Essays

Old and New Trends in School Liability

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Abstract

The paper investigates the double 'contractual relationship' (due to the enrollment of minors in school and to the 'social contact' between teachers and pupils), reflecting on the liability of the educational institutes in cases of damage inflicted by pupils on themselves and damage caused to a pupil by a third party.

In particular, the regulation of the school's liability for damage caused by a third party outside the school has been significantly modified, giving parents the possibility of authorizing schools attended by their children to allow them to leave school premises freely at the end of lessons. This authorization exempts educational institutes from any liability connected with the performance of their supervisory obligation.

I. Introduction

A series of recent decisions by the *Corte di Cassazione*[1] seems to have rekindled discussions (never completely settled) in the Italian legal system on the fundamental characteristics of civil liability of educational institutes for any damage suffered by students.[2]

The paper aims to investigate the liability of the school, critically reflecting on the passive legitimacy of the Ministry of Education, University and Research (MIUR) (§ II), on the cases (and on the nature) of the school's responsibility (§ III) and on the compensable loss (§ IV), without neglecting the probable

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[1] Corte di Cassazione 19 September 2017 no 21593, *Responsabilità civile e previdenza*, 159 (2018), with note by C. Murgo (and E. Tuccari, 'Riflessioni sulla responsabilità civile dell'istituto scolastico prima e dopo la legge 4 dicembre 2017, n. 172: lo "scandalo" della normale applicazione dei criteri legislativi nella giurisprudenza di legittimità', in C. Granelli ed, *I nuovi orientamenti della Cassazione civile* (Milano: Giuffrè, 2018), 689-704); Corte di Cassazione 28 April 2017 no 10516, *Diritto e giustizia*, 2 May 2017, with note by E. Mattioli; Corte di Cassazione 19 July 2016 no 14701, *Diritto e giustizia*, 20 July 2016; Corte di Cassazione 25 February 2016 no 3695, *Foro italiano*, I, 2858 (2016), with note by F.A.R. Ferrara. In the same sense, see the recent case law of merits courts: Tribunale di Asti, 1 August 2017 no 671, available at www.dejure.it.

[2] Previously, see Corte di Cassazione 11 November 2003 no 16947, *Enti pubblici*, 627 (2005); Corte di Cassazione 20 April 2010 no 9325, *Massimario di Giustizia civile*, 569 (2010); Corte di Cassazione 26 April 2010 no 9606, available at www.dejure.it; Corte di Cassazione 15 February 2011 no 3680, *Guida al diritto*, 47 (2011), *Responsabilità civile e previdenza*, 1562 (2011), with note by A. Cocchi; and, more recently, Corte di Cassazione 15 May 2013 no 11751, *Responsabilità civile e previdenza*, 1005 (2013).

consequences attributable to the changes recently introduced by the Italian legge 4 December 2017 no 172 (§ V).

II. The Passive Legitimacy of the MIUR

The passive legitimacy of MIUR for behaviour of teachers and of the entire staff of public schools, as well as that of students subject to their supervision, is set out in Art 61 of the Italian legge 11 July 1980 no 312:

> '(1) the patrimonial responsibility of the managerial, teaching, educational and non-teaching staff of primary, secondary and artistic public schools and of public educational institutions for damages caused directly to the administration in connection with the behaviour of students, is limited only to cases of willful misconduct or gross negligence in supervising pupils. (2) The limitation of the preceding paragraph also applies to the liability of the aforementioned personnel towards the administration that compensates a third party for the damages suffered as a result of the behaviour of the pupils subject to supervision. (3) Except for recourse in cases of willful misconduct or gross negligence, the administration subrogates the said personnel in the civil responsibilities deriving from judicial actions promoted by third parties (3)'.

This regulation – considered of a predominantly (though not exclusively) procedural nature –[3] is aimed at supporting, in full respect of the constitutional charter,[4] the position of each teacher and (more generally) of the entire staff (teachers or not) employed by public schools.[5]

[3] See – albeit with nuances that are sometimes partially different (about, precisely, the substantive and/or procedural nature of Art 61 of the legge 11 July 1980 no 312) – Corte di Cassazione 3 March 1995 no 2463, *Giustizia civile*, I, 2093 (1995), with note by F. Casini; Corte di Cassazione-Sezioni unite 11 August 1997 no 7454, *Danno e responsabilità*, 260 (1998), with note by M. Rossetti, *Responsabilità civile e previdenza*, 1071 (1998), with note by R. Settesoldi; Corte di Cassazione 21 September 2000 no 12501, *Responsabilità civile e previdenza*, 73 (2001), with note by R. Settesoldi, *Danno e responsabilità*, 257 (2001), with note by F. Di Ciommo; Corte di Cassazione-Sezioni unite 27 June 2002 no 9346, *Responsabilità civile e previdenza*, 1012 (2002), with note by G. Facci, *Nuova giurisprudenza civile commentata*, I, 264 (2003), with note by R. Barbanera, *Foro italiano*, I, 2635 (2002), with note by F. Di Ciommo; Corte di Cassazione 11 February 2005 no 2839, *Guida al diritto*, 18, 70 (2005); Corte di Cassazione 10 May 2005 no 9758, *Giurisprudenza italiana*, 396 (2006); Corte di Cassazione 29 April 2006 no 10042, *Massimario di Giustizia civile*, 4 (2006); Corte di Cassazione 10 October 2010 no 24997, *Massimario di Giustizia civile*, 1469 (2008); Corte di Cassazione 3 March 2010 no 5067, *Giustizia civile*, I, 2931 (2011), with note by M. Cocuccio; Corte di Cassazione 6 November 2012 no 19158, *Diritto e giustizia online*, 7 (2012), with note by A. Villa.

[4] See Corte Costituzionale 24 February 1992 no 64, *Giurisprudenza italiana*, I, 1618 (1992), with note by M. Comba, *Foro Amministrativo*, 1220 (1993), with note by F. Staderini. On this item, more recently, see C. Rusconi, 'Minore età e responsabilità dei genitori e degli insegnanti' *Ius Civile*, 122, fn 88 (2014).

[5] In literature, with express reference to the only partial nature of reimbursement (limited

The school administration, because of the organic relationship 'administration-dependent staff', is therefore considered liable for damage caused to minors during the time which they are subject to the supervision of the institute's personnel.[6]

III. The Hypothesis and the Nature of the Institute's Responsibility

In the context of damage suffered by pupils, it is appropriate to distinguish – in addition to the case of damage caused to a pupil by another pupil – the hypothesis of damage inflicted by a pupil on himself and damage caused to a pupil by a third party.[7]

Whereas the damage done to a pupil by the actions of another pupil triggers, according to a well-established orientation,[8] the extra-contractual liability of the teacher (pursuant to Art 2048 of the Italian Civil Code),[9] the two remaining

to the hypothesis of wilful misconduct and gross negligence), see M. Comporti, 'Fatti illeciti: le responsabilità presunte', in P. Schlesinger ed, *Il Codice Civile. Commentario, Artt. 2044-2048* (Milano: Giuffrè, 2nd ed, 2012), 291-299; A. Ferrante, *La responsabilità civile dell'insegnante, del genitore e del tutore* (Milano: Giuffrè, 2008), 320; D. Chindemi, 'La responsabilità dell'insegnante per i danni subiti dall'alunno' *Responsabilità civile e previdenza*, 2137 (2011).

[6] Corte di Cassazione 7 November 2000 no 14484, *Foro italiano*, I, 3288 (2001), with note by M.P. Giracca; Corte di Cassazione 26 June 1998 no 6331, *Foro italiano*, I, 1574 (1999), with note by F. Di Ciommo. In literature, see, among others, D. Chindemi, n 5 above, 2137.

[7] We can find other similar situations represented, for example, by the case of damage suffered by the pupil as a result of his/her interaction with something (cf Corte di Cassazione 8 February 2012 no 1769, *Responsabilità civile e previdenza*, 1538 (2012), with note by A. Cocchi, *Foro italiano*, I, 1040 (2012)) and by the case of damage caused to a student by an animal (cf Corte di Cassazione 15 February 2011 no 3680, *Responsabilità civile e previdenza*, 1560 (2011), with note by A. Cocchi, *Giurisprudenza italiana*, 590 (2012), with note by E. Petrone). For a complete analysis of the different cases, cf, *ex multis*, M. Ferrari, 'La responsabilità civile di scuola e insegnanti in Italia e Francia: un'analisi comparata' *Responsabilità civile e previdenza*, 1377 (2014).

[8] This judicial interpretation seems to be shared also in the context of the so-called 'European soft law'. In particular, although in the absence of an express regulation on the responsibility of the staff and the educational institution, they provide for cases of (extra-contractual) liability for damage caused by the children or supervised persons the Art 6:101 of the 'Principles of European Tort Law' (PETL) and the Art VI. – 3:104 of the 'Draft Common Frame of Reference' (DCFR). In general, on the different characteristics of these two 'soft law' projects (PETL and DCFR) as well as on the difficulties of harmonization of the continental rules of civil liability; see, for all, G. Alpa, M. Andenas, 'Fondamenti del diritto privato europeo', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2005), 525-527.

[9] On the archaic terminology as well as on the evolution and extensive interpretation of Art 2048 of the Italian Civil Code, cf, *ex multis*, L. Rossi Carleo, 'La responsabilità dei genitori *ex* art. 2048' *Rivista di diritto civile*, II, 125-151 (1979); A. Venchiarutti, 'La responsabilità dei genitori, dei tutori, dei precettori e dei maestri d'arte', in P. Cendon ed, *La responsabilità extracontrattuale. Le nuove figure di risarcimento del danno nella giurisprudenza* (Milano: Giuffrè, 1994), 414; Id, 'Il minore e il danno. Riflessioni sulla responsabilità dei genitori in Francia e in Italia' *Rivista di diritto civile*, 219-240, 233 (2005); C. Salvi, 'La responsabilità civile', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffrè, 2nd ed, 2005), 187-188; E. Carbone 'La responsabilità aquiliana del genitore tra rischio tipico e colpe fittizie' *Rivista di diritto civile*, 1-12 (2008); A. Ferrante, 'Illecito del figlio minore: nuove prospettive'

cases raise distinct problems and suggest distinct solutions.

In particular, the hypothesis of damage inflicted by a pupil on himself (so-called 'self-perpetrated damage')[10] cannot fall within the scope of Art 2048, para 2, of the Italian Civil Code. Indeed, this provision refers to damage caused by the conduct of a pupil supervised by a teacher, assuming a necessary alterity between the party causing damage and the party suffering damage. Having excluded application of Art 2048, para 2, of the Italian Civil Code, the trend that seems to prevail, also thanks to endorsement by the *Corte di Cassazione-Sezioni unite*, it is that of liability for non-performance, pursuant to Art 1218 of the Italian Civil Code, of the teacher and of the school.[11] This liability for non-performance follows the establishment not only of a binding legal relationship, concluded by student enrollment, between the educational institute and the student (*rectius*, his parents), but also of a 'social contact' between the teacher and the student.[12] The latter part of this reconstruction allows, according to part

Danno e responsabilità, 585-602 (2009); and, for a more recent examination (especially from the perspective of case law), see A. Anceschi, *Rapporti tra genitori e figli. Profili di responsabilità* (Milano: Giuffrè, 2nd ed, 2014). This extra-contractual liability pursuant to Art 2048 of the Italian Civil Code (in addition to the constant interference with the responsibility under Art 2047, which, however, refers to the hypothesis of 'natural' incapacity) it can also contribute to the responsibility for breach pursuant to Art 1218 of the Italian Civil Code of educational institutes (which finds its source in the enrolment of the student and in the consequent obligation of supervision placed on the school staff). See, for all, Corte di Cassazione 19 July 2016 no 14701, n 1 above.

[10] Or, in Italian, '*danno autocagionato*'.

[11] See Corte di Cassazione-Sezioni unite 27 June 2002 no 9346, n 3 above; Corte di Cassazione 18 July 2003 no 11245, *Nuova giurisprudenza civile commentata*, 491 (2004), with note by I. Carassale; Corte di Cassazione 26 April 2010 no 9906, *Responsabilità civile e previdenza*, 2288 (2010), with note by C. Menga, *Nuova giurisprudenza civile commentata*, I, 1160 (2010), with note by A. Querci.

[12] This responsibility arises, in extreme synthesis, from a 'qualified contact' between a subject endowed with a particular *status* and another person injured: this generates, according to a part of the literature, a commitment and a duty of protection without a primary obligation of performance. In this paper, it is not possible to retrace all the origins, reasons and systematic profiles of 'social contact'. Therefore we refer – in addition to the studies of the German literature (see, among others, the work, recently translated into Italian, of G. Haupt, *Sui rapporti contrattuali di fatto* (Torino: Giappichelli, 2012) and the study, from a critical perspective, of C.-W. Canaris, 'Il "contatto sociale" nell'ordinamento giuridico tedesco' *Rivista di diritto civile*, 1-9 (2017)) – to our national debate: C. Castronovo, 'Obblighi di protezione' *Enciclopedia giuridica* (Roma: Treccani, 1990), XXI, 1-9; Id, 'Il diritto civile della legislazione nuova. La legge sulla intermediazione mobiliare' *Banca borsa e titoli di credito*, 300-329, 319 (1993); Id, 'L'obbligazione senza prestazione. Ai confini tra contratto e torto', in G. Alpa et al, *Le ragioni del diritto. Scritti in onore di Luigi Mengoni* (Milano: Giuffrè, 1995), I, 147; propose a partially different reconstruction A. di Majo, 'L'obbligazione senza prestazione approda in Cassazione' *Corriere giuridico*, 446 (1999); Id, 'Contratto e torto. La responsabilità per il pagamento di assegni non trasferibili' *Corriere giuridico*, 1710 (2007); and, with specific reference to the liability of the medical doctor (subsequently, as known, reformed by the recent legge 8 March 2017 no 24, so-called 'legge Bianco-Gelli'), S. Mazzamuto, 'Note in tema di responsabilità civile del medico' *Europa e diritto privato*, 501-512 (2000). For an overview of the juridical problems raised by the so-called 'social contact' and by the so-called 'obligation without performance' in our legal system, please refer to, without any claims for completeness, M. Franzoni, 'Il contatto sociale

of the literature, avoidance of significant discrimination between students who suffer damage through the conduct of a third party and students who self-inflict damage, because the rule of Art 1218 of the Italian Civil Code (unlike that of Art 2043)[13] is very similar to the probative system of Art 2048, para 2, of the Italian Civil Code.[14]

The same solution is outlined with reference to damage caused to a student by a third party:[15] the inapplicability of Art 2048, para 2, Italian Civil Code (due to the absence of illicit activity by the student) and the existence of the double 'contractual relationship' (arising, as mentioned above, because of the enrolment of a minor in school and the already mentioned 'social contact' between teacher and pupil) again lead commentators (and the courts) to consider liability for non-performance of the scholastic institute, pursuant to Art 1218 of the Italian Civil Code (with all the related outcomes on the evidential burden).[16]

non vale solo per il medico' *Responsabilità civile e previdenza*, 1693-1702 (2011); S. Faillace, *La responsabilità da contatto sociale* (Padova: CEDAM, 2004); I. Sarica, 'Il contatto sociale tra le fonti della responsabilità civile: recenti equivoci nella giurisprudenza di merito' *Contratto e impresa*, 97-102 (2005); A. Thiene, 'Inadempimento delle obbligazioni senza prestazione', in G. Visintini ed, *Trattato della responsabilità contrattuale* (Padova: CEDAM, 2009), I, 345; L. Manna, 'Le obbligazioni senza prestazione', in L. Garofalo and M. Talamanca eds, *Trattato delle obbligazioni* (Padova: CEDAM, 2010), III, 29.

On the contractual nature of the teacher's liability, see, for all, C. Castronovo, 'Ritorno all'obbligazione senza prestazione' *Europa e diritto privato*, 679-717, 681 (2009); Id, *Responsabilità civile* (Milano: Giuffrè, 2018), 573; in a critical perspective, see A. Zaccaria, '*Der Aufhaltsame Aufstieg des Sozialen Kontakts* (La resistibile ascesa del «contatto sociale»)' *Rivista di diritto civile*, 77-108, 98 (2013).

[13] Indeed, the risk – ventilated by the literature and the courts – would be represented by the option to configure the hypothesis of damage inflicted by a pupil on himself (so-called 'self-perpetuated damage') as a case of extra-contractual liability pursuant to Art 2043 of the Italian Civil Code, thus penalizing the injured, forced to prove (unlike the case of damage suffered by another pupil) the fault of teachers and of educational institutes. On this item, see, among others, M. Ferrari, n 7 above, 1378-1379.

[14] On the contrary, the other distinctions persist due to the different nature between contractual, pursuant to Art 1218 of the Italian Civil Code, and extra-contractual liability, pursuant to Arts 2043 e 2048 of the Italian Civil Code. In the case law, see, *ex multis*, Corte di Cassazione 18 November 2005 no 24456, *Danno e responsabilità*, 1081 (2006), with notes by V.V. Cuocci and T. Perna; more recently, Corte di Cassazione 21 September 2012 no 16056, *Nuova giurisprudenza civile commentata*, 163 (2013), with note by V. Montani (who gives an overview of different types of damage suffered by the pupil).

[15] See Corte di Cassazione 19 September 2017 no 21593 n 1 above; Corte di Cassazione 28 April 2017 no 10516 n 1 above. The courts often consider the case of a student who suffers an accident resulting from the conduct of a third party (for example, the driver of the school bus) upon leaving the school premises.

[16] In particular, according to the Corte di Cassazione, the evidential burden of the injured person, in this case, is exhausted in the demonstration that the fact occurred in the time when the child is entrusted to the school, being sufficient to make presumption operative of guilt for the non performance of the obligation of surveillance, while it is up to the school administration the proof that the supervision has been exercised on the students with a diligence suitable to prevent the fact (Corte di Cassazione 7 November 2000 no 14484 n 6 above). Numerous others judgments also detract from the distinction between liability for non performance and non-contractual liability precisely from the practical point of view of the evidential burden

There follows a progressive 'contractualization' of the liability of the educational institute in the context of so-called 'self-perpetrated damage' and in the context of damage caused to a student by a third party.[17]

This majoritarian trend seems to be reinforced by (more and more) forecasts within internal institute regulations, where there are often specific obligations for school staff to pick up and drop pupils from transport vehicles in front of the school and to supervise the hypothesis of a possible delay of the means. These regulations seem to regulate in more detail the benefits deriving from the agreement – perfected through enrollment of the pupil – between the pupil's parents, on the one hand, and the educational institution, on the other.[18]

The obligation of supervision by teachers – and, more generally, by school staff – is derived from the enrolment agreement. This obligation must be exercised with due diligence and with the attention required *by the age and physical and mental development* of the child and *by the current conditions of the specific case*.[19]

Therefore, the age and development of the child are considered on a case by case basis to evaluate the liability of the educational institute: the lower the age and development of the student, the more stringent the obligation of surveillance. This obligation is then adapted differently in the light of the circumstances of the specific case (consider, for example, an accident occurring inside or outside the

incumbent on the injured party: who acts to obtain compensation must prove that the harmful event occurred over time in which the pupil was subjected to the supervision of teachers, remaining indifferent that invokes the contractual responsibility for negligent fulfilment of the surveillance obligation or extra-contractual responsibility for omission of the necessary precautions, suggested by ordinary prudence, in relation to the specific circumstances of time and place, so that the safety of minor learners is safeguarded (cf Corte di Cassazione 4 February 2005 no 2272, *Repertorio Foro italiano*, '*Responsabilità civile*' no 339 (2005)).

[17] This phenomenon of 'contractualization', as we have already tried to underline (see n 9 above), is not unknown – even if (sometimes) together with the responsibility of teachers pursuant to Arts 2047 and 2048 of the Italian Civil Code – also in the context of the recent decisions on the damage occurred to a pupil for the fact of another pupil.

[18] Nor can doubts arise about the compensation of non-pecuniary loss due to non performance for the protection of inviolable rights of constitutional importance (among which certainly the right to life and health of the pupils). On the compensation for non-pecuniary loss, please refer to the 'twin pronunciations of San Martino' of 2008: Corte di Cassazione-Sezioni unite 11 November 2008 nos 26972, 26973, 26974 and 26975, *Responsabilità civile e previdenza*, 38 (2009), with notes by P. G. Monateri and D. Poletti, *Foro italiano*, 1, I, 120 (2009), with notes by A. Palmieri, R. Pardolesi, R. Simone, G. Ponzanelli, and E. Navarretta, *Rassegna di diritto civile*, 499 (2009), with notes by P. Perlingieri and F. Tescione. This profile was then resumed (and confirmed) by scholars and courts (see, with an explicit reference to the cases of liability of educational institutes, D. Chindemi, n 5 above, 2157).

[19] See Corte di Cassazione 5 September 1986 no 542, *Repertorio Foro italiano*, '*Responsabilità civile*' no 97 (1987). There are several reflections on extending the 'subjective' sphere of surveillance activity which can now be referred not only to public or private school teachers, but also to post-school teachers, catechism teachers, driving teachers and sports teachers. Cf, among others, M.L. Chiarella, 'Minore danneggiante e responsabilità vicaria' *Danno e responsabilità*, 973-987 (2009).

school premises, or inside or outside school hours).[20]

In any case – regardless of the widespread trend in the courts regarding the obligation of surveillance as well as 'corrective measures' represented by the age of the child and the specific circumstances of the case – internal school rules must always be taken into serious consideration because these regulations, as discussed above, often clarify the practical characteristics of the duty to supervise.[21]

IV. The Compensable Loss

In order to determine the extent of the compensable loss, after having verified the liability of the educational institute, the argumentative procedure of mainstream courts is developed mainly on three 'cornerstones'.

Firstly, the compensation of non-pecuniary loss can only be based on the analysis (and, in the case of second-instance judges, on the possible re-analysis) of the concrete data of the case at issue. Thus, it is necessary to identify not only the behaviour of the subjects involved, but also the characteristics of the prejudice actually suffered by the student.

Secondly, the compensation of non-pecuniary loss always comes from the use of the Court of Milan Tables 'for the compensation of non-pecuniary loss'.[22]

Finally, an important role in the compensation proceedings is performed, due to the often very complex activity of the practical evaluation, by the liquidation of losses on an equitable basis. This assessment – in addition to not being evaluated by the Court of Cassation – can only take place residually if the existence of the damage (so-called '*an*') has already been proven, but significant difficulties remain in the exact determination of the compensable losses (so-called '*quantum*').[23]

[20] In literature, see, for all, C. Murgo, n 1 above, 167. The impossibility to predetermine exactly the content of the supervisory obligation has long been consolidated in the case-law (Corte di Cassazione 15 December 1980 no 369, *Giurisprudenza italiana*, I, 1593 (1980), *Responsabilità civile e previdenza*, 55 (1981)).

[21] However, according to a rather consolidated approach, the obligation of surveillance, despite finding its source in the contract-enrolment between the school and the parents of minors, does not end with the finish of the lessons but continues beyond, ceasing only with the effective passage of the children under another sphere of protection (that of the parents or other people). See Corte di Cassazione 30 March 1999 no 3074, *Danno e responsabilità*, 916 (1999), *Diritto ed economia dell'assicurazione*, 632 (2000), with note by D. de Strobel.

[22] The 'Tables for the compensation of non-pecuniary loss' are drawn up by the Court of Milan and recently republished, as every year, on its website (2018 edition). These Tables available at https://tinyurl.com/yb55swd3 (last visited 27 December 2018).

[23] Cf, among others, Corte di Cassazione 8 November 2016 no 22638, *Diritto e giustizia*, 9 November 2016, with note by K. Mascia; Corte di Cassazione 16 March 2016 no 5252, *Diritto e giustizia*, 17 March 2016, with note by R. Savoia.

V. Criticisms and the Recent Legislative Reform on Children Under Fourteen Leaving School Premises

Confirming the process of 'contracting' the liability of the teachers and of the school,[24] the argumentative process of the courts seems to follow carefully, as demonstrated above, not only the main rules (legal and judicial) concerning the assessment of responsibilities (often supported by specific provisions contained, from time to time, in the various internal institutional regulations),[25] but also on quantification of the loss (with appropriate reference to the Milan Court's Tables for compensation for biological damage as well as to the non-recoverability, and residual, judicial assessment according to fairness of the compensable damage).

The result is an appreciable controllability of the logical procedure of the rulings and an appropriate reduction in the uncertainty of the judicial outcome.

This solution does not seem to be distorted by the doctrinal perplexities on the so-called 'social contact' because, although wishing to accept the (significant)

[24] This process of 'contracting' the responsibility of teachers and of educational institutes for the damages suffered by the pupil does not seem so clear in the other European legal systems. It is possible to consider, for example, the French legal system. On the evolution of the liability of teachers and of educational institutes in the French literature (from extra-contractual responsibility for fault to responsibility – always extracontractual but – strict), see G. Viney, P. Jourdain, S. Carval, *Les conditions de la responsabilité* (Paris: Dalloz, 2013), 1227-1228; Ph. Le Tourneau, *Droit de la responsabilité et des contrats* (Paris: Dalloz, 2012), 1867; A.-M. Galliou-Scanvion, *L'enfant dans le droit de la responsabilité délictuelle* (Villeneuve d'Ascq: Presses universitaires du Septentrion, 1999), 283-286; F. Alt-Maes, 'Le nouveaux droits reconnus à la victime d'un mineur' *La Semaine Juridique*, 3627 (1992); G. Viney, 'Vers un élargissement de la catégorie des «personnes dont on doit répondre»: la porte entrouverte à une nouvelle interprétation de l'article 1384, alinéa 1re du Code civil' *Recueil Dalloz*, 157 (1991); Ead, 'La réparation du dommage causés sous l'empire d'un mineur' *La Semaine Juridique*, 3189 (1985); B. Puill, 'Vers une réforme de la responsabilité des père et mère du fait de leur enfants' *Recueil Dalloz*, 185 (1988); Ch. Lapoyade Deschamps, 'Les petits responsables (Responsabilité civile et responsabilité pénale de l'enfant)' *Recueil Dalloz*, 299-305 (1988); P.D. Ollier, *La responsabilité civile des père et mère. Étude critique de son régime légale* (Paris: Dalloz, 1961), 138-155; R. Savatier, *Traité de la responsabilité civile en droit français* (Paris: Dalloz, 2nd ed, 1951), I, 279; and, in the case law, see Cour de Cassation 11 March 1981, *Recueil Dalloz*, 320 (1981), with note by Ch. Larroumet; Cour de Cassation-Assemblée plénière 9 May 1984, *La Semaine Juridique*, 20255 (1984), with note by N. Dejean de la Batie, *La Semaine Juridique*, 20291 (1984), *Revue trimestrielle de droit civil*, 123 (1984), with note by J. Huet; Cour de Cassation 3 March 1988, *Revue trimestrielle de droit civil*, 772 (1988), with note by P. Jourdain; Cour de Cassation-Assemblée plénière 17 January 2003, *Recueil Dalloz*, 591 (2003), with note by P. Jourdain.

However, no specific rule seems to regulate today the extra-contractual responsibility (for fault? strict?) of school staff and of educational institutes in the current 'Projet de réforme de la responsabilité civile'. See G. Alpa, 'Sulla riforma della disciplina della responsabilità civile in Francia' *Contratto e impresa*, 1-9 (2018); M. Machart, 'Le fait d'autrui dans l'avant projet de réforme de la responsabilité civile' *Village de la Justice*, available at https://tinyurl.com/y7xc77kc (last visited 27 December 2018).

[25] These provisions – as already noted – further specify the extent of the supervisory obligation imposed on the school staff up to the delivery of the pupils to other responsible subjects.

critical observations raised,[26] it is difficult to exclude liability for non-performance of the educational institute in the case of harm suffered by the student. In particular, according to the orientation of the courts, a 'double contractual relationship' is established: exoneration from responsibility for non-fulfilment of the educational institute therefore requires not only the exclusion of duties resulting from the alleged social contact between the child and teacher, but also of the general obligation of surveillance deriving from the enrolment of the pupil in school (often set out, as we have seen, in the specific regulations of the institute).

The current orientation is not even slightly affected by the reflection, although abstractly acceptable, based on the need to reconcile the obligation of supervision by the school with the educational and training duties of parents (notable aimed, firstly, at the enhancement of skills and, then, the correct construction of the young child's personality, with a view of achieving full autonomy).[27]

This argument is often reduced – precluding the scholar to deviate significantly from the position taken by the courts in condemning the educational institution to compensation for harm – from the young age of the student, from the rarity of 'anomalous' (unpredictable or very dangerous) conducts by the minor and from the numerous specifications of the supervisory obligation contained also in the internal regulations of each institute.

The recent rulings of the *Corte di Cassazione* therefore seem to represent the outcome of the clear and consistent application of the criteria for loss compensation in the civil responsibility of educational institutes.

Thus, no particular 'case-law revolution' emerges, but, at most, a '(widely) predicted judicial scandal', and without the premises for a quick *revirement* on the horizon.

These positions – despite being inserted, as pointed out above, in a consolidated trend – have sown concerns among school leaders who, frightened by the practical consequences of the rulings, have begun to request significant sacrifices to parents and teachers, forcing the former to pick up children directly at school and the latter to extend, if necessary, their presence on the school premises beyond the normal school hours.

Following these reactions by school leaders and various other debates (no longer technical-legal, but mainly political) raised by the rulings,[28] it was decided

[26] See, among others, A. Zaccaria, n 12 above, 98.

[27] See, C. Murgo, n 1 above, 170.

[28] On the public polemics (political more than legal) triggered by the judgments of the Corte di Cassazione on the civil liability of educational institutes, we can refer to the numerous articles published in some of the most important national newspapers: 'Genitori all'uscita da scuola, Renzi: «Cambiamo la legge»' *Il Messaggero*, available at https://tinyurl.com/ya4bjhpb (last visited 27 December 2018); G. Fregonara, 'Fedeli: cari genitori, alle medie dovete prendere i figli. Lo dice la legge' *Il Corriere della Sera*, available at https://tinyurl.com/yclessqx (last visited 27 December 2018); 'Scuole medie, Renzi: subito una legge per consentire ai ragazzi di tornare a casa da soli' *La Repubblica*, available at https://tinyurl.com/yacmwpdf (last visited 27

to run for cover with an '*ad hoc*' regulatory intervention.[29]

The regulation of the school's liability for damage caused to a pupil by a third party outside the school premises was significantly modified with the introduction, under the recent legge 4 December 2017 no 172, of Art 19-*bis* ('Provisions on children under fourteen years old leaving school premises') as part of the conversion into law of the decreto-legge 16 October 2017 no 148 ('Urgent provisions on financial matters and for non-transferable needs').

In particular, according to Art 19-*bis*,

> '(1) parents exercising parental responsibility, guardians and recipients pursuant to the legge 4 May 1983 no 184, over children under the age of fourteen years old, considering the age of the minors, their degree of autonomy and the specific context, in a process aimed at their self-responsibility, may authorize the institutes of the national education system to allow children under fourteen years to leave the school autonomously at the end of lessons. The authorization exempts the school staff from liability related to the performance of the supervisory obligation. (2) The authorization to autonomously use the school transport service, issued by parents exercising parental responsibility, guardians and recipients of those under the age of fourteen years old to the local service managers, exonerates staff from liability related to the performance of the obligation of vigilance in entering and leaving the vehicle and during the time at the bus stop, also after the end of school activities'.

Thus, parents – according to a (subsequent) note from MIUR–[30] can authorize, from year to year,[31] schools attended by their children to allow them to leave the school premises autonomously at the end of the lessons, considering

December 2018); 'Scuola, obbligo di andare a prendere i minori. Fedeli: "È la legge". E Renzi si intesta la campagna per cambiarla' *Il Fatto Quotidiano*, available at https://tinyurl.com/ybrfgeug (last visited 27 December 2018); A. Corlazzoli, 'Scuola, obbligo di andare a prendere i minori. Il salvagente Malpezzi pronto per la Manovra. Moige: "Ma non basterà"' *Il Fatto Quotidiano*, available at https://tinyurl.com/y9cb5v5o (last visited 27 December 2018).

[29] This reconstruction has been textually confirmed by the Ministry of Education, University and Research in a note dated 1 December 2017 (available at https://tinyurl.com/yagdev85 (last visited 27 December 2018)). The legislative intervention, rather than denying the judicial trend so far consolidated, seems to constitute therefore the confirmation of the school's liability for omitted supervision in the case of damage caused to a student by a third party outside the school premises.

[30] See Circolare 12 December 2017 no 2379 by the Ministry of Education, University and Research (availale at https://tinyurl.com/yd2zd5vf (last visited 27 December 2018)).

[31] On the annual duration of the authorization, see C. Tucci, 'Le autorizzazioni per l'uscita da scuola dei minori saranno valide per tutto l'anno' *Il Sole 24 Ore*, available at https://tinyurl.com/y7tmuw27 (last visited 27 December 2018).

Neither the law nor the note of MIUR specify that the authorization must be issued in writing. This form, however, seems necessary in order to guarantee the evidence of the parental consent.

the *age*, *degree of autonomy* and *specific context*.[32] This authorization must be issued by the parents only after a careful assessment of the circumstances of the case because it involves – as can be seen from the text of Art 19-*bis* and from the forms prepared by the operators – the effect of completely exempting the school from any liability connected with performance of the supervisory obligation.

VI. Final Remarks

The Italian legislator – after having taken note of the state of the art of case law – significantly modified regulation of the responsibility of educational institutes, seeking a different balance from the past between the protection of the safety of minors and risk assessment by families.

In the (rather specific) case considered by legislation, indeed, preference is given to significantly enhancing the position of parents (or whoever in their place) in order to overcome the *impasse* resulting from the attribution of responsibility, according to the rules of case law, to the head of the school.

However, the new provision only partially solves – with a sort of 'emergency approach' – the problems raised by the liability of the educational institute.[33]

The legislative destiny of children under fourteen who are not authorized to leave, for example, remains unknown.[34]

Nothing seems to have changed after the introduction of Art 19-*bis* with the educational institute expected to comply with the supervisory obligation (paying particular attention, as was pointed out by the *Corte di Cassazione*, to the formulation of the regulations of the institute, approved pursuant to Art 10, para 3, letter a), of the decreto legislativo 16 April 1994 no 297).[35] The obligation

[32] The maximum age limit for minors is set by the law at fourteen years old. There are legal reasons – of a civilistic (such as the debate aroused, especially in the 'civil law' systems, from the so-called '*grandi minori*') and criminal nature (deduced mostly from Arts 97 and 591 of the Italian Criminal Code) – but also practical and organizational reasons (as it is well-known, the lower secondary schools usually end up just in coincidence with the completion of fourteen years old).

[33] Furthermore, it seems appropriate to start a general reflection (already partially recalled) on the need to strengthen not only the items traditionally delegated to the attention of parents (such as education and child growth), but also the autonomous evaluation of situations of danger by minors (especially if '*grandi minori*'). This assessment may (perhaps) allow a better risk management. On the ineluctable increase of the risks in our society, see, among others, U. Beck, *La società del rischio. Verso una seconda modernità* (Bari: Carocci, 2000).

[34] Nor does it seem much clearer what happens – after the approval of the legge 4 December 2017 no 172 – in the case of damage suffered by the student in the phase following the material entry into the school building but immediately preceding the beginning of the lessons. On this item, before the legge 4 December 2017 no 172, see Corte di Cassazione 19 July 2016 no 14701 n 1 above.

[35] It is mostly up to the school managers to communicate to the entire staff the new rules and to review, using the help of the school council, the provisions of the internal institute regulations with a view to providing for an effective integration of the new provisions of the Art 19-*bis*, paras 1 and 2.

to supervise children without a release – required to remain in the classroom to await the arrival of their parents or of other persons obliged by legge 4 May 1983 no 184 to provide parental care – threatens to force some of the staff to stay at school beyond normal school hours.

Further reflection is therefore required, especially from the Government and the Ministry of Education, about the reconsideration of at least the prolonged hours of teachers as well as extra-remuneration for the supplementary supervision service in the case of children under fourteen years of age not authorized to leave.

The dialogue between legislators and the courts on the civil liability of educational institutes (especially for damages caused to a student by a third party) seems to be more open than ever today...