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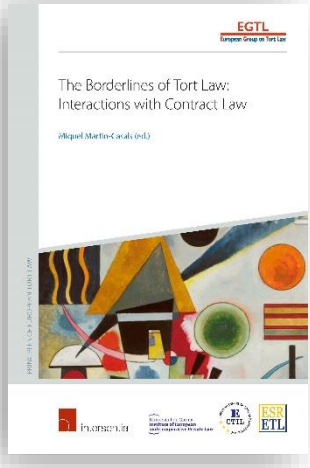

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THE BORDERLINES OF TORT LAW IN ITALY

Cristina Amato and Giovanni Comandé

QUESTIONS

CASES

QUESTIONS

I. TRACING THE BORDERLINES

A. DISTINCTION BETWEEN TORT AND CONTRACT

The distinction between tort and contract in the Italian legal system can be explained as follows. 1

1) Contractual Liability

The *nomen iuris* defines the obligation to pay compensation for damage resulting from the non-fulfilment of a pre-existing agreement (hereinafter: obligation), leaving out of consideration whether or not the origin of the agreement is the contract. Indeed, scholars, instead of referring to contractual liability, frequently refer to the breach of a pre-existent duty.[1] 2

Contractual liability is based on the general provision of art 1218 of the Italian Civil Code (It cc), founding liability of the debtor on his/her objective fault in failing to fulfil a contractual obligation, within the limits of force majeure and act of God. 3

Italian law includes a special set of rules to regulate some contractual types (so-called typified contracts) either under art 1470 ff It cc or under special statutes. Within the limits of the law concerning any contract, one can face specific provisions as regards contractual liability that integrate the general rule provided for by art 1218 It cc. 4

2) Non-Contractual/Tort Liability

Liability arising in the absence of a contractual relationship is liability in tort: it is an unlawful action, a wrong that causes damage that shall be compensated. The unlawful action is the direct source of the duty to compensate damage. 5

Liability in tort is supported by the general clause of liability for fault under art 2043 It cc. 6

Italian law provides for special rules for tort liability caused both by the wrongdoer's own actions and by the action of a third party for whom he/she is liable. These rules are governed either by the Civil Code (art 2049 ff) or by special statutes (ie the Law on Product Liability, Decreto Presidente della Repubblica: d PR no 224/1998, now arts 114 ff Consumer Code; or the Law concerning 7

[1] *Ex plurimis*: *F Giardina*, Responsabilità contrattuale e responsabilità extracontrattuale (1993) 14 ff, 75 ff.

Liability for Nuclear Damage, 31 December 1962, no 1860, as modified by the d PR 10 May 1975, no 519).

8 To sum up: the original frame of the Italian Civil Code organises non-contractual liability as a special kind of liability, regulated at the end of the fourth book devoted to the law of obligations. Contractual liability (that is, default/breach of an obligation) instead is regulated at the beginning of the fourth book devoted generally to the law of obligations.

9 The structural differences between contract and tort explain why the Italian system draws a clear line between the two sources of obligations. This is why a different set of rules is provided for both sources (see below sec I.C).

B. EXISTENCE OF A 'GREY ZONE'?

10 The Italian Civil Code recognises *culpa in contrahendo* at arts 1337 and 1338, dealing with pre-contractual liability (*responsabilità precontrattuale*).[2] Pre-contractual liability represents an original and innovative peculiarity of the Italian Civil Code. Article 1337 It cc bestows on the prospective parties of a contract (that may never be stipulated) a general duty to bargain in good faith. Article 1338 It cc applies the above-mentioned general duty to cases where a contract has been concluded though it revealed itself ineffective (for any reason): in this case the party who knew or should have known of the reason that rendered the contract ineffective is held liable vis-à-vis the innocent party who reasonably relied on the validity of the contract. The breach of the above-mentioned duty to bargain in good faith gives the innocent party a right to reliance damages (*interesse negativo*), even if a valid contract has been concluded:[3] because a contract has not been concluded, what is restored is *neither* the breach of an obligation *nor* the (positive) interest to the performance of the obligation. Reliance damages, on the contrary, consist in restoring either the detriment suffered or the increase of damage, including loss of earnings and any direct damage, suffered by the innocent party.[4]

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2 *PG Monateri*, La responsabilità contrattuale e precontrattuale (1998); *G D'Amico*, La responsabilità precontrattuale, in: V Roppo (ed), Trattato del contratto, vol V, t 2 (2006); *P Trimarchi*, La responsabilità civile: atti illeciti, rischio, danno (2017) 85 ff.; *B Marucci*, La responsabilità precontrattuale (2018) 2 Rassegna di diritto civile 528 ff.

3 Cassazione civile (Italian High Court, Cass civ) 8 October 2008, no 24795 (2009) I Nuova giurisprudenza civile commentata 205; Cassazione civile, Sezioni Unite (Cass civ, Sez Un), 19 December 2007, no 26725 (2008) II Rivista di diritto commerciale 17; (2008) Danno e responsabilità 525 note *V Roppo*, La nullità virtuale del contratto dopo la sentenza Rordorf. See recently: *C Miriello*, La responsabilità precontrattuale in ipotesi di contratto valido e efficace, ma pregiudizievole (2006) La responsabilità civile 649.

4 Cass civ, Sez Un, 19 December 2007, no 26725; Cass civ, 29 September 2005, no 19024.

The duty to bargain in good faith is a general clause, whose meaning has been identified by courts as having three main specific features: (1) unfair withdrawal from negotiations;[5] (2) duty to disclose relevant information to the other party;[6] and (3) confidentiality duty.[7] It is important to stress that, in any of the situations listed, what is relevant is not the failure to sign a contract, but the relevance of the reliance of the innocent party on the honest behaviour of the other. 11

As for the nature and discipline of the general duty to bargain in good faith, case law and scholars do not agree. The majority of the opinions of the High Court consider this liability as tortious.[8] This principle is also affirmed in cases where the pre-contractual relationship involves a public entity.[9] Though most 12

5 Cass civ, 10 March 2016, no 4718; Cass civ, 10 January 2013, no 477; Cass civ, 10 June 2005, no 12313 (2006) I Nuova giurisprudenza civile commentata 349; Cass civ, 14 February 2000, no 1632 (2000) Giurisprudenza italiana 2250; Cass civ, 10 June 2005, no 12313 (2006) I Nuova giurisprudenza civile commentata 349.

6 Cass civ, 23 March 2016, no 5762; Cass civ, 20 December 2011, no 27648 (2012) I Contratti 235.

7 Tribunale Amministrativo Regionale (TAR) Catania, 11 July 2013, no 2005.

8 Recently: Cass civ, 16 January 2013, no 1000 (2013) Giustizia civile Massimario; Cass civ, Sez Un, ord 19 October 2012, no 18092 (2012) 22 ottobre Diritto e giustizia online; Cass civ, 20 March 2012, no 4382 (2012) Responsabilità civile e previdenza 1166 note *M Mattioni*, Contratto 'interinale' concluso durante una trattativa e responsabilità precontrattuale; Cass civ, Sez Un, ord 27 February 2012, no 2926 (2012) Giustizia civile Massimario 222; Cass civ, Sez Un, 10 July 2003, no 19896; Cass civ, 11 September 2003, no 13390 (2004) Responsabilità civile e previdenza 400 note *L Vedovato*, Competenza giurisdizionale e natura aquiliana della responsabilità precontrattuale: il responso della Corte di giustizia e gli oblii della Corte di Cassazione. For an opposite affirming the contractual nature of pre-contractual liability see Cass civ, 20 December 2011, no 27648 (2012) Responsabilità civile e previdenza 1949 note *R Scognamiglio*, Tutela dell'affidamento, violazione dell'obbligo della buona fede e natura della responsabilità precontrattuale; *C Castronovo*, La Cassazione supera se stessa e rivede la responsabilità precontrattuale (2012) Europa e diritto privato 4; *F Della Negra*, *Culpa in contrahendo*, contatto sociale e modelli di responsabilità (2012) I Contratti 4; *E Fasoli*, Contatto sociale, dovere di buona fede e fonti delle obbligazioni: una sentenza (quasi) 'tedesca' (2012) Giurisprudenza italiana 12; Corte di Appello (App) Milano, 2 February 1990 (1991) Giurisprudenza di merito 744; Tribunale (Trib) Milano, 11 January 1988 (1988) Responsabilità civile e previdenza 772.

9 Cass civ, Sez Un, 11 January 1977, no 93; Cass civ, 25 May 1985, no 3178 (1985) Giustizia civile Massimario fascicolo 5. Cf recently: Cass civ, 10 June 2005, no 12313 (2005) Diritto e giustizia 15 note *C Garufi*, Nelle trattative l'ente è come il privato; Cass civ, 1 March 2007, no 4856 (2008) Responsabilità civile e previdenza 1608 note *MG Anghelone*, Sospensione delle trattative e responsabilità precontrattuale della P.A.; Cass civ, Sez Un, 12 May 2008, no 11656 (2009) Rivista del notariato 1487 note *M Graziano*, Le Sezioni Unite intervengono nella materia dei rapporti tra vendita di cosa futura e appalto; Cass civ, 10 January 2013, no 477 (2013) I Foro italiano 845. Recently, an important judgment rendered by the Supreme Administrative Court, Consiglio di Stato, has argued in favour of the pre-contractual liability of the public administration before the award of contract: Cons Stato, Adunanza Plenaria, 04 May 2018, no 5 (2018) 12 Corriere giuridico 1547 note *F Trimarchi Banfi*, La responsabilità dell'amministrazione per il danno da affidamento nella sentenza dell'adunanza plenaria n. 5 del 2018.

scholars agree with this solution,[10] there is an important and authoritative thesis according to which pre-contractual liability is contractual in nature. From this perspective, the principle of good faith is the direct source of the duty to compensate reliance damage suffered by one party caused by the other during negotiations. The breach of the general duty triggers a liability different in its nature from liability in tort, as it is rooted in a 'special relationship', or 'social contact' (*contatto sociale*)[11] existing between the prospective parties to a contract. The obligation to pay damages arises whenever there is evidence that breaking off negotiations has caused a detriment to the innocent party who relied on the fair conduct of the counterparty, who should behave in true respect of the interests of the innocent party. In compliance with the latter approach, recent opinions delivered by the High Court (Corte di Cassazione)[12] have referred pre-contractual liability to the law (art 1173 It cc) as a direct source of such a special obligation.

C. COMMON OR DIFFERENT RULES REGULATING TORT AND CONTRACT

13 The Italian Civil Code devotes Title I of Book IV to the law of obligations as a general part, dealing with several events in the life of an obligation, regardless of its source (contract or tort). Therefore, fulfilment of an obligation, liability for breach of the obligation (damages), joint and several liability, assignment of debts, and termination of the obligation are all topics regulated by the Italian Civil Code through common general rules.

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10 Cf *CM Bianca*, Il contratto, Diritto civile, vol III (2000) 158 ff; *R Sacco/G De Nova*, Il contratto, t 2, in: R Sacco (ed), Trattato di diritto civile (2004) 235 ff.

11 *C Castronovo*, Information Duties and Precontractual Good Faith (2009) European Review of Private Law (ERPL) 559; *A Di Majo*, Delle obbligazioni in generale, in: V Scialoja/G Branca (eds), Commentario al codice civile (1988) 162 ff; *CA Cannata*, Sulle fonti delle obbligazioni, in: G Visintini (ed), Trattato della responsabilità contrattuale, vol I (2009) 29 ff. See recently: G Varanese, "Sonderverbindung" e responsabilità precontrattuale da contatto sociale (2018) 1 Rivista di diritto civile 116–143; *P Gallo*, 1 Quale futuro per il contatto sociale in Italia? (2017) 12 Nuova Giurisprudenza Civile Commentata 1759 ff.; *A Albanese*, La lunga marcia della responsabilità precontrattuale: dalla "culpa in contrahendo" alla violazione di obblighi di protezione (2017) 3 Europa e diritto private 1129 ff.

12 Cass 12 July 2016, no 14188 note *A Di Majo*, La culpa in contrahendo tra contratto e torto (2016) 12 Giurisprudenza italiana 2565; *C Scognamiglio*, Verso il definitivo accreditamento della tesi della natura contrattuale della responsabilità precontrattuale (2016) 11 Nuova giurisprudenza civile commentata 1515; *id*, Responsabilità precontrattuale e 'contatto sociale qualificato' (2016) 6 Responsabilità civile e previdenza 1950; Cass civ, 20 December 2011, no 27648; Cass civ, 10 August 2012, no 14400; Cass civ, 21 November 2011, no 24438. *V Giovanna*, Il dibattito sulla natura della responsabilità precontrattuale rivisitato alla luce della casistica (2017) 3 Contratto e impresa 335–355.

The general theory on damages is set out in arts 1223–1227 It cc, that is in the part of the Civil Code devoted to common general rules to which some rules in tort law refer. In particular, art 2056 It cc on the evaluation of damages in tort merely states that 'damages to the injured person must be calculated according to arts 1223, 1226, 1227', mainly referring to cases of breach of contract. Nevertheless, it must be underlined that this original framework has been questioned by scholars' interpretation, case law and special statutes: Italy has experienced a mutual exchange in the central role of contractual and tortious liability with regard to the law of damages. Tort law constantly seems to appear as the general framework of liability, while contractual liability seems a special framework. A clear example is given by non-economic loss (see below at no 20). Yet in some areas, such as medical liability, it appears that courts are applying contract rules as default rules in order to make the burden of proof easier for plaintiffs. 14

In addition to a general part, there are some special rules devoted to contract or to tort liability. 15

As explained above in sec I.A, the different structure of the two sources of obligations necessarily implies different sets of rules. Below a list of different rules regulating contract and tort are provided. 16

1) Contract

(a) The creditor only has the burden of proving the non-fulfilment of an obligation by the debtor. It is up to the debtor in breach to demonstrate that his default was due to factors beyond his will, and which cannot be imputed to him. The Corte di Cassazione has established[13] that the creditor's burden of proof is limited to alleging the existence of a previous contractual relationship and the breach of the obligation by the debtor: the creditor has no further burden of proof. 17

(b) The statutory limitation period for claiming compensation for damage is 10 years, unless otherwise provided by the law (eg credit deriving from professional unpaid invoices have a short limitation period of three years: art 2956, para 1, no 2 It cc; credit deriving from a contract of education are subject to a limitation period of one year: art 2955 It cc, para 1, no 1). 18

(c) Under contract law, only damage which was foreseeable can be restored. Foreseeability is assessed on the date of the conclusion of the contract. 19

[13] Cass civ, Sez Un, 30 October 2001, no 13533 (2002) I Foro italiano 770 note *P Laghezza*, Inadempimento ed onere della prova: le sezioni unite e la difficile arte del rammendo.

20 *(d)* Non-economic losses were not recognised in contract law according to a previous interpretation of the Civil Code. As shall be argued below (no 45), a recent decision of the High Court superseded this approach: art 2059 It cc was originally interpreted to apply only to the law of tort but today it can also be applied to obligations deriving from a previous contractual relationship.[14]

2) Tort

21 *(a)* Under the law of tort, art 2043 It cc recognises a heavier burden of proof: it is up to the victim to demonstrate intent or fault on the part of the injurer, together with damage and causation between the two.

22 *(b)* There are shorter limitation periods: five years is the general statutory limitation period, but in several cases, both in the Civil Code or in special statutes, the limitation periods can be even shorter (eg three years for product liability: art 125 Italian Consumer Code).

23 *(c)* In tort, any damage deriving from an unlawful act shall be restored, provided that the creditor gives evidence of the direct causal link between the wrongful act and the wrongful damage. Because no relationship existed before the wrongful act, the question of foreseeability cannot even be raised.

24 *(d)* Non-economic losses are recognised in tort law, within the limits of art 2059 It cc as recently interpreted by the Constitutional Court[15] and by the High Court.[16]

D. APPLICATION OF COMMON RULES IN A DIFFERENT WAY

25 Usually courts do not apply the rules common to tort and contract differently. A few exceptions concern damages:

(a) In contract law, where the obligation has a previous monetary value, damages assessed by the court are defined as monetary debts (*debito di valuta*), and

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14 Cass civ, Sez Un, 11 November 2008, nos 26972, 26973, 26974, 26975 (2009) Responsabilità civile e previdenza 63 note *E Navarretta*, Il valore della persona nei diritti inviolabili e la complessità dei danni non patrimoniali; (2009) Rivista italiana di medicina legale 460 note *M Bona*, La riparazione delle lesioni personali dopo le Sezioni Unite di San Martino: nessuna novità per i medici legali, scompiglio nel diritto; (2009) Giustizia civile 930 note *M Rossetti*, *Post nubila phoebus*, ovvero gli effetti concreti della sentenza delle Sezioni Unite no 26972 del 2008 in tema di danno non patrimoniale; (2009) Rivista italiana di diritto del lavoro 486 note *R Scognamiglio*, Il danno non patrimoniale innanzi alle Sezioni Unite.

15 Corte Costituzionale (Corte Cost), 11 July 2003, no 233 (2003) Responsabilità civile e previdenza 1041 note *P Ziviz*, Il nuovo volto dell'art 2059 c.c.; Corte Cost, 06 October 2014, no 235 (2015) 1 Rivista Italiana di Medicina Legale (e del Diritto in campo sanitario) 295.

16 See fn 14 above.

they are subject to the principle according to which the damage is liquidated on its face value (art 1277 It cc). In tort law, because there is no previous obligation, damages are always assessed by courts at the very moment when the unlawfulness of the tort is assessed, that is on the date of trial; therefore, damages are assessed on their face value when the decision is rendered (*debito di valore*).

(b) In contract law, non-economic losses have only recently been admitted by courts (see above no 20).

(c) In tort law, pure economic losses have only recently been admitted by courts (see below, sec II.D; see also Case 11: Injured rock star), and are awarded only when the unlawfulness of the damage has been assessed.

(d) Loss of chance is a controversial head of damage, recently considered by the Italian courts as general damage, instead of loss of profits. In contract law, courts would qualify the loss of chance as economic damage;[17] in tort law, courts would qualify it as a non-economic loss.[18] This is true especially in cases of medical malpractice, where the plaintiff claims the loss of opportunity of living longer and/or better.

II. MAIN DIFFERENCES BETWEEN TORTIOUS AND CONTRACTUAL LIABILITY

A. DIFFERENCES AS REGARDS THE FOUNDATIONS OF LIABILITY

1) Role of Intention

In contract law, the role of intention in breaching the contract is taken into consideration as a criterion for attributing non-foreseeable damage to the party intentionally in breach (art 1225 It cc).[19] This rule cannot be applied to non-contractual liability because art 1225 is not mentioned by art 2056 and above all because the structure of the two sources of obligations is different. An obligation in contract derives from a previous agreement, from which 26

[17] The most common cases concern the loss of opportunity of a candidate to be successful (Cass civ, 7 October 2010, no 20808 (2010) Giustizia civile Massimario 1300; Trib Roma, 20 October 1999 (2000) Giurisprudenza romana 297); or the loss of opportunity of a worker to be promoted because of the unlawful conduct of his/her employer (Cass civ, Sez Lav, 2 December 1996, no 10748 (1996) Giustizia civile Massimario 1656); or the loss of opportunity of a client to be successful in a suit because of the negligent conduct of his/her lawyer (Cass civ, 27 May 2009, no 12354 (2009) Giustizia civile Massimario 846).

[18] Cass civ, 18 September 2008, no 23846 (2010) Rivista italiana di medicina legale 174 note *A Fiori*, Il più probabile che improbabile ed il più improbabile che probabile.

[19] See *P Cendon*, Il dolo nella responsabilità civile (1974).

damages are assessed. On the other hand, an obligation in tort has no previous reference to which damages can be related; as a matter of fact, the obligation in tort arises when the unlawful conduct causes damage. Therefore, it is commonly acknowledged that damages awarded as a consequence of a tort always include, by definition, compensation even for unforeseeable injuries, notwithstanding the intention of the tortfeasor.

2) Role of Wrongfulness and Fault and their Variations

27 In tort law, fault is a sufficient ground to establish liability. Nevertheless, there are some 'intentional torts': nuisance (art 833 It cc), unlawful interference with contract, unlawful diversion of employees/auxiliaries,[20] and dismissal of a complaint for a criminal offence.[21] Moreover, intention coupled with gross negligence often justifies aggravated damages with a punitive/retributive function: see below sec II.C.5.

28 Intentional liability can be neither excluded nor limited in contract as in tort under art 1229 It cc: see extensively sec III.B.1 below.

29 In contract law, the role of fault is not limited to a 'subjective' notion (personal difficulty or negligence). The 'objective' definition of fault (*diligenza*: art 1176 It cc) refers to an objective notion of impossibility, the contents of which are represented by the impossibility of satisfying the creditors' interests by applying a regular standard of care. 'The regular standard of care' can be ascertained through a cross-reference to the rule of good faith and fair dealing (art 1175 It cc), according to which it is possible to determine and limit the content of the contractual relationship and consequently the obligations of the debtor.[22]

30 In tort law, the role of fault and fraud represents the very foundations of liability, that is the general rule upon which tort law is founded.

31 Fraud consists in the intention to provoke an injury, or it may consist in accepting the risk that an injury to a third party may result from one's conduct the aim of which is to achieve one's own final purpose.

32 Fault, on the other hand, consists in the infringement of the standard of care imposed by the legal system. As for the definition of the 'standard of care', it is an objective standard, though different in content from contract law. In tort law, since no previous agreement exists, the objective standard guidelines are expressed in 'statutes, regulations, orders and disciplines' (art 43, para 1

20 Cass civ, 8 June 2012, no 9386 (2012) Giustizia civile Massimario 767.

21 Cass civ, 12 January 2012, no 300 (2012) Diritto e giustizia online 103 note *G Tarantino*, Querela archiviata: chi non ha denunciato deve risarcire solo se ha agito con dolo.

22 *U Breccia*, Le obbligazioni (1992) 461 ff.

It Criminal Code); negligence, imprudence or malpractice can be affirmed only by taking into account all the relevant circumstances of the case.

3) Role of Strict Liability

In contract law, strict liability has no specific role: as previously affirmed, the contractual standard of care (objective diligence) is necessarily carved out depending on the content and type of the contract. While the burden of proof to provide good reasons for the non-fulfilment of the obligation rests on the debtor, the creditor only needs to show the existence of the contractual relationship and non-fulfilment of the obligation. 33

On the other hand, Italian law provides special rules for tort liability caused both by the wrongdoer's own actions or by the action of a third party for whom he/she is liable (see below sec II.E). The most relevant rules on strict liability within the Civil Code concern: 34

- the employer, for damage caused by employees to third parties (art 2049 It cc);
- the owner, for damage caused by the building in his/her property (art 2053 It cc);
- the owner of an automobile and the driver, in the case of a car accident (art 2054, para 4 It cc).

In all the above cases there are no caps and ceilings, but for the following exceptions: 35

- the manager of a nuclear installation (arts 15–24, L 31.12.1962, no 1860, as modified by d PR no 519/1975): in this case, art 19 provides ceilings to the 'indemnity' (financial guarantee), while damage is covered by the state for the amount exceeding the manager's financial guarantee;
- product liability (art 114 ff It Consumer Code): in this case, art 123 of the Italian Consumer Code (implementing Directive 85/374/CEE of 25 July 1985) provides a threshold of €387,00. Moreover, it is often defined as a 'limited' strict liability, as it is not enough for the plaintiff to prove damage and causation. The plaintiff has to prove the defectiveness of the product according to a regular standard of care in the production as well as in the use of the product.[23]

[23] Cf *G Ponzanelli/L Frata*, La responsabilità del produttore dal 1988 al 2012: una lunga evoluzione venticinquennale, in: E Tosi (ed), La tutela dei consumatori in Internet e nel commercio elettronico (2012) 819 ff. Cass. civ., 29 May 2013, no 13458 (2013) I Foro italiano 2118.

36 Finally, there are some special rules which fall under the heading of so-called 'aggravated liability', or quasi-strict liability. According to such rules, the fault of the tortfeasor is presumed; moreover, the defendant cannot rebut the presumption by demonstrating his/her diligence, he/she has to provide evidence of the external fact interfering with the agent's (diligent) conduct (force majeure, act of God: *caso fortuito, forza maggiore*). This is the case for:

- supervisors, as regards damage caused by those without legal capacity (art 2047 It cc);
- parents, tutors and educational supervisors, as regards damage caused by minors (art 2048 It cc);[24]
- agents carrying out a dangerous activity (art 2050 It cc), such as producing electric energy, producing explosive materials, running a building enterprise, or doing sporting activities (skiing, automobile/bike races, etc.);
- damage caused by goods under the keeper's custody (art 2051 It cc);
- damage caused by animals under the owner's custody (art 2052 It cc).

B. DIFFERENCES AS REGARDS CAUSATION

37 Both in contract and in tort, causation is regulated by art 1223 It cc, according to which damage includes general damage and loss of earnings, provided that both can be considered as consequential damage, that is damage directly deriving from the conduct of the party in breach or the party who acted unlawfully, as well as foreseeable damage. This two-tier test can be summarised in causation in fact, and remoteness of damage.

38 The notion of remoteness of damage is subject to the rule of conflicting proceedings applicable to both contract and tort contained in the Criminal Code, art 41, according to which conflicting proceedings do not exclude causation. This rule has been interpreted in different ways in criminal law and private law over the course of time. At present, courts dealing with damages in private law would apply the test of *causalità adeguata*, rather that the test of *conditio sine qua non*. According to the first test, there is remoteness of damage when the conduct is normally (that is, according to rules of experience) adequate to cause a specific harmful event. The scope of this rule is to exclude that damage which cannot be considered as foreseeable to a reasonable person. This is why courts, in the case of liability based on fault, usually apply this test.

[24] Cass civ, 20 March 2012, no 4395.

It also gives courts the additional possibility to award compensation for indirect damage, provided that it was foreseeable.

On the other hand, the test of *conditio sine qua non* provides that all behaviour can be considered as materially linked to a specific harmful event if, without their occurrence, the same event would not have occurred. 39

C. DIFFERENCES AS REGARDS REMEDIES

Both in contract and in tort law, the compensation of damage is regulated by arts 1223, 1226 and 1227.[25] Therefore, courts, within the limits already described above in secs I.C and I.D, apply the same rules. As regards the equitable evaluation of loss of earnings, see below at no 46. 40

1) Degree of Certainty of the Damage

As regards the degree of certainty, the rule of causation and remoteness of damage expressed by art 1223 It cc is equally applied by courts, regardless of whether the damage derives from a contract or from unlawful conduct. In the case of loss of chance, certainty of damage is ascertained with reference to the principle 'more probable than not'.[26] 41

Damage is compensated with reference to the date of trial, not to the time when the damage occurred. At that moment, both actual and future damage is compensated. Loss of a chance is a future damage for which compensation will be awarded, provided that it is 'more probable than not' that it will arise after the date of trial. On the other hand, loss of earnings is future damage and will be compensated provided that the plaintiff can provide evidence that the likelihood of it occurring is very close to certainty. 42

Damage deriving from tort liability shall be compensated on its face value at the date of trial, being qualified as a monetary debt (*debito di valore*); damage deriving from breach of contract shall take into account the interests accrued on the face value of the original obligation (see above at no 25). 43

2) Compensation for Non-Pecuniary Losses

After a very controversial debate that started during the 1970s, the limits of compensation for non-pecuniary losses have recently been clearly stated by the 44

25 *FD Busnelli/S Patti*, Danno e responsabilità civile (2013) 24 ff.

26 Cass civ, 14 December 2001, no 15810 (2001) Giustizia civile Massimario 2155.

High Court[27] and by the Constitutional Court.[28] Both courts have proposed a construction of the statutory discipline (art 2059 It cc) broadening the original meaning of the rule,[29] linking art 2059 It cc to the Italian Charter (1948). In sum,[30] according to the above-mentioned case law, compensation for non-pecuniary losses, whether deriving from breach of contract or from unlawful conduct, is recognised in three situations: (a) when the non-pecuniary loss is a consequence of a tort which is also a criminal offence; (b) when the recoverability of the non-pecuniary loss is clearly provided by a statutory provision;[31] and (c) when the non-pecuniary loss derives from the infringement of a fundamental right related to the person, directly protected by the Constitution.[32] Notwithstanding the three-tier distinction, non-pecuniary losses shall be quantified by courts as a unified notion.

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27 Cass civ, 31 May 2003, nos 8827, 8828 (2003) Danno e responsabilità 816; Cass civ, Sez Un, 11 November 2008, nos 26972, 26973, 26974, 26975 (fn 14). This construction has been constantly reaffirmed: Cass civ, 15 January 2009, no 794 (2009) Responsabilità civile e previdenza 793. The construction of art 2059 It cc linked to the Charter was originally supported by: *GB Ferri*, Oggetto del diritto della personalità e danno non patrimoniale (1984) I Rivista di diritto commerciale 155; *E Navarretta*, Diritti inviolabili e risarcimento del danno (1996); *id* (ed), Il danno non patrimoniale. Principi, regole e tabella per la liquidazione (2010); *Busnelli/Patti* (fn 25) 68 ff.

28 Corte Cost, 11 July 2003, no 233 (fn 15).

29 The application of art 2059 It cc was limited to cases where non-pecuniary losses were a consequence of criminal offences.

30 See *G Ponzanelli*, Il 'nuovo' danno non patrimoniale (2004) 60 ff.

31 As is certainly the case for the infringement of privacy (art 152, decreto legislativo (d lgs) 30.06.2003, no 196), for the infringement of the copyright (art 159 L 22.04.1941, no 633), for non-pecuniary loss deriving from the unreasonable duration of a trial (L 24.03.2001, no 89), or for non-pecuniary loss arising from a spoilt vacation (art 47 d lgs 22.05.2011, no 79 – Code of Tourism).

32 As is certainly the case for any right and fundamental freedom that cannot be questioned or even limited by the law, nor by any public or private authority: right to psycho-physical health integrity, the right to life, the right to personality, the right to personal freedom, the right to dignity. Coherently, the High Court has recently ruled that damages cannot be awarded in cases of constant train delays and discomfort suffered by subscribers to the railway service, as the nuisance suffered cannot be qualified as a fundamental right: Cass civ, 08 February 2019, no 3720 (2019) Diritto & Giustizia 11 February 2019, note *R Savoia*, Treno sistematicamente in ritardo? Certamente fastidioso, ma non lesivo dei diritti inviolabili della persona. As concerns the right to psycho-physical health integrity in particular, the Italian High Court has recently pointed out that the injuries may in special cases affect the relation life of the injured, which should therefore be restored as such. Moreover, pain and suffering (not necessarily having a medical basis), shall be awarded as non-pecuniary losses related to the person and thus falling within the infringement of a fundamental right, as a separate and autonomous heading of damages: Cass civ 17 January 2018, no 901, (2018) Foro italiano 923; Cass civ, 27 March 2018, no 7513 (2018) 2 Nuova giurisprudenza civile commentata 836; Cass civ, 31 May 2018, no 13770 (2018) Danno e responsabilità 465; Cass civ 31 January 2019, no 278 (2019) 2 Nuova giurisprudenza civile commentata 278 note *G Ponzanelli*, Il nuovo statuto del danno alla persona è stato fissato, ma quali sono le tabelle giuste?

Nevertheless, the modern construction of art 2059 It cc has been questioned by scholars and by some courts under two main arguments: 45

(a) The first does not accept the limitation of recovery of non-pecuniary losses to fundamental constitutional rights. According to this opinion,[33] such a limitation would leave the infringement of a significant number of rights that – though not included in the list of fundamental rights – represent a substantial part of human life and personality without a remedy.[34]
(b) The second argument considers as inappropriate the narrow range of application of non-pecuniary losses when a contractual source of obligation is concerned. According to this view,[35] the different structures of the two sources of obligations (contract and tort) do not allow an overall definition of non-pecuniary loss. In truth, in an obligation to pay damages in tort, the selection of the relevant interests infringed by unlawful conduct can be limited by a statutory provision (art 2059 It cc) as narrowly constructed by courts. On the contrary, in the case of non-pecuniary losses caused by a breach of a previous obligation, the assessment of the relevant interests by the parties, in compliance with the principle of freedom of contract, is relevant. In other words, the parties can include within the contractual liability non-pecuniary interests the infringement of which by the party in breach can provoke a non-pecuniary loss that courts may recognise as recoverable.

3) Compensation for Loss of Earnings and for Loss of Chance

Article 2056, para 2 It cc states that a loss of earnings is always assessed through an equitable evaluation of the case at stake in the case of liability in tort.[36] 46

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33 *P Cendon* (ed), Il *quantum* nel danno esistenziale: giurisprudenza e tabelle (2010); *P Cendon/P Ziviz*, Il risarcimento del danno esistenziale (2003).

34 As is the case for the right to happiness, the right to moral integrity, or the right to develop one's own personality.

35 *CM Bianca*, Diritto civile, vol 5: La responsabilità (1994) 171 ff; *C Scognamiglio*, Il danno non patrimoniale contrattuale, in: S Mazzamuto (ed), Il contratto e le tutele. Prospettive di diritto europeo (2002) 467 ff; *G Conte*, Considerazioni critiche sull'applicazione del paradigma risarcitorio ricavato dall'art 2059 c.c. anche al danno non patrimoniale contrattuale (2010) I Contratti 709; *C Amato*, Danno non patrimoniale da inadempimento contrattuale (2011) Digesto delle discipline privatistiche, Sezione civile (aggiornamento) 302 ff. Pretura (Pret) Salerno, 17 February 1997 (1998) II Giustizia civile 203; Trib Roma, 21 July 2009 (2009) Giurisprudenza di merito 2764; Trib Genova, 4 May 2009 (2009) Giurisprudenza di merito 2764; Giudice di Pace di Piacenza, 30 December 2008 (2009) Danno e responsabilità 2 note *C Amato*, I primi passi del danno non patrimoniale per inadempimento contrattuale dopo le Sezioni Unite di San Martino.

36 See extensively *P Rescigno*, Valutazione equitativa: profili comuni, in: G Visintini (ed), Risarcimento del danno contrattuale ed extracontrattuale (1984) 84 ff; *G Afferni*, Il quantum del danno nella responsabilità precontrattuale (2008) 82 ff.

47 As concerns pre-contractual liability (see above at no 10), the assessment of loss of earnings is admitted, together with general damages, though what differs is the general principle underpinning such awards. According to the Corte di Cassazione, damages to be awarded to an innocent party in the case of frustration of negotiations (art 1337 It cc) or conclusion of an invalid contract (art 1338 It cc) must be limited to so-called 'reliance damage' (*interesse negativo*) suffered by the innocent party, as opposed to 'expectation damage' (*interesse positivo*) to be awarded in the case of breach of a (valid) contract. Such 'reliance damages' shall be assessed by taking into account either the lower enrichment or the highest costs deriving from the breach of the duty of good faith in the pre-contractual phase.[37] This is because such damages are not connected to the non-conclusion of a contract: they instead represent compensation for the infringement of an interest (in not suffering bad faith conduct) rather than a true contractual interest (the performance of a contractual obligation).

48 Compensation for loss of a chance was questioned by Italian scholarship and case law in the past century until the end of the 1960s.[38] At present, it is admitted especially in the areas of labour law (loss of a chance of promotion of civil servants, loss of a chance of recruitment), professional liability, and public procurement procedures. It is not clear, though, whether this damage can be qualified as general damage or loss of earnings. In the last case, the difference between loss of a chance and loss of earnings lies in the degree of certainty: while the latter are very close to certain, the former are subject to the 'more probable than not' principle.

4) Restitutionary Damages

49 Restitutionary damages are awarded where an obligation was not due or unjustified enrichment occurred.[39] More precisely, they are awarded whenever unjustified displacements of assets took place. They do not aim at recovering a loss deriving from the violation of a previous right; they instead aim at protecting a different interest, which is the lawful movement of assets. Their main characteristic is the enrichment of one party at the other's expense/damage.

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37 Cass civ, Sez Un, 19 December 2007, no 26725 (2008) Responsabilità civile e previdenza 556 note *F Greco*, Intermediazione finanziaria: violazione di regole comportamentali e tutela secondo le Sezioni Unite; Cass civ, 29 September 2005, no 19024 (2006) Giurisprudenza commerciale 626 note *CE Salodini*, Obblighi informativi degli intermediari finanziari e risarcimento del danno. La Cassazione e l'interpretazione evolutiva della responsabilità precontrattuale. Cf *B Scumace*, Lucro cessante e interesse negativo (2018) 4 I Contratti 467-473.

38 See *MF Lo Moro Biglia*, Il risarcimento della chance frustrata. Un itinerario incrementale (2006); *M Feola*, Il danno da perdita di *chance* (2004).

39 *A Di Majo*, La tutela civile dei diritti (2003) 320 ff.

Recovery of undue payments together with contractual damages are prescribed in two cases. Firstly, when a payment was not due at all (*indebito oggettivo*): art 2033 It cc. This is the case whenever an executed contract is terminated (breach, rescission, impossibility of performance, invalidity: see arts 422, 1463 It cc). The same restitutionary remedy applies when a payment was rendered to the wrong creditor (*indebito soggettivo ex latere accipientis*). Secondly, when a payment was wrongly rendered by a false debtor (*indebito soggettivo ex latere solventis*): art 2036 It cc.[40] Moreover, specific rules are provided by the Civil Code, aiming at avoiding unjust enrichment at the other party's expenses.[41] Finally, a general action against the unjustified enrichment is regulated by the Civil Code: arts 2041 and 2042 affirm that this general remedy can be triggered when no other remedy exists, provided that the victim can prove his/her loss and the causal connection to the other party's enrichment.[42] 50

As concerns the relationship between restitutionary damages and damages in tort, they are concurrent, in the sense that they can both be claimed whenever the conditions of admissibility of either of them are met.[43] In particular, unjustified enrichment and restitutionary damages represent a valid alternative to liability in tort and restoration damages in the area of protection of intellectual property[44] and competition law.[45] 51

5) Aggravated and Exemplary (or Punitive) Damages

As a general rule, exemplary (punitive) damages as such are not recognised, neither in contract nor in tort.[46] 52

40 Ibid, 348 ff.

41 A typical case occurs when the owner has initiated a proprietary action against a third party who is in possession of the thing, and the former has obtained the restitution of the good: in this instance, the owner is requested to refund the third party of any expenses actually incurred to maintain the thing: arts 1149, 1150 It cc.

42 Cf *C Amato*, Unjustified Enrichment in Book VII DCFR: Beyond the European Models, in: B Pasa/L Morra (eds), Translating the DCFR and Drafting the CESL. A Pragmatic Perspective (2014).

43 *Di Majo* (fn 39) 356 ff.

44 *A Nicolussi*, Proprietà intellettuale e arricchimento ingiustificato: la restituzione degli utili nell'art 465 TRIPs (2002) Rivista di diritto civile 1030; *C Castronovo*, La violazione della proprietà intellettuale come lesione del potere di disposizione. Dal danno all'arricchimento (2003) Diritto industriale 11; *A Plaia*, Proprietà intellettuale e risarcimento del danno (2003); *P Sirena*, Il risarcimento dei c.d. danni punitivi e la restituzione dell'arricchimento senza causa (2006) I Rivista di diritto civile 531.

45 Cf *A Genovese*, Il risarcimento del danno da illecito concorrenziale (2005).

46 *G Ponzanelli*, I danni punitivi (2008) II Nuova giurisprudenza civile commentata 27. See in particular: Cass civ, 19 January 2007, no 1183 (2007) I Foro italiano 1460, which set aside a North American decision awarding punitive damages as contrary to the Italian public order.

53 Aggravated damages can be awarded in contract law whenever one party is intentionally in breach of contract: in this case compensation for non-foreseeable damage is awarded (see above at no 26).

54 Nevertheless, the punitive and retributive function of civil liability is not completely unknown to the Italian legal system.[47] A recent important decision of the Corte di Cassazione admitted the exequatur of a foreign judgment (in the case at stake, an American judgment) awarding punitive damages as it cannot be considered as contrary to the public order, although the Court warned that the punitive function of liability in tort cannot be admitted in the Italian legal system, unless expressly introduced by law.[48]

55 Setting aside the controversial nature of non-pecuniary losses and the multiple functions of tortious liability, there are several statutory rules reflecting – according to the interpretation of relevant scholarship[49] – a punitive and/or retributive function quite different from the traditional compensatory nature of damages. Here follows a non-exhaustive list:

- art 614-*bis* It Code of Civil Procedure,[50] according to which the judge may order payments due to the party in breach of an affirmative duty;[51]
- art 709-*ter* It Code of Civil Procedure,[52] providing damages to the parent and/or to minor offspring in case the other parent has violated fundamental rights of family members;
- art 96 It Code of Civil Procedure, according to which the right to a trial might turn into unlawful conduct should the plaintiff abuse his/her right with

47 *MG Baratella*, Le pene private (2006); *A D'Angelo*, La funzione 'sanzionatoria' della responsabilità civile nella giurisprudenza dei giudici di pace dopo le SS.UU. del novembre 2008, in: G Comandé (ed), Il danno nella giurisprudenza dei giudici di pace. Itinerari tematici e istruzioni per l'uso (2009) 45 ff. Trib Venezia, 14 May 2009 (2009) Responsabilità civile e previdenza 1885.

48 Cass civ, Sez Un, 5 July 2017, no 16601. Cf *G Ponzanelli*, Le Sezioni Unite sui danni punitivi tra diritto internazionale privato e diritto interno (2017) 10 Nuova giurisprudenza civile commentata 1413 ff.

49 *R Pardolesi*, Tutela specifica e tutela per equivalente nella prospettiva dell'analisi economica del diritto, in: S Mazzamuto (ed), Processo e tecniche di attuazione dei diritti, vol I (1989) 522 ff; *U Mattei*, Analisi economica e comparata delle clausole penali nel diritto dei contratti (1996) Rivista critica di diritto privato 603; *FD Busnelli/G Scalfi* (eds), Le pene private (1985).

50 Recently introduced by L 06.08.2015, no 132, art 13.

51 See Cass civ, 15 April 2015, no 7613 (2016) 3 Giurisprudenza italiana 562: this was a case where the Italian High Court recognised the conformity to the Italian public order of a Belgian judgment that had condemned a Belgian corporation to pay a daily penalty clause in favour of the custodian trustee. The payment order referred to the delay in delivering the corporation shares. According to the Italian High Court, such payments should be classified as '*astreintes*', that is as pecuniary sanctions aiming at deterrence, similar to the provision of art 614-*bis* It Code of Civil Procedure.

52 Recently introduced by L 08.02.2006, no 54.

fraud or gross negligence; in this case the judge may award compensation for non-pecuniary losses in favour of the innocent defendant;[53]
- art 129-*bis* It cc, imposing an indemnity to the spouse liable of the invalidity of the marriage, in favour of the spouse in good faith who relied on the validity of the marriage;[54]
- arts 311, para 3, and 313 d lgs 03.04.2006, no 152 (Environmental Code), according to which, where specific performance is not possible, or is impracticable, or has not been complied with by the tortfeasor, the amount of compensation for environmental damage due to the State shall be assessed by the judge taking into account the amount of pecuniary and future losses;[55]
- Art 12 L 08.02.1948, no 47 (regulating the press) introduces a pecuniary award (supplementing non-pecuniary loss) to be paid by a journalist;[56]
- Art 140 para 7, It Consumer Code: this provision gives the judge (who orders an injunction) the power to condemn the party who has not complied with the injunction to the payment of a sum (from €516 to €1,032) per any day of delay;
- Art 1382 It cc (penalty clause) recognises for the creditor – in the case of breach of contract – the right to liquidated damages, without the need to provide any proof either of the existence or of the extension of damage after

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53 *G Bongiorno*, Responsabilità aggravate, in: Enciclopedia giuridica Treccani, vol XXVI (1991) 1 ff; *R Breda*, Recenti sviluppi interpretativi in materia di responsabilità processuale aggravata (2007) Danno e responsabilità 1045; *id*, Responsabilità aggravata ed effetti regolatori, in: PG Monateri/A Somma (eds), Patrimonio, persona e nuove tecniche di 'governo del diritto'. Incentivi, premi, sanzioni. XIX Colloquio biennale Associazione Italiana di diritto comparato, Ferrara 10–12 maggio 2007 (2009) 991; *id*, Responsabilità processuale aggravata tra risarcimento del danno e sanzione (2010) II Nuova giurisprudenza civile commentata 490. Cass civ, Sez Un, 30 September 1989, no 3948 (1989) I Giustizia civile 2535; Cass civ, 6 June 2003, no 9060 (2003) Giustizia civile Massimario 6.

54 *C Marti*, L'art 129-*bis* c.c. nella prospettiva dei rapporti tra pena privata e diritto di famiglia, in: FD Busnelli/G Scalfi (eds), Le pene private (1985) 209 ff.

55 *B Pozzo*, La responsabilità civile per danno all'ambiente tra vecchia e nuova disciplina (2007) Rivista giuridica dell'ambiente 815; *id*, Nuove tecniche di governo del diritto: incentivi, premi, sanzioni. Il territorio della responsabilità civile in campo ambientale, in: PG Monateri/A Somma (eds), Patrimonio, persona e nuove tecniche di 'governo del diritto'. Incentivi, premi, sanzioni. XIX Colloquio biennale Associazione Italiana di diritto comparato, Ferrara 10–12 maggio 2007 (2009) 880; *D Morgante*, La responsabilità per danno all'ambiente, in: P Fava (ed), La responsabilità civile: trattato teorico-pratico (2009) 1841 ff; *S Patti*, La valutazione del danno ambientale (1992) II Rivista di diritto civile 447; *id*, La quantificazione del danno ambientale (2010) Responsabilità civile 485; *M Franzoni*, Il nuovo danno all'ambiente (2009) Responsabilità civile 785.

56 *V Zeno-Zencovich*, Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria *ex* art 12 della legge sulla stampa (1983) Responsabilità civile e previdenza 40; *id*, Revirement della Cassazione sulle sanzioni civili punitive contro la stampa (1986) Diritto dell'informazione e dell'informatica 473; *MG Baratella*, La riparazione pecuniaria (2001) Responsabilità comunicazione e impresa 295. Cass civ, 7 November 2000, no 14485 (2001) Giurisprudenza italiana 1360: the High Court has expressly recognised the punitive function of this provision.

the breach. In order to avoid abuse, the Code (at art 1384) also gives the judge the power to reduce the original amount of the penalty clause, provided that it be may considered as grossly excessive,[57] or that the obligation has been partly executed by the party in breach, having regard to the interest of the creditor to the performance.[58]

6) Other Remedies

56 Having regard to the statutory texts and to case law, it can be inferred that both specific performance and restoration in kind are secondary remedies, whereas damages remain the primary remedy.

57 Specific performance in contract law always seems possible in principle (art 1453 It cc), but for the irreplaceable nature of the object of the contract or the destruction of the object of the contract.[59]

58 Restoration in kind in tort law is expressly regulated by art 2058 It cc: the statutory text provides for the possibility of restoration in kind, as an alternative to damages, provided that it is requested by the injured party and that it is not unreasonably expensive for the injurer.

59 Examples of specific performance in tort law are:

- the publication of the court's decision in newspapers in cases of infringement of honour or reputation (art 186 Criminal Code; art 120, para 1, Civil Procedure Code);
- the release of a mortgage in the case of professional liability of a notary public who has registered a mortgage but has not mentioned the existence of the mortgage into the deed for the sale of a real estate.[60]

60 As concerns injunctions, they are unanimously considered as remedies that have no *general* application in private law. They aim at restoring the previous situation, notwithstanding the damage suffered by the victims (that may be claimed in a separate action).

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57 The Supreme Court has interpreted the function of the judiciary power to reduce the penalty clause as corrective of the parties' freedom of contract, in order to bring the agreement to an equitable balance, in the name of a public interest (and not only on behalf of the debtor's inequality of bargaining power): Cass civ, Sez Un, 13 September 2005, no 18128 (2006) I Giurisprudenza italiana 2279.

58 *A Spatuzzi*, L'entità della penale, tra 'lex contractus' ed eterointegrazione giudiziale (2016) I Contratti 15; *FP Patti*, Penalty Clauses in Italian Law (2015) 3 ERPL 297; *FP Patti*, Il controllo giudiziale della caparra confirmatoria (2014) Rivista di diritto civile 685; *G Pardi*, Osservazioni e spunti critici sulla clausola penale (2011) II Giustizia civile 511.

59 *Di Majo* (fn 39) 287 ff.

60 Cass civ, 16 January 2013, no 903.

Special injunctions in tort are recognised by statutory provisions in the areas of: 61

- unlawful competition (art 1599 It cc);
- environmental damage (art 311 ff d lgs 03.04.2006, no 152);
- protection of proprietary rights (art 949, para 2 It cc).

Special injunctions in contractual relationships are recognised by statutory provisions, in the areas of: 62

- unfair terms in B2C contracts (arts 37, 139, 140 d lgs 06.09.2005, no 206: Consumer Code);
- abuse of economic position in subcontracting agreements (art 9, L 18.06.1998, no 192);
- late payments in commercial transactions (art 8 d lgs 09.10.2002, no 231, as modified by d lgs 09.11.2012, no 192, implementing Directive 2011/7/EC).

D. DIFFERENCES AS REGARDS RECOVERABILITY OF 'PURE ECONOMIC LOSSES'

In contract law, the recoverability of pure economic loss is a general rule. 63

In tort law, since 1971[61] courts have recognised the recoverability of pure economic loss, within the limits of unlawful conduct (such as negligent interference of a third party within a contractual obligation; see below, Case 11). At present, the recoverability of pure economic loss is admitted *in principle*, provided that all the elements of the unlawful conduct required by the law and by case law exist. In particular, the recoverability of pure economic loss which 64

[61] Cass civ, Sez Un, 26 January 1971, no 174 ('Meroni' case), confirmed by: Cass civ, Sez I, 14 July 1987 no 6132; Cass civ, Sez III, 25 June 1993, no 7063, Cass civ, Sez III, 8 January 1999, no 108. On the unlawful conduct that may include pure economic loss, cf: *FD Busnelli*, La lesione del credito da parte di terzi (1964); *id*, La tutela aquiliana del credito: evoluzione giurisprudenziale e significato attuale del principio (1987) Rivista Critica del Diritto Privato 273 ff; *id*, Itinerari europei nella 'terra di nessuno' tra contratto e fatto illecito: la responsabilità da informazioni inesatte (1991) Contratto e impresa 545; *G Alpa*, La responsabilità civile. Parte generale (2010) 358 ff; *E Navarretta*, L'ingiustizia del danno e i problemi di confine tra responsabilità contrattuale e extracontrattuale, in: N Lipari/P Rescigno/A Zoppini (eds), Diritto civile, vol IV, t III, Attuazione e tutela dei diritti. La responsabilità e il danno (2009) 242 ff. For a different perspective on pure economic loss (considered as recoverable under the application of the general principle of good faith and fair dealing: arts 1337, 1338 It cc) cf: *C Castronovo*, La nuova responsabilità civile (2006) 443, 474; *id*, Ritorno all'obbligazione senza prestazione (2009) Europa e diritto privato 694; *id*, Vaga *culpa in contrahendo*: invalidità, responsabilità e la ricerca della chance perduta (2010) Europa e diritto privato 679 ff.

results from false/misleading information outside a contractual relationship has been recognised as unlawful conduct in several situations:

- prospectus liability,[62] including the liability of the independent authority controlling the financial market (CONSOB);[63] and
- false/misleading information rendered by a professional. This instance covers different situations ruled by the Supreme Court in favour of the recoverability of pure economic loss, where the unlawfulness of the conduct consists – according to the Corte di Cassazione – in the infringement of the right to self-determination also in the area of economic interests. This rationale was used for the first time to establish the recoverability of the pure economic loss suffered by the purchaser of a painting falsely attributed to a famous Italian artist.[64] The same rationale was used in cases where the false/misleading information was rendered by banks' employees to professionals who, though outside a contractual relationship, were provided with false/misleading financial information concerning clients of the bank (*benefondi bancario*).[65]

E. DIFFERENCES AS REGARDS LIABILITY

1) Liability for Auxiliaries and for Independent Contractors

65 In the Italian Civil Code, liability for auxiliaries is regulated by two different norms: arts 1228 (liability in contract) and 2049 (liability in tort). Recently, scholars have stressed the different foundations of liabilities.[66] In the case of art 1228 It cc, the foundation of the debtor's liability acting through an agent is fault (as defined above at no 29) and it is a direct form of liability; in the case of art 2049 It cc the foundation for the employer's liability is strict (see above at no 34) and this type of liability is indirect. Moreover, in the case of art 1228, the existence of a master/servant relationship is not necessary, as required in art 2049. Therefore, liability under art 1228 can be attributed to a debtor for the breach of contract caused by an independent contractor, which is not the case under art 2049.

62 See recently: Cass civ, 11 June 2010, no 14056 (2011) Le Società 411.

63 Cass civ, 3 March 2001, no 3132 (2001) I Foro italiano 1139.

64 Cass civ, 4 May 1982, no 2765 (1982) II Giustizia civile 1745.

65 Cass civ, 1 August 2001, no 10492 (2002) Danno e responsabilità 90; Cass civ, 9 June 1998, no 5659 (1998) Danno e responsabilità 1048.

66 See *G Ceccherini*, Responsabilità per fatto degli ausiliari. Clausole di esonero dalla responsabilità, in: P Schlesinger/FD Busnelli (eds), Commentario al codice civile (2nd edn 2016).

2) Liability for Legal Representatives or Organs of a Company

Legal representatives and organs of corporations with share capitals are liable in contract vis-à-vis the company, its partners, the creditors and third parties. For each of these situations there are different actions provided by the Civil Code. The claim brought by the company is contractual in nature (art 2392 It cc); the claim brought by creditors (art 2394) is directly founded on the violations of the representatives' duties imposed by the law; the claim brought by partners and third parties is traditionally considered as grounded on the law of tort.[67] 66

3) Liability of Representatives of Natural Persons

Representatives of natural persons with full capacity (parents or tutors) are liable in tort under art 2048 It cc, provided that they live with parents or tutors. This is a case of aggravated and vicarious liability. In the case of persons without full capacity, parents or tutors shall be liable under art 2047 It cc, which provides for direct and strict liability[68] (see above at no 36). 67

4) Liability of the Auxiliary/Organ Itself

In all the situations discussed above at no 66, the auxiliary/organ is liable together with the principal, both in contract and in tort. In compliance with the rule of joint and several liability (see below at no 69 f), the principal can file a recourse claim against the auxiliary/organ, and he/she can rebut the presumption of equivalent responsibility by demonstrating the unique fault/negligence of the auxiliary/organ.[69] 68

F. DIFFERENCES AS REGARDS LIABILITY IN THE CASE OF MULTIPLE TORTFEASORS/BREACHING PARTIES

Joint and several liability is the general rule expressed in arts 1292–1313 It cc: because this is regulated in the general and common part of the law of obligations (see above at sec I.C), it applies to contract as well as to tort law (see also art 2055, para 1). Negligence in contract and fault in tort are presumed as equally shared among tortfeasors. 69

This general rule may sometimes be set aside by special statutory provisions, as is the case of environmental liability, where art 311, para 2, d lgs 03.04.2006, 70

67 See *G Cottino*, Diritto societario (2011) 432 ff.
68 Cass civ, 2 March 2012, no 3242.
69 See *A Torrente/P Schlesinger*, Manuale di diritto privato (23rd edn 2017) 889 f.

no 152, has clearly established that if the damage to the environment was produced by multiple tortfeasors, 'each of them shall be liable within the limits of his/her own negligence'.

G. DIFFERENCES AS REGARDS THE PERSONS WHO MAY BE PROTECTED

71 Under contract law, the privity doctrine (art 1372 It cc) would eliminate any protection for third parties. Nevertheless, authoritative scholars have proposed a different interpretation of contractual liability.

72 Some authors[70] – inspired by the German law of obligations – have proposed the theory of protective interests, according to which autonomous duties of good faith can spring from a 'social contact', regardless of the existence of a primary (that is: contractual) obligation. Such supplementary duties maintain the contractual nature of any 'special relationship', different from tort law and very similar to contract law. Their source lies in the law (arts 1175, 1337 It cc). Courts have accepted this view: since 1999, the Corte di Cassazione has afforded protection to third parties under this doctrine.[71]

73 Other authors have proposed an interpretation of contractual duties and liability more respectful of the Italian Civil Code (arts 1176 and 1218). According to this different view, protection of third parties may derive from subsidiary duties of good faith that represent the very essence of a contractual obligation, having regard to the object and type of the contract.[72] In other words, the criterion of diligence mentioned in art 1176 It cc and imposed on the debtor in order to satisfy the creditor's contractual interest is suitable to identify a number of further

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70 *F Benatti*, Osservazioni in tema di 'doveri di protezione' (1960) Rivista trimestrale di diritto e procedura civile 1342; *A Di Majo*, Delle obbligazioni in generale. Artt. 1173–1176, Commentario Scialoja-Branca, Libro IV delle Obbligazioni (1988) 121 ff; *C Castronovo*, Obblighi di protezione e tutela del terzo (1976) Jus 123; *id*, voce 'Obblighi di protezione', in: Enciclopedia giuridica Treccani (1990) 2 ff; *id*, Ritorno all'obbligazione senza prestazione (2009) Europa e diritto privato 679; *L Lambo*, Obblighi di protezione (2007) 110 ff.

71 Cass civ, 22 December 1999, no 589 (2000) Giurisprudenza italiana 740; Cass civ, 10 May 2002, no 6735 (2001) I Foro italiano 3115, where liability of a doctor for wrongful birth was extended to the father; Cass civ, 15 March 1999, no 2284 (1999) I Foro italiano 1165; Cass civ, 21 June 2004, no 11488 (2005) Rivista critica del diritto privato 361; Cass civ, 19 April 2006, no 9085 (2006) Corriere giuridico 914; Cass civ, 13 April 2007, no 8826 (2007) II Nuova giurisprudenza civile commentata 445; Cass civ, Sez Un, 16 June 2007, no 14712 (2008) Danno e responsabilità 160; Cass civ, Sez Un, 11 November 2008, no 577 (2008) Danno e responsabilità 788; Cass civ, Sez Un, 11 November 2008, nos 26972–26975 (2009) fn 14; Cass civ, 21 July 2011, no 15992 (2012) I Nuova giurisprudenza civile commentata 1172.

72 See *U Natoli*, L'attuazione del rapporto obbligatorio, in: A Cicu Messineo (ed), Trattato di diritto civile e commerciale, vol XVI, t I (1974) 11–12 ff; *CM Bianca*, Diritto civile. Le obbligazioni (2002) 37 ff.

'instrumental' duties that – though they do not form part of the contractual obligation – can be identified through the good faith principle. According to this view, contractual liability in violation of the primary obligation arises whenever a third party beneficiary suffers damage derived from the breach of contract. This is the case for investors who suffer damage deriving from wrongful information provided by the board of directors or by auditors ('prospectus liability'), and third party victims of professional liability (patients/victims of medical malpractice suffered in a hospital; victims of professional negligence of teachers supervising students in a college).[73]

74 In sum, compared to the protection of third parties under the law of tort, contract law does not offer the same certainty and privileged regime than liability in tort.

75 Under tort law, statutory provisions directly protect minors, persons lacking capacity, victims of auxiliaries/employees/organs, or of a building in ruin, or of dangerous activities or of a car crash. Not only are they expressly mentioned by the law, but a separate regime is provided, aiming at protecting them through a facilitated burden of proof and through the direct or vicarious liability of persons financially more reliable (see above sec II.E).

H. DIFFERENCES AS REGARDS DEFENCES

76 Contributory negligence is the general rule expressed in art 1227 It cc: because this is settled in the general and common part of the law of obligations (see above sec I.C), it applies to both contract and tort law. The provision distinguishes between a case where the causation of the damage can be attributed to the contributory negligence of the victim (art 1227, para 1 It cc); and a case where the victim was in breach of the duty to mitigate damage (art 1227, para 2 It cc). In the first instance, the rule of apportionment of damage shall apply, and damages shall be awarded to the victim pro quota.[74] In the second instance, instead, the victim shall bear all the costs that he/she could have avoided if he/she had acted with diligence in mitigating damage.[75]

77 As regards defences, if we define 'defence' as the exclusion of the consequences of the breach, once liability has been assessed, then in contract law, there are no defences. Impossibility of performance (arts 1463–1466 It cc) or economic

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73 Cf *C Amato*, Affidamento e responsabilità (2012) 205 ff.

74 Cass civ, Sez Un, 21 November 2011, no 24406: the High Court endorsed the argument according to which the victim's negligence does not concern the attribution of liability: it rather concerns the causation of the damage. Cf *M Franzoni*, Fatti illeciti, in: V Scialoja/G Branca (eds), Commentario al codice civile, sub art 2043 (2004) 40 ff.

75 Cass civ, 20 December 2011, no 29864.

impracticability in relational contracts (arts 1467–1469 It cc) would not be qualified as 'defences', as they exclude contractual liability and justify the breach.

78 The right to withhold performance (*exceptio inadimpleti contractus*) is classified as a self-defence remedy that is an exception to the general principle that prohibits self-defence in favour of judicial settlement.[76] It may be triggered in bilateral contracts, against the other party's breach, or when both obligations should be performed at the same time, provided that the innocent party acted in good faith, having regard to the particular circumstances of the case (art 1460 It cc).[77]

79 A right of retention is given to one innocent party of a bilateral contract who is expected to perform his/her obligation *before* the counterparty, provided that he/she can give evidence that the counterparty shall not perform because the latter is experiencing difficulties in terms of his/her creditworthiness (art 1461 It cc).[78] The provision of real or personal guarantees by the party in default excludes the possibility of triggering the right of retention. This case especially occurs in the sales of goods, when the seller does not deliver the goods, because he/she has reason to believe that the buyer will not pay for the goods after delivery.

80 The only possible defence in tort law that excludes liability is capacity: that occurs when the tortfeasor was not capable at the time when the injury took place (art 2046 It cc). This is true only if we define 'defence' as the exclusion of the consequences of the injury once liability has been established. The exercise of a right, the fulfilment of preceding obligations, self-defence (art 2044 It cc), act of necessity (art 2045 It cc), consensus or running a dangerous but lawful activity cannot be qualified as 'defences', because they all exclude the unlawfulness of the conduct and consequently they do not give rise to any liability in tort.

I. DIFFERENCES AS REGARDS LIMITATION PERIODS

81 The statutory limitation period for claiming damages is 10 years in contract, unless otherwise provided by law (art 2946 It cc).

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76 *F Camilletti*, Brevi considerazioni su alcuni strumenti di autotutela contrattuale (2015) 12 I Contratti 1142 ff.

77 Case law affirms that the violation of the duty of good faith by the innocent party can be stated after balancing the breaches of the parties, in respect to their proportion to the economic basis ('*causa*') of the bilateral contract. See recently: Cass civ, 4 May 2016, no 8912.

78 *F Piraino*, Il 'mutamento' delle condizioni patrimoniali e l'eccezione dilatoria ex art. 1461 c.c. 2 (2015) Osservatorio del diritto civile e commerciale 387 ff. Providing real or personal guarantees by the party in default excludes the possibility of triggering the right of retention.

Under tort law, there are shorter limitation periods: five years is the general statutory limitation period (art 2947 It cc), but in several instances, both in the Civil Code and in special statutes, the limitation periods are even shorter (see above at no 22). 82

Rules of suspension and interruption apply to both contract and tort liability. 83

The discipline of *dies a quo* presents many more problems as regards tort law. As a general rule, it runs from the moment when the conduct of the agent and the consequential injury are objectively detectable. Within this general principle, we can distinguish two different situations. The first occurs when the unlawful act and the personal injury are not instantaneous: the *dies a quo* starts from the time when the first appearance of the injury was objectively perceivable. Nevertheless, in the case of 'development' damage, that is damage which appears a very long time after the unlawful conduct (*danni lungolatenti*), the *dies a quo* starts from the time when the victim has perceived that his/her injury was due to previous and specific wrongful conduct.[79] The second situation occurs when the unlawful conduct is permanent (as is often the case with environmental damage): in this case the *dies a quo* starts from any day after the date when the damage occurred.[80] 84

J. DIFFERENCES AS REGARDS PROOF

Both the burden and standard of proof are different in contract and tort, as provided both by statutory law (Civil Code) and by courts. See extensively above at nos 17 and 21. 85

It should be remarked that in contract law the burden of proof has been assessed by case law for any kind of contract. In particular, the only burden of proof upon the creditor is to prove the non-fulfilment of the obligation by the debtor. It is up to the debtor in breach to demonstrate that his default was due to factors beyond his will, not imputable to him (see above at no 17). The situation is different as regards the standard of proof, which varies according to the type and object of the contract to which diligence must be referred. 86

In tort law, the burden of proof as well as the standard of proof vary with reference to the subjects involved in tort and to the nature of the activity carried out by the tortfeasor. 87

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79 The most relevant cases concern physical damage caused by a compulsory vaccination: Cass civ, Sez Un, 11 January 2008, nos 576, 580, 582, 584 (2009) Giustizia civile 2531–2533 note *C Blaiotta*, Causalità e colpa: diritto civile e diritto penale si confrontano.

80 Cass civ, 28 May 2013, no 13201.

K. OTHER DIFFERENCES

88 Other differences concern: capacity, jurisdiction, conflicts of law, and transmissibility of claims.

89 As regards capacity, contract law applies the general rules on statutory capacity (age of majority, insanity, temporary incapacity). As a consequence, the contract is voidable (art 1425 It cc), unless the minor (but not the insane) has fraudulently concealed his/her age (art 1426 It cc), or – in cases of temporary incapacity – the counterparty knew of the status of temporary insanity (art 428 It cc). In tort law, on the contrary, capacity is determined on a case-by-case basis (art 2047 It cc);[81] damages (or indemnity) are due from the person in charge of the tortfeasor.

90 As regards jurisdiction, conflicts of law in contract law are regulated by art 57 L 31.05.1995, no 218, which refers to the Rome Convention. In B2C sales, the conflicts of law rule in favour of consumers imposes jurisdiction according to the place of residence of the consumer (art 33, para 2, lit u) Italian Consumer Code).

91 Articles 62–63 L 31.05.1995, no 218 regulate tort law and product liability. In the first case, unless the injured party prefers the application of the law of the State where the damaging event occurred, the applicable law is the law of the State where the damage was suffered. In the second instance, the victim can choose between the jurisdiction of the State where the registered office of the producer is located and the jurisdiction of the State where the product was bought.

92 As regards transmissibility of claims, contract law has detailed rules concerning bilateral contracts not executed (arts 1406–1410 It cc). As regards tort law, the most relevant problem in the transmission of claims concerns the claims of secondary victims for non-pecuniary losses deriving from the primary victim's death. Traditionally, and until recently, Italian courts have recognised the claims of secondary victims exclusively in cases when the primary victim survived for a significant[82] period of time before dying. Such non-pecuniary losses were, in fact, considered as damage to the psycho-physical integrity of the primary victim (*iure proprio*), that could be transmitted to the victim's heirs (*iure hereditario*).[83] From this perspective, compensation for pain and suffering was denied in those cases where the victim died instantaneously, or after a period

81 Cass civ, 19 November 2010, no 23464.

82 Only 16 hours were needed by Cass civ, 20 February 2015, no 3374: 16 hours of survival were deemed sufficient; Cass civ, 8 April 2010, no 8360: 30 minutes of survival were deemed sufficient.

83 See Corte Cost, 27 October 1994, no 372 (1994) Responsabilità civile e previdenza 996 ff.

of unconsciousness.[84] In contrast, the High Court – in a recent and controversial judgment[85] – questioned the traditional courts' and scholars' opinion,[86] thus awarding non-pecuniary losses to secondary victims also in a case where the primary victim's death was instantaneous. As an obvious consequence, this judgment has created a contrast in case law that brought the matter at stake before the Joint Chambers of the High Court.[87] According to the last ruling, the Corte di Cassazione restated the older course, that is: bereavement damages can be claimed by secondary victims only when the primary victim survived consciously for a significant period of time. The main reason for this decision is rooted in the traditional argument: damages for instant death do not affect health, but life; as such, the right to life can be claimed by the conscious victim only, and subsequently transmitted to the heirs.

L. REASONS FOR THE DIFFERENCES

The main reason for all these differences lies in the divergent structure of the two sources of obligations. Contractual liability aims at restoring damage caused by the breach of a previous (and 'primary') obligation; consequently, all the main features of contractual liability are strictly connected to its secondary nature.[88] On the other hand, damage deriving from a wrong as defined in art 2043 It cc finds its primary source in the law itself, which contains all the fundamental features of the obligation but at the same time is much more flexible. From this perspective, several differences that relate to historical reasons, the different functions of liability in contract and in tort, and the different categories, rules and remedies that they imply still remain. 93

As regards the historical reasons, suffice it to say that art 1173 It cc, dealing with the sources of obligations, distinguishes clearly between obligations deriving 94

84 See *ex plurimis*: Cass civ, 20 February 2015, no 3374.

85 Cass civ, 19 November 2013, no 1361. In support of this original decision: *CM Bianca*, La tutela risarcitoria del diritto alla vita: una parola nuova della Cassazione attesa da tempo (2014) Responsabilità civile e previdenza 492 ff.

86 See *ex plurimis*: *E Navarretta*, Danni da morte e danno alla salute, in: FD Busnelli/M Bargagna (eds), La valutazione del danno alla salute (4th edn 2001) 261 ff.

87 Cass civ, Sez Un, 22 July 2015, no 15530. For a favourable comment, see *E Navarretta*, Con il risarcimento del danno 'E' forse il sonno della morte men duro?' Riflessioni in margine alla Sezioni Unite della Cassazione no 1530 del 2015 (2015) 9 Giustizia Civile com 2 ff; *id*, La 'vera' giustizia ed il 'giusto' responso delle S.U. sul danno tanatologico *iure hereditario* (2015) Responsabilità civile e previdenza 1416; for a more critical position, see *FD Busnelli*, Tanto tuonò, che … non piovve. Le Sezioni Unite sigillano il 'sistema' (2015) 10 Corriere giuridico 1206.

88 In truth, the different limitation periods in contract and in tort cannot be explained having regard to the different structure of the two sources of obligation. Indeed, there is no reasonable justification of the divergence in the application of the remedies: *Giardina* (fn 1) 160 ff.

from a contract and obligations deriving from an unlawful act. The second source was ancillary to the first, although at present this statement is no longer true: case law and statutory interventions have almost reversed the relationship between the two sources.[89]

95 As concerns the different functions, contract law has the main goal of providing enforcement to conventional promises recognised by the law. Another important goal is to assess risks. Liability in tort has several functions: to compensate damage suffered by individuals, to punish unlawful behaviour, and to deter injurious conduct.[90]

96 As regards the different categories, rules and remedies, see in detail above in sec I.C.

III. LIMITATION OR EXCLUSION OF LIABILITY ARISING FROM TORT AND FROM CONTRACT

A. STATUTORY PROVISIONS AUTHORISING A LIMITATION OR EXCLUSION OF LIABILITY

97 As we shall argue below in sec III.B, limitation clauses in contracts as well as in tort are admitted within very restrictive conditions that can be thus summarised: *culpa lieve*, or the existence of express statutory provisions.

98 Nevertheless, there are still some statutory provisions providing a limitation/exclusion of liability, or caps on damages, under special circumstances (see also at no 35):

- Strict liability: at 123 It Consumer Code, in compliance with the European legislation and case law, has implemented a threshold of €387.00, in case of product liability, and in favour of the producer. The strict liability of professionals in cases concerning environmental damage was established by art 311 d lgs 03.04.2006, no 152 (implementing Directive 2004/35/EU, as amended by L 06.08.2013, no 97). Paragraph 2 of this provision provides the exclusion of restoration in kind in favour of specific performance.
- Transport law:[91] caps on damages have been established by European regulations that interact or sometimes even implement international conventions. A limitation of damages occurs both in cases of delay or cancellation of flights, trains, ships and in cases of death or injury of passengers.

89 *PG Monateri*, La responsabilità civile (2006) 8, 12.
90 *G Ponzanelli*, La responsabilità civile. Profili di diritto comparato (1996) 9 ff.
91 *V Zeno Zencovich*, Transport Law (2nd edn 2016) 131 ff.

B. LIMITATION OR EXCLUSION OF CONTRACTUAL AND TORTIOUS LIABILITY BY CONTRACT

Limitation/exclusion of liability is regulated by a complex set of rules that can be found in the Italian Civil Code and in the Italian Consumer Code (d lgs 06.09.2005, no 206). 99

Article 1229 It cc states at para 1 the possibility of limiting or excluding liability of the debtor (and his/her auxiliary) only in cases of *culpa lieve* ('soft' negligence). More clearly, the rule prescribes that an agreement which admits a limitation/exclusion of liability in cases of fraud and gross negligence is to be considered void. At para 2, the same article states that when the conduct of the debtor or his auxiliaries represents a breach of the obligations arising from public policy (psycho-physical personal integrity, family relationships, criminal sanctions), terms limiting/excluding liability are void, even in the case of *culpa lieve*.[92] As a general rule, art 1229 is constructed in a very broad manner: therefore, it can also be applied to limitation of liability admitted by special statutory provisions (see transport regulations) with reference to the quantum, insofar as they infringe fundamental constitutional rights.[93] 100

This rule seems to be carved out over an existing legal relationship; therefore, it was exclusively applied to contractual relationships.[94] This thesis seemed to be supported by the logical argument according to which art 2056 It cc did not mention art 1229 among the general rules on obligations applicable to tortious liability. Nevertheless, Italian doctrine has recently admitted the application of the rule to the law of tort by analogy.[95] This opinion is confirmed by Italian courts, which admitted the extension of art 1229 to tortious liability, especially by considering that an agreement excluding/limiting tortious liability is always void under the second paragraph or art 1229 as it is against public policy.[96] 101

Article 1341, para 2 It cc sets out the general regulation of contractual terms and conditions in B2B contracts. According to this rule, exclusion/limitation clauses included in one-sided standard contracts are ineffective if they are not expressly signed in writing by the subscriber. In sum, after the entry into force of the Consumer Code, this article applies: 102

- to B2B contracts only; and
- even in cases of *culpa lieve* vis-à-vis the party who drafted the contract.

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92 *Ceccherini* (fn 66) 42 ff; *Monateri* (fn 2) 57 ff.

93 Corte Cost, 6 May 1985, no 132 (1985) Vita notarile 709, affirming that some Italian rules applying the Warsaw Convention were against the constitutional protection of personal integrity.

94 *C Castronovo*, Problema e sistema del danno da prodotti (1979) 537 ff.

95 *G Ponzanelli*, Le clausole di esonero dalla responsabilità civile (1984) 222 ff.

96 The leading case is Cass civ, 3 July 1968, no 2240.

103 Articles 33–38 It Consumer Code[97] deal with unfair terms in B2C contracts. In compliance with Directive 93/13/EU, these rules prescribe a control[98] over unfair terms based on the significant imbalance of rights and duties, provided that:

- the terms were not individually negotiated (art 34, para 4 It Consumer Code); and
- they do not reflect mandatory statutory, or regulatory domestic or international, provisions or principles (art 34, para 3 It Consumer Code).

104 Article 124 It Consumer Code[99] considers as void any agreement excluding or limiting liability attributed to producers or retailers under arts 114 ff for damage to person or to property caused to consumers by products delivered on the market.

105 A contractual exclusion/limitation clause admitted within the limits described above (at no 100) cannot provide a defence to a third party to a contract because of the privity rule (see art 1372 It cc). On the other hand, an exclusion/limitation provision triggered in a tortious claim would probably meet the same limits set out by art 1229 It cc and art 124 It Consumer Code; however, no case law can be quoted in support of this statement.

IV. NON-CONCURRENCE OR CONCURRENCE OF ACTIONS

A. OVERVIEW

1) Areas of Overlap between Tort and Contract

106 Under Italian law, there is a large range of issues characterised by the overlap between contractual and extra-contractual liability (*concorso proprio*).

107 Indeed, the entire matter is based on the assumption that, under certain circumstances, the same behaviour causes both the non-fulfilment of a pre-existing agreement and a tort. In these cases, many different regulations

97 These rules implement Directive 93/13/EC on Unfair Contract Terms.

98 In the Italian implementation of Directive 93/13/EC, the control over unfair terms is distributed between ordinary courts (in the case of individual claims for damages) and an independent administrative authority, AGCM (in the case of injunction aiming at cancelling the unfair terms from the terms and conditions of a one-sided contract).

99 Arts 114–127 Italian Consumer Code implementing Directive 1985/374/EC on Product Liability.

concur at the same time on the same event: the convergence is between the contractual liability of the debtor (special or general) and the debtor's liability in tort (special or general). From a procedural point of view, the convergence of many different regulations corresponds to the convergence between actions *ex contractu* and actions *ex delicto*. However, the application of one excludes the application of the other. It is obvious that damage compensation assessed according to one rule shall pay off the debt: a creditor cannot receive damages twice.

It is always the judge who determines the legal qualifications applicable to the action according to the facts sustaining it (the so-called *causa petendi*). 108

No specific express statutory rule regulates the phenomenon of overlapping between liability in contract and in tort: the solution is left open to interpretation. 109

After some initial doubts, since the 1970s case law has admitted the possibility of the option between tort and contract liability when the same fact can be considered as not fulfilling some contractual obligation and in the meanwhile as infringing an individual's rights, apart from the contract, then the overlapping between contract and tort liability is permissible. Rare and scarcely significant are the decisions against the effectiveness of the overlapping. From an analysis of the decisions and *rationes decidendi* it quickly becomes apparent that concurrence does not cover all cases. Actually the overlapping of the rules regulating the two different ranges of liability deals exclusively with those circumstances where the fact integrates the non-fulfilment of a pre-existing obligation. The circumstances leading to concurrence are alternatively: 110

- prejudice to an absolute right of the debtor, and, in particular infringement of the right to property, right to life and physical integrity. In these cases, the logical and juridical requirement for the overlapping is that the contract itself generates a duty to avoid causing damage to the tort victim. These instances occur most often in cases of contract of carriage,[100] medical care contracts,[101] and labour contracts;[102]
- the actions of an individual were intended to infringe upon someone else's right;
- the actions of an individual is a crime.

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100 Cass civ, 24 May 1993, no 5831; Cass civ, 20 April 1989, no 1855 (1990) I Foro italiano 67 ff; App Napoli, 26 February 1990.

101 As concerns medical malpractice, the High Court has supported the theory of concurrence since 1979. See recently: Cass civ, 23 June 1994, no 6064 (1995) I Foro italiano 202.

102 Cass civ, 19 June 2001, no 8331 (2001) Foro italiano, Repertorio, voce 'Esecuzione in genere' no 58.

111 Several decisions of the High Court state a general rule that includes all possible overlapping of actions provided for in arts 1218 and 2043 It cc.[103]

2) Approach to Non-Concurrence and Concurrence of Actions

112 The main borders of the issue under Italian law having been described, we can turn now to the legal reasons explaining the rule. The possibility to accumulate the advantages connected to both types of liability rules makes it possible to mitigate any unjustified discrimination caused by the different effects of tort and contract liability rules. To deny concurrence would indeed lead to different results for similar cases since the rules in tort and contract liability remain different. The first instance is the case of non-economic loss which, without a rule of concurrence of claims and without a theory of protective interests, would lead to the denial of this form of compensation even though the damage (to the person) would be the same in contract and in tort. A second reason is provided by the different statutory limitation periods. This is the prevailing reason in motivating the creditor to sue in tort. It is the case especially in contracts for the carriage of persons when personal injuries occur. In fact, the action under contract expires after one year, according to art 2951 It cc, while, in tort, an action for personal injury becomes time-barred after five years.

113 Therefore, under Italian law, the rule for concurrence is mainly grounded on equitable reasons because it allows judges to neutralise possible discriminatory consequences which would otherwise arise from the different rules governing liability for tort and for breach of contract in actual cases.

114 However, it is clear that if concurrence is useful to prevent the consequences of an irrational and incoherent system, it does not help in eliminating them.

115 Though scholars seemed to agree on the possible cumulative presence of both contract and tort liability,[104] the theory of concurrence has been severely questioned on legal and systemic grounds. In particular, the concurrence rule can be avoided if a different approach to contractual liability and its effects on third parties is adopted. This is the opinion of an Italian scholar[105] who, in the main stream of the German experience, assumes it is possible

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103 *Breccia* (fn 22) 671. The leading case is: Cass 13 March 1980, no 1696; more recently: Cass 8 May 2008, no 11410.

104 *PG Monateri*, Cumulo di responsabilità contrattuale ed extracontrattuale (1989) 17 ff; *R Sacco*, Concorso della azione contrattuale ed extracontrattuale, in: G Visintini (ed), Risarcimento del danno contrattuale ed extracontrattuale (1999) 161 ff; *M Rossello*, Responsabilità contrattuale ed aquiliana: il punto sulla giurisprudenza (1996) Contratto e impresa 659–661.

105 *C Castronovo*, Obblighi di protezione e tutela del terzo (1976) Jus 123; *id*, voce 'Obblighi di protezione', in: Enciclopedia giuridica Treccani (1990) 2 ff; *id*, Ritorno all'obbligazione senza prestazione (2009) Europa e diritto privato 679.

to derive several collateral duties from the principal duty upon which the whole contract relies. These are the so-called duties to protect third parties, aiming to protect the physical person of the creditor. The legal source of such collateral duties is usually found in the general principle of objective good faith, which is understood as a general rule suitable for integration of the contract (see above sec II.G). Inserting these duties into the contract would cause a 'contractualisation' of damages to the person expanding the reach of the rule for concurrence. This opinion has recently been supported by a ruling of the High Court,[106] according to which the existence of protective interests, even towards third parties, triggers a contractual liability that can be restored as non-pecuniary loss. At present, this argument prevails over the traditional arguments concerning the overlap between contract and tort. Therefore, the theory of concurrence of the two claims has lost its original goals and roots. Within a legal proceeding, the rule of concurring tort and contract liability allows the highest protection for the plaintiff. The plaintiff can choose between them but he can also accumulate the advantages of both.

B. CONCURRENCE/EXCLUSION OF ACTIONS FOR THE PROTECTION AGAINST PERSONAL INJURY AND OF PROPERTY

As argued at no 110, under Italian case law and according to the majority of scholarly opinions, the circumstances leading to concurrence of actions in tort/contract for protection against personal injury are primarily linked to the infringement of the right to life and physical integrity, as well as to labour law cases. 116

In the case of protection of property, the circumstances leading to concurrence are linked to the infringement of an absolute right, such as the right to property. 117

C. CONCURRENCE/EXCLUSION IN THE CASE OF INTERFERENCE WITH CONTRACTUAL RIGHTS

Interference with contractual rights is, in principle, treated under tort law, unless a specific different action (whether in contract or in tort) is available (eg competition law rules). 118

This is also true where a pure economic loss is derived from a personal injury to someone else's employees or to property damage to an entrepreneur. 119

106 Cass civ, Sez Un, 11 November 2008, nos 26972, 26973, 26974, 26975 (fn 14) para 4.

Since 1971[107] Italian courts have admitted damages in tort also in cases where a third party caused damage to economic interests deriving from a previous contractual relationship. These are situations where a debtor has been injured by a third party thus becoming unable to satisfy the creditors' interests, who consequently suffer economic loss as a result of the breach of the contract. In such situations the creditor can file a claim in tort against the injurer who provoked the damage to her debtor. The very foundation of a broad construction of art 2043 It cc is that the definition of 'unlawful damage' provided by the above quoted provision cannot be limited to identify property rights, or rights to the integrity of the person, or personality rights ('absolute interests'). On the contrary, the definition of 'unlawful damage' also includes rights *in personam*.

V. SPECIFIC SITUATIONS

A. PRE-CONTRACTUAL LIABILITY

120 As extensively explained in sec I.B, pre-contractual liability in the Italian system is recognised by the Civil Code at arts 1337 and 1338, under the general clause of good faith in negotiations. This form of liability has recently been extended by case law even to situations where a contract has been validly concluded, though without properly informed consent so that one party has accepted conditions that he/she would never have accepted. This liability leads to the recovery of damage limited to reliance damage (*interesse negativo*), though there is a great debate on the opportunity of recognising expectation damage in all those instances where a contract has been validly concluded. According to case law and a majority of scholarly opinions, such liability is non-contractual in nature: therefore, the regulation concerning tort liability would apply, in particular as regards the burden of proof (plaintiff has to demonstrate the defendant's negligence) and the limitation period (five years).

B. LIABILITY OF PROFESSIONALS

121 Professional liability (physicians and health care personnel, lawyers, architects and other professionals belonging to regulated professions) is contractual in nature. Therefore, the general rules on contractual negligence apply, with a relevant adaptation to medical malpractice, with the result that the latter is considered as a sub-system within professional liability.[108] Here follow

[107] Cass civ, Sez Un, 26 January 1971, no 174 (fn 61).

[108] *De Matteis*, La responsabilità medica. Un sottosistema della responsabilità civile (1995); *id*, La responsabilità medica tra *scientia iuris* e regole di formazione giurisprudenziale (1999)

the relevant special rules on medical malpractice, aiming at facilitating the attribution of liability to the physician and, above all, to the health care facility as the last instance payer:[109]

(a) The burden of proof on the victim of medical malpractice has been relieved by case law: the patient has to provide evidence of the existence of a contractual relationship with the professional, alleging (without providing material evidence) the breach of the contractual obligations by the professional/defendant. It is up to the professional/defendant to discharge the proof by either providing evidence of the non-existence of any contractual relationship, or by demonstrating (by providing material evidence) that his/her behaviour strictly complied with the required professional diligence, and that the event that led to the injury of the patient was due to supervening and extraordinary circumstances.[110]
(b) The Italian Civil Code provides a special liability rule for professional obligations in general, at art 2236. According to this particular provision, debtors of professional obligations that raise special difficulties can be held liable only if the breach of contract was caused through malice or gross negligence. The above-mentioned (apparent) 'limitation of liability' applies only when the professional has 'to solve technical problems of special difficulty' (art 2236 It cc). This means that if the obligation implies a special technical skill/knowledge, the victim has a right to

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Danno e responsabilità 781; *M Franzoni*, Dalla colpa grave alla responsabilità professionale (2011).

109 The High Court has clearly affirmed the contractual liability of health care facilities since 2008 (Cass civ, Sez Un, 11 January 2008, no 577). According to case law, the relationship between the hospital and the patient is atypical, as the obligations of the former include not only medical care, but also other obligations, such as, to provide an efficient organisation of the services, to provide a healthy and comfortable recovery (*contratto di spedalità*): Cass civ, 8 January 1999, no 103; Cass civ, Sez Un, 1 July 2002, no 9556. The health care facility may be liable in contract notwithstanding that the physician who has provoked an injury to the patient is not held liable (Cass civ, 8 January 1999, no 103). More complicated has always been the qualification of the liability of a physician operating within a health care facility (either public or private). According to the most recent opinions of the High Court, this is a case of 'social contact' between the physician and the patient (see above sec I.B (no 12)): liability springs from the frustration of the patient's reliance in the professional skills of the physician operating within the health care facility: Cass civ, 22 January 1999, no 589; Cass civ, Sez Un, 11 January 2008, no 577.

110 This rule has been established since 2004 (Cass civ, 21 June 2004, no 11488), and it has been confirmed by Cass civ, Sez Un, 11 January 2008, no 577 (2008) Responsabilità civile e previdenza 856 note *M Gorgoni*, Dalla matrice contrattuale della responsabilità nosocomiale e professionale al superamento della distinzione tra obbligazioni di mezzo/di risultato. Please note that this opinion rendered by the Joint Chambers of the High Court superseded the traditional distinction between obligations aiming at a positive satisfaction for the creditor (*obbligazioni di risultato*), and obligations implying the debtor's compliance to standards of professional diligence (*obbligazioni di mezzi*). See also recently: Cass civ, 18 June 2015, no 18307.

recovery, limited to cases of malice and gross negligence. Nevertheless, if – within the same case – the professional infringes the ordinary rules of professionals through trivial negligence, or he/she acts with imprudence, then the ordinary rule of diligence would apply (art 1176 It cc), and he/she would be liable for damages.[111] In medical malpractice cases, evidence of the special difficulty must be provided by the physician; by the same token, the physician shall provide evidence of supervening events that caused the damage to the patient, notwithstanding the special technical knowledge demonstrated by the physician.[112]

122 From the special process concerning liability for medical malpractice, Italy eventually witnessed a shift from the liability of the physician to the liability of the health care facilities.[113] This shift was confirmed by the recent statutory interventions (see below fn 114 and 115) that highlight the health care facility's liability, and provide special measures on risk management.

123 The most recent statutory reform in force at present, dealing with medical health care practice (L 08.03.2017, no 24, '*legge Gelli Bianchi*')[114] has introduced substantial changes in the medical malpractice regime, with the intent of mitigating the burden of proof on professionals, and reducing litigation. Consequently, case law constructions as illustrated above have been dramatically challenged. In particular:

- criminal liability is excluded in cases of trivial negligence, provided that the physician has respected guidelines and good practices imposed by the scientific community *in similar cases* (art 6 *legge Gelli Bianchi*); and
- in any case, notwithstanding the level of negligence and the criminal liability, physicians are liable in tort vis-à-vis patients, while the hospital is liable in contract (art 7 *legge Gelli Bianchi*).

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111 The leading case defining the regime (especially in terms of burden of proof) of the 'special difficulties' cases is Cass 21 December 1978, no 6141.

112 See fn 110.

113 *G Comandé*, Dalla responsabilità sanitaria al *no-blame* regionale tra conciliazione e risarcimento (2010) Danno responsabilità 977. Arts 1–3 of the *Gelli Bianchi* law deal with prevention of risks and risk management.

114 *M Lovo/L Nocco*, La nuova responsabilità sanitaria (2017); *G Ponzanelli*, 'Medical malpractice': la legge Bianco-Gelli (2017) Contratto e impresa 356; *L Bettiol*, Riforma Gelli-Bianco: il ruolo delle linee guida nel giudizio di responsabilità penale in campo sanitario (2017) 142(6) Il Foro italiano 236; *C Scognamiglio*, Regole di condotta, modelli di responsabilità e risarcimento del danno nella nuova legge sulla responsabilità sanitaria (2017) 34(6) Corriere giuridico 740; *R Pardolesi*, Chi (vince e chi) perde nella riforma della responsabilità sanitaria (2017) 3 Danno e responsabilità 261 ff. Before this statute, a similar reform had been implemented by the L 08.11.2012, no 189 ('legge Balduzzi'): *R De Matteis*, La responsabilità professionale del medico. L'art. 3 del d.l. 158/2012 tra passato e futuro della responsabilità medica (2014) Contratto e impresa 123.

This provision has mitigated the former statutory approach of the *legge Balduzzi* (L 08.11.2012, no 189), as it provides patients with a double cause of action, in tort and in contract, vis-à-vis two different defendants (*concorso improprio*) thus covering all the possible situations without excessively burdening physicians with a contractual liability imposed through a reversal of the burden of proof. The previous law, on the contrary, had tried to cancel over 80 years of case law concerning the contractual nature of medical malpractice, as well as 40 years of case law concerning the distribution of the burden of proof by recognising tortious liability for physicians only. This explains why the former provision was met with severe criticism from scholars[115] and the courts.[116] 124

CASES

CASE 1. THE UNATTRACTIVE SHOPPING MALL

C can bring a claim in tort against D, as the landlord is liable for damage caused by the immovable which is under his/her custody (art 2051 It cc).[117] Whether C can also sue D in contract is, however, controversial. While it is uncontroversial that Z has a right to sue D in contract (see below Case 4), there is no statutory provision or case law affirming the right of the subtenant to sue D in contract, especially if – as in the case at stake – the landlord was not given notice of the sublet. 125

CASE 2. THE IDLE LAWYER

There is no specific statutory provision or case law concerning the case at stake. Strictly speaking, it would not be possible for the daughters to sue D, 126

115 *F Cembrani*, La Legge Balduzzi e le pericolose derive di un drafting normativo che (forse) cambia l'ambito alla responsabilità giuridica del professionista della salute (2013) Rivista italiana di medicina legale 799; *M Bona*, La R. C. medica dopo il decreto-legge no 158/2012: indicazioni per la corretta interpretazione e per la (dis)applicazione delle nuove disposizioni, in: F Martini/U Genovese (eds), La valutazione della colpa medica e la sua tutela assicurativa (2012) 29 ff; *M Bona*, La responsabilità medica civile e penale dopo il Decreto Balduzzi (2013).

116 Cass civ, 19 February 2013, no 4030 (2013) Danno e responsabilità 367; Trib Milano, 21 March 2013 (2013) Rivista italiana di medicina legale 1171. According to some first instance courts, the new statutory liability based on tort law would only apply in cases where the professional is employed by the health care facility: Trib Torino, 26 February 2013 (2013) Danno responsabilità 373; Trib Varese, 26 November 2012 (2013) Danno e responsabilità 375. Trib Enna, 18 May 2013 (2014) Danno responsabilità 74: according to the Court, the reform would imply a two-tier regime: contractual liability as regards the health care facility and liability in tort for the physicians employed by the hospital.

117 Cass civ, 13 December 1988, no 6774 (1989) Giustizia civile 896; Cass civ, 27 July 2011, no 16422 (2011) Diritto & Giustizia 282.

neither under the rules concerning general contract law (as there is no privity of contract between the solicitor and the two daughters) or under the general rules of tort law (as there is no unlawful conduct of the professional vis-à-vis the two daughters, who have not yet acquired a right to the father's estate). Nevertheless, the possible solutions to the case at stake are both rooted in a contractual claim.

127 Application of the recent doctrine of 'social contact' (see above at no 12), according to which a contractual obligation may include – besides the fundamental obligation towards the creditor – protective duties due by the debtor towards third parties who are in a 'special relationship' with the creditor. This doctrine has been acknowledged by the High Court in two sets of cases[118] that share with the case at stake the existence of a contract whose protective effects should be extended to third parties/intended beneficiaries (ie the two daughters).

128 Application of the general contract law rules in compliance with the theory of contractual liability that examines – by means of the principle of good faith – the contents of the contract and consequently the extension of the fundamental obligation.[119] From this perspective, the obligation undertaken by a professional towards his/her client may imply an obligation towards an intended beneficiary, who relies on the correct and diligent fulfilment of the obligation and has therefore a right to sue (in contract) the professional in breach of his/her commitment.

CASE 3. THE DEFECTIVE HOUSE

129 The case at stake is governed by the provisions dealing with procurement contracts (art 1655 ff It cc). In particular, art 1669, para 1 provides the solution: if the contract concerns immovable property, the contractor is liable vis-à-vis the principal, *and his/her assignees/successors in title* for the damage caused by building defects (or even by defects due to the characteristic of the ground), provided that C has given notice of the defect (to the contractor D) within one year from discovery. The action for compensation of the damage caused to the house has a limitation period of 10 years from the termination of the building and the acceptance of the principal, although it expires one year after the notice.

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118 The two sets of cases concern: (1) the liability of a doctor on service in a hospital vis-à-vis the patient admitted to the hospital: Cass civ, 20 January 1999, no 589 (1999) Responsabilità civile e previdenza 652; (2) the liability of a teacher on service in a school vis-à-vis a minor student who injured himself: Cass, Sez Un, 27 June 2002, no 9346 (2002) I Foro italiano 2635; recently confirmed by: Cass civ, 10 May 2013, no 11143 (2014) Danno e responsabilità 605.

119 See *Breccia* (fn 22) 237; *Amato* (fn 73) 216 f.

Because C also suffered personal injuries, he may also claim compensation for the non-pecuniary losses, as the injury affects a fundamental right protected by the Constitution (see no 44, fn 27). 130

The nature of the action provided by art 1669 is not qualified by the Code as either contractual or tortious. In any case, an action in tort (art 2043) would not have any practical advantage for C; it would instead make the burden of proof more demanding for him (see no 21). 131

As concerns the exclusion of liability clause, it should be considered as void, because the injury has in fact violated the public order (see art 1229, para 2, at no 100) in two aspects. First, it caused damage to the physical integrity of C; second, the provision itself in art 1669 is considered by the High Court[120] as mandatory. 132

The rationale is that immovables have a long-lasting nature; therefore their preservation and functionality must be considered as a matter of public order, and the contractor is strictly liable not only with respect to the contractual partner, but also with respect to his/her assignees/successors in title. 133

CASE 4. APARTMENT IN FLAMES

C can bring a claim in damages against D, who is liable in contract under arts 1575, lit 2), 1576 and 1577 It cc, according to which the landlord has a duty to maintain the immovable in a good state (arts 1575, lit 2), and 1576),[121] and a duty to repair the immovable (art 1577). C can concurrently bring a claim in tort, under art 2051 It cc (affirming the liability of the person who has the custody of a movable item or immovable) and art 2053 It cc (affirming the liability of the landlord in cases where the immovable is destroyed). The latter rule can also be applied to cases where the person injured by the thing in custody or by the immovable is the tenant.[122] What is relevant in order for both actions to succeed is that the tenant has to prove that, notwithstanding the contract of lease, the landlord maintained a power of control over the immovable, and that the tenant gave the landlord prompt notice of the danger.[123] 134

120 Cass civ, 12 December 1987, no 9635.

121 See recently: Cass civ, 22 May 2014, no 11353.

122 Cass civ, 13 December 1988, no 6774 (1989) Giustizia civile 896; Cass civ, 27 July 2011, no 16422 (2011) Diritto & Giustizia 282.

123 See Cass civ, 30 March 2001, no 4737 (2001) I Rivista giuridica dell'edilizia 827: where the action is filed in tort, the landlord held liable has a right of recourse against the tenant who did not promptly inform the landlord of the imminent danger; Cass civ, 11 July 1995, no 7578 (1995) Giustizia civile Massimario 1354 side structures of the immovable are under the tenant's control, and therefore under his/her responsibility. On the definition of control over

135 The statutory references are arts 1576, 1577, 2051 and 2053 It cc.

136 The rationale is that art 1576 (Maintenance of the immovable in a good state) and art 1577 (Occurrence of repairs) refers to the contractual duties of landlords and tenants as regards the rented immovable. The landlord has to diligently maintain the immovable property in a sound condition by repairing it, provided that the tenant has given him/her prompt notice of the dangers deriving from the deterioration. Minor maintenance work, for which only the tenant is liable, is excluded. Statutory law clearly describes the obligations of landlords and their liabilities in contract: the action in tort is therefore subsidiary and concurrent.

137 Notwithstanding that statutory law provides a contractual cause of action to tenants, the majority of claims are filed under tort law, and therefore art 2051 (Damage caused by goods under the keeper's custody) or art 2053 It cc (Deterioration of real property) would more frequently apply. This is probably due to long-standing case law that has held keepers of immovables directly liable under a reversal of the burden of the proof or under a strict liability basis, without any consideration of the respective positions of landlord and tenant, or to their contractual duties. Moreover, a claim in tort also provides the tenant/plaintiff with the possibility to recover compensation for non-economic damage.

CASE 5. INJURED SKIER

138 C can bring a claim in tort (art 2043 It cc) against the owner of the ski resort (D1): the insurance company (D2) will therefore honour its contractual obligations towards D1. Both D1 and D2 can be sued by C. According to a recent decision of the Italian High Court, the personal injury suffered by the skier can be classified as non-economic loss, which can be fully restored where fundamental rights (like health) protected by the Italian Constitution have been infringed. A homogeneous definition of non-economic loss has in fact been adopted by the Italian High Court, regulated by the law of tort (art 2059 It cc) but applicable to any non-economic damage, regardless of the source of the obligation (cf above fn 14).

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the landlord, and on the apportionment of liability between landlord and tenant according to the distinction between finishing work (under the landlord's control) and side structures (under the tenant's control), see the leading case: Cass civ, Sez Un, 11 November 1991, no 12019 (1993) I Foro italiano 922 (the branch of a tree fell on a member of an association whose registered seat was located on a property owned by the local municipality and rented to the association: according to the Italian High Court, a tree is a 'side structure' whose maintenance is to be executed by tenants).

The statutory reference is art 2059 It cc. 139

As regards the rationale, this is a controversial case, as it involves an unwritten rule. The alternative or cumulative actions rule (*concorso proprio*)[124] adopted by Italian courts and consisting in allowing the plaintiff to choose between a claim in contract or in tort (alternative), or in submitting to courts both claims (cumulative actions), whereas the choice or aggregation would depend on which of the two actions can be considered as more convenient to the plaintiff. Such a choice has traditionally been recognised by Italian courts when one person is under an obligation to protect a counterpart from personal injury.[125] This may happen when – as in the case here – there is both a contractual obligation to protect the party and a legal duty in tort (art 2043 It cc). Because the fact that the injured plaintiff can choose is not supported by convincing legal arguments, and following the enlargement of the notion of non-economic loss, the Italian High Court has coherently declared the opportunity of abandoning this unwritten rule in favour of a general claim in tort.[126] 140

In terms of the case law, notwithstanding the arguments provided recently by the Italian High Court against alternative and cumulative claims, some courts still admit the alternative/cumulative actions' unwritten rule, or they dismiss the rule in favour of a contractual claim. 141

In a case in the area of labour injuries, a teacher was injured to such an extent that she died on the premises of the kindergarten where she was on duty.[127] The Italian High Court recognised the liability of the local authority under both claims in contract (art 2087: liability of employers for breach of contractual obligations to protect physical and mental distress of his/her employees) and in tort (art 7 L no 444/1968, establishing a legal duty to take care of the immovable 142

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124 It must be distinguished from *concorso improprio* occurring in cases where damage deriving from the same injury can be claimed against two different defendants. In such cases, damages shall ultimately only be awarded in one case (contract) or the other (tort): it give plaintiffs a double path to damages, it does not duplicate damages.

125 Cass civ, 25 September 2002, no 13942 (2003) Giustizia civile 2034; Cass civ, 20 June 2001, no 8381 (2002) Giustizia civile 2204 note *AV Doronzo*, Sulla responsabilità del datore di lavoro ex art. 2049 c.c.; Cass civ, 2 March 1982, no 1295 (1982) Giustizia civile Massimario fascicolo 3; Cass civ, 2 May 1981, no 2654 (1981) Giustizia civile Massimario fascicolo 5; Cass civ, 5 January 1980, no 28 (1980) I Giurisprudenza italiana 1599. In the area of transportation: Cass civ, 24 May 1993, no 5831; Cass civ, 20 April 1989, no 1855 (1990) I Foro italiano 1970; also in (1990) I Nuova giurisprudenza civile commentata 424; App Napoli, 26 February 1990. In the area of medical malpractice, see recently: Cass civ, 23 June 1994, no 6064 (1995) I Foro italiano 202. In the area of labour law: Cass civ, 14 May 1987, no 4441 (1987) I Giustizia civile 1631.

126 Cf fn 14. Before the famous decision quoted above, when a title does exist, most scholars would insist on abandoning the unwritten rule of alternative/cumulative actions in favour of a claim in contract: *Breccia* (fn 22) 665, 676; *C Castronovo*, Le due specie della responsabilità civile e il problema del concorso (2008) Europa e diritto privato 81.

127 Cass civ 27 June 2011, no 14107.

where the kindergarten is located). In a set of cases the Italian High Court instead chose the contractual action only.[128]

CASE 6. EXPLODING CAR

143 C can sue D2 in tort under art 2043 It cc, affirming a general principle of *neminem laedere* based on fault, and aiming to protect property rights (the destruction of the car in this case). C can also claim damages from D1 in contract under art 1494 It cc, according to which – setting aside the provisions concerning warranties – the seller is liable vis-à-vis the purchaser within the ordinary time limits (10 years), provided that the former has recognised the defect, and/or he/she has not succeeded in excluding his/her fault in ignoring the defect.

144 According to art 123, para 1, lit b) Consumer Code, implementing Directive 1985/374/EC of 25 July 1985 on Product Liability, C has no cause of action against the producer pursuant to this Directive and based on strict liability, as only the product (car) itself was damaged.

145 On the other hand, a warranty claim would fail either under arts 128–135 Consumer Code, implementing Directive 1999/44/EU,[129] or under arts 1490 ff It cc, dealing with the general regime of contractual warranties in the sale of goods. As concerns arts 128–135 Consumer Code, the two-year warranty of conformity with the contract has already expired (art 132, para 1 It Consumer Code), as it starts to run from delivery of the good: therefore, C cannot sue D1 under the special regime. As regards the general regime of sale of goods in the Italian Civil Code, the warranties for defects (art 1490 It cc) or for lack of a fundamental characteristic of the good (art 1497 It cc) are both subject to the draconian limitation period of one year from the time of delivery (provided that the purchaser has informed the seller of the defect or of a lack of the fundamental characteristic after eight days from the time of the discovery): art 1495, para 3 It cc.

CASE 7. RACING BOAT BURNING

146 C can sue D in tort under art 2043 It cc, provided that he can give evidence of D's fault. As in the previous case, C can also claim damages from D in contract

128 Cass civ 23 April 2009, no 9689; Cass civ 17 February 2009, no 3788; Cass civ 17 February 2009, no 3786; Cass civ 15 December 2008, no 29323; Cass civ 13 August 2008, no 21590; Cass civ 23 April 2008, no 10529.

129 Directive 1999/44/EU has been modified by Directive 2011/83/EU and implemented into Italian law by d lgs 24.02.2014, no 21 (thus modifying several provisions of the Consumer Code).

under art 1494 It cc, setting aside the provision on warranties: the seller is liable vis-à-vis the purchaser for damage within the ordinary time limits (10 years), provided that the former has recognised the defect and/or he/she has not succeeded in excluding his/her fault in ignoring the defect.

As in the previous case, the action in tort is possible according to Italian law because the plaintiff suffered damage to property. He can claim the value of the destroyed boat at the time of the fire. 147

The very nature of the good (a boat) also admits a claim to recover the costs of repatriation, though it may be arguable that the airplane is the only possible way to be repatriated, pursuant to the doctrine of mitigation of damage. 148

For the same reasons explained under the previous case (time limits), a warranty claim would fail under art 1490 ff It cc, dealing with the general regime of contractual warranties in the sale of goods. 149

CASE 8. INSIDIOUS REPORT

C can sue D in tort for unfair competition. According to art 2598, para 1 (3) It cc D has caused economic damage to Z through conduct contrary to good faith. As D acted fraudulently (art 2600, para 1), C can claim damages at art 2600 It cc, and in compliance with the criteria set out in d lgs 19.03.2017, no 3, implementing Directive 2014/104/EU. C can also claim the publication of the decision (art 2600, para 2 It cc), as well as an injunction before the ordinary trial, together with restitutionary remedies (art 2599 It cc). C can also sue D for breach of contract, as the latter violated a general duty of trust (art 2105 It cc). 150

CASE 9. CIRCULAR LETTER

As in the previous case, C can file a claim against D under arts 2598, para 1 (3), 2599 and 2600 It cc for unfair competition. D may also be held liable of the criminal offences of slander (honour and defamation: arts 594, 595 It Criminal Code). 151

CASE 10. SHORTAGE OF SUPPLY

Special legislation deals with abuse of a dominant position in the supply of goods/service contracts: L 18.06.1998, no 192, art 9, defines the abuse of a dominant position as a 'situation where one business is able to determine – within a contractual relationship with another business – an excessive imbalance 152

in the parties' rights and obligations. The economically dominant position shall be estimated also by taking into account the actual possibilities of the business which claims the abuse of a dominant position to enter the market with alternative goods. The situation described by the law applies to the case at stake: the contractual term determining a 20% increase in prices may therefore be considered as void' (art 9, para 3). Consequently, the previous terms of the original contract shall be restored. As regards payments, the Italian law quoted above assumes that the buyer is in a dominant position vis-à-vis the supplier. Therefore, art 3 imposes maximum payment terms that cannot be applied to this case. In the present case, because the supplier D is in a dominant position vis-à-vis C, the contractual terms concerning early payments can be considered as void (see art 9, para 3) under art 9, para 2 ('The abuse may also consist in the refusal to sell or the refusal to buy, in the imposition of contractual conditions unduly burdensome or discriminatory, or in the arbitrary interruption of an ongoing trade relationship').

153 Moreover, C can sue D alleging the infringement of competition law rules, that is an abuse of a dominant position (see art 102 of TFEU; art 3 L 10.10.1990, no 287; art 2598, para 1 (3) It cc). In particular, C can either trigger public enforcement rules and/or seek compensation under private enforcement rules. Through the first claim, C can ask the Italian Autorità Garante per la Concorrenza e del Mercato (AGCM) to order D to cease the unlawful conduct and/or to impose a fine. Through the second claim, C can obtain an injunction the aim of which is cessation of D's conduct (art 2599 It cc), as well as damages in the case of intentional conduct (see art 2600 It cc, and d lgs 19.03.2017, no 3, implementing Directive 2014/104/EU).

154 The statutory references are art 9 L 18.06.1998, no 192; art 3, para 1 (a) L 10.10.1990, no 287; arts 2598, para 1 (3), 2599 and 2600 It cc; d lgs 19.03.2017, no 3.

CASE 11. INJURED ROCK STAR

155 C has a cause of action against D in tort under art 2043 It cc. This case clearly describes a situation where a debtor has been injured by a third party, thus becoming unable to satisfy the creditor's interests, who consequently suffers economic loss from the breach of the contract. The case that has introduced a broader construction of the notion of *danno ingiusto* in art 2043 It cc was decided in 1971 (the *Meroni* case) and was subsequently confirmed by several decisions (see above at no 64, fn 61). Since this decision, the expression *danno ingiusto* has been extended not only to the violation of rights *in rem* (property rights, personal rights, such as health and personality) but to rights *in personam* as well (*diritti relativi*, or *diritti di credito*), thus including (pure) economic loss

deriving from the breach of a contract due to a tort committed by a third person against the debtor, provided that the creditor can give evidence of causation and of the damage suffered. In particular, in the *Meroni* case, although the principle admitting the recovery of economic loss was stated, a strict test concerning causation is required. In particular: obligations consisting of an interchangeable transfer of goods (*prestazioni di dare*) cannot be considered as a direct and immediate consequence of the tortious event; on the contrary, fundamental and personal obligations (*obbligazioni di fare*) can be considered as a direct and immediate consequence of the tortious event, provided that the debtor's commitment is strictly personal, founded on personal trust and personal sills (reputation, technical skills, professional abilities). The relativity of such a personal obligation lies in the fact that the creditor can possibly obtain the same service/product in the market from another person for the same price: if this is the case, causation cannot be assessed. This important decision overruled a previous and opposite view of the Italian High Court, which, in a very similar case, had rejected the argument of the creditor (a soccer society) who, under art 2043 It cc, sued a third party (an aircraft company) for the economic damage deriving from an airplane accident that led to the death of the entire soccer team (the so-called *Superga* case).[130] At that time, a pure economic loss classified as right *in personam* was not considered as embraced by the definition of 'unlawful damage' of art 2043 It cc. From the information we have in the case at stake, we may infer that the injury provoked by D to the rock star X can be considered as direct and immediate damage to C, provided that the latter can demonstrate that he had to cancel the concert because he could not have replaced X with any other rock star for a similar price.

CASE 12. EQUIPMENT DESTROYED

If the accident is entirely caused by D2, and no contributory negligence can be attributed to D1, the contractual action of C vis-à-vis D1 would be defeated by the doctrine of impossibility of performance (art 1463 It cc). Nevertheless, the concurrence of an action in tort has been established by the High Court in the *Meroni* case (see Case 11). Therefore, C has a cause of action in tort against D2, provided that C is able to pass the strict test on causation and direct damage. While damages concerning the destruction of the equipment can be considered as direct damages (to be paid to the owner), in the case at stake it is doubtful that C may recover damages for the cancelled concert, unless he is able to demonstrate that he cannot replace the equipment for the same price. 156

130 Cass civ, Sez III, 4 July 1953, no 2085.

CASE 13. SLIPPING ON A LETTUCE LEAF

157 C can sue D in tort under art 2051 It cc (Damage caused by goods under the keeper's custody). This provision applies to situations where inactive things cause damage within premises. It is a rule of the law of tort that does not adopt the traditional imputation of liability based on fault or fraud (art 2043 It cc). Recently, a stream of case law,[131] supported by the opinion of some scholars,[132] considered the liability imposed on the good's keeper as strict.

158 Therefore, C has to prove that the damage was caused by the lettuce leaf lying on the floor of the grocery shop, subject to D's custody, while evidence of unknown events must be provided by D, which is definitely difficult to prove in the case at stake.

159 No actions as regards contractual or pre-contractual liability can be taken, as respectively:

- no contract has been concluded. In any case, it can hardly be argued that, under a contract for the sale of goods, protective obligations can extend to personal damage suffered after the creditors' interests have already been satisfied; and
- pre-contractual liability is limited to damage affecting the protected interests of (both) perspective parties to a contract, that is relying on the counterparty's fair dealing concerning the sale of goods.

CASE 14. TEST DRIVE

160 C can sue D in tort under art 2054, para 1 It cc, which holds a car driver (and in general the driver of a vehicle) strictly liable in the case of damage to persons and/or things (the tree, if damaged), unless he proves that the car crash occurred notwithstanding his utmost diligence.

161 No action under pre-contractual liability can be taken, as explained in Case 13.

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131 Cass civ, 10 December 2012, no 22384 (2013) Responsabilità civile e previdenza 1532; Cass civ, 24 February 2011 no 4476 (2011) Foro italiano, Repertorio 2011, voce Responsabilità civile, no 124; Cass civ, 19 May 2011, no 11016, ibid, no 147; Cass civ, 24 February 2011, no 4484 (2011) Foro italiano I 1082; Cass civ, 6 July 2006, no 15384 (2006) I ibid 2006 3358.
The leading cases were: Cass civ, Sez Un, 11 November 1991, no 12019 (1992) I Giurisprudenza italiana 2218 note *E Corradi*, La custodia di cose quale criterio di imputazione della responsabilità ex art 2051 c.c. nel quadro del rapporto di locazione; Cass civ, 20 May 1998, no 5031 (1998) Danno e responsabilità 1101 note *P Laghezza*, Responsabilità oggettiva e danni da cose in custodia.
See among several first instance holdings: Trib Rovereto, 13 January 2010 (2010) Danno e responsabilità 412; Trib Siracusa, 31 October 2010 (2011) Danno e responsabilità 508.

132 *Monateri* (fn 89) 1033 ff; *Franzoni* (fn 74) 545 ff.

CASE 15. BREAKING OFF NEGOTIATIONS

C can sue D under art 1337 It cc, affirming a legal duty to act in good faith during negotiations and before the formation of a contract. 162

In particular, C can argue that D implicitly accepted to refuse parallel negotiations by accepting C's proposal to continue negotiations the next Friday, after C's return from his business trip. 163

Nevertheless, this is a controversial case: breach of negotiations, in fact, is a situation where Italian courts have the difficult task of balancing two opposing interests, equally protected by the law of obligations, that is: freedom of contract and reliance on fair dealing. Therefore, in a free-market economy, what is relevant is not withdrawal from negotiations, but a withdrawal without cause and with the conscious (though not necessarily malicious) attitude of one party who has already started parallel negotiations.[133] 164

In the case at stake, should the courts recognise D's bad faith in the withdrawal from negotiations, C may obtain reliance damages. According to case law, reliance damages (*interesse negativo*) correspond either to the minor advantage or to the highest detriment (including loss of profits) suffered by the innocent party.[134] 165

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133 Cass civ, 25 February 1992, no 2335 (1993) I Foro padano 149; Cass civ, 6 March 1992, no 2704 (1993) I Giurisprudenza italiana 1560; Cass civ, 30 August 1995, no 9157 (1995) Giustizia civile Massimario 1568; Cass civ, 13 March 1996, no 2057 (1996) I Foro italiano 2065; Cass civ, 27 October 2006, no 23289 (2006) Giustizia civile Massimario 10; Cass civ, 14 February 2000, no 1632 (2000) Giurisprudenza italiana 2250 note *A Musy*, Comportamenti affidanti e valutazione del danno risarcibile; (2000) Danno e responsabilità 982 note *P Maninetti*, Responsabilità precontrattuale e risarcimento dei danni: verso una concezione sempre più estensiva; Cass civ, 10 June 2005, no 12313 (2006) I Nuova giurisprudenza civile commentata 349 note *R Morese*, La responsabilità precontrattuale della pubblica amministrazione per recesso ingiustificato da trattative con privato e risarcimento del danno; Cass civ, 5 August 2004, no 15040 (2005) Danno e responsabilità 599 ff note *P Pardolesi*, Recesso nelle trattative: un esercizio di *comparative law and economics*. Cf *G Meruzzi*, La trattativa maliziosa (2002) 266 ff; Cass civ, 16 January 2013, no 1000 (2013) Giustizia civile Massimario; Cass civ, Sez Un, ord 19 October 2012, no 18092 (2012) 22 ottobre Diritto e giustizia online; Cass civ, 20 March 2012, no 4382 (2012) Danno e responsabilità 1103 ff note *V Montani*, Responsabilità precontrattuale e abbandono ingiustificato delle trattative: un rapporto da *genus* a *species*; Cass civ, Sez Un, ord 27 February 2012, no 2926 (2012) Guida diritto 45; Cass civ, 10 August 2012, no 14400 (2013) II Giurisprudenza commerciale 202 note *FM Mucciarelli*, Il risarcimento del danno per mancata proposizione dell'Opa obbligatoria: l'epilogo del caso Sai/Fondiaria?

134 Cass civ, Sez Un, 19 December 2007, no 26725 (2008) Giustizia civile 2785 note *T Febbrajo*, Violazione delle regole di comportamento nell'intermediazione finanziaria e nullità del contratto: la decisione delle Sezioni Unite; Cass civ, 29 September 2005, no 19024 (2006) Responsabilità civile e previdenza 1087 note *F Greco*, Difetto di accordo e nullità dell'intermediazione finanziaria; cf *A Luminoso*, La lesione dell'interesse contrattuale negativo (e dell'interesse positivo) nella responsabilità civile (1988) Contratto

CASE 16. NON-DISCLOSURE OF RELEVANT FACTS

166 C can sue D, provided that he can provide evidence of D's knowledge of C's needs:

(a) Under pre-contractual liability (art 1337 It cc): violation of the duty to disclose, as part of the duty to act in good faith during the formation of the contract (see Case 15). The Italian High Court has in fact stated that reliance damages can be awarded under pre-contractual liability even though a contract has been entered into.[135]
(b) Under contract law, as a fraudulent omission to inform of facts relevant to the conclusion of the contract (C would not have bought the type X, but a completely different type of machine, if one existed on the market) (art 1439, para 1 It cc (reticenza dolosa)): according to this provision, C may claim the invalidity of the contract (annullamento) that will eventually be terminated, restitutionary remedies would be triggered, and expectation damages awarded to C.
(c) Under contract law (art 1497 It cc): breach of a warranty of quality implied by the law. In this case, C can ask for the termination of the contract and expectation damages, provided that the lack of quality exceeds the sustainability in compliance with customs, and that C informed the seller of the lack of quality within eight days from the discovery of the defect, and the action is taken within one year from discovery (art 1495 It cc).

e impresa 792; *P Gallo*, Responsabilità precontrattuale: il quantum (2004) I Rivista di diritto civile 487; *C Turco*, L'interesse negativo nella *culpa in contrahendo* (verità e distorsioni della teoria di Jhering nel sistema tedesco e italiano) (2007) II Rivista di diritto civile 165 ff; *D'Amico* (fn 2) 122 ff.

135 Cass civ, 8 October 2008, no 24795; Cass, Sez Un, 19 December 2007, no 26725 (fn 3).