TORT LIABILITY AND LEX AQUILIA

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SUMMARY: 1. A different perspective. – 2. The general clause of reasonableness. The doctrine of liability *ex lege Aquilia*. The intuition of Pothier. – 3. The Latin concept of *dolus bonus*. The degrees of guilt. – 4. From breach of duty of care to the without negligence responsibility. The doctrine of strict liability. Product liability. – 5. The comparative method as a search for a code.

1. In common law the general concept of liability is considered in a different perspective: from the series of torts received from earlier tradition, the paradigm of Tort of Negligence differs, and can be today considered as the homologous of civil liability derived from the *Lex Aquilia*.

Fault and deceit constitute the subjective elements of tort liability that rooted in classical Roman law, today find correspondences and analogies in almost every legal system even apparently distant as those of common law. These are characterized differently in the two considered areas: that of Torts Law and that of Contracts Law, where they find the respective reference in the rules and in the intention of parties.

Based on these premises, transversely, the different legal systems concur, while in many respects, for the different articulation of related principles, the procedures and the criteria of liability lawsuit diverge.

Different, moreover, are the application rules of the remedies, with regard to the rescission, the cancellation or the compensation for damage, but univocal is the conclusion to which arrives, in each system, the judgment of blameworthiness, which has the superior objective of protecting the injured party.

These results are achieved mostly thanks to a rebalancing harmonization operated by the different legal formants: so that statutes and case law, in reciprocal and proportional relationship of subsidiarity, lead, by separate ways, to a surprising uniformity of practical results, as well as the *ratio* underlying them.

It should also be considered how the subjective notions of fraud and deceit are connected, in the two areas of analysis, to as many objective elements, such as the different connotations of the torts, or the content and the contractual terms, with specific rules and general principles of reference, which regulates the *genera* and the *species* of duty and damage: the entire and in some ways unitary doctrine, which stems from it, poses itself as the legal core of the global, diversified world of interpersonal legal relations.

As a result, in the analysis of case law and statutes, legal institutions and related paradigms – in the various systems - the comparative law, rather than method or science, reifies itself in the inescapable framework of general doctrine of tort liability in civil law and common law.

2. The reasonableness, which plays the role of a general clause such as that of good faith of Roman law, allows the judge to interpret with the necessary flexibility the criterion of proximate cause of the wrong, freeing themselves from the predetermined forms of other principles, in favor of the right of the victim of the tort to compensatory damages.

Thus the flexible application of the criterion of *proximate cause* and the intent of the judge, determined to counter the willful misconduct of the wrongdoers, is common to all the major legal systems considered, consistent with the dual purpose of compensatory intent and intent to prevention, inherent in the action in tort.

The Italian and the French judge, like that of common law, also appear well determined to charge the wrongdoer moved by specific malice for the remote and indirect consequences of his reprehensible conduct.

And sometimes, indeed, the Anglo-American judge shows himself, in substance, as the most convinced supporter of the only founding principle of the original doctrine of liability *ex lege Aquilia*, centering not on the notion of *culpa*/fault, but on the certain attribution to the offender of *damnum iniuria datum*. And this is valid even if departing from an ancient, always followed precedent based on the rule: "an act otherwise lawful, although harmful, does not become actionable by being done

maliciously"[1]: the new *principle* which takes over, asserts instead that "an action so despicable such as the malicious one imposes and justifies recourse to other legal canons more favorable to the injured party"[2].

Therefore, in the evaluation of causation, the imputability of malicious behavior seems to act as an unwritten general clause of proceeding in tort.

In addition, in the various legal systems the case law, in full agreement of jurisprudence, sometimes sees the first and decisive event even in deceit that takes the form of an omission or a non-action. As if the objective relevance of the animosity felt - *contra legem* - towards the neighbour is a condition in itself sufficient to charging the accused of the wished injurious event, even if only indirectly caused.

Another common forming factor emerges in continental legal systems, with reference to compensation for damages, which can be defined as the logical antecedent of the test of causation: although it is clear that the classical Latin law known by Domat and Pothier is reread, in Germany, *in Pandectist perspective*, it is equally undeniable that the *Code Napoléon* is a source or integrated component of almost all civil law systems: in Italian law it could be said to be almost native, rooted as it is in the substrate common to pre-unit codes.

And in the present analysis, and with reference to the example of Giuliano cited by Labeone[3], again stands out that the need to mitigate the burden of compensation, from which derives the evaluation of remoteness of injury, is born from the intuition of Pothier, that clearly - as Paolo Cendon, with the hint of a smile asserts - had in mind a…cow, but yet is equally certain that the malicious persons in charge, not only French, no more connected to an infinite chain of compensatory damages, are still debtors to Pothier's *pecus morbosum*.

3. It is clear from carried out research how the levels of liability in tort or liability in contract and the notions of fault - and sometimes of malice - complement and intersect, arriving often, in certain cases, at the coexistence and concurrence of the two elements[4].

Moreover, at the base of the notions of fault and deceit, as well as compensation for damage, the concepts and remedies typical of classic Roman law, or even older, unfold, and the history of the millennial journey that led to their emergence – in the age of the great Codes – is certainly diversified, *più e meno altrove*, but still verifiable, as has been said, also in the Anglo-American systems.

This can be pointed out as much in the concept of contractual misrepresentation as *machinatio, fraud* or *deception,* as in the general sense of the *dolus bonus*, considered excusable, lawful and in any case irrelevant: from the *naturaliter licet contrahentibus se circumvenire* up to *mere puff* of common law[5].

In every system, however, the *dolus bonus* finds today a strong protection in the rules set up in consumer's defense, which safeguards - indirectly or not – even the professionals of the market from the dangers of unfair competition; so that, in full accordance with the jurisprudence, the lawgiver and the judge, with the support of the Authorities, condemn and sanction the misleading advertising practices that go beyond the limit of the statements – although hyperbolic - intervening between the parties, and which everyone accepts, but that no reasonable man believes.

No place, in general, for the other Latin concept of *dolus bonus:* that *sollertia* that takes shape as *si adversus hostem latronemve quis machinetur* (D. 4.3.1.3, Ulp. 11 *ad ed.*).

Different is the *quaestio* of degrees of guilt, from *culpa lata* to *culpa levissima* that exist in *civil law*, but denied - and almost mocked - in the courts of common law[6].

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[1] It is the principle enunciated in *Allen v. Flood.* [1895] 2 QB 21.

[2] and, with reference to the case in which the remoteness of damage made the chain of causation look quite fragile, if not inexistent, Lindley L.J. concluded that *the intention to injure the plaintiff disposes of any question as to remoteness of damage*, insomuch that the deliberate intention to cause damage resulted, for the House of Lords, decisive and sufficient to compel the defendant to damages: some sort of *punitive judgment*, almost a substitute of *punitive damages*!

[3] D.19.1.13pr. (Ulp. 32 *ad ed.*): "*Iulianus libro quinto decimo inter eum qui sciens quid, aut ignorans vendidit, differentiam facit in condemnatione ex empto; ait enim, qui pecus morbosum, aut lignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestiturum, quanto minoris esse empturus, si ita esse sciissem; si vero sciens reticuit, et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestiturum ei. Sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbis pecoris perierunt, quod interfuit idonae veniisse, erit praestandum*".

[4] Cf., P. G. MONATERI, *Cumulo di azioni*, in *Dig. Ipertestuale*, 1989.

[5] Cf. *De Beers Abrasives v. International General Electric*, [1975], F.S.R. 323. *Adde*, G. CRISCUOLI, *Il criterio discretivo fra «dolus bonus» e «dolus malus»*, in *Annali sem. giur. Univ. Palermo*, 1957, 26, 5; C. M. BIANCA, *Il negozio giuridico*, Padova, 2002; R. SACCO, Dolus bonus, in *Dig. Ipertestuale*, 2012.

With regard to contractual liability, especially emerges the strict liability of the non-performing contractor, that in the Anglo-American legal system, excluding the hypothesis of frustration, rejects any exception and does not admit the error: error however excusable, even when it concerns a law, in the field of torts.

After all**,** the italian term *prestazione* retains even in the etymology a reference to the latin root of contractual fault: *culpam praestare* expresses the obligation of the debtor to anticipate and avoid any *facere* which can result in damage caused to third parties, while the *diligentiam praestare* implies a duty to put in place the necessary behaviour to preserve the interest of the other party, the lack of which integrates a proper case of contractual fault by omission[7].

It is widely spread instead, in every legal system, the notion of fault joined by strict liability, especially in the sector of product liability, with regard to accidents related to hazardous activities and products imminently or inherently dangerous.

4. It should be noted that, even in the North American common law, the doctrine of strict liability has increasingly expanded from the first half of the nineteenth century, contrasting, by action in tort for negligence[8], the many accidents at work that have marked the first industrial era. The turning point that denoted the decisive step from breach of duty of care to the without negligence liability, to the strict liability, concerns the moment in which the neighbour rule formulated by Atkin and now underlying the practical meaning of tort of negligence is found, like a general principle, in any kind of damage, in the parallel expansion of the duty of care which quickly permeates almost the entire field of tort and becomes the cardinal rule of liability for defective products.

So that in proceedings for damage the inverse problem will arise, associated to the opposite need to limit the burden of damages, very frequently connected to devastating <for industries> punitive damages: the North-American judge will succeed in some way to contain their recognition by applying an <ulterior> flexibility rule, related to the identification of higher and compelling *policy considerations*.

So the strict liability, extending beyond the need of an effective commercial relationship between manufacturer and injured person[9], which has conveyed the case of damage in the flexible vessel ruled by the hendiadys: duty of care/neighbour principle, is now characterized by an unavoidable need for measure, which can be modulated by *reasonable judge of common law*. This, though unable to deny a sufficient causation between tortfeasor and damage, will be able to refuse damages recognizing, naturally in his …judgment, concurring appropriate elements of policy consideration. There is no equal of this in civil law.

Moreover, again in the field of tort liability, the English Pollock unsuccessfully tried, almost in the same way of a civil lawyer, a distribution of torts in three general categories including, respectively, malicious torts, negligent torts and torts by strict liability, together with the use of an exempting circumstance based, in particular, on the exercise of a right[10].

Therefore, an analysis that touches the area of tortious liability cannot be separated from that of product liability, which might stand as a paradigmatic example of the entire cross doctrine *de qua*: in fact, more than a century earlier than in civil law, it is born in tort law[11] and then hinges upon the doctrine of the contractual liability and compensation for damage, to finally merge in the general

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[6] *English jurist have always had a healthy disrespect for the latter distinction … Lord Denman C.J. doubted whether any intelligible distinction exists; (1866) … Willes J. famously observed that gross negligence is ordinary negligence with a vituperative epithet*: such was the clarification by judge Millet in the decision of the case *Armitage v. Nurse*.[1997] EWCA Civ 1279, [1998].

[7] Cf.,C. CANNATA, *Responsabilità contrattuale nel diritto romano medievale, e moderno*, n. 1, in *Dig. Ipertestuale*, 1998

[8] Cf., on the topic, P. GALLO, *L'elemento oggettivo del Tort of Negligence,* Milano, 1988.

[9] Indeed, at the beginning of the industrial age, the lack of a commercial relationship excluded the direct liability of manufacturers towards their customers. Moreover, not being yet generalized the sharing of the existence of a general principle of duty of care, a non-contractual liability in connection with an action in tort was not even conceived. Furthermore, in the nineteenth century, the expansion of the tort of negligence removed the special immunity that characterized the work of the producer, such as that connected to the many industrial accidents.

[10] F. Pollock, *The Law of Torts*, London, 1887.

[11] On the distinction between british and north-american *common law*, cf. U. MATTEI, *Ripensando il rapporto fra diritto inglese e diritto americano: l'esempio dei torts,* in *Quadrimestre,* 1991; Cf. in *terms of law of torts,* M. SERIO, *I fondamenti del diritto dei "torts"*, in F. MACIOCE (curated by), *La responsabilità civile nei sistemi di* Common law, Padova, Cedam, 1989, p. 33 ss.

system of protection that, after a century and a half, is set up by the other legal systems, in favor of the consumer, that is the weaker contracting party[12].

Again with regard to product liability, it is prominent the importance of the first North American cases of damage and liability that led to the emergence (and the solution) of issues with dramatic social consequences, such as the actions of persons injured from asbestos. This had a radical impact even on the economy, for having led to the almost total elimination of materials and techniques harmful for the industry operators and third parties and, after the recognition of huge compensations, to the closure of a whole typology of producing industries[13].

Equally significant was the incisiveness of actions for product liability in the pharmaceutical sector, for the direct influence - positive or deleterious - on the well-being and health of individuals, and the consequences in terms of negative regression at first, then - instead - in an incentive towards greater and responsible attention to the research and study of new drugs or bio techniques, in the right balance between benefit and harm with regard to physical integrity of the consumer.

A special case, for the anomaly of contrasting results, are - again in the North American environment - the *Tobacco Litigations* in which guilt and malice of tobacco products manufacturers, even in the face of overt evidence of mortal harm and pernicious as captivating addiction[14], remain, for over half a century, inexplicably unpunished, not only for the constant guidance of the juries in acquittal sense, but also because of the difficulty of reaching the actual *trial.* And this led, both for the many, almost ritual exceptions raised by the judge in the certification procedures for the authorization of the class actions, and for the skilled delaying tactics carried out by lawyers of manufacturers - given the huge asymmetry in terms of economic power between the habitual and the occasional parts, typical in serial causes - to the levitation of the pre-trial stage costs[15].

Remarkable, finally, regarding a singular and purely economic originality, the formulation of the rule of *market share liability*, based on the '*fungibility*' of offending products[16], where strict liability, very practical and effective criterion for the courts in decreeing damages, was allocated proportionally, based on market share, among all the defendants in *the mass action*,[17].

It is relevant, however, how in the North American common law, earlier than in other legal systems, the rights to privacy have been protected, as much as the consumer rights, both integrated in cases of product liability which appeared, with evidence and outcry, hundred and fifty years ago[18].

Then, as part of a comparative reflection on responsibility, product liability perhaps comes to take shape as a compendium and exemplification of the composite doctrine *de qua* and the overall cross-discipline. Today, in fact, the entire system of common law tort liability takes place along the two riverbeds of contract law and tort law, communicating *inter se*, in the conscious sharing of the common origin from the breach of duty of care, that Lord Atkin liked to call *the duty of care to our neighbours* (founded more than on *neminem laedere*, on the duty not to harm the neighbor)[19].

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[12] The reference is necessary, today, even regarding the composite and extremely relevant matter of online contract and e-commerce. *Adde*, on the topic, A. G. PARISI, *E-contract e privacy*, Torino, 2015.

[13] At the start of the last century, the huge increase of the causes of damage and their costs - charged to producers – generated a chain of crisis, both in the production sector and in the connected insurance system. Moreover, many industries, such as manufacturers of asbestos, have been forced to exit the market.

[14] moreover, consciously induced by cigarette manufacturers. On the topic, cf. G. PONZANELLI, *Il caso Cipollone: la tutela del fumatore tra normativa federale e statuale (Nota a U. S. Supreme Court, 24 giugno 1992, Cipollone c. Ligget Group inc.),* in *Foro It.,* 1992, IV, 502.

[15] Consequently, between 1954 and 1994 none of the hundreds of plaintiff ever got the slightest compensation from tobacco companies. Which is singular, if we consider the series of unprecedented success of damaged that had acted against other manufacturers of defective products. On the topic, cf. G. PONZANELLI, *Class action, tutela dei fumatori e circolazione dei modelli giuridici (Nota a Federai Court U.S. for the district of Louisiana, 17 febbraio 1995, Castano c. The American Tobacco co. Adde*: ID., *Il caso Brown e il diritto italiano della responsabilità civile del produttore (Nota a U. S. Supreme Court California, 31 marzo 1988, Brown c. Abbott Laboratories),* in *Foro It.,* 1989, IV, 128.

[16] so that the product liability became ... proportionally shared among all manufacturers of products characterized by mutual fungibility, given the objective impossibility to find, *beyond any possible doubt*, against one or more, considered individually, the fateful '*smoking gun*'.

[17] Cf., on the topic, M. GRAZIADEI, *Il patto e il dolo*, in *Scritti in onore di Rodolfo Sacco*, *La comparazione giuridica alle soglie del 3 millennio*, (curated by) P. CENDON, Milano, 1994.

[18] If considered as leading case, *in nuce* or in absolute, *Thomas v. Winchester*, 6 NY 397 (1852).

[19] Cf. *Donoghue v. Stevenson,* [1932] All ER Rep. 1: *The law should recognize a unifying principle that we owe a duty of reasonable care to our neighbors… The rule that you are to love your neighbour becomes in law, you must not injure your neighbour.* (From Lord Atkin's opinion).

5. In light of these considerations, it is relevant that only through a comparative analysis, substantial similarities and identities - of values and judgment - can be grasped and simultaneously can be appreciated the diversity of method, conceptual or linguistic, more and less consistent, but actually irrelevant to the substance of rights: so that the jurist of comparative law may well be called the lawyer of a country without borders, where the procedural and perspectival variables appear similar, in a way, to dialects - all historically and rationally justified - of the same essential common language.

Called, as it may be, inherent standardization or juridical κοινη, global law, in the global world, is necessarily the result of the comparative method that is its frame and basis.

A further reflection comes from the analysis of the complex world of the law of contract and law of torts, ruled by the intrinsic and very wide discretionary power given to the judge lawmaker, who decides/administers equity and justice, roaming the universe of cases, elementary particles of the Anglo-American legal reality.

It is amazing that an entire socioeconomic, cultural, legal system rests on the competence, integrity and balance of the judge. Even if in the foreign observer a doubt arises, too much Continental, or maybe too much Italian: how many ruinous consequences would result from a so large degree of autonomy, if (or when) it is not placed in clean hands, but in the wrong hands?

However, even this hypothesis becomes inconsistent, when you consider that in more than a thousand years of history the judge is both the height and the root of all the constructions of the law.

An additional deduction emerges: the comparative method is, at times, the search for a code, an algorithm whose *formants,* for a civil lawyer, are almost all to be discovered or to be redefined. Possessing that code, it could be less difficult to read, to browse and - especially - to accept (and not to swallow up) a system where the general categories are the single remedies, which are suitable and compliant, under the expert guidance of the judge-helmsman, to the individual stories of the men and the diverse and varied material facts afferent to each single remedy.

The common lawyer does not detect chaos or disorder because, *healthy*, from his perspective, he does not take them into account, so that he briskly moves along petrified coordinates of a system founded on the - few - forms of action and is securely oriented between the bright and immutable lights, as those are, of remedies.

It is a change of perspective; it is the choice of the right "vanishing point" that leads - in awareness -, to the correct solution of any case that in the age-old practice fits almost automatically into the scheme, in the *writ* already owned by the jurist across the Channel.

Cases not as disorder but as humanity: because the equitable law can only be human and suited for the individual person and the particular circumstance.

For Balzac Life was in the Fact. If the literature of the Realism aspires, virtually, to unrivaled veracity of the records of the Registry, and the great *Comédie Humaine* is the living and material mirror of real life, in the catalogs of the case law it is the legal and humane vision of life, the *Legal human Comedy* of common law: fascinating in the colors and in the nuances of a vivid portrait, of fleshy *tranches de vie*, ultimately the core of the entire social and juridical experience, with the miseries, deviances, the ideals that integrate, in a Democritean *continuum*, the living matter.