

# UNJUST DAMAGE AND THE ROLE OF NEGLIGENCE: HISTORICAL PROFILE

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## I. INTRODUCTION

In scholarly doctrinal works, there is usually little occasion for an historical treatment of civil code provisions. There is a tendency among scholars to focus narrowly and ignore the history of their specialty. Historians, on the other hand, may tend to theorize too broadly for these purposes. Bearing this in mind, we see that in Article 2043<sup>1</sup> regarding fault liability, the Italian Civil Code reflects almost word for word the norms and the contents of its predecessors. The terms of the provision refer back to “principles,” adages and Roman notions. The various arguments about the subsection on negligence have referred constantly to the importance of legal tradition; in fact, this tradition is so valued that it has at times overruled the letter of the law. With the support of historical studies, this tradition reached the 1960s almost unchanged. Civil lawyers then found it necessary to take on tasks that were traditionally reserved for historians.<sup>2</sup> Thus, we have shown an awareness of the importance of tradition.

But how solid is this tradition? Were the historic sources really intended to convey the meaning that some modern scholars would have us believe? When reference is made to the past, what exactly are the source’s historical roots: French, Pandectist, or authentically Roman?

Finally, how was the notion of “unfair” damage introduced into the Italian Civil Code? And what is the relationship between that

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1. Article 2043 provides: “Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.” *THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION* 209 (Mario Beltramo et al. trans., Book 4, 1991).

2. On this subject there is an excellent work by Gianfranco Massetto, a renowned historian, on the topic of “extra-contractual liability” recently published in the *ENCICLOPEDIA DEL DIRITTO* 1099 (XXXIX ed. 1988).

code and the BGB, which has, delictually speaking, features similar to common-law tort systems? Is the BGB an alternative model to the French codification or just a kind of limitation upon it? To these initial questions that any code interpreter must address, we can give an easy answer.

It is not necessary to trace the internal history of the “*Lex Aquilia*.” This ground was covered excellently by G. Rotondi, as well as by various Roman historians. Further, we have no need to search for ancient sources, as was recently undertaken by Jolowicz and Markesinis, who made a schematic comparison between various tort systems—Code Napoleon, BGB, and other modern systems, which were preceded by the *Lex Aquilia*, as if this Roman legislation were a unifying model for all the modern systems of liability.<sup>3</sup> It may now be common knowledge, but only recently were the above systems considered to be similar. Then it became clear that tort and crime are but two aspects of the same matter. It also became accepted that the notion of “tort” originates in Roman “culpa,” and that the Roman sources, being rich in nuance and detail, offer a wealth of insightful literature.

The interpretive study proposed here is quite different. Its purpose is to try and understand, by examining the sources that may have influenced the outlook and culture of the 1942 legislators who authored the Italian Civil Code, how the actual system of fault liability was conceived, with no pretension, however, of being a complete and definitive treatment of the subject.

New questions that need to be answered are then raised. We will consider how the Roman sources were adapted in the fault liability field by the jurists of the 1600s and 1700s to conform to their own outlook, heritage and philosophy. Also to be addressed is the different relationship existing between civil liability sanctions and criminal punishment for fraudulent and negligent acts. We need also to understand where human behavior ends (and with it the principle of civil liability) and where casualty begins. We must also consider situations where an unintentional human act coincides with an unavoidable act of nature. These are problems and questions that have yet to be answered. Regarding sources, we will investigate the

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3. F.H. LAWSON & B.S. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW (1982).

impact of the Jesuit and Jansenist “*querelles*.” These quarrels concern man’s free will (*arbitrium*), his control over his daily life, and doubts concerning the relationship between God and man. All of these have influenced ethical concepts and therefore the relationship between negligence and sanctions in civil law. In fact, the initial findings of the ancient authors indicate a close connection between ethical principles and liability within a legal system. It goes without saying that ethical principles of recent centuries, even if permeated with Christian values, are more closely related to our system than to the ethical values in Roman times.

A brief analysis of some of the most popular and well-known sources will convince us of the above assumptions. It will also prompt questions and help us to understand the novelty contained in the deceptively simple construction of Civil Code article 2043.

## II. HISTORICAL ANTECEDENTS

In the fourth book of Mario Viviani’s work,<sup>4</sup> which is dedicated to liability arising from criminal offenses, he cites those usages or practices (*praxis*) that, in reference to free will (*arbitrium*), connect human actions and their consequences to the will. “It is said that what we want to do or not to do depends on our choice, and its opposite is due to our choice.”<sup>5</sup> Viviani quotes extensively from St. Thomas Aquinas, St. Augustine, and Plato’s *Gorgia*. The author examines several types of torts. Theft, robbery, and finally damage are regulated by the *Lex Aquilia* and are thus distinguished. The question of sanctions for damage arising from self-defense is analyzed here, taking into account the Holy Writ.

In the analysis of obligations arising from “quasi-crime,” Viviani offers some examples (hotel-keeper, carriers, etc.), which highlight the subjective fault basis of the action (“the wrong of one person cannot be attributed to another”—“*delictum unius non debet alteri imputari*.”). The justification for third-party liability due to negligence in the selection of people who proved to be unreliable or untrustworthy is then given. In a concise sentence, the problem of

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4. MARIO VIVIANI, *RATIONALE INSTITUTIONUM JURIS CIVILIS* 303 (Rome, 1623).

5. *Id.* (“[I]d dicitum positum in nostra facultate quod et agere et non agere valemus, et cuius oppositum in nostra facultate est positum.”).

reconciling the subjective basis of the responsibility for damages with “third-party liability” is again called to mind.

The writings of Johann Gottlieb Heinecke (Heineccius, 1681-1741) are also important and well known in Italy. His treatise on torts brings out his esteem for tradition, his convictions about fault liability, the unquestioned role of negligence, and the secondary significance of exceptions related to liability arising from personal conduct.<sup>6</sup>

Heineccius’s description of the tort categories is systematic. He specifies the characteristics of crime and quasi-crime separately, thus avoiding the creation of a universal tort system as well as the general clauses so characteristic of the French system.<sup>7</sup> Heineccius introduces the obligations arising from crime in Book IV of his *Recitazione*. The act originating the obligation can be either lawful or unlawful. A lawful act arises from the will of the parties and is called “convention”; an unlawful act is called a crime or misdeed. According to the author, Justinian’s treatment of crime in the *Institutes* deals almost exclusively with the crime of theft, and thus Heineccius feels a need to put into his treatise other types of tort, as well as a general preface.

His general preface refers to both crimes and quasi-crimes. It differentiates real crimes (fraud), quasi-crimes (negligent acts), public crimes (threats to State security), and private crimes which encompass harm to “citizens’ rights and property.” According to the Italian translator of this work, “crimes” include only those acts classified as offenses.

His general definition of “crime”<sup>8</sup> separates “act” from “thought.” An act is something apparent and expressed. It is a thought which has materialized into an action. An “unlawful” act indicates a violation of a “civil or natural law” (we recognize here the

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6. See JOHANN GOTTLIEB HEINECKE, *ELEMENTA JURIS CIVILIS SECONDOM ORDINEM INSTITUTIONUM* 349, ¶1112 (Neapolitan ed. 1778); JOHANN GOTTLIEB HEINECKE, 4 *RECITAZIONI DI DIRITTO CIVILE SECONDO L’ORDINE DELLE ISTITUZIONI DI GIUSTINIANO* 163 (A.L. Naplas trans., 1830).

7. Article 1382 of the French Civil Code provides: “Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.” C. CIV. art. 1382 (Crabb trans., 1977).

8. *Id.* (“[A] crime is an unlawful and spontaneous act, by which a party is obligated to suffer a punishment, and to repair the damage if possible.”).

similarity to the notion of “unfair damage,” which means damage caused *contra jus*). Further, this act has to be “spontaneous,” that is it cannot be coerced. The obligation to make the victim whole applies only when possible (for example, if the victim dies there can be no reparation).

In treating the crimes of theft<sup>9</sup> and robbery,<sup>10</sup> Heineccius addresses the *Lex Aquilia* and the subject of injuries.

The author defines *damnum injuria datum* as “any harm to personal property or rights caused by a person with no legal justification.” Here again we note the similarity to the second part of the modern definition of “unfair damage,” that is, damage caused *non jure*. Harm to a person’s property and rights can also occur as a consequence of a crime, for example the killing of a person. The author clarifies that in this case several legal actions will co-exist. The main interest protected is personal property; the damage caused must be unjustifiable, which means that it must not arise from the exercise of a legal right (*non jure factum*).

Whether the damage arises from a fraudulent or negligent act or a failure to exercise due care is irrelevant: Under the *Lex Aquilia* slight fault is actionable (“*in lege Aquilia et levissima culpa venit*”). Depending upon the degree of negligence, the case will be classified as a crime or quasi-crime. In the description of tort, the author continues with examples and arguments taken from Roman sources: damage caused by servants or animals and damage to trees and objects. Finally, the subject of injury to persons is introduced. The injurer is obligated to pay for the medical expenses of the injured; he is responsible for “*lucrum cessans*” and “*damnum emergens*.”

A superficial reader reviewing these sources could argue at this stage that in Heineccius’s time it was only necessary to update the interpretation of Roman sources in order to discover the enforceable legal rules. However, here Heineccius abruptly changes the scenario; he questions whether the *Lex Aquilia* still has currency, and he highlights all of the arguments against it. Today, he says, there is no distinction between servants, or different types of animals, or among the different means of causation. The damage, whether

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9. *Id.* ¶ 1039-1070.

10. *Id.* ¶ 1071-1079.

“corpore” or not, is not doubled because the party denies it, and so on. Thus Heineccius, rather than preserving and updating the portion of the sources which remain valid, adopts a drastically simplified solution. He derives the modern concept of damage from the natural law and *patrii statuti* instead of the *Lex Aquilia*. A quotation of Tomasius follows.

There follows a dissertation on injuries, libel, damage to reputation, and so on.<sup>11</sup> We finally arrive at an explanation of obligations arising from quasi-crime.<sup>12</sup>

Heineccius opens up a polemic on the work of Struvio regarding the definition of “quasi-crime.” Feeling strongly about his own theory on the subjective basis of tort, he cannot accept the concept of third-party liability when no negligence has occurred (which in his opinion is Struvio’s theory). He insists on the definition of “quasi-crime” as “a tort committed with negligence but without fraud.” Hence a lessee is liable for his servant’s tort because “he has failed to admit in his house a more diligent subject”—not because of third-party liability.

At this stage his thesis becomes obvious. He, in fact, provides a description of six types of quasi-crime: (1) an unfaithful judge; (2) scattered and thrown objects (*de effusis et dejectis*); (3) suspended and hanging objects on passageways; (4) damage to clients’ chattels caused by sailors, hotel-keepers and grooms; (5) aiding and abetting; and (6) “dissimulation” (giving consent to the commission of a crime).

The Neapolitan editor’s footnote is also quite interesting. He recalls, without noting any contrasts and almost as a natural sequence, the liability rules of the Two Sicily Kingdoms which derive from the Napoleonic Code.

Let us return to Heineccius’s dialogue with his interlocutors. Among them we have Struvio (Giorgia Adamo Struvio, 1619-1692) whose *Jurisprudentia Romano Germanica Forensis* is well known in Italy.<sup>13</sup> In reference to crimes, Struvio uses the Roman divisions of

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11. *Id.* ¶ 1096-1111.

12. *Id.* ¶ 1112-1125.

13. GIORGIA ADAMO STRUVIO, *JURISPRUDENTIA ROMANO GERMANICA FORENSIS* (16th ed. 1739).

the subject.<sup>14</sup> As a general definition of crime, he insists on an act in itself illicit (*factum in se illicitum*) committed spontaneously and in violation of the law. The obligation to pay damages and to submit to sanctions arises from such actions. After treating *furtum* (theft) and *iniuria* (libel), the author deals with *damnum iniuria datum*, which is the damage caused to a person or his chattels due to fraud or negligence, no matter how slight. He highlights the point that in crimes, damages consist of a sum of money and in cases of physical injury (reference is made to the *Lex Aquilia*) this will include medical expenses and worker's compensation (*operae, quibus quis caruit aut cariturus est ob vulnus*), and, if requested by the victim, an amount for pain, grief, scars, and deformity. Further on, Struvio discusses quasi-crime,<sup>15</sup> citing the same examples as Heineccius. The crux of his theory lies in the recognition of third-party liability—liability based on something other than personal conduct. Struvio's modernity lies in not insisting upon proof of the subjective negligence of the tortfeasor.

Grotius also differentiates between *casus* and *culpa*, that is, between accident and fault. *Culpa* (negligence) implies conscience and action, despite the lack of any desire to cause the damage. As stated in the Aristotelian ethic, fault is similar to the principle of responding for one's behavior.<sup>16</sup> In dealing with damage *per injuriam*, Grotius states that once it has been perpetrated, the obligation to make good on the damage arises *naturaliter*.<sup>17</sup>

The writings of Vinnius (1588-1657) are also relevant to this discussion. According to Orestano,<sup>18</sup> the works of Vinnius were well known and widely used by Italian scholars teaching civil law up until the first half of the 1800s. Vinnius's most used works are the four books concerning *Institutuinum Imperialium Commentatius*

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14. 2 *id.* tit. XXIII, at 436.

15. 3 *id.* tit. XXVI, at 442.

16. "*Culpa affinis est qui in se habet agendi principium*," GROTIUS, *DE JURE BELLI AC PACIS* 514 (Amsterdam, 1646).

17. *Id.* at 289.

18. RICCARDO ORESTANO, *INTRODUCTION TO THE STUDY OF ROMAN LAW* 81 (1987).

*Academicus et Forensis*,<sup>19</sup> with footnotes from Heineccius, and the four books concerning *Partitionum Juris Civilis*.<sup>20</sup>

In reference to third-party liability, Vinnius mentions damage caused by objects and animals. He does not, in any event, mention “negligence” as a premise for damage liability.

Voet (1647-1714) does not present any particular surprises on the subject. His *Commentarius ad Pandectas*<sup>21</sup> defines “crime” as a verbal offense or action based on fraud or negligence and *contra jus* (against the law). Such description refers mainly to crimes against a person’s rights and property.

### III. THE MODERN EVOLUTION

The problem of personal negligence for third-party liability remained unresolved until the 1865 codification, in Italy, which, as we know, creates a synthesis (*crasi*) of the two opposite theories. In fact, even though it supports (at least literally) the nonliability thesis, the Code still recognizes that a person is liable for damages caused by his own actions or by persons for whom he is responsible or by objects in his custody.

Indeed, the textbooks used by practitioners (*pratici*) and by civil law students in that period summarize and reproduce the rules of Roman law. The work of Carlo Redi is an exemplary model.<sup>22</sup> His definition of *delictum* is every illicit wrong done willingly against the law.<sup>23</sup> He then describes the different types of crime (theft, robbery), damages *ex Lege Aquilia*, injuries (insult, offense) and finally quasi-crimes (with no mention of the law applied at that time). The usual examples (a judge’s bad decision, “effusiones et deiectiones”; *posita et suspensa*; hotel-keeper and carrier liability) are found here as well.

We can now see how the Roman sources can be read, interpreted, and manipulated to support both the principle of “no liability without fault” and the opposite principle of objective liability

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19. VINNIUS, *INSTITUTIONUM IMPARICLIUM COMMENTARIUS ACADEMICUS AT FORENSIS* 770 (Naples, 1771).

20. VINNIUS, *PARTITIONUM JURIS CIVILIS* 185 (Venice, 1793).

21. VOET, *COMMENTARIUS AD PANDECTAS* tit. 1, 802 (XLVII ed., Colonia, 1778).

22. See CARLO REDI, *INSTITUTIONES JURIS CIVILIS* 225 (Florence, 1841).

23. *Id.* (“*omne factum illicitum sponte contra jus admissum*”).



that recognizes third-party liability (for objects or animals in custody or for employees) with no need to prove personal negligence.

The Roman sources being predominant, a system of typical paradigms is constructed by using case methodology to identify the different types of tort.

How does the transition occur from a system based upon typical cases to a system founded upon abstract principle?

We see the change occurring in Domat and Pothier. The former describes in minute detail the different types of tort, but prefaces the description by giving a general concept of tort. The latter simplifies the matter and draws some general guidelines for the Code's norms on crime and quasi-crime, insisting mainly on imputability.

Domat, unlike the authors studied so far, starts from a wide and unitary concept of torts. He takes into consideration not only all the facts expressly forbidden by the law, but also those in conflict with equity, honesty, and society's morals, "even if the same are not provided for by written law."<sup>24</sup> Thus, we begin our outline of the concept of "unlawfulness" (*illicite*), which will be discussed later. This leaves out reference to tight guidelines regarding specific rules, and strives to evaluate general behavior. In other words, we are approaching the creation of a "general cause." Domat explains: "Anything against equity, honesty and society's morals is against the principles of the Laws and God's Law."<sup>25</sup>

Further on Domat provides an explanation for such rules: men are united in a society by a certain order which obligates them to refrain from damaging the rights and property of others and also obligates each member to maintain his possessions in such a way so as to not damage another's.<sup>26</sup> In Domat's words, an orderly, civil life requires sanctions against damages which are caused by personal conduct of employees, by objects owned or by animals used.

The norms of the Code Civil are born in this microcosm: each member of society (citizen) deserves a peaceful life, and this can be achieved if each member has control over certain things which are

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24. Domat, *Lois civiles*, in 1 OEUVRES COMPLETES 467 (J. Remy ed., Paris, 1835).

25. *Id.*

26. *Id.* at 473.

controllable, such as personal behavior, possessions, employees and the use of animals. These are the reasons for this legal regulation.

In his description of torts, Domat does not at first refer to damage. It is mentioned in the context of commitments created without a previous contractual obligation (“extra-contractual,” as we would say). He then deals with the giving (*datio*) of things, that is the giving or receiving of a sum of money not due, for unlawful reasons.

In Domat’s classification of negligent damage, he distinguishes negligence which causes a crime or tort from that which produces breach of contract. For example: the failure to consign an object that has been sold or the failure to make repairs to a rented house. He also contrasts these from negligence, which is not connected with a crime or tort or agreement but is simply due to imprudent behavior or the custody of an animal or object.

Domat is therefore the first one clearly to differentiate those matters unified by the common denominator of negligence, and to distinguish between torts and crimes (*delitti*), since the latter belongs, in his view, to a section of the law which should not be mixed with “civil matters.”<sup>27</sup>

It should be noted how Roman sources are also taken into consideration by Domat, especially in citations to the Digest. These receive an interpretation quite different from that given by the historians and jurists of Domat’s day. Domat does not follow the typical Roman arrangement, nor does he mix together crimes and torts. After enunciating the definition of tort, which he insists has to be anchored in negligence, he gives some examples. These examples are of course taken from the Digest, as well as from daily life.

Remy, who is the editor of the post-code edition of Domat’s work, presents some references to the “code civil” and also includes in a footnote the French Court’s first decisions (*arrêts*). One of these decisions concerns the liability of a building owner for damage to a third party arising out of the use of the owner’s property and his servants’ negligence. The owner is responsible even if such damage occurred in his absence or without his knowledge. In the case of undivided ownership, all owners are jointly liable unless the property is divided. Teachers, craftsman and anybody who boards pupils,

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27. *Id.* at 470.

apprentices, or others for reasons of commerce or industry are liable for their actions.<sup>28</sup> The same applies for objects suspended or thrown from a building.

Domat tries to adapt the Roman rules to the contents of the French customs (*coutumes*). Regarding damages caused by animals, Domat examines several cases and cites a general rule: if the owner or custodian of the animal was in a position to avert the damage, he is responsible because he stands to benefit from the animal's use.<sup>29</sup> In reference to damage caused by buildings, the owner is always liable except for fortuitous cases or if he proves to have exercised his own right.<sup>30</sup>

We may ask, why does Domat focus on damage caused by objects, people and animals? These examples can be easily linked to their Roman sources and to the frequency with which damage of this kind occurred at Domat's time in the agricultural world. Unlike scholars in the Roman-German tradition, Domat is not satisfied with a simple list of cases. He elaborates general rules for human society. That is, all cases are governed by general rules which should correspond, in a descriptive order (the order of civil society) to the definition of tort found in the opening of his treatise. The "grand" author enunciates here his general rule, with notes referring to other types of damage caused by negligence, excluding offenses (*reati*) and crimes:

All losses and damages which may occur through the act of a person, whether due to imprudence, rashness, ignorance of what one ought to know, or other similar faults, however slight they may be, must be repaired by him whose imprudence or other fault brought it about.<sup>31</sup>

The above general enunciation and the text of the Code Napoleon art. 1382 correspond exactly. In fact, the latter states: "Every act of man

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28. *Id.* at 472.

29. *Id.* at 474-75.

30. *Id.* at 478-79.

31. "Toutes les pertes et tous les dommages qui peuvent arrivé par le fait de quelque personne, soit imprudence, légèreté, ignorance de ce qu'on doit savoir, ou autres fautes semblables, si légères qu'elles puissent être, doivent être réparées par celui dont l'imprudence ou autre faute y a donné lieu."

which causes damage to another obliges him by whose fault it occurred to repair it.”<sup>32</sup>

Pothier (1699-1772) restates the position that crime and quasi-crime are a third and fourth source of obligation: a crime is an act by which a person, with fraud or malice, causes damage or tort to another; a quasi-crime is an act by which a person, without malice but with unjustified negligence, causes harm to another.

Pothier, in his concise and clear style, derives implicitly from the above definition the essential elements of tort: the subjective element (fraud or negligence); the objective element (damage); the knowledge, which implies imputability (much consideration is given to cases of damage caused by minors, incapables, and the mentally insane); and the chain of causation.

In reference to quasi-crime, which as defined by Struvio involved, “acts for which we are liable even if caused by others,” Pothier does not insist on the necessity of negligence when referring to custodians, masters and parents. Nonetheless, he relieves parents of all responsibility if they can prove that they could not have prevented the child’s act. This exemption, however, does not apply to owners and employers, for reasons of social policy and “deterrence”: “This liability has been established in order to make masters careful to use only good servants.”<sup>33</sup> Obviously, however, masters and employers are not liable for torts caused by servants and salesmen acting outside of their employment.<sup>34</sup>

Pothier’s dissertation on torts ends here. The codifiers had only to produce a synthesis (*crasi*) between Domat’s and Pothier’s writings. As can be seen in Fenet’s documents, this is what occurred.

The concise norms of the Code Civil soon became a source of analysis for the doctrine and the jurisprudence. Among the commentators we cite two examples, one belonging to the systematic model, the other to the exegetic one. The transformation that occurred, whether expansive or restrictive, over almost two centuries of application, will be discussed later.

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32. “*Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.*”

33. “*Ce qui a été établi pour rendre les maîtres attentif à ne se servir que de bons domestiques.*”

34. 1 POTHIER, OEUVRES DE POTHIER 64, 141 (Dupin ed., 1835).

K.S. Zachariae's version defines "crime" as "any unlawful act by which a person offends against, purposely and with malice, somebody else's rights."<sup>35</sup>

The definitions of "crime" and "offense" are followed by a discussion of the distinction between the two terms, which are considered parallel but not synonymous. A crime is a harmful, damaging act which has the following elements: (a) illicitness, that is, a prejudice to somebody's rights, which derives either from an action or an omission; (b) absence of justification for such action; (c) imputability; and (d) a subjective element: fraud for crime and negligence for quasi-crime. As we can see, the core of the entire theory of torts lies in this concise and clear analysis. It is still today endorsed by jurists, with the exception, of course, of the definitions of crime and quasi-crime. All of the characteristics indicated above for crimes are repeated for quasi-crimes,<sup>36</sup> which he believes are based on negligence.

Without negligence, an act cannot be considered a quasi-crime; the existence of negligence must be proved by the injured party.<sup>37</sup> Third-party liability, for which the law attaches legal responsibility, is treated like quasi-crime whenever the tortfeasor is negligent.

The superb treatise of Toullier<sup>38</sup> may be considered next. He starts from the terms of Code article 1382 in order to clarify that the expression "*fait*" is intended in its broader meaning, including mistakes and omissions. The expression "*faute*" refers to the objective illicit act (*quod non jure fit*), not to the subjective feeling.

He concludes that it is forbidden to prejudice someone else's rights<sup>39</sup>—namely individual rights, personal rights, ownership and other real property rights. Toullier includes possession, among other real rights, provided it has lasted for over a year. A very detailed case study of jurisprudence and legislation follows, concerning mainly

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35. K.S. ZACHARIAE, CORSO DI DIRITTO CIVILE FRANCES (Aubry & Rau trans., 5th ed. 1868); 2 K.S. ZACHARIAE, CORSO DI DIRITTO CIVILE FRANCES 110 (Attanasio & Del Core trans., Naples 1847) [hereinafter ZACHARIAE].

36. ZACHARIAE, *supra* note 35, at 113.

37. *Id.* at 113.

38. TOULLIER, 6 LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DE CODE 48 (New Belgian ed., Bruxelles 1838).

39. *Id.* at 50.

arson, real property, leasing, and so on. There is also a specific discussion on norms concerning third-party liability for persons or objects in custody.

Toullier is very skeptical regarding the link between negligence and liability. How can third-party liability be justified when reason and moral principles indicate that civilized people should be measured by the subjective standard of negligence? Toullier analyzes the Roman sources and determines that the Romans also based third-party liability on negligence.<sup>40</sup>

Toullier then believes that the Code considers third-party liability to be based upon exceptional cases imposed by the law or by an expressed or implied agreement, for example, hotel-keeper or carriers' liability. These norms, though severe, are considered necessary for safety reasons.<sup>41</sup> He also proposes a restrictive interpretation in reference to parents' responsibility. For masters and employers, he does not recognize that this is a type of third-party liability. They are responsible for damage because they ordered somebody to do something on their behalf.<sup>42</sup> The same concept applies to a servant's fraudulent acts, such as stealing from a neighbor's crop, provided the servant is not a criminal.<sup>43</sup> Toullier justifies the liability as follows: masters and employers use servants and salesmen to operate on their behalf; therefore, any damage occurring as a result of the actions of the latter must be considered as if caused by the masters and employers *directly*.

Toullier notes that the Code excuses the liability of parents and teachers who can prove that they could not have prevented the damage. He explains why it does not do the same for masters and employers. The author recalls the argument, which occurred during the Code's compilation, between Tarrible who was in favor of the exemption and Bertrad de la Greuille who was against it. To resolve this question, Toullier cites Pothier, who denies the exemption with respect to acts by servants and employees within the scope of their employment.

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40. *Id.* at 101.

41. *Id.* at 109.

42. *Id.* at 117.

43. *Id.* at 117 n.4.

In other words, the subjective character of an act—and therefore the liability for it—is maintained by treating the act of the servant or employee as an intermediary link to the employer.

If damages are caused by objects, they, too, are rationalized in terms of negligence. Thus, “if a building collapses the owner is responsible because it was his duty to maintain it in good order.”<sup>44</sup>

When the draft of the Civil Code norms was written by the redactors, the question of liability for negligence and the exceptions thereto were not straightforward and clear. To better understand the different approaches to the regime of liability, we should now have a look at the other legal systems which were in force in Europe at that time,.

The Austrian Civil Code came into force on January 1, 1812, under Francis I. It was extended to the state of Milan on January 1, 1816, with the understanding that the Italian translation of the Code would prevail over the Austrian text. The Code follows Gaius’s arrangement of the civil law by subdividing legal topics into subjects (persons, property and possessory rights, and norms common to both). The resulting picture, however, is more complex than the linear and simplified Code Napoleon. In fact, when the stratified layers of rhetoric are removed, the Austrian Civil Code appears surprisingly modern. The general rules regarding contracts are placed in the Code’s Second Part, which concerns personal and real property rights. The opening article states: “Personal rights in property, under which one person is obliged to some extent to accomplish something for another, are based either directly on a law, on a legal transaction, or on damage suffered.”<sup>45</sup> We can instantly see here the tripartite sources of the field of obligations (*ex lege, ex contractu, ex delictu*).

Yet in the succeeding chapters where general and particular contracts are dealt with, obligations arising from the law are not included, and the principles related to tort are placed at the end of Part Two under the heading: “Right to Damage and Satisfaction.”

The Austrian legislator’s main concern is to categorize different types of damage, whether contractual or extra-contractual,

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44. *Id.* at 131.

45. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] ¶ 859 (Austria). The English translation appearing in the above text and in subsequent text is taken from Baeck’s edition of The General Civil Code of Austria (Oceana, 1972).

by the use of similar norms. This classification should take into consideration the damage's cause, namely a breach of contract or a tort. Paragraph 1295(1), using a formula similar to Napoleon Code Article 1382, reads: "A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by the violation of a contractual duty or without regard to a contract."<sup>46</sup>

In this highly descriptive Code, a damage is defined as "every detriment which has been caused to any person in regard to his property, his rights or his person." Such damage refers to the direct loss (*damnum emergens*), which, the Code states, must be distinguished from the *lucrum cessans*—namely "the loss of profits which a person expects according to the usual course of his affairs."<sup>47</sup>

What is the cause of the damage? Paragraph 1294 answers: "Damage arises either from an illegal act or an illegal omission of another, or from an accident." It is further specified in paragraph 1306: "A person is generally not responsible for damages he has caused without fault or by an involuntary act."

Paragraph 1311 then says: "Mere accidents affect only the person to whose property or person they occur." Negligence is the crux of the system. There is to be no liability without fault, and when in doubt, "[t]he presumption prevails that damage has arisen without any fault on the part of another."<sup>48</sup> The burden of proof is on the injured party.<sup>49</sup>

Damage, by definition, must be negligent and "illegal." Illegal damage is caused "either willfully or not willfully."<sup>50</sup> Willful damage is based either on a wrongful intention, when caused with knowledge and willingness or on an omission, when caused by ignorance or lack of care of duty. Fault (*verschulden*) includes, in this text, both negligence and omission if there was a duty of care.<sup>51</sup> According to Basevi,<sup>52</sup> willful damage would best be translated as

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46. *Id.* ¶ 1295(1).

47. *Id.* ¶ 1293.

48. *Id.* ¶ 1296.

49. *Id.* ¶ 1298.

50. *Id.* ¶ 1294.

51. *Id.*

52. BASEVI, PRACTICAL ANNOTATIONS TO THE AUSTRIAN CIVIL CODE 578 (VI ed., Milano, 1855).



“*danneggiamento*,” corresponding to the original “*Beschadigung*”; Ellinger also agrees on such definition.<sup>53</sup>

The above system, though obviously redundant, clearly states that a tort must be connected through a chain of causation to fraudulent or negligent behavior on the part of the responsible party<sup>54</sup>; furthermore, damage must qualify as “illegal.” The indiscriminate use of “act” and illegal “damage” derives from the norms which at times sanction the behavior and at other times the effects of that behavior.

There is no third-party liability then, except for some specific circumstances which correspond to those in the Code Napoleon, namely: (a) custodians of the insane and under-aged are responsible for damages caused by their protégés when the former have neglected their duties;<sup>55</sup> (b) employers are responsible for damage caused by employees only if they have been illegally hired or if they are, by reason of their nature, dangerous individuals;<sup>56</sup> (c) employers of incompetent or unfit employees are responsible for them;<sup>57</sup> (d) hotel-keepers and carriers are responsible for their employees’ damage;<sup>58</sup> (e) the owner of a building from which an object falls is liable for damage caused;<sup>59</sup> and (f) whoever incites or irritates an animal or provides improper custody for it is liable for any damage it may cause.<sup>60</sup> But since an animal, unlike an object, is mobile, chances are that its custodian’s contribution to the accident in terms of actual causation, is marginal. The paragraph adds: “if no one is convinced of negligence, the damage which occurred should be considered as a fortuitous case.”

As far as protected interests are concerned, it can be seen that the Code creates a general scheme of typical and atypical cases. In fact the definition of damage makes reference to harm caused to “property,” to “rights” and to “persons.” This categorization is

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53. ELLINGER, *MANUAL ON THE AUSTRIAN CIVIL LAW* 289-90 ¶ 1294 (G. Rotondi trans., Milano, 1853).

54. *Id.* ¶ 1313 (“A person is not generally liable for the illegal acts of another in which he has not participated.”).

55. *Id.* ¶ 1308-1309.

56. *Id.* ¶ 1314.

57. *Id.* ¶ 1315.

58. *Id.* ¶ 1316.

59. *Id.* ¶ 1318.

60. *Id.* ¶ 1320.

tempered both by the adjective “any” harm, and by use of the expression “rights.” Ellinger stresses that this term refers to “civil and political rights to which any citizen is entitled, and not to legal action for contractual obligations.”

Looking through the subsequent articles, we note that the type of damage taken into consideration is mainly that related to property and possessions. Nonetheless, the level of precision relating to the regulation of physical and moral damage<sup>61</sup>—so lacking in the Italian legal system—is surprisingly high. The Code deals with “permanent injuries, injury to a female who cannot, because of her gender, improve her standard of living with her own means;”<sup>62</sup> recognition of the right of parents to receive compensation for the loss of a child,<sup>63</sup> and finally with female seduction,<sup>64</sup> loss of freedom<sup>65</sup> and damage to one’s honor which causes pecuniary loss.<sup>66</sup>

Damages relating to physical injury include compensation for lost gains (*lucrum cessans*) and possibly for future damage stemming from permanent injuries caused by the accident, as well as expenses for medical care and suffering. In cases of negligent or fraudulent damage to property or possessions, thorough compensation or “indemnity” can be obtained.

According to paragraph 1323, there are no *lucrum cessans* damages recoverable in the case of injury to property.

If the action causing the damage was forbidden by the criminal law, or there was malice and impertinence, “sentimental value” may be demanded instead of the usual “estimated market value.”

We come now to the period of the Unified Code (1865) in Italy, which is the best known and most compelling period in history for the civil law scholars specializing in this subject. The Italian Unified Code reproduces, almost completely, the text of the Napoleon Code, with parallels corresponding to the previous codes. It establishes six liability norms, including: a general principle of

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61. *Id.* ¶ 1325.

62. *Id.* ¶ 1326.

63. *Id.* ¶ 1327.

64. *Id.* ¶ 1328.

65. *Id.* ¶ 1329.

66. *Id.* ¶ 1330.

responsibility based on negligence;<sup>67</sup> rules recognizing third-party liability with the exception<sup>68</sup> of parents, teachers, tutors, and craftsmen; and rules of liability for damage caused by animals<sup>69</sup> and objects.<sup>70</sup> In a work by G. Foschini<sup>71</sup> treating the Italian Kingdom Civil Code, the new norms are compared with the previous ones, but without comment, the new norms being apparently “self-explanatory.”<sup>72</sup>

Problems arising from the application of the Unified Code are extensively dealt with in the jurisprudence of this period. It is further settled that “act” includes omission (or negative action) as indicated in the Code’s general principles. Thus, reticence, meaning omission and concealment of the truth, obligates one to make good any damages.<sup>73</sup>

The extensive coverage of the Code’s general liability clause is highlighted. In fact, the phrases used in this norm are so “absolute” and “general” that there are no conceivable limits. “The law (it is stated) does not mention the injured party; the only concern is the damage which, by virtue of its occurrence, obligates one to repair. Hence, in case of homicide, anyone who claims to be damaged by the crime is entitled to recover his loss *jure proprio* (in his own right), and not simply as an heir of the injured party.”<sup>74</sup> The principle stating that “everybody is liable for his own fault” is further reiterated.<sup>75</sup>

When describing the conditions under which an injurious act becomes a civil tort, the Italian decisions take into account the theories of Domat, Pothier, and Zacharie concerning whether (a) the

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67. Unified Civil Code arts. 1151, 1152 (1865).

68. *Id.* art. 1153.

69. *Id.* art. 1154.

70. *Id.* art. 1155.

71. G. FOSCHINI 430-31 (Chieti, 1867).

72. Forschini’s tables are as follows: 1151 = Franc. 1382; Rep. 1336; Parm. 2085; Alb. 1500; Est. 1393; 1152 = Franc. 1383; Austr. 1294, 1295 e 1296; Nap. 1337; Parm. 2086; Alb. 1501; Est. 1394; 1153 = Franc. 1384; Austr. 1313; Nap. 1338; Parm. 2087; Alb. 1502; Est. 1395; 1154 = Franc. 1385; Austr. 1320; Nap. 1339; Parm. 2088; Alb. 1503; Est. 1396; 1155 = Franc. 1386; Nap. 1340; Parm. 2089; Alb. 1504; Est. 1397.

73. C. Palermo, April 10, 1894, Crisafulli c. Genio Militare—C.G. di Pal., 1894, 234; C. Roma, December 11, 1893, Com. di Cagliari c. Zappati C.S.R., 1893, ii, 359.

74. C. Torino, April 30, 1883, Lanza c. Ferrovie A.L. - L., 1888, II, 524; C. Roma May 20, 1889, ric. Mamazza L. 1889, I.

75. Cass. Florence, May 16, 1889, L. 1887, II, 295.

act is against the law; (b) the act is imputable to the acting subject; or (c) the subject acted with the knowledge and the intention to cause such damage.<sup>76</sup>

Negligence, it is stated, is either contractual (art. 1224) or extra-contractual (quasi-crime). While the same legal concept applies in both cases, the “cause” and the degree of negligence differ. In fact contractual negligence originates from a contract, whereas extra-contractual negligence arises simply from human behavior. Contractual negligence has several degrees: slight negligence (or failure to use great care), ordinary negligence (failure to use ordinary care) and gross negligence (failure to use even slight care). Extra-contractual negligence does not have internal gradations. Tort liability arises even for slight negligence: “in lege Aquilia et levissima culpa venit.”<sup>77</sup> Furthermore, contractual negligence generates in any case liability to make good the loss, while tort negligence creates liability only when there is a violation of a legal duty, which exists by virtue of society’s expectations regarding interpersonal conduct.<sup>78</sup>

Roman sources are often mentioned, though they are modified in the process. For example, the *actio institoria*<sup>79</sup> is cited to justify third-party liability of masters and employers based on the assumption that an employee looks after his employer’s interests.<sup>80</sup> The *actio de pauperie*<sup>81</sup> is quoted to justify master and custodial liability. Several arguments have been raised by jurists as to whether to recognize proof which would release the master or custodian. According to the Supreme Court of Turin,<sup>82</sup> such liability occurs regardless of negligence. The Supreme Courts of Rome<sup>83</sup> and Florence,<sup>84</sup> however, take the opposite view on the basis that the

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76. C. Roma, May 28, 1888, Rosini c. Anelli, L., 1889, I, 548.

77. C. Roma, June 8, 186, X c. Gualandi and others, L., 1886, II, 253; F., 1886 I, 714; A.G.I., 1886, I, 264, e G.I., 1886, I, 1, 479.

78. A. Venezia, May 18, 1888, De Boni c. Antonini, L., 1888, II, 339.

79. The *Institoria actio* was an action in which an actor has contracted with an institor to instigate another’s performance.

80. Cass. Florence, May 14, 1883, L. 83, II, 44.

81. The *Actio de pauperie* was an action brought for damage done by an animal without fault of the owner, but for which the owner is still liable.

82. March 3, 1882 - G.I. ’82, I, 1, 425.

83. August 16, 1894; L. ’94, II, 487.

84. December 30 ’89 - L. ’90, 299.

Code provision introduces a presumption of fault *juris tantum*, which can be overcome by proving the contrary. Jurisprudence, then, reflects the arguments and doubts embedded in the doctrine.

The important debate which took place at the end of the century (as already mentioned in another part of this work) originates right here, the main points of contention being the principle of negligence versus theories of strict liability (no-fault liability). The great jurists of that epoch favored a dyarchy: the principle of no-fault liability was justified by the needs of social order. Today we would call it social solidarity. With the beginning of the industrial era, the principal arguments sustaining no-fault liability became the proliferation of “anonymous” forms of damage, the need to offer damages to the victims who could not prove fault, and the need to introduce some form of welfare in the working-class world. This thesis was supported also by scholars such as Barassi, Cogliolo, Coviello, Gabba, Chironi, and Venezian.

We are now approaching the eve of the modern codification. Toward the end of the last century and the beginning of the twentieth, another factor arose which was eminently doctrinal and academic: the successful dissemination of German Doctrine.

As we know, the exegetic phase of the Italian Civil Code was followed by a phase of high esteem for the Pandectist theories and their systematic approach. Questions were raised as to whether there was an actual revival of the Roman Law, or whether its influence was only conceptual and indeed whether such influence was actually felt in civil tort liability.

Answering the above questions is not easy. Some attempt can be made, however, by comparing the Italian translation of the Pandectist manuals that were used by Italian jurists, with the contemporaneous Italian manuals then in use. We will take into consideration some of the Pandectist authors such as Savigny (1779-1861), Puchta (1798-1846), Arndt (1803-1861), and Windscheid, (1817-1892), all of whom have different cultural and ideological backgrounds.

Savigny’s *Treatise on Obligations*<sup>85</sup> states precisely that a tort is the violation of a right, a “dominion” exercised by a person who is

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85. SAVIGNY, *TREATISE ON OBLIGATIONS* (G. Pacchioni trans., 1915).

not entitled to exercise it. This dominion is defined as “an illegal and unfair taking.” The author takes us to an abstract and conceptual field where will and power prevail. In the criminal area, the author implies the requirement of an intention to violate a right (fraud-malice), or the violation of a legal duty of care (negligence-fault). The treatise continues with trial proceedings (*actiones*), an analysis of sources and a discourse on private sanctions. Lastly, Savigny remarks that “*iniuria*” is an expression that should apply only to libel (a prejudice to someone’s honor).

Savigny’s followers are considered to be more conventional than he was. They take some of the Maestro’s theories and erect an abstract system of torts. They also suggest an examination of tort sources, yet their treatment of the subject is quite modern. In fact their works contain the two main elements which later influenced the BGB code and the modern juridical thought: negligence as the basis of torts and violation of subjective rights as the criteria for damages.

Puchta quotes, by way of footnote, the Roman sources<sup>86</sup> and outlines a definition of tort that was endorsed by Italian doctrine up to some decades ago. Two conditions, he says,<sup>87</sup> must coincide in order to have a tort: (1) an objective condition, which is the violation of someone’s “right,” and (2) a subjective condition, which is the tortfeasor’s negligence understood in its wider sense.

With reference to the consequences of torts, damages and sanctions are mentioned. The author follows the Roman tradition. There are no variances concerning the different types of tort.

An important innovation, however, is that a tort must be perpetrated intentionally—with fraud, malice, or negligence, and *non jure*—meaning that the tortfeasor was not pursuing a legal right.

This was the basis of the modern definition of tort, and it was adopted by the BGB.

Arndt further clarifies the relation between tort, will, and negligence.<sup>88</sup> He emphasizes that “every tort implies an objective element, the offense, and a subjective element, the connection between the offense and a person’s will, which makes such person

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86. PUCHTA, INSTITUTIONS COURSE (A. Turchiarulo trans., 1st ed., Naples, 1854).

87. *Id.* at 241.

88. ARNDT, PANDETTE TREATISE 161 (F. Serafini trans., III ed., Bologna, 1877).

responsible and liable. This second aspect is designated by the word 'negligence,' meaning *culpa* in a general sense." There is a further passage: negligence makes the tortfeasor appear as "the author of a legal violation, one who commits an *injuria* (harm, offense)." The connection between will-negligence-tort and also between negligence-violation of a right-tort is thus established. The *Lex Aquilia* is the parameter used "to fix the limits within which actions are contrary to the law; any action exceeding such limit is therefore by definition a fortuitous case."

Crime is also treated in the section describing the sources of obligations. The subject of damages and alternative sanctions is discussed early on (sanctions are considered obsolete), while theft and damage are covered in the final pages, on the basis of *Aquilian* principles. We may be surprised to find Arndt's paragraph 324, concerning damage, became the exact basis of BGB paragraph 823: "anyone acting with negligence, and therefore in a tortious manner, who damages, destroys, or diminishes something (property or possessions), and anyone who, with malice or negligence, physically injures a free person, is always liable toward the injured party, to make good damages for the harm caused, *damnum injuria datum*." Arndt considers the *Lex Aquilia* to be the general legal action for damage,<sup>89</sup> and its general principles are relied upon when describing specific cases such as fire, tree cutting, etc. Further on, Arndt considers damage caused by third parties, animals and objects. In paragraphs 831, 833, and 836 of the BGB, we find the same subjects covered in detail.

As we analyze the above writings, the conflicting views about negligence become immediately evident. To some authors, negligence is a criterion by which to evaluate human behavior and negligence should be considered as violation of a duty of care. For others, it is synonymous with the violation of legal rights, and, as such, it focuses on the effects of behavior rather than on (its mode) its interior basis.

Windscheid's dissertation is considerably different. It is extremely complete and accurate in analysing the Roman sources.<sup>90</sup>

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89. *Id.* at 279.

90. 2 WINDSCHEID, LAW OF PANDETTE 342 (Fadda & Bensa trans., 1904).

Windscheid deals with tort in two stages: first in reference to legal acts and legal relations; second in regard to *choses in action*.

In reference to tortious behavior the author distinguishes two types: the violation of an individual's subjective right and the violation of a specific prohibitory law. An action is tortious either because of its effects (for example the stealing of someone else's possessions) or because "the author is blameworthy" for such conduct and negligence is implied. Negligence (*culpa*) is a unified concept, "whether it applies to the protection of property or obligations," to contractual or extra-contractual matters. It always refers to a reasonable man's behavior. Negligence entails imputability, meaning "the psychological status of the subject allowing him/her to be responsible for the consequences of his/her will, action or omission."<sup>91</sup>

In relation to the second stage, the writer deals with damage caused by fraudulent actions (defining these cases as "credits arising from crimes and similar matters").

Even though he fails to formulate a general rule, Windscheid does examine the Roman sources in order to ascertain which sources remain valid and why. Also, he places in relief the integrating theory of the German Law. Several cases are analyzed: theft, robbery, damage, damage caused by animals or objects, fraud, harm to creditors, disturbance of one's possession of things (*beni mobili*), actions against someone's will, actions against someone's protest, interference with the right of burial, violation of duty, and unfair litigation.

When speaking of a "damaging" action, the author cites negligence. In an action for negligence, he says, damages are due only if the harm or injury qualifies as unfair.<sup>92</sup> Unfairness occurs when the tortfeasor is negligent and has no legal right to cause the damage. Damages can be claimed either by the owner or the possessor of the damaged property (even if, in the possessor's case, they must be claimed against the owner).

Windscheid does not give a satisfactory and complete answer to the dogmatic problems mentioned above, even we can see that his

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91. *Id.* at 406.

92. *Id.* at 357.



analysis is constructed upon a solid basis. In reality, if we compare his analysis with that of Domat or the French exegetical authors, we can see how limited the Pandectist influence was on interpretation of the French Code. In the redaction of the BGB, such influence was heavily felt (Windscheid actually exercised a personal influence), but in the Italian doctrine, the Pandectist influence was irrelevant, both at the end of the last century and at the beginning of our own. The Unified Code's provision on civil liability, unlike the fields of contract and legal relation, is not indebted to the Pandectist school. The clear norms of the Code Napoleon are poured into the Unified Code, and appear more suitable than the principles derived from Roman sources, or from the schematic BGB. Actually, the choice of civil liability principles gives the impression of a continuous alternation between courses and countercourses. Roman sources may be kept in the background but they may emerge when needed to support and strengthen a principle or an interpretation by certain supporters. Domat's and Pothier's views are sometimes reconsidered critically, at other times ignored. Other serious conceptual or lexical questions may also be ignored in the interest of simplification or simply due to indifference.

Since our main concern is to search for the roots of the present liability in Italy, we will examine, without pretense of completeness, the analysis found in two manuals and one systematic treatise.

Biagio Brugi's manual, first published in 1904,<sup>93</sup> considers crime and quasi-crime as sources of obligation. The author draws a distinction between the "Roman doctrine of obligations ex delicto" and the liability laws currently in force. Furthermore, he differentiates the typical system of criminal law from the atypical civil tort law. Also, imitating the German Civil Code, he tries to substitute the double notion of crime/quasi-crime in place of tort.<sup>94</sup> Displaying a modern way of thinking, Brugi speaks of liability for parents, tutors, etc., in terms of implied fault. He discusses consequential obligations related to ownership, such as owning a building, or having animals in one's custody. The author regrets that the Code does not lay out the precise limits of the word "damage" nor

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93. His citations are taken from his work *Institutions of Italian Civil Law*. BIOGIO BRUGI, INSTITUTIONS OF ITALIAN CIVIL LAW 562 (1923).

94. *Id.* at 564.

provide a method of calculating it.<sup>95</sup> The measure of damages is simply a question of fact left to the judge's discretion. We must recognize then that Brugi is a Romanist who pays attention to the Pandectist scholars and to the BGB, which at the time of the author's writings, had been in force for only a few years.

Emanuele Gianturco's treatment is more lapidary. He is not inclined to discuss the basis for the liability system.<sup>96</sup> His exposition indicates the elements of tort (imputability, moral and material damage, man's fault with the exception of fortuitous cases). Social laws regarding labor relations are noted in reference to quasi-crime. It is further specified that employers' and masters' liability is applicable because of the *mala electio est in culpa*. The Roman "*actio de effusis et deiectis or noxae deditio*" should no longer apply. Here the discussion ends.

We have finally arrived at the threshold of the new codification.

Giovanni Pacchioni is extremely precise and complete in his treatment of the subject. One full book of his treatise "Italian Civil Law" is dedicated to tort liability, and he still uses the old nomenclature "crimes and quasi-crimes."<sup>97</sup> Still Pacchioni's approach is absolutely modern. His historical introduction shows the obsolete areas in the *Lex Aquilia*. It also shows what traditional principles are worth keeping. He specifies, above all, that the requirement of injury (*damnum iniuria datum*) did not have a connection with fault but was simply indicating that the damage was "*non jure*." In other words, he rejects the interpretation which connects damage to the question of imputability, even though that theory was supported by many scholars. For Pacchioni, the *Lex Aquilia* was originally based on the "chain-of-causation" principle, and the concept of negligence was introduced at a later time.

Pacchioni then draws parallels between the theory and design of general contract and the theory and design of general tort, and he abandons the bipartite classification.

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95. *Id.* at 569-70. He defines "damage" as "any injury suffered, which should not be suffered, in property, health, honor."

96. EMANUELE GIANTURCO, INSTITUTION OF ITALIAN CIVIL LAW 150 (Lessona ed., 1st ed., 1929).

97. GIOVANNI PACCHIONI, ITALIAN CIVIL LAW, vol. IV-F, pt. II (1940).

Any tort produces the same effects, whether based on fraud, fault or no fault.<sup>98</sup> Thus, doctrine, as we can see, reached an important conclusion even before the new codification took place, namely the consideration of liability without fault as a possible (and not merely exceptional) criterion of imputability. This view was reached with some difficulty once again in the sixties, by the further elaboration of doctrine, though sometimes jurists still ignore it.

Pacchioni also opens up another facet of the question that we have only briefly mentioned in this historical account. This is the issue of “illicitness.” What is the meaning of “tort?” Pacchioni’s suggestion is to invert the prior thinking by considering a tort to be the violation of a “social duty of care,” instead of the violation of a personal right.

On the controversy between fault and no-fault supporters, Pacchioni takes an intermediate position. He criticizes those who want to extend fault even to cases where fault “shines only because of its absence.”<sup>99</sup> But he also criticizes the doctrine of “pure causation,” which he considers of German lineage (it was supported by Gierke against Windscheid, but did not penetrate the BGB). The principle, *ubi commoda*, which justifies no-fault liability in terms of risk, is to be considered “a general principle of law.”<sup>100</sup> Yet this principle should not be considered as a unifying element for all the cases of no-fault liability. Indeed, each situation has its own justification. Here we come to the crux of the argument which divided the doctrine, at the beginning of the sixties.<sup>101</sup>

Thus, in Pacchioni’s view, we have no-fault liability only: (a) when carrying on activities dangerous to society; (b) when carrying on personal activities (called by the author biological) by using dangerous means; or (c) when the activity is carried on by an insane person.

Pacchioni’s ideas are inscribed in the codification. Yet, whether because of the ambiguous phrases used in the Report of the drafters, or because of the normative text which does not state

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98. *Id.* at 48.

99. *Id.* at 207.

100. *Id.* at 222.

101. Pietro Trimarchi and Marco Comporti (who altered the unifying criterion by basing it on risk) should be put on one side, and Stefano Rodotà on the other.

explicitly the choices made, the old arguments are not put to rest. In other words, it seems that the codification does not solve the issue of a bipolar criterion concerning imputability, nor does the code resolve the question of the criteria to be used to individualize the rights deserving legal protection.

We noted earlier the weak influence that German theories had on the civil liability, and this observation is confirmed when the new tort regime is codified.

Here, more or less consciously, the concepts and choices are exposed, but only to be criticized or rejected, in most cases. This is particularly apparent in several sections of the preliminary draft.

First, it is stated that the phrase “illicit facts” seems more appropriate than “illicit acts” since in other parts of the same book,<sup>102</sup> the word “acts” has referred to “legal relations” (agreements).<sup>103</sup>

Second, it is clarified, in reference to the meaning of the general clause, that:

the basis of liability, in this general clause, remains negligence. The German code does not contain a general disposition of this kind. Instead, it has a series of specific dispositions from which interpreters can derive a general theory. Even in such a code, however, the most important cases are related to liability for intentional injuries or negligent injury to the right to life, personal integrity, freedom or any other human right, or for breach of a law protecting a person.<sup>104</sup>

The analytical spirit of the BGB norms, summarized above, creates a laborious and unclear system which is discarded by the Italian redactors. They feel that they should not “get lost in a meticulous case load.” They prefer to follow as a guide the Swiss Code<sup>105</sup> and the Austrian one.<sup>106</sup> Some accommodations have been incorporated into the negligence principle, which after all already cohabited with negligence in the main base of the tradition.

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102. C.C. arts. 154, 164 & arts. 1324, 1334 (Italy).

103. R.R., n.263.

104. R.C.R., p. 24.

105. CODE CIVIL SUISSE [Cc] art. 41 (Switz.).

106. ABGB ¶ 1295.

Third, in the remarks of the Guardasigilli (Garde des Sceaux), we find practical doubts being expressed as to the appropriateness of this principle under contemporary social conditions:

“Generally we have maintained the principle that the author’s liability of a damaging fact must be based on his/her fault/negligence. A doubt has arisen concerning the necessity to change, for practical reasons, the burden of proof, meaning to require the author responsible to prove his lack of negligence, while still keeping in mind the rule of no liability without fault. I said for practical reasons because probably it would be easier [for the author] to collect proof which ascertains or excludes, the requisite negligence. Reserving the right to meditate further on this problem, I have in the meantime elaborated art. 764 in the traditional way; namely the injured party has to prove the negligence of the injurer.”<sup>107</sup>

It is evident from the King’s Report that we prefer to remain anchored to tradition, even though we may want the judge to create simple presumptions that facilitate the burden of proof for the injured party:

“[I]n case of fault liability, the traditional principle, by which the burden of proof is on the injured party, applies (art. 882). In some special cases, such principle presents difficulties to the injured party. Then the judge can obviate these obstacles by utilizing to the maximum extent simple presumptions and common sense rules. Therefore the innovating tort theory which was based on shifting the burden of proof from the injured party, who affirms negligence, to the injurer who denies it, seemed unnecessary.”<sup>108</sup>

As it is known, the unfairness of damage is mentioned in the general clause with the following justification:

To clarify art. 1151 of the 1865 civil code, it is therefore specified that negligence and (injury) *injuria*

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107. R.G., 651.

108. R.R., n. 264.

are two different concepts; as such an action or an omission is a source of liability, therefore imputable, when committed with fraud and negligence and to harm one's legal sphere of rights. Therefore there will not be liability (when a damage is caused) in case of legitimate defense, in fact one has the right to defend himself even if causing damage to his/her aggressor (assailant); damage caused under such circumstances cannot be qualified as unfair. In other words, we have *injuria* only when one's sphere of legal rights is infringed (violated) without justification."<sup>109</sup>

Such words, even if they may appear insignificant today, are rich in history and experience.

The subject of employer liability raised another revealing question. Basing liability for employers upon fault in the surveillance or selection of employees (*culpa in vigilando* and *in eligendo*) raises doubts because there is the need to exclude fault liability when compulsory employment laws apply.<sup>110</sup> To recognize that fault could not anyway operate in case of compulsory employment. Was that a verbal manifestation of solidarity towards the category of "Employer?" Here we find the origin of need to use a double fiction, or even manipulation, which seeks to justify liability on the basis of fault, though it conflicts with the literal interpretation of the text as well as with the uniform orientation of the doctrine of that time.

The one truly innovative feature concerns liability for dangerous activities. Here the code authors prescribe an intermediate regime of fault and no-fault liability.<sup>111</sup>

Another innovation has much less value. This transfers the liability for vehicular accidents from the Traffic Code to the Civil Code.<sup>112</sup>

Finally, moral damages are recognized, closing an old and persistent controversy.<sup>113</sup> Moral damages will be awarded only in the

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109. R.G., n. 267.

110. R.R., n. 656.

111. R.R., n. 265.

112. Art. 2054.

113. Art. 2059.

cases contemplated by the law, since social views are subject to change.<sup>114</sup>

Thus ends our historical profile of the Italian Civil Code's liability articles. The Civil Code was unable to overcome the impasse on negligence, and could not establish the connection between *culpa* and *iniuria*, which the sources in the prerevolutionary period had solved.

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114. R.R., n. 273.