure to Toxic Substances

An unpublished decision of the Tribunal of Venice, dated June 19, 2008, deals with a complex case of liability for exposure to toxic substances. In the case at hand, the widow and the daughters of a deceased worker sued the companies that had employed him as a chemical operator, exposing him to aromatic amines and allegedly causing a bladder cancer, which ultimately caused his death.

After rejecting various preliminary exceptions, the tribunal upheld several allegations of the plaintiffs and decided to resort to article 2050 c.c.,<sup>44</sup> observing that:

According to legal literature, article 2050 c.c. aims at protecting strangers to the activity, as “*it wants that the ones who carry out the activity internalize the costs of the risk so created*”. From this perspective the distance between articles 2050 and 2043 c.c. becomes clear. The typical feature of the negligence envisaged by the latter entails the difference between the concrete framework of the action and the abstract one, which should have taken place according to social norms or a specific regulation applicable to the subject matter. Within the progressive trend towards an objective notion of negligence in civil law, this feature becomes strictly tied to risk: that is, the perceived possibility, surely uncertain but subject to evaluation, that a given type of accident will occur. [...]

The different notion of risk, envisaged by the general clause of article 2043 c.c. and by article 2050 c.c., lies in the concrete difference between their perspectives with regard to the exercise of a dangerous, but socially useful, activity giving rise to a lawful risk: the world of “what actually happens” and of “what ought to be”, for the former; and the realm of uncertainty (or, rather, of the absence

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<sup>44</sup> Article 2050 c.c. reads as follows: ‘Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.’

of a consolidated system of behavioural rules), for the latter. In the evaluation of negligence the judge must look backward and see whether there are parameters governing the conduct of all actors, in order to ascertain which behaviour the tortfeasor adopted to mark out the difference between his conduct and the one required by the law. Conversely, in the case of article 2050 c.c. this parameter is missing, as the system has not yet developed a suitable apparatus of knowledge and precautions. In this context, the system puts on the actor the burden to take whatever precaution is considered suitable pursuant to the available state of knowledge.

The above considerations forced the court to adopt a different approach to the assessment of causation. In the case at stake, there was no causal relation between a specific conduct and the event, but only a general nexus between an activity and an event, thereby demanding an *ex ante* perspective in order to estimate the inclination of the activity itself to cause that specific type of event. Therefore, it was for the plaintiffs to prove the length of the work relationship, the tasks carried out by the employee, and the occasions in which he could have been exposed to the toxic substances. Conversely, it was for the defendants to demonstrate adoption of all suitable measures, not only pursuant to the regulation in force but even to the level of scientific knowledge at the time of the activity, or to show that the damages occurred because of an exogenous cause. It is then irrelevant that the employees had regular medical checkups and used the safety equipment prescribed by the law (such as gloves, masks, helmets, and so on).

With a long excursus on the witnesses' contributions and the experts' opinions (which cannot be shown here), the court explained how the plaintiffs met the burden of proof, while the defendants did not. The court also rejected the comparative negligence exception based on the fact that the victim had been addicted to smoking up to twenty cigarettes a day for forty years. Even though this habit was considered an important risk factor for bladder cancer, the evidence showed that two non-smoking employees of the defendants, sharing the same work conditions of the victim, contracted bladder cancer a remarkably long time before the statistically expected age.

A thorough analysis of the most recent case-law on causation would go beyond the boundaries of this paper. Suffice it to mention that, unlike in criminal cases, causation in tort law can be based on a probabilistic evaluation of cause-effect relations. However, this may not be an abstract or merely statistic evaluation but should be an assessment based on the facts of the dispute. The judge explained this as follows:

We know that [*the victim*] was a habitual smoker, and then exposed himself to another risk factor. It is no doubt that in all cases characterized by the impossibility to have a direct representation of the dynamic of relevant facts, even though filtered by the description offered during the proceeding [...], the construction of the nexus of causality is carried out through inference and without reaching a degree of

absolute individual certainty (which is no longer [...] seen as a goal of the system's policy).

This evaluation is allowed in the civil area, provided that a complete description of the event and of all relevant risks is given, not only in consideration of the compensatory function of tort law, but also based on the deterrence goal. In other words, an approach based on the notion of foreseeable (and avoidable) risk *ex ante* provides incentives to adopt investments in precautions for the professional manager of the activity, who is able to make an appropriate choice as to the internalization of the costs (as well as to spreading them on the market) and as to the uncertainty pertaining to the same activity, deemed dangerous, avoiding that they lay were they fall.

The framework sketched out by the judge in the last sentence shows consistent adhesion to the tenets of Calabresi's approach to tort law. The *ex post* evaluation, typical of a judicial opinion, cannot ignore the signals that will be given to parties dealing with analogous situations. One of them, the entrepreneur, has the clear opportunity to internalise a foreseeable risk: namely, one that should have been considered and that the victim would not have been able to control. The entrepreneur can make the right choice and, therefore, is the obvious candidate for liability when he/she does not behave accordingly.

## 10 Liability for Things under Custody

With its unpublished decision of June 18, 2007, the Tribunal of Venice dealt with a case calling for the application of article 2051 c.c., which – as already noted – provides for the discipline of liability for things under custody. The plaintiff claimed that he was on the way to his shop, crossing a street that had two carriageways divided by a centre strip. To reach the other side he had to step over the strip, and he accidentally put his left foot into a tap-water drain, which was about twenty centimetres deep and had no protective grate. In so doing, he lost his balance and fell, suffering serious injuries to his left knee and leg veins. The Municipality of Venice claimed that the event occurred because of the plaintiff's negligence, as the opening was quite visible, and denied that article 2051 c.c. should apply.

After ascertaining that the facts took place according to the plaintiff plea, the tribunal refused to deploy the 'trap doctrine', stemming from the judicial interpretation of article 2043, and opted for article 2051, which has crucial consequences. While the first cause of action requires the plaintiff to prove that the state of the thing, which resulted in the accident, was both (subjectively) not visible and (objectively) not evitable (thereby grounding a claim of negligence against the Public Administration), the second cause of

action requires simply that causation be proved between the thing and the damage.

Mainstream case-law disallows application of article 2051 to goods such as public roads, because the extension of the thing and its intense use by society at large make it impossible for the administration to effectively exercise control powers as custodian, which is a precondition for the liability in question. The Court then explained that:

The argument [*based on the interpretation of article 2051 c.c.*] usually goes hand-in-hand with the fear of excessively burdening public bodies with the costs of the system in comparison to the negligence regime, and of over-restricting judicial discretion in the assessment of the case. [*In short,*] the economic burden of compensations to be paid would be exorbitant for the Public Administration and, ultimately, for the entire collectivity.

Nevertheless – the judge goes on to say – it is also to be noted that the above doctrine turned out to be a rule of strict liability, even though formally not related to the concept of custody. As liability automatically follows from lack of maintenance implied by the very presence of a danger (without any possibility to prove the contrary), this implies that a rule of ‘negligence in re ipsa’ is implemented.

After an excursus on the most relevant and recent case-law on the matter, the above argument led the tribunal to reconsider the traditional scope of application of article 2051 c.c. and to state that in the case at stake there was no reason to exclude it. The portion of the good that created the danger was delimited, such as to allow for actual control and to burden the custodian with liability only when the risk connected to the custody materialises. In other words, this provision is not to be applied to dangerous situations that are extemporary and exceptional (as it would be, for instance, for a banana skin dropped by a pedestrian or for oil leaked out from a car). However, the opening in question, located along the centre strip, seemed to have been the result of a state of things consolidated over time. Then – the judge concluded – article 2051 c.c. does not implement a mere presumption of negligence but rather a rule of strict liability based on the relation of custody. This can be avoided only by proving a fact outside the sphere of control of the custodian (such as the conduct of a third party or of the victim), which would exclude the nexus of causality between the thing and the harm.

In the tribunal’s view, pursuant to a way of reasoning close to the first decision commented upon in this article:

The solution is consistent with economic efficiency – that is, the trade-off between aggregated social benefits and costs – because the cost of the accident is borne by the one in the best position to control the risk and to invest in precautions suitable to reduce it, leaving aside the possibility to apply for insurance. In this case, the cost of



the accident will be spread among all users because of the likely increase of taxation, or among all people insured. Both solutions are much better than leaving the damage where it falls, also considering that the harshness of a strict liability rule can be mitigated taking into account the comparative negligence of the victim, who relies on the full responsibility of the tortfeasor, but also receives an incentive to prevent risk situations connected to the use of roads, at least because of the incompleteness of the compensation for damages in this kind of accidents. Indeed, it is not indifferent for the victim to preserve her health (primarily injured in such events) or to recover the potential monetary equivalent. On the other hand [...] the mechanism of article 1227, first paragraph, c.c. is not consistent at all with the trap or danger doctrine [*since*], if there is a causal contribution of the victim, the conditions of non-foreseeability and non-visibility are lacking<sup>45</sup>. In clearer terms, a rule of strict liability, with a comparative negligence defence, makes the economically oriented opposition to the extension of article 2051 c.c. to damages suffered by public road users questionable.

It is worth remarking that a similar rationale was followed by another judgment inspired by L&E principles, which was rendered by the Tribunal of Monza on October 25, 2001.<sup>46</sup> A pedestrian sued a municipality, asking to be compensated for damages suffered when he slipped and fell because of subsidence on the road surface. Also in this case, the tribunal rejected the trap or danger doctrine, in favour of the application of article 2051, because

[*The traditional view*] does not conform with [...] the application of economic analysis of law methodology, with which the implementation of liability rules is to be made consistent.

After this general statement, the tribunal advanced many other arguments about public goods, the ‘tragedy of commons’, and the consequent free riding problems. All of them contribute to recommend (strict) liability as the preferred remedy:

Liability for the thing under custody means to give the custodian (that is the one entitled to intervene on the thing) an incentive to adopt measures suitable to avoid damages for third parties. The construction of the provision [*article 2051 c.c.*] as a strict liability rule then prompts not only the adoption of precautionary tools already

<sup>45</sup> Article 1227 c.c. reads as follows: ‘If the creditor’s negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. Compensation is not due for damages that the creditor could have avoided by using ordinary diligence’.

<sup>46</sup> In *Danno e responsabilità* (2002) 1201, with a comment by Laghezza, ‘Responsabilità della P.A. per omessa manutenzione delle strade: la prospettiva dell’analisi economica del diritto.’ For a more in-depth analysis of the long part of the judgment, which deals with L&E issues, see Pardolesi and Tassone, above n. 21, at 137 ff.

known and available (which also a negligence rule would stimulate), but even an investment in technological research, aimed at finding new remedies.

Returning to general L&E principles, the judge explained that a liability rule is the best solution because in the case at stake the allocation of resources, of property rights, and of entitlements to compensation for damages is not a matter of indifference.

Above all, for goods which raise a ‘collective’ problem, such as public ones, [...] transaction costs become prohibitive. This reason alone implies that a mitigation of the ordinary liability regime, as to the custodian, might be seriously inefficient, reducing the already poor incentives to control dangers, when a real possibility for potential victims to negotiate a preliminary protection is lacking.

The decision also excluded a solution based on the regulatory logic – implemented through administrative controls and criminal sanctions – because it would raise agency costs without ensuring an efficient level of deterrence. In the judge’s view, this solution would also increase the indirect costs for public medical assistance if the level of expected damages were not limited.

As to the contents of the liability rule, after examining the situations in which a strict liability regime would be inefficient, the judge concluded that the case in question is not among them – because the municipality had a real possibility to control the risk – and strongly criticised the trap or danger doctrine. On the one hand, it leads to some irrational outcomes, as liability may be established when the public administration is not to blame at all and may be excluded when it is really negligent. On the other hand, it is not compatible with the comparative negligence rule, whose application entails the rejection of the claim in the present case), since:

The management of ordinary rules of civil liability is able to fulfil the need to stimulate a diligent and careful conduct of citizens, avoiding burdening the collectivity with the costs of non-excusable behaviours.

In summary, the traditional reliance of the Italian judiciary on the fault principle as the pivotal rule, which inspires and governs the whole realm of torts, is overcome. Strict liability emerges as the new emperor’s clause in quite a large set of situations where Italian lawyers were used to resorting to negligence. This trend may be considered as an endorsement of ideas coming from New Haven. The two opinions show an unmistakable familiarity with the analysis developed in *The Costs of Accidents*. Calabresi is speaking through the judges’ pages.

## 11 Motor-vehicle circulation

Another interesting decision was issued by the Tribunal of Venice on January 14, 2003,<sup>47</sup> in the field of motor-vehicle accidents, calling for the application of article 2054 c.c.<sup>48</sup>

The passenger of a car sued the driver together with his insurance company, asking for a high compensation of damages (estimated at more than 500,000 euro). The judge ascertained that the exclusive responsibility for the accident was with the defendant, and then explained that:

Rejecting the discriminatory case-law rule, based on an unproven possibility, for the victim, to foresee the danger and control the risk, as well as on a highly questionable possibility for her to demonstrate the fault of the accident, the Supreme Court considers article 2054 c.c. (a provision embodying general principles in the matter of motor-vehicles circulation) applicable also in favour of persons transported gratuitously or by simple courtesy. Therefore, the victim is entitled to make the same claim that can be made against the owner. [...] This tribunal agrees to the just-mentioned doctrine [...] because it stems from a social-economic evaluation of the motor-vehicles circulation phenomenon.

Then, in the tribunal's view:

Considering that tort liability provisions are also a tool to prevent accidents, it is not clear which unilateral precautions the transported person can take, as she cannot ensure the good condition of the vehicle nor the compliance with the regulations applicable to circulation by the part of the driver, unless we imagine an obligation to cooperate in making the driver aware of risky situations. Her possibility of foreseeing the danger and controlling the risk is the same, taking into account the vehicle in which she is transported and any other vehicle, with a basic alternative: to accept or not to accept being transported. The alternative, in the light of tort law provisions, is not such to affect the possibility of preventing accidents through investments in precautions, or the capacity to internalize the externalities of one's own action, as the person transported – who does not contribute to the occurrence of

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<sup>47</sup> *Id.* at. 89 ff.

<sup>48</sup> Article 2054 c.c. reads as follows: 'The operator of a vehicle that is not guided by rails is liable for the damage caused to persons or to property by operation of the vehicle unless he proves that he did everything possible to avoid the damage. In the case of collision of vehicles, it is presumed, until proof to the contrary is offered, that each operator contributed equally towards causing the damage suffered by each vehicle. The owner of the vehicle, or in his place the usufructuary or purchaser with reservation of ownership, is liable in solido with the operator of the vehicle, unless he proves that the vehicle was being operated against his will. In any case, the persons indicated in the preceding paragraphs are liable for damage arising from defects in the manufacture or maintenance of the vehicle.'

the accident – is a mere bystander on the ‘stage’ of motor-vehicle circulation. [...] we imagine an obligation to cooperate in making the driver aware of risky situations.

Therefore, according to article 2054, first paragraph, the plaintiff is not burdened to prove the driver’s fault, whereas the latter, according to a model of liability based on the intrinsic danger of the activity or on the possibility of controlling the risk, must demonstrate having done everything possible to avoid the damage.

Recalling the analogous economic *rationale* that inspired the judgments of January 20, 2003, commented upon in section 3, the underlying logic of efficient allocation of risk is evident. If the victim cannot be reasonably required to adopt precautions, no apportionment between her and the driver has to be carried out. Again, the cheapest cost avoider principle offered the best solution to the judge.

While issues of insurance need not be raised, as the Law No. 990/1969 (in force at the time of the decision)<sup>49</sup> sets forth a regime of compulsory third party insurance, it is less clear why a strict liability rule is preferred to the ordinary fault regime implemented by article 2043 c.c. A tentative explanation might be that the references to the ‘*social-economic evaluation*’ of the phenomenon and the ‘*intrinsic danger*’ of the motor-vehicle circulation led the tribunal to consider the economically oriented distinction between the reasonable care standard and the level of activity (i.e. driving safely vs. how much driving). While the former is obviously promoted by the fault machinery, the latter cannot be effectively monitored through diligence. This state of things clearly supports the choice in favour of a strict liability rule.

Eventually, even though the decision focuses on a specific provision, no-one could ignore its link to the general themes dealt with by the first judgment commented upon, expressly recalling the economic function of the law of torts.

## 12 Spoiled Holidays and the Amount of Damages

In completing our overview, it is worth stressing that L&E insights do help Italian courts not only to establish liability but also to assess damages. This result is shown in an unpublished decision of January 12, 2007, of the Tribunal of Venice.

As a by-product of a collision involving a scooter and a car, the driver of the former asked compensation for all damages suffered. Among other things, he claimed that, because of his impaired physical integrity, he

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<sup>49</sup> The subject matter is now regulated by the ‘Code of Private Insurances’: that is, the Legislative Decree of September 7, 2005, No. 209.

had to give up a planned holiday and lost the monthly rent of 1,870.00 euros already paid for an apartment. In addition to this, the victim claimed that 10% of all damages were to be paid to an ‘accident expert’, who had assisted him in the negotiations carried out prior to the proceeding.

After ascertaining the exclusive liability of the car driver and having assessed the other components of the harm, the tribunal noted that the assessment of the damage for the ‘spoiled holiday’ required more definite proof. Information was needed about the time during which the scooter driver would have joined his family at the rented accommodation (in a region not far from their residence) for the whole month of July. Due to the lack of evidence with regard to his work duties, it could only be assumed that he would have spent at least each weekend with his relatives. In this respect, the judge observed that:

[*Concerning*] more significant elements to assess the value of the loss of the deserved holiday, it is possible to consider the planned costs, which demonstrate the amount the plaintiff was willing to pay for carrying out non-profitable activities. Assuming a daily cost for the rent of Euros 62,30 (1.870 : 30), it is possible to award the sum [...] of Euros 412,40.

As to the claim concerning the debt towards the expert assisting the plaintiff before the lawsuit, the judge underlined that, in general, this kind of expense can be accounted for within the liquidation of the economic harm (as they are incurred in order to ensure the victim a technical and professional support during pre-trial negotiation). However, at the time of the decision nothing had been paid yet to the expert.

From this perspective, there is a risk of overlap between not reserved [*to lawyers*] extra-judicial assistance and pre-trial assistance functional to the (reserved) judicial assistance, whose burdens are allocated pursuant to the procedural rules on fee shifting [...]. This could induce an exponential increase in managing costs of accidents to the detriment of victims. In addition to this, as these expenses have not yet been incurred by the plaintiff [...], it is not possible to assess its consistency with respect to the activity effectively carried out.

Here the flavour of Calabresi’s thought, as a distinctive ‘soul’ of L&E, is admittedly impalpable. At most, this may amount to a feeble echo of tertiary costs. The reason for reporting this opinion is that it confirms, in an almost clerical way (and precisely for this humble attitude), the growing sensitivity of Italian case-law to the economic dimensions of adjudicative decision-making. All in all, this is invaluable evidence of the inroads of L&E into the citadel of Italian law.

### 13 Nuisances

The best opportunity to conclude our views on the influence of Calabresi's thought on Italian case-law is offered by an unpublished injunction of the Tribunal of Venice of July 27, 2007, dealing with a nuisance controversy. In such disputes, the distinction between property rules and liability rules necessarily comes into play.

Both the owner and the user of an apartment (enjoyed through a bailment contract) claimed that the restaurant located on the ground floor made too much noise, owing to the music played throughout the premises and to the loud conversations of restaurant guests who regularly stood outside the building. In particular, the owner alleged that the prolonged exposure of the good to disturbing noise raised the risk of termination of the bailment relationship, and it might even have decreased the value of the property in the long run. The other plaintiff claimed harm to his health in the broad sense, considering the disrupted sleeping conditions, the decrease in mental concentration, and the ensuing stress and nervousness: in short, all the negative consequences relating to the quality of his life. Therefore, both plaintiffs asked the judge to immediately order the restaurant to cease its activity in originating the nuisances or to take all measures necessary to eliminate them.

Before determining that the nuisances exceeded the limit of what is ordinarily bearable and that no precautions can be taken to bring them below the threshold, the judge observed that article 844c.c. can be seen as a tool to protect not only rights on real estate but even the person who lives in it and his health.<sup>50</sup> Therefore, both plaintiffs were entitled to ask for a final injunction, whereas only the apartment dweller could apply for an interim order, considering that he was the one bearing the risk of irreparable damages if the remedy was granted only at the end of the trial.

Regarding restaurant clients conversing loudly outside the restaurant, the tribunal noted that:

As the function of the law of torts is to internalize the negative externalities in the perspective of reducing the social costs of accidents, the circumstance that clients hang out in front of the premises to drink and smoke does not exonerate the defendant from liability. In other words, it is totally lawful to pursue a profit goal (selling drinks [...]), but this cannot be done to the detriment of the neighbours' sphere. [...] As a result, in this context, even in light of the impossibility of adopting precautionary measures apt to abate the nuisances, the only workable remedy at this

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<sup>50</sup> Article 844 c.c. reads as follows: 'The owner of land cannot prevent the emission of smoke, heat, fumes, noises, vibrations or similar propagation from the land of a neighbour unless they exceed normal tolerability, with regard to the condition of the sites. In applying this rule, the court shall reconcile the requirements of production with rights of ownership. It can also take account of the priority of a given use.'

moment is a full injunction: that is, the order to stop the use of any musical equipment and the conversations of clients inside and outside the restaurant.

In addition – the judge concluded – the above reasoning is supported by the recent reform of the Italian Code of Civil Procedure, according to which the preliminary injunction becomes permanent and definitive if no party asks for the prosecution of the proceeding on the merits.

It is not to be excluded that the preliminary order totally fulfils the need of protection, above all when the damages occurred are difficult to assess and the comparison between the negative externalities and the adoption of precautions justifies the implementation of a *property rule* – that is, [*a rule grounded on*] the impossibility of intruding on the sphere of other citizens without their assent – thus paving the way to the injunction.

On the whole, the opinion seems to be influenced by both the perception of the function of tort law as a means to reduce the costs of harmful activities and by the awareness that the nuisance framework is the prototypical case of conflicting interests. According to the scheme proposed by Calabresi and Melamed's 'View of the Cathedral'<sup>51</sup> as a sophisticated development of Coase's theorem,<sup>52</sup> for the purpose of protecting legal entitlements a choice is to be made between property rules and liability rules. Property rules confer on the entitled party a strong protection forbidding interferences by other parties, whereas liability rules allow the other party to take the entitlement upon the payment of damages established by a court. Where transaction costs are sufficiently low (and this might have been the situation submitted to judicial evaluation in the case presented, since the owner of the restaurant was held to be perfectly aware of the individuals exposed to the by-products of her activity), the property rule is best suited to handle the problem: in fact, the parties are not impeded from negotiating towards the optimal allocation of resources.

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<sup>51</sup> G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.

<sup>52</sup> This is the nickname forged by George Stigler for the celebrated article by R.H. Coase, 'The Problem of Social Costs' (1960) 1 *Journal of Law and Economics* 3. The real significance of the Coasian message is still hotly debated: see A. Nicita and R. Pardolesi, 'Il Nobel che fece l'impresa,' forthcoming in *Mercato, concorrenza, regole*.

## 14 Conclusion

Some authors argue that the popularity of L&E is rapidly increasing, especially with regard to its European strand. Other writers evoke a doctrinal background that focuses on the inherent structure of the law as an autonomous system and refuse programmatically to accommodate any invasive contribution from the outside. Which of the two approaches will be dominant in the following years is still an open question. Moreover, it is uncertain whether the movement will evolve towards a more refined level of economic/econometric sophistication, banishing as inchoate all that rings of idle chatter about least cost avoider, efficiencies, transaction costs, and so forth. An alternative evolution would realise that, beyond mathematical niceties and formal elegance, the insights of economics should be deployed at the level at which economics works for lawyers and judges.

The hardcore economists' view would probably assert that the work of the founding fathers was of heroic origins, which have definitely vanished. Unfortunately, in so doing, it would also ignore that the main achievement of L&E was to illuminate many black holes in the Kafkaesque technicalities of the law. Thanks to the ingenuity of the forerunners – Calabresi being in many respects the first in line, precisely for his lack of addiction to the tenets of wealth maximisation and for his attention to other values – much has been done in the direction of clarifying and rationalising legal concepts. And a great deal more may be added in the future, always aiming to help lawyers to better grasp the very sense of their mission: applying the law in a less than arcane way, open to scrutiny from external perspectives, and conscious of the necessity that the rule be consistent with its functional fabric. After all, this has been – and hopefully will continue to be – the most genuine contribution of the movement.

Since the publication of *The Costs of Accidents*, tort doctrine has developed a policy awareness that has deeply reshaped its conceptual foundations. Calabresi's insights have penetrated the academic world, well beyond its candour in recognising the occurrence of the phenomenon. But this legacy was not destined to be confined simply to law in the books or in the university classrooms. To the surprise of no-one, it has made significant inroads into the day-by-day operations of the courts, and not only in the US, as we have tried to demonstrate. The appropriate mix of different techniques aiming to minimise the costs of accidents is not, according to Calabresi, a choice reserved for the legislator: the judge is equally involved, and is called to handle delicate trade-offs. The analysis presented in this paper should be coupled with the more general trend to re-interpret some key provisions of the Civil Code, from the original primacy of the fault principle to the new 'credo' of strict liability. And this confirms that a section of the Italian



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judiciary not only did not refute the hurdle but possibly tried to abide conscientiously by the guidelines stemming from Calabresi's work.

The view that L&E has forged Italian case-law in the field would appear, at first glance, to be an overstatement. Nonetheless, if one thinks of the almost metaphysical attitude that was dominant just a few decades ago, the perception of Calabresi's involvement in the new manner of dealing with tort law and policy cannot but gain momentum.

