INTRODUCTION

1. Italian background to the European directive

The social problem of injuries caused to consumers by defective products had already been solved in Italy (as in the other European member States), when the directive on product liability was enforced. The solution adopted was substantially the same everywhere and consisted in channelling the liability for these injuries towards the manufacturer. But the instruments used in order to achieve this solution where different in the different member States.

In Italy the solution was engineered by the courts using instruments already existing in the legal system. The instruments available were: the liability related to the sale contract law, the general provision of the art. 2043 c.c. on tort liability for fault and one of the strict liability hypotheses described by the legislator.

2. The sales contract law.

Under the sales contract law the Italian Civil Code imposes three principal obligations on the seller: an obligation to deliver, an obligation to transfer to the buyer the property if it does not happens as an automatic consequence of the contract (principle of consensualism) and an obligation to guarantee the goods he sells (art. 1476 c.c.). The latter obligation is the most important in the context of product liability. Art. 1490 c.c. provides that the seller guarantees the goods sold against hidden defect rendering the goods improper for the use for which it is intended. The conditions required for the application of the warranty are: 1) the product is defective; 2) the defect was hidden and not easily detectable; 3) the defect was present prior to the transfer of property of the goods; 4) the defect is material enough to render the product unfit for use or to materially reduce its value. The remedies available for the breach of this warranty is the reduction of the purchase price or the rescission of sale and, in both cases, a damages claim. For damages to be awarded, the Civil Code lays down the condition that the seller knew of the defect at the time of sale or ignored it for his negligence. Considering all the legal requirements, it is evident that there is several weaknesses in basing an action for
product defect on the latent defect warranty of the sales contracts law. The primary problem is that the contractual product liability requires the existence of a sale contract between the defendant and the claimant. This means that the action could be bring only between buyer and seller. Hence, if the seller is not the producer or if the victim of the defective product is not the buyer, the contractual liability is not applicable because of the privity of contract. Moreover the buyer has to prove the seller fault (which knew or should have known the defect). Overall the seller’s liability has a short limitation period. Art. 1495 c.c. provides that these actions must be brought by the buyer within one year from the date in which the product has been delivered to him and only if he has declared the defect to the seller within 8 days from its detection.

As it is very well known, the EC directive n. 44/99 implemented a new discipline for sale contract of movable things between consumers and professionals. But this new discipline does not considerably change the problems already mentioned.

3. The tort law

Instead of enlarging the contractual liability despite the privity of contract, the Italian courts choose the general tort law with some adjustments\(^1\). This choice led to a 1964 case ruled on the *Corte di Cassazione*\(^2\): Mr. and Ms. Schettini ate some cookies produced by Saiwa which had allegedly gone off. Because of the defect Mr. and Ms Schettini suffered food poisoning and, as a result, an economic loss due to the medical fees. Mr. Schettini, who, by chance, was a lawyer, sued the manufacturer claiming compensation. He argued that the manufacturer was liable under art. 2043 c.c. that states: “(Q)ualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno”\(^3\). Hence, the prerequisites of the liability are: damage, causation and fault.

The plaintiff proved the damage by medical expertise. Causation was considered proven by the fact that the producer offered to change the defective product with another one when Mr. and Mrs. Schettini wrote him a letter complaining about the injury. But, as the defendant objected, the plaintiff was unable to prove the manufacturer’s fault.

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\(^1\) Since 1960 Italian doctrine started to rethink the role of the civil liability as an instrument for distributing the profit between entrepreneurs and consumers; in particular the attention was put on the strict liability rule as an instrument for making the firm liable (P. TRIMARCHI, *Rischio e responsabilità oggettiva*, Milano, 1961; S. RODOTA, *Il problema della responsabilità civile*, Milano, 1964).


\(^3\) “If an act committed through fault or intention causes an unjust damage to somebody else, then the person who has committed the act must compensate the damage”.

The question was that theoretically Italian courts are not allowed to add new strict liability hypothesis to those described by the legislator because these are exceptions to the general principle of fault liability and, as exceptions, they are in *numerus clausus*. Of course, none of the legislative provisions concerned the manufacturer’s liability for defective product. The Court solved the problem holding that this is not a strict liability case, because the manufacturer’s fault is still relevant, but the fault does not have to be proven by the plaintiff as it is *in re ipsa*, i.e. in the fact that the product had a defect and that this defect caused an injury to the plaintiff⁴.

In practice, the court created a sort of liability which is half way between strict liability and fault liability: fault is still necessary, but the burden of proof has been reversed in order to protect the plaintiff’s position.

In some pharmaceutical product cases, courts have increased the manufacturer’s liability applying the strict liability provision of art. 2050 c.c.. Under this rule the person who causes a damage to somebody else while he is carrying out a dangerous activity is held strictly liable unless he is able to prove not only that he was not at fault, but also that he used all the appropriate (i.e. existing) measures in order to avoid the risk of injuries⁵. In *Fiorasi vs. Soc. Crinos* the plaintiff argued that she got hepatitis because of an infected blood product used for the manufacture of Trilergan, a medicine she was taking for her cephalalgia treatment. In that case the court held that putting into commerce a potentially injurious product is a dangerous activity under art. 2050 c.c.⁶. Therefore the manufacturer was held strictly liable considering that it did not succeed in proving that it had taken all the appropriate measures in order to avoid the risk of damage. In fact the claimant remarked that a test for hepatitis detection was already existing (even if still in an experimental phase).

### 4. The implementation of the European directive.

Italy implemented the EC directive in 1988 with the d.p.r. n. 224, which follows quite literally the European provisions, including the rule of the development risk defence and the threshold of compensation for injuries caused to products other than the defective one. The

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⁴It is known that an improper use of the presumption is a typical judicial device to introduce a legal change avoiding the trauma of a break down in the system (M. FrANZONI, *Colpa presunta e responsabilità del debitore*, Padova, 1988, 2).


Italian law does not provide any limitation for the total amount of a producer’s liability for damage resulting from a death or personal injury and caused by identical items with the same defect.

The European solution for product liability has been implemented over and above a system of legal rules already engineered by courts and by scholars. Nevertheless the Italian courts did not seem to feel any gap or any interruption between the old and the new discipline. Indeed, in a case which began before the enforcement of the European directive, but decided afterwards, the *Corte di Cassazione* held that the new discipline could be useful in order to enlighten the correct application of the old one⁷.

The plaintiff claimed compensation for physical injury, which had occurred when he was a twelve year old child and his hand was crushed into the chain joint of a swing. Because this joint was structured like scissors, his thumb was severed from his hand. The crucial point of the case was to decide whether or not the conduct of the victim was reasonably foreseeable by the manufacturer. Surprisingly the court stated that the swing’s manufacturer was not liable because the child’s conduct (he was standing on the machine instead of sitting properly) is not one that can be considered reasonably foreseeable. Therefore the product was not defective following the definition of defect given by the European directive.

5. Applications of the Directive= the concept of defect

Fifteen years after the implementation of the European directive on product liability no more than ten cases have been decided by Italian courts. The question more often discussed in front of the courts concerns the definition of defectiveness given by the new law. In fact it is a flexible definition, which distributes the liability between the parties in such a way that the damage is the responsibility of the one in the best position to foreseeing it and, consequently, to preventing it. Therefore, taking advantage of this flexible definition of defectiveness, the manufacturer defends himself most of the time by putting the blame on consumer’s conduct. This happens when he alleges either that the product has been used by the victim in a way that could not be reasonably expected or that the victim was contributory negligent having being warned about the danger and nevertheless ignoring the warning.

As example of the first hypothesis (besides the already mentioned swing case) there is the case of the ladder that collapsed causing injuries to the gardener who was working on it: the

Tribunal held the manufacturer liable after having verified through witnesses that the ladder had been used in a normal, foreseeable way when accident occurred\(^8\). The same kind of inquiry has been made in the classical case of the sparkling water bottle that explodes in the hands of the consumer\(^9\).

For the second hypothesis, a housekeeper, who was injured by a needle hidden in the earth for her flowering plant, was considered contributory negligent under the European directive because she had not worn gloves, as was recommended by the manufacturer’s instructions written on the wrapping. Thus, the manufacturer escaped liability because he had written on the wrapping: “to use with proper instruments for gardening, like spades, rakes, hoes, gloves and so on” and, by consequence, he transferred the duty of care to the user\(^10\).

**the role of warnings and advertising in the detection of product defectiveness.**

Otherwise said, a proper instruction or a proper information about the product can neutralise the danger connected to certain use of it. On the other hand the missing information can be the reason why a product was held to be defective. For example in the case of the coffee machine which exploded injuring the user, the court held liable the manufacturer because he lacked to advise that the valve of the machine has to be changed every two years\(^11\). However, this kind of decisions can be criticised whenever they charge the manufacturer with a duty to inform the consumer even about facts of common knowledge.

Being the product’s defectiveness based on expectations, the advertising accompanying the product are also relevant as instruments which make explicit the parties internal expectations. In *Tentori Umberto vs. Ditta Rossin s.n.c.* the consumer suffered physical injuries because the front fork of his mountain bike broke while he was cycling up a mountain\(^12\). The Tribunal asserted that the use of this kind of bicycle on an inaccessible mountain road is normal, considering that the product was advertised by the manufacturer as an off road bicycle. Consequently the manufacturer was held liable because he had not made the bicycle with appropriate materials.

\(^8\) Trib. Milano 31-1-2003, in *Danno e Resp.*, 2003, 634.
\(^10\) Tribunale di Roma, 22-11-2001, in *Giur. Romana*, 2002, p. 137. Actually it has to be noticed that the housekeeper did not suffered a serious physical injury: she was only claiming damages for her psychological stress (she did all the tests in order to check whether she had caught some infection or not). So, probably, the Tribunal would have better exempted the manufacturer from his liability by explicitly asserting the injury’s irrelevance instead of assessing the product’s defectiveness.
\(^11\) Trib. Vercelli 7-4-2003).
6) *joint and several liability and the non-material damage recoverability.*

Under the art. 2059 c.c. the non-material damage\(^{13}\) is recoverable only in cases explicitly mentioned by the law, i.e., following the usual interpretation of this prescription, only if the fact which caused the injury is also relevant under criminal law. In order to qualify the fact as a crime, the manufacturer’s fault has to be proven. As under product liability law the fault has not to be shown (assuming that it is a strict liability case), the courts have affirmed explicitly that this damage is not recoverable. Nevertheless, whenever another person besides the manufacturer has been held jointly liable under the general tort law (which on the contrary requires fault), the courts assume that the art. 2059 c.c requirements are fulfilled and, consequently, condemn both to compensate also the non-material damage. For instance, in a 1995 case the Tribunale of Milano held liable the manufacturer and the seller of a bunk bed, which collapsed the first night after its installation, seriously injuring the person who was sleeping below\(^{14}\). Considering the difficulty of assessing whether the responsibility was more of the manufacturer who designed the bunk bed or of the seller who installed it without remarking on the defective installation instructions, the Tribunal assumed that there was a joint and several liability for the injury that occurred. In other words the Tribunal used art. 9 of the Italian law, which explicitly allows the manufacturer to share his liability with any other person who has been found liable for the same injury. It does not matter if, as in that case, the manufacturer is held liable under product liability law and the other person under contractual law, because the Italian legal system allows the non-concurrence of contractual liability and civil liability for the same injury\(^{15}\). And it does not matter if the European directive allows joint and several liability only among persons who have been held liable for the same injury “under the directive’s provision”, because the Italian law does not require this last boundary\(^{16}\). In conclusion because they are jointly liable, the court condemned both to compensate also the non-material damage.

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\(^{13}\) As non material damage it has to be intended the emotional di stress or the pain and suffering.


\(^{16}\) The commentator of the Italian law, who has noticed this imprecision, has suggested that the expression “other persons” should be better interpreted as “other producers” in order not to betray the directive’s *ratio* (D. Poletti, *Commento a art. 9, pluralità di responsabili*, in Pardolesi e Ponazanelli (a cura di), *La responsabilità per danno da prodotti*, in *Nuove leggi civ. commentate*, 1989, 600). But Italian courts do not seem to have taken care of this suggestion.

Concerning the ECJ’s decision on French law which refused the possibility for member states to increase the liable persons under the directive provision, it has to be noticed that Italian courts increase the liable persons but not under the same law (Case C-52/00, *Commission vs. France*, [2002] ECR I-3827). However the directive’s *ratio* is betrayed as I will point out below.
Lissoni vs. De Bernardi and Tessitura Lissoni s.r.l. is the classic design case\textsuperscript{17}: an industrial machine with exposed parts injured an inattentive worker. The victim argued that the machine should have been designed with safety features to prevent such accidents. The defendant argued that the risks could have best been avoided by the user exercising care because he should have known that such a machine was dangerous. The court affirmed that the worker could not have known that the machine was dangerous because there was no evidence in the case that he had started to work a long time before the accident occurred. Therefore it rejected manufacturer’s defence (asserting also that the machine was especially unsafe for a short worker like the plaintiff\textsuperscript{18}) and held jointly and severally liable both the machine’s manufacturer and the employer who bought the machine. Concerning the latter, lacking a more precise plaintiff’s demand, the court vaguely evoked the general law of torts instead of applying the employer’s liability. Consequently to the detection of employer’s fault, the court condemned both the manufacturer and the employer to compensate the non-material damage.

Nevertheless it has also to be remarked that recently the Courts are widening the possibility of compensation for non-material damages, overruling the doctrine which excludes this compensation in the strict liability cases. The Tribunale di Vercelli in the coffee machine case held that the fact that the manufacturer is strictly liable under the European directive does not preclude a finding of liability also for non-material damages when fault is proven. Therefore, considering that the lack of information proves the manufacturer’s fault, the Court condemned him to pay also for non-material damages.

Going further the Corte di Cassazione held that non-material damage has to be compensated also in strict liability cases because there the fault, even if not investigated by the Court, is presumed as existing by the law\textsuperscript{19}. If this new doctrine will be confirmed by further decisions of the Corte di Cassazione, then it will be absolutely relevant to establish if the directive charge the manufacturer with an absolute strict liability, or with a strict liability which presumed the existence of the fault.

\textsuperscript{18} In other words the physical characteristics of the victim, instead of requiring him to be especially careful, increased the manufacturer liability.
\textsuperscript{19} C. Cass. 12 may 2003 n. 7282, in Resp. Civ. e prev., 2003, pag. 676.