THE 'RATIO' BEHIND ARTICLE 2049 OF THE ITALIAN CIVIL CODE

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TRADITIONALLY, the responsibility of the Master for damages caused by his servant has been an acknowledged principle of Civil Law. The basis of this responsibility is the Roman Law principle 'qui facit per alias facit per se' which has been reproduced in modern times, subject to exigencies of time and place. The Maltese Civil Code embodies the principle in section 1080; the English system accepts it under the doctrine of vicarious liability, and the Italian Code of 1865 followed the Code Napoleon in a similar provision in section 1153. The 1942 Civil Code says much the same thing in article 2049: 'I padroni e i committenti sono responsabili per i danni arrecati dal fatto illecito dei loro domestici e commessi nell'esercizio delle incombenze a cui sono adibiti'. Materially there is no difference between section 1153(s) of the older Code and the provision of section 2049. The difference is one of principle in that the responsibility of Masters and Employers, founded on a different concept than that of parents and tutors is dealt with in a separate section.

The basis of this liability is that Masters and Employers are responsible for damages caused by their servants and employees independently of their personal fault. This principle carries an amount of rigidity because whereas the provisions immediately preceding section 2049 contemplate the right of those responsible for those under their care, to prove 'di non aver potuto impedire il fatto', no such reservation is admitted under section 2049. From one point of view, this is a form of indirect responsibility which arises from the actions of a different person, beyond his legitimate sphere of action, and as such, therefore, delictual. But there are some writers who consider such responsibility as Direct. To Paladini (Responsabilità civile e penalé p. 36-37) the fact that a particular act by the subordinate produces ipso facto the responsibility of the principal, is to be considered direct responsibility ex hypotesi. The difference between the two points of view seems only to be one of terminology and as such immaterial for our present purpose.

The important thing here is the responsibility without fault. It was once thought that this responsibility was based on the absolute presumption iuris et de iure which embraced an abstract concept of faith not in conformity with reality. But where fault cannot be proved liability is not to arise for presumed fault: 'Una colpa che è presunta', says Cogliola 'è una contradizione in se stessa perchè si viene a dire che colpa nel committente non c'è', ma che la legge la presume per utilità sociale; e allora non è meglio trovare in questa utilità la ragione della legge senza ricorrere a concetti fittizii?'

A variation of this absolute presumption was that of Culpa in Eligendo vel Vigilando. This doctrine was expounded by Baudrio-Lecautinerie and Giorgio and is in fact the one accepted by our Code: 'Where a person for any Work or service whatsoever employs another person who is incompetent, or whom he has no reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service cause to others' section 1080. In this case, Masters and Employers who are free to choose servants and employees are held liable on the basis of their negligence in the exercise of their choice, that is to say on the basis of 'Culpa in Eligendo'. Such a fault is presumed iuris et de iure without the possibility of proof to the contrary.

Not so however with regard to Parents and Tutors who are responsible for their wards. In their case the presumption is

only iuris tantum and liability exists insofar as they cannot prove 'di non aver potuto impedire il danno'.

Contrary to what may appear at first sight, the section under discussion although faithful to the traditional concept of Indirect Responsibility departs to a considerable extent from the doctrine of *No Responsibility without fault.* Certainly, both doctrine and Case Law have been inclined to accept the absolute presumption of fault based on the wrong choice of the servant or employee. But this presumption does not account for cases where both Master and Employer having exercised the maximum amount of care remain responsible for the negligent performance of their subordinates. To this effect De Cupis points out: 'è inutile, per il committente, provare che egli ha scelto bene e che quindi non può parlarsi di Culpa in Eligendo, precisamente perchè la sua responsibilità e independentemente dalla colpa'.

Some writers have dwelt on the doctrine of Representation of fault. But it is difficult to accept this doctrine, as it is based on the fictitious transfer of liability from the servant to the Master 'Ma a quest'altra teoria è stato obiettato che, se davvero avvenisse una proiezzione del fatto del domestico o commesso sulla persona del padrone o committente, non spiegherebbe il sussistere della responsabilità del domestico o commesso accanto a quella del padrone o committente'. On the other hand since this is a question of responsibility without fault the ratio legis must be sought elsewhere.

Various writers including Barassi, Pacchioni and Trimarchi adopt the theory of Rischio Profitto, in which 'secondo l'opinione più evoluta si identifichi la responsabilità del preponente con quella dell'impresa; cosí da tradurne il peso in un demento di costi che l'imprenditore deve tener presente e può riversare attraverso il mecchanismo dei prezzi sulla massa dei consumatori (e del resto può cautetarzi contro il rischio con il ricorso all'assicurazione (Nov. Digesto). Since the Master has made use of the services of his servant for his own benefit, he has to accept as well the consequences arising from such an activity. Considering that the law in no way, refers to the social and economical implications which the authors of this theory have indicated Professor Renato Scognamiglio is prone to discard the theory as incorrect. The theory of risk and profit would not exhaust all the possible relations between the master and the servant, the employer and the employee. Indeed, one is left to wonder what would be the type of responsibility if the Master entrusts his servant with a personal undertaking, quite independent of any economic considerations.

Perhaps the responsibility of the Principal for damages incurred by his subordinate is best explained by De Cupis in 'La critica della critica' basing himself on the well-known saying: Cuius commoda eius incommoda. The Responsibility arising from the provisions of section 2049 presuppose a casual relationship between the entrusting of the duties and the damage produced by the exercise of those duties. 'Orbene, a questo rapporto, cosí strutturato, corrisponde un particolare interesse del datore di lavoro, che consegna l'utilità inerente all'attività del lavoratore, tal quale questa attività è da lui, per i propri fini, diretta e regolata. E poichè la medesima attività, intensamente vincolata a favore del datore di lavoro, può produrre danni a terzi giustizia vuole che il datore di lavoro sia responsabile di tali danni, in conformità dell'antico principio secondo cui particolari effetti pregiudiziendi non possono scindersi da particolari effetti utili, le posizioni di più intenso vantaggio hanno da essere bilanciate dal peso di una particolare responsabilità ("cuius commoda cius et incommoda") (163)' (De Cupis 'Il Danno' p. 152).

The liability which the Master or Employer is to assume is part of the risk accompanying the services entrusted to the servant or employee. It is because the immediate cause of the damage is linked up with an activity directed towards the be-

nefit of the Master or Employer that the latter is liable vis-a-vis the third party independently of any fault on his part. Insofar as he has initiated a kind of relationship which ultimately results in damage he is to be considered the Mediate cause. De Cupis accepts the theory of 'Rischio d'Impresa' as the logical explanation of this type of responsibility. He goes so far as to say that: 'se la responsabilità dei padroni e dei committenti costituisce la contropartita di una situazione di vantaggio, essa è destinata a venir meno ove manchi quest'ultima: in altre parole, se nessun utile personale si recava dall'opera altrui affidata, cessa la "ratio" che ispira la legge, e questa non va applicata (cessante ratione Legis, cessat et ipsa Lex). I soggetti che si propongono un fine filantropico anzichè speculativo, non sono responsabili ex articolo in esame del danno arrecato dai propri dipendenti'. Incidentally this view is held by Mosca (vide 'Nuovi studi e nuove dottrine sulla colpa') and Gabba ('Quistioni di diritto Civile' 11 page 271). As pointed out already, this theory of Rischio-Profitto has been criticized by Scognamiglio according to whose opinion, responsibility under articolo 2049, can be attributed to any relationship between 'un padrone e un domestico' and 'un committente ed un commesso'. That is exactly why he rejects the theory of Rischio Profitto and refuses to limit such a responsibility to that sphere of liability.

The hardened position taken by De Cupis in 1958 when he was writing 'DEI FATTI ILLECITI' (Vide Commentario del Codice Civile Libro Quarto – Delle Obbligazioni) has been reviewed in his recent work 'Il Danno' (1970), which explores the intellectual hinterland in the theory of responsibility, probably as a result of the criticism levelled at his theory. His answer has been quite convincing. The starting point remains, that the burden of risk is justified by the utility accruing from the relationship and within the sphere of activity which he directs. 'Quale che sia questa destinazione' he says 'anche se essa abbia carattere liberale e meramente filantropico, ciò non altera la realizzazzione dell'interesse del datore di lavoro all'interno del rapporto di lavoro, e non può quindi rivolgere a fini liberali e filantropici risultati del lavoro che intendano rivolgere ai fini liberali e filantropici i risultati del lavoro per essi svolto rispondono ex art. 2049 dei danni arrecati ai terzi dai lavoratori nell'esercizio delle affidate incombenze'.

It seems possible to deduce from what has been considered, that generally, any type of relationship between a principal and his subordinate is contemplated by this article. The extent to which it finds application, depends upon the particular instances to which it is applied and no 'a priori' definition could be laid down. Various commentators have upheld the idea that liability would arise even if the office under which the employee is acting is one of appointment or is imposed. The important element here is the relationship between the Principal who has ordered and the subordinate who is entrusted with the undertaking. So long as the Master or Employer have 'una normale e giuridica possibilità di controllo e di sorveglianza, sul lavoratore, in virtù del potere direttivo spettante al datore di lavoro', a relationship exists which is sanctioned by article 2049. It is immaterial whether that power conforms or otherwise with strict supervision so long as control and supervision are possible from the nature of the relationship. In practice such degree of control may not exist, but that is no excuse to exclude responsibility. It is only were the the possibility of control is incompatible with the juridical nature of the relationship, that responsibility is excluded. This even, where the principal has ordered specific works to be carried out. Because there is no risk where the control of the action for which one is responsible is impossible from the very nature of the relationship. How can I be held liable for damages which the plasterer whom I employ incurs when his activity is totally out of my control? 'Il rischio d'impresa non può estendersi a danni verificatasi nello svol-

gimento di un lavoro che, seppure eseguito per l'interesse dell'imprenditore, è estraneo alla sfera del suo potere direttivo... Il rischio, invero non può incombere su chi non ha il potere di ridurre il pericolo incrisce' (De Cupis 'Del Danno' p. 157 Vol. 111). However where the principal is not the 'de iure' incumbent of the responsibilities, as when a temporary person is entrusted with supervision of work ordered by the principal responsible under art. 2049 subsists, nevertheless. In fact the responsibility envisaged in this article arises from the 'lavori subordinati' which are contemplated. Any deviation from this rule would negative any responsibility on the part of the principal, and this is the case where the nature of work undertaken does not allow for direction and supervision of the Employer or Principal. Where however the principal, maliciously orders such work to be executed with the full knowledge that damages may ensue then he would be the mediate cause of damage and as such, therefore, accountable. Where the relationship between the principal and the subordinate does not partake in the nature of 'subordinazione gerarchica' contemplated in section 2049, then responsibility of the principal does not arise. For instance, a mandator cannot be held responsible for damages incurred by a Mandatory.

Up to a certain extent, this kind of responsibility is objective, insofar as it exists independently of any fault of the person responsible. Where the principal is not responsible for damages sustained by his subordinate, then ordinarily responsibility falls upon the subordinate who is the author of the delictual action. However, art. 2049 is not all that could be said of any responsibility arising from the relationship of Master – Servant, Employer – Employee. Otherwise the principal may be held responsible under art. 2043 for having been the mediate cause of damages. But in this case the burden of proof lies with the person who has suffered the damage.

The Italian Legal System has gone so far as to apply the principle of indirect responsibility, also in relation to the state. The state is held liable for acts done by its employees in the course of their duties. Thus, says Cammeo (Corso di Diritto Amministrativo p. 619) 'un'altra dottrina.... Ammette la responsabilità per questi desumendola dai principi di diritto privato desumendola dai principi di diritto privato a tali atti applicabili, e precisamente dalla norma del diritto civile contenuta nell'art. 1153 (2048, 2049) Cod. Civ; per cui i committenti sono responsabili degli atti dei loro commessi,....'. Le Persone giuridiche, e l'amministrazione in particolare come si avvantaggiano dall'attività lecita delle persone fisiche che formano i loro organi, cosí debbono sopportare le conseguenze della loro attività illecita'. This is nothing but the doctrine of 'cius commoda cius incommoda' in its pure application.

Maltese Law on the subject has not been so clear and so assertive. Positive legislation does not contain anything to this effect, and any application by the courts has followed the lines of doctrinal interpretation. But that has not been very consistent either, and any positive statement on the position cannot allow for dogmatic predicaments. The difficulties which have to be superseded partially arise from the unsolved problem of whether to attribute to the Government any liability in choosing its servants. Italian writers have argued, that this type of liability cannot be applied to the Government, since Government appoints its servants on the basis of examination and relevant qualifications. This would make the application of section 1080 (Culpa in Eligendo) impossible where the Government is concerned. Modern writers on the subject tend to regard the application of Culpa in Eligendo in Government Liability with disfavour. The reason is simple: one cannot appreciate a reconciliation of sec. 1080 with the liability of the Government while on the other hand the theory of Rischio d'Impresa which forms the basis of art. 2049 of the Italian Code can be extended even as far as the Administration is concerned.