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Civil Liability and Precautionary Principle

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Abstract

Civil liability and the precautionary principle are both concepts within legal and regulatory frameworks designed to address risks and prevent harm in various contexts, particularly in environmental and public health issues. This study analyzes the application of the precautionary principle to identify a point of compatibility between technical-scientific development and risk control. The study, carried out by an Italian lawyer PhD student in "sustainable development" at the Pegaso International University of Malta, through the review of the literature and the analysis of the main ideas provided by the Jurisprudence. The results indicate that the precautionary principle can impact both the establishment of the causal link and culpability. The implications include the understanding that there is the possibility of recognizing civil liability despite the absence of scientific evidence. The need to identify a point of compatibility between technical-scientific development and the control of risks (real or imaginary) associated with it has led to the affirmation not only of the prevention principle but also of the precautionary one.The application of the precautionary principle means that when the risks induced by a potentially dangerous activity are not known with certainty, the action of public and private authors must translate into early and anticipatory prevention with respect to scientific knowledge. The precautionary principle can impact both the establishment of the causal link and guilt. Scientific uncertainty does not prevent the establishment of a causal link. There is the possibility of recognizing civil liability despite the absence of scientific evidence.

Keywords: sustainable development and responsibility, precaution, causal link

In the context of the operational development processes and for any harmful and harmful effects that could arise from them, the identification of the causal link and the content of the duty of caution is of particular importance. Responsibility is based on these elements, such as that of the manufacturer, regulated by the Consumer Code in articles. 114-127, and the responsibility for the exercise of dangerous activities referred to in art. 2050 Civil Code (C.C.).

Compliance with public law regulations, which identifies and prescribes compliance with certain safety standards, represents an ex ante paradigm of lawfulness of prejudicial conduct. However, it is certainly not sufficient to exclude the production of damage in the execution of a risky activity, which at the time it was carried out was scientifically uncertain.

Who is responsible for the damage?

Should the risk - in an economic sense - be assumed by the producer or operator of a dangerous activity or by third parties?

The question does not yet have a clear answer.

The prevailing orientation believes that the precautionary principle is not applicable to the institution of civil liability, as it would express its applicative effectiveness only with reference to the political choices of public authorities. On the strictly technical-legal level of attributability, however, it would be irrelevant in civil liability: the principle, in fact, could not intervene ex-post in the evaluation of the dangerousness of a product placed on the market when that dangerousness was neither known nor foreseeable at the time. Moment of release and the producer has complied with the standards required by secondary legislation; nor could it determine a greater level of diligence normally required of companies and commercial operators (also with reference to activities classified as dangerous) who cannot be called upon to adopt measures aimed at preventing unforeseeable damage.[1] The exemption from development risk, in one case, and the disclaiming proof referred to in art. 2050 of the Civil Code, on the other, would operate as limits to the direct application of the precaution. At most, the principle could impact "upstream" on the legal qualification of an activity as risky or not and therefore pass a certain activity, previously considered not risky, among those typified which import the application of 2050 of the Civil Code or, again, on the information duties incumbent on producers, when scientific studies in relation to a particular product show increasingly solid evidence of possible or probable damage to health.

[1] The example is the case of mobile phones. If mobile phone manufacturers have complied with the safety standards required by law, resulting in the product being compliant, the doctrine tends to exclude the possibility of liability for former companies. art. 114 et seq. of the Consumer Code.

The situation is different regarding the profile of the causal link.[2]

Part of the doctrine believes that the introduction of the precautionary principle can affect the causal link between conduct and event, with the judge being able to ascertain the existence even if there is no scientific certainty, but only the "possibility", as long as it is serious and appreciable.[3]

The historic sentence no. 17438 of 12 October 2012, with which the Supreme Court, fully confirming the sentence of the Court of Appeal of Brescia, recognized the right to the payment of an annuity by INAIL in favor of an employee who had contracted ear cancer resulting from prolonged use of mobile phones at work.[4]

In both sentences, the condemnation of INAIL to the payment of the professional income is based on the identification of a causal link between the exposure to radiation emitted by the telephones used to carry out the work activity and the onset of the tumor. In particular, the Court recognized the existence of a causality (albeit in its "weak" form, relevant for the purposes of the attribution of social security benefits), noting that, although the scientific literature regarding the etiology between ear cancer and

[2] In this sense, B. BERTARINI, Tutela della salute, principio di precauzione e mercato del medicinale (Health protection, precautionary principle and medicine market), cit.

[3] F. DE LEONARDIS, Il principio di precauzione nell'amministrazione del rischio (The precautionary principle in risk management), Giuffrè, Milano, 2005; R. MONTINARO, Dubbio scientifico e responsabilità civile (Scientific doubt and civil responsibility), Giuffrè, Milano, 2012; F. D. BUSNELLI, Il principio di precauzione e l'impiego di biotecnologie in agricoltura (The precautionary principle and the use of biotechnology in agriculture), in M. GOLDONI, E. SIRSI (a cura di), Regole dell'agricoltura, regole del cibo: produzione agricola, sicurezza alimentare e tutela del consumatore. Atti del convegno, Pisa, 7-8 luglio 2005 ((ed.), Rules of agriculture, rules of food: agricultural production, food safety and consumer protection. Proceedings of the conference, Pisa, 7-8 July 2005, Editions "Il Campano", Edizioni il Campano, Pisa, 2005, p. 115 ss.; M. ARBOUR, A proposito della nebulosa. Principio di precauzione – responsabilità civile (About the nebula. Precautionary principle – civil liability), in Liber amicorum per Francesco D. Busnelli, Il diritto civile tra principi e regole (Civil law between principles and rules), I, Giuffrè, Milano, 2008, p. 513 ss.; F. DEGL'INNOCENTI, Rischio di impresa e responsabilità civile. La tutela dell'ambiente fra prevenzione e riparazione dei danni (Business risk and civil liability. Environmental protection between prevention and repair of damage), Firenze University Press, Firenze, 2012; E. DEL PRATO, Il principio di precauzione nel diritto privato: spunti, ivi, (The precautionary principle in private law: ideas, ibid) p. 545 ss.; ID, Precauzione e obbligazione, in Rivista del diritto commerciale e delle obbligazioni (Precaution and obligation, in Journal of commercial law and obligations), 2012, p. 1 ss.; E. AL MUREDEN, Uso del cellulare e danni alla salute: la responsabilità del produttore tra dannosità "tollerabile", principio di precauzione e nuovi obblighi informativi, in Il corriere giuridico (Use of mobile phones and damage to health: producer responsibility between "tolerable" harmfulness, precautionary principle and new information obligations, in Il courierjuridical), 2013, 3, p. 330 ss.; Id., Principio di precauzione, tutela della salute e responsabilità civile, Libreria (Precautionary principle, health protection and civil responsibility, Library) Bonomo, Bologna, 2008; B. BERTARINI, Tutela della salute, principio di precauzione e mercato del medicinale. Profili di regolazione giuridica europea e nazionale (Health protection, precautionary principle and medicine market. European and national legal regulation profiles), Giappichelli, Torino, 2016.

[4] Cass., section. Work, 3-12 October 2012, n. 17438, in Corriere Diritti, 2013, p. 330 ss., with note by E. AL MUREDEN, Cell phone use and damage to health, cit. ------ App. Brescia, sec. lav., 22 December 2009, in Civil liability and social security, 2010, p. 1369 with commentary by E. AL MUREDEN, Damages from cell phone use between social security protection and limits of producer liability, cit., p. 392. (Cass., sez. Lavoro, 3-12 ottobre 2012, n. 17438, in Corriere giuridico, 2013, p. 330 ss., con nota di E. AL MUREDEN, Uso del cellulare e danni alla salute, cit.------ App. Brescia, sez. lav., 22 dicembre 2009, in Responsabilità civile e previdenza, 2010, p. 1369 con commento di E. AL MUREDEN, I danni da uso del cellulare tra tutela previdenziale e limiti della responsabilità del produttore, cit., p. 392).

use prolonged use of the cell phone does not lead to an exhaustive judgement, it is possible to document, despite all the limitations inherent in the type of studies, an additional risk for brain tumors and in particular for neuroma connected to exposure to radio frequencies for more than ten years emitted by portable phones and cell phones. Of particular interest, from this point of view, is the evidence given in the reasoning of the Court of Appeal of Brescia to the conclusions reached by the independent scientific studies deemed most reliable and those, subsequent to the decision on the merits, reached by the research conducted by the 'International Agency for Research on Cancer (IARC). With regard to the former, they served to identify an epidemiological risk connected to exposure to electromagnetic fields emitted by cell phones, which could be far greater than that «caused by the atomic explosions of Hiroshima and Nagasaki»; as for the latter, the need to apply the precautionary principle and therefore to adopt protective measures even in a situation of scientific uncertainty was recalled. The findings of the Court of Cassation, therefore, seem to move in the following direction: the need to anticipate the threshold of protection of the right to health, preventing risks on which there is no scientific certainty from translating into damage, is expressed ex-post on the judgment of causality, not so much by modifying the technical rules that support it, but rather by modifying the scientific literature that allows these rules to be concretely implemented.

Furthermore, the precautionary principle becomes a criterion capable of influencing the regulation of contractual risks and the distribution of guarantees for defects.[5] The Court of Cassation, on the basis of the principle, affirmed the existence, on the part of the company purchasing a food product which turned out to be defective, of the duty to analyze the risk factors specifically pertaining to the selling company. More in detail, according to the Court of Cassation, the precautionary principle imposes on the professional operator (producer) the obligation to carry out independent checks - including random checks - on food products to verify their correspondence with the safety requirements and prevent future damage to consumers. Ordinary diligence is thus modulated also on the basis of the principle in question, the application of which produces the effect of extending the obligation to verify the presence of the defective product throughout the entire commercial chain in the food sector, affecting not only the seller but the buyer, too. Ultimately, the duty to protect the health of the end user, particularly significant in

[5] Cass., 10 July 2014, n. 15824, in Contracts, 2015, p. 891 ss., with note by F. CAFAGGI, P. IAMICELI, Responsibility of the food supplier between professional negligence and contribution of the final producer, in Contracts, 2015, p. 896 ff.; G. VACCARO, The precautionary principle and the responsibility of companies in the food supply chain, ibid., p. 50 ff; See also on this point: A. JANNARELLI, Environmental principles and conformation of negotiation autonomy: general considerations, in M. PENNASILICO (ed.), Contract and environment, cit., p. 289. (Cass., 10 luglio 2014, n. 15824, in Contratti, 2015, p. 891 ss., con nota di F. CAFAGGI, P. IAMICELI, Responsabilità del fornitore alimentare tra colpa professionale e concorso del produttore finale, in Contratti, 2015, p. 896 ss.; G. VACCARO, Il principio di precauzione e la responsabilità delle imprese nella filiera alimentare, ivi, p. 50 ss; Si veda sul punto anche: A. JANNARELLI, Principi ambientali e conformazione dell'autonomia negoziale: considerazioni generali, in M. PENNASILICO (a cura di), Contratto e ambiente, cit., p. 289).

the agri-food sector, justifies the applicability of the precautionary criterion also in relationships between private individuals, guiding their conduct and conforming their negotiating relationships.

There would, therefore, not be an insurmountable contrast between the traditional assessment of the causal relationship based on the criterion of "more probable than not" and the precautionary principle.

Think of the compensatory protection of chance, which becomes a tool that allows the injured party to be granted compensation, even if limited in terms of quantum, in cases where there is a situation of unavoidable scientific and event-related uncertainty "about what would have happened if".

In short, it is a corrective to the rigidity of the "more probable than not" criterion and the "all or nothing" rule, which would allow the precautionary principle to penetrate civil law.

Secondly, it was highlighted that the causal link between an antecedent and a consequent can also be proven by resorting, in the case of not yet mature scientific knowledge, to serious, precise, concordant and unambiguous empirical evidence, even if not yet scientifically supported, which are such as to be able to found a presumption, even if it is simple and can be overcome with contrary proof.

This was stated by the Court of Justice of the European Union (Section II, ruling 21 June 2017, n. C-621/15) with reference to liability for vaccine damage, which was classified as damage from a defective product .

In fact, demanding only certain scientific proof and excluding every alternative for the purposes of ascertaining the existence of the causal link would mean debasing the principle of effectiveness of protection because compensation should be excluded whenever scientific uncertainty still remains.

The effect, in fact, would be to make it excessively difficult or even impossible to assert the producer's responsibility (when medical research does not allow the existence of a causal link to be established or excluded).

In short, if it is true that there is not yet certain scientific proof of the causal-correlation link between the administration of a certain vaccine and the occurrence of a certain disease, however, it is also undeniable that there are a series of sufficiently serious, precise indications and concordant, the co-presence of which could lead a national judge to consider causality established.

Thus, the following were valorised: the temporal proximity between the administration of a vaccine and the onset of a disease; the lack of personal and family medical history related to said disease; the existence of a significant number of reported cases of the appearance of this disease following similar administrations.

In light of the aforementioned premises, it can be concluded that there may be room for civil liability in conditions of scientific uncertainty, in compliance with the precautionary principle, in all those situations in which it is possible to prove "the more probable than not" through empirical elements that, although not scientifically supported, are endowed with a serious, precise, concordant, univocal evidentiary force and, therefore, sufficient to found a presumption.

REFERENCES

M. PENNASILICO, Manuale di diritto civile dell'ambiente, ESI, Napoli, 2014, p. 329 e ss **(M. PENNASILICO**, Manual of environmental civil law, ESI, Naples, 2014, p. 329 et seq.)

E. AL MUREDEN, I danni da uso del cellulare tra tutela previdenziale e limiti della responsabilità del produttore, Uso del cellulare e danni alla salute: la responsabilità del produttore tra dannosità "tollerabile", principio di precauzione e nuovi obblighi informativi, in Il corriere giuridico, 2013, 3, p. 330 ss.; Id., Principio di precauzione, tutela della salute e responsabilità civile, Libreria Bonomo, Bologna, 2008 **(E. AL MUREDEN**, Damages from cell phone use between social security protection and limits of producer responsibility, Cell phone use and damage to health: producer responsibility between "tolerable" harmfulness, precautionary principle and new information obligations, in Il corriere legal, 2013, 3, p. 330 ff.; Id., Precautionary principle, health protection and civil responsibility, Libreria Bonomo, Bologna, 2008).

B. BERTARINI, Tutela della salute, principio di precauzione e mercato del medicinale. Profili di regolazione giuridica europea e nazionale, Giappichelli, Torino, 2016 **(B. BERTARINI**, Health protection, precautionary principle and medicinal market. Profiles of European and national legal regulation, Giappichelli, Turin, 2016).

F. DE LEONARDIS, Il principio di precauzione nell'amministrazione del rischio, Giuffrè, Milano, 2005 **(F. DE LEONARDIS**, The precautionary principle in risk management, Giuffrè, Milan, 2005; R. MONTINARO, Scientific doubt and civil responsibility, Giuffrè, Milan, 2012).

R. MONTINARO, Dubbio scientifico e responsabilità civile, Giuffrè, Milano, 2012 **(R. MONTINARO**, Scientific doubt and civil responsibility, Giuffrè, Milan, 2012.

F. D. BUSNELLI, Il principio di precauzione e l'impiego di biotecnologie in agricoltura, in M. GOLDONI, E. SIRSI (a cura di), Regole dell'agricoltura, regole del cibo: produzione agricola, sicurezza alimentare e tutela del consumatore. Atti del convegno, Pisa, 7-8 luglio 2005, Edizioni il Campano, Pisa, 2005, p. 115 ss. (**F. D. BUSNELLI**, The precautionary principle and the use of biotechnology in

agriculture, in M. GOLDONI, E. SIRSI (ed.), Rules of agriculture, rules of food: agricultural production, food safety and consumer protection. Proceedings of the conference, Pisa, 7-8 July 2005, Edizioni il Campano, Pisa, 2005, p. 115 ff.);

M. ARBOUR, A proposito della nebulosa. Principio di precauzione – responsabilità civile, in Liber amicorum per Francesco D. Busnelli, Il diritto civile tra principi e regole, I, Giuffrè, Milano, 2008, p. 513 ss. **(M. ARBOUR**, Concerning the nebula. Precautionary principle - civil liability, in Liber amicarum per Francesco D. Busnelli, Il giorno civil tra Principi e Regole, I, Giuffrè, Milan, 2008, p. 513 ff.);

F. DEGL'INNOCENTI, Rischio di impresa e responsabilità civile. La tutela dell'ambiente fra prevenzione e riparazione dei danni, Firenze University Press, Firenze, 2012 **(F. DEGL'INNOCENTI**, Business risk and civil liability. Environmental protection between prevention and repair of damage, Florence University Press, Florence, 2012).

E. DEL PRATO, Il principio di precauzione nel diritto privato: spunti, ivi, p. 545 ss.; ID, Precauzione e obbligazione, in Rivista del diritto commerciale e delle obbligazioni, 2012, p. 1 ss.. **(E. DEL PRATO**, The precautionary principle in private law: ideas, ibid., p. 545 ff.; ID, Precaution and obligation, in Journal of commercial law and obligations, 2012, p. 1 ff.).