Personal Rights and Sport Injuries: The Civil Liability Between Risk and Negligence

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Abstract

The sports phenomenon is a form of manifestation of the human personality, necessary for the growth and maturation of human beings as individuals and as members of the social groups to which they belong.

The practice of sport, as it happens for the great variety of so-called lawful dangerous activities, even if promoted and encouraged to promote values such as loyalty and fairness, respect for rules, legality, integration and protection of diversity and democracy, can also represent a danger to the fundamental legal assets of the person, namely life, health and mental and physical integrity.

In the light of Italian legal theory and case-law on civil liability in sport, this work proposes to discuss the implementation of the general principle of neminem laedere – summarised in the general clause of Art 2043 of the Civil Code and considered regulatory protection for the guarantee of inviolable rights – in terms of the application of the theory of acceptable risk to have individual models that would exclude negligent behaviour.

I. Premise: The Question

Sport is a complex phenomenon that can be studied from a variety of viewpoints: it is an economic activity, it is socially relevant and it has a well-structured organisation that has been conceived in the past as a genuine legal system.

However, sport is above all a human activity that can be traced back to a personal right and as such must be balanced against the protection of other primary interests, such as the health and physical and mental integrity of its practitioners.

In the light of Italian legal theory and case-law on civil liability in sport, this work proposes to discuss the implementation of the general clause of *neminem laedere* in terms of the application of the theory of acceptable risk in order to highlight how and to what extent it is necessary to be able to have individual models to assess behaviour that would exclude negligent behaviour when performing lawful risky activities that are characterised by a normal degree of aggressiveness.

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II. The Value of Sporting Activities According to Prevailing Interest

The Italian Constitution does not include an express provision that guarantees the right to practise sport as a personal right; but this lack, the politico-ideological and historical reasons of which have repeatedly been emphasised,[1] has not prevented the interpreters[2] from believing that they could still make a positive evaluation in terms of lawfulness and value, thanks to the theory of prevailing interest[3] elaborated in the light of the principles and fundamental freedoms of the legal system, the foremost being the personalist principle[4] and that of formal and substantial equality and freedom of association.

The sports phenomenon is in fact a form of manifestation of the human personality, necessary for the growth and maturation of human beings as individuals and as members of the social groups to which they belong. It finds its maximum expression in private sports law associations established pursuant to Book I of the Civil Code to promote values such as loyalty and fairness, respect for rules, legality, integration and protection of diversity and democracy.

In the light of the principle of horizontal subsidiarity pursuant to Art 118 of the Constitution, the aforementioned entities are appointed to promote activities of general interest according to the 'Third Sector Code', introduced with decreto legislativo 3 July 2017 no 117,[5] thus contributing to achieving the social function of sport, in turn proclaimed by the Treaty of Lisbon[6] and promoting the

[1] See A.G. Parisi, 'Sport, diritti e responsabilità: un confronto con l'esperienza francese' *Comparazione e diritto civile*, 1-36 (2010). The author states that the Italian constitutional legislator did not recognise the right to sport in the Charter because of its link with the past political regime. See also G. Manfredi, 'La giuridificazione dello sport' *Giurisprudenza italiana*, 485-494 (2016); the latter author stresses that in the last century sport gained a political and social relevance and it became an instrument for building consensus.

[2] R. Frascaroli, 'Sport' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 514-538; A. Marani Toro, 'Sport' *Novissimo digesto italiano* (Torino: UTET, 1971), XVIII, 42-54; regarding the case-law, see M. Calciano *Diritto dello sport. Il sistema della responsabilità nell'analisi giurisprudenzial*e (Milano: Giuffrè, 2010), passim, and V. Frattarolo, *Lo sport nella giurisprudenza* (Milano: Giuffrè, 1984), passim.

[3] F. Antolisei, *Manuale di diritto penale* (Torino: UTET, 1985), 271 and F. Mantovani, *Diritto penale* (Padova: CEDAM, 2017), 233.

[4] See P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 131.

[5] Re the Third Sector Code, see R. Rametta, *Profili civilistici degli enti del Terzo Settore* (Roma: Aracne, 2018); on the relationship between sports associations and the Third Sector Code refer to V. Bassi, 'Associazioni sportive dilettantistiche ed enti del terzo settore' *Rivista di diritto sportivo*, 349-364 (2017).

[6] See G. Liotta, L. Santoro, *Lezioni di diritto sportivo* (Milano: Giuffrè, 2018); G. Manfredi, n 1 above, 485-494; S. Bastianon, 'La funzione sociale dello sport e il dialogo interculturale nel sistema comunitario' *Rivista italiana di diritto pubblico comunitario*, 391-411 (2009); J. Zylberstein, 'La specificità dello sport in ambito europeo' *Rivista di diritto ed economia dello sport*, 59-70 (2008); the latter author states that the European Commission observed in its 'White Paper on Sport' (2007), the 'specificity of sport' includes '(…) a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and

improvement of the level of individual and collective well-being in society.

The practice of sport, as it happens for the great variety of so-called lawful dangerous activities, even if promoted and encouraged, can also represent a danger to the fundamental legal assets of the person, namely life, health and mental and physical integrity.[7]

As a consequence, since under Italian private law there is no specific discipline of civil liability in sport, case-law was burdened with the task of establishing the legal value of sporting activities, that is, when the right to practise sport should be extended, and when this right should succumb to the protection of the right to life and/or the psychophysical integrity of human beings, which can sometimes be injured by sporting activities.

Indeed, the Courts have referred in this area to the principle of *neminem laedere* summarised in the general clause of Art 2043 of the Civil Code and considered regulatory protection for the guarantee of inviolable rights.[8]

III. The Legal and Theoretical Development of the Assumption of Risk

The theory of acceptance of sports risk[9] was developed from Italian case-law.

According to this, damage to the physical integrity of the individual, the subject of the sporting risk, for harm that occurs in the context of the sporting

operators, the organisation of sport on a national basis, and the principle of a single federation per sport'.

[7] Refer to L. Di Nella, *Il fenomeno sportivo nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 2000), 258; according to the author there are different kinds of sporting activities, some based on body contact and violent, allowed by the rules of the game; in this case the legal evaluation of the sporting behaviour is difficult because it needs a solution of an antinomy, between opposite interests: on the one hand the promotion of the sporting activity and on the other hand the safeguarding of the safety of the players.

[8] About the legal nature of liability in sport, see: A. Scialoja, 'Responsabilità sportiva' *Digesto delle discipline privatistiche. Sezione civile* (Torino: UTET, 1998), XVII, 410-417; E. Bonvicini, *La responsabilità civile* (Milano: Giuffrè, 1971), 145; the authors identify sporting liability as a genus in its own right as it meets the principles and rules of the sports. On the other hand, to configure sporting liability as a kind of civil liability, see: G. Ponzanelli, 'Le regole ordinarie di responsabilità civile nell'attività sportiva', in P. Rescigno et al, *Fenomeno sportivo ed ordinamento giuridico*. Atti del 3° Convegno Nazionale della Società Italiana degli Studiosi del Diritto Civile - Capri 27-29 Marzo 2008 (Napoli: Edizioni Scientifiche Italiane, 2008), 161-170; G. De Marzo, 'Accettazione del rischio e responsabilità sportiva' *Rivista di diritto sportivo*, 8-26 (1992); G. Alpa, 'La responsabilità sportiva in generale e nell'attività sportiva' *Rivista di diritto sportivo*, 471-489 (1984); and V. Frattarolo, *La responsabilità civile per le attività sportive* (Milano: Giuffrè, 1984). Regarding the role that sport has in the promotion and in the achievement of human rights by specific classes of people (women, people with disability, minors, foreigners, etc), see P. Donnelly, 'Sport and human rights' *Sport in Society*, 381-394 (2008); also, refer to J. Caudwell and D. McGee, 'From Promotion to Protection: Human Rights and Events, Leisure and Sport' *Leisure Studies*, 1-10 (2018), and E. Isidori, 'Sport as Education: Between Dignity and Human Rights' *Procedia Social and Behavioral Sciences*, 686-693 (2015).

[9] See L. Di Nella, n 7 above, 349-360; V. Frattarolo, n 8 above, 408-514; M. Calciano, n 2 above, 47-66.

event is not considered unlawful and therefore indemnifiable, as it does not occur where there is unlawful behaviour; the harm to the participant is the 'concrete expression of normal danger', depending on the type of activity concerned.

In particular, it was recognised that the participant in the competition accepts the rules and principles both in the abstract and when he/she becomes a member of the sports organisation upon registration, or at the time of enrolment in the sporting event. In relation to the specific behaviour in the individual race or sporting event, this consent would also include the risk of suffering injuries during the competition.

It is a legal theory that has also been developed in common law systems where sporting liability falls within the law of tort,[10] in particular in the tort of negligence, one of the elements of which is the breach of a duty of care. In this case, the assumption of risk has the function of excluding the duty of care and consequently preventing the person who assumes the risk of damage that may derive from the negligent conduct of others from taking legal action to obtain compensation for negligence.

However, the difficulty of proving awareness of the acceptance of risk has in some cases led to the belief that the implied assumption of risk is unsatisfactory as a form of primary assumption of risk based on the theory of inherent risk;[11] it has instead led to a demand for a voluntary assumption, which, in Italy, has also favoured the extension, by some scholars, of the clause in question to a conventional negotiation process.[12]

Since the assessment of liability does not presuppose the existence of a protected legal situation, but rather the duty of care, in an attempt to justify the basic aggression inherent in sports activities, recourse was made, in terms of psychology, to a figure other than simple negligence – namely, to recklessness,[13] halfway between guilt and malice, occurring when the harmful action is coupled with aggression that goes beyond what is normal, or in the case of an action carried out with awareness that it will cause harm, or create a dangerous situation, or a situation that would signal danger to a reasonable person.

Therefore, the difficulty of evaluating both recklessness and the standard of care[14] required by a reasonable person has led to a quid pluris being considered

[10] See G. Alpa et al, *Diritto privato comparato. Istituti e problemi* (Bari: Laterza, 2018).

[11] See L. Santoro, *Sport estremi e responsabilità* (Milano: Giuffrè, 2008), in particular 36. See also J.N. Drowatzky, 'Assumption of Risk in Sport' 2 *Journal of Legal Aspect of Sport*, 92-100 (1992).

[12] L. Santoro, n 11 above, in particular 36. See also J.N. Drowatzky, n 11 above, 92-100.

[13] L. Santoro, n 11 above, 46; M. Ferrari, 'Rischio sportivo e responsabilità sciistica: spunti comparatistici da Francia e Stati Uniti' *Danno e responsabilità*, 633 (2006) and, if allowed, refer to M. Cimmino, *Rischio e colpa nella responsabilità sportiva* (Napoli: Liguori Editore, 2006).

[14] On this point see T.M. James and F. Deeley, 'The standards of Care in Sport Negligence Cases' 1 *Entertainment law*, 104-108 (2002), commentary to *Caldwell* v *Maguire and Fitzgerald* [2001] EWCA 1054; J. Kitchen and R. Corbett, *Negligence and Liability - A Guide for Recreation and Sport Organizations* (Alberta: Centre for Sport and Law, 1995). The author states that the

necessary, based on the recognition of the 'prevailing circumstances', in order to take into account not only the normal standards represented by the rules of the sport, but also additional factors related to sporting practice.[15]

In the Italian legal system the theory of assumed risk has many weaknesses, due to its abstract and generic nature and to the reference to the concept of normal, which varies from sport to sport. This has made it necessary, in fact, to verify on a case-by-case basis what the specific harmful events were for which some form of civil liability could have been excluded and consequently some compensation obligation by the party causing the damage.

Moreover, although, under the Italian legal system, the reconstruction of civil liability in the sport has undoubtedly been influenced by criminal theory and related case-law in criminal proceedings, has found itself having to assess and justify even behaviour that causes serious harm to the integrity of the practitioners, the scholars of civil law have not failed to point out how civil liability and criminal responsibility 'move on distinct planes with different dynamics and purposes that do not coincide'.[16]

Indeed, according to theoretical guidelines developed on the Art 2043 of the Italian Civil Code, the civil liability is characterised by the atypical nature of the offense; consequently, under the law of tort the unlawful conduit and its contents are not previously established by a specific and typical rule, such as it happens under the Criminal Code; therefore, it explains the exquisitely case-based nature of civil liability that ends up being anchored to a variety of subjective figures, conducts, and of 'socially adequate models of conduct' that it is up to the interpreter to identify.

A legal path has thus been initiated, enriched by copious academic works,[17] providing an opportunity to reflect on the legal significance of sports regulations.[18]

standard of care is related to various factors: written standards include government statutes and regulations, unwritten standards as common practices, discipline or profession. The case-law refers to court decisions and common sense refers to intuition based on one's knowledge and experience that something does not seem safe or right and the ability to perceive significant risks and act accordingly.

[15] For the relevance of all reasonable care, taking account of your circumstances see G. Gearty, 'Tort Liability for Injuries Incurred during Sport and Pastimes' 3 *The Cambridge Law Journal,* 371-373 (1985); S. Greenfield et al, 'Reconceptualising the Standard of Care in Sport: The case of Youth Rugby in England and South Africa' 18 *Potchefstroom Electronic Law Journal*, 2184-2217 (2015).

[16] Underlines this aspect, L. Di Nella, n 7 above, 310 and 333.

[17] For an interesting analysis, see A.P. Benedetti, 'Responsabilità civile sportiva. Un esempio di diritto consuetudinario?', in G. Famiglietti ed, *Sport e ordinamenti giuridici* (Pisa: Edizioni Plus, 2009), 189-199; the author states that there is an unwritten rule according to which the participant in a sporting activity accepts the possible consequential damages and the social community accepts this as well. Re the relationship between the penal liability and the civil liability see L. Di Nella, n 7 above, 257-261; see also R. Frau, 'La r.c. sportiva', in P. Cendon ed, *La responsabilità civile* (Torino: UTET, 1998), X, 307. A large reconstruction of judicial liability involving the various positions is found in M. Pittalis, *Fatti lesivi e attività sportive* (Padova: CEDAM, 2016).

[18] On this aspect, see L. Di Nella, 'Il sistema sportivo, tra unitarietà dell'ordinamento e orientamenti giurisprudenziali' *Actualidad Jurídica Iberoamericana*, 53-70 (2015); A. Lepore,

In reconstructing the legal nature of assumed risk, two opposing tendencies have been identified, one in private law[19] and the other in public law.[20]

Based on the assumption that there is agreement among athletes that they accept that there is a risk of events occurring during a race that may damage their physical integrity, some academics have readily traced the permitted risk back to the level of a contract, with all the consequences that this approach implied from the point of view of the conclusion and the way in which the will and capacity to put it into effect manifests itself.

Simply consider the problems that arise in identifying the moment when the agreement is made, the validity of a contract in which the will tacitly manifests itself and the possibility that a minor is a party to the contract.[21]

Looking at it from a more public law perspective, others have preferred to identify a non-codified[22] ground for justification in assumed risk, or one of the grounds for non-liability already codified as the exercise of the right[23] or the consent of the entitled party.[24]

The premise of these latter positions was the consideration that sporting activity is authorised by law for its benefits and therefore represents the content of the exercise of a right, that is, the right to practise sports, based on Art 2 of the Constitution.

The constitutional guarantee of sporting activities has been used to justify

'Fenomeno sportivo e autonomia privata nel diritto italiano ed europeo' *Actualidad Jurídica Iberoamericana*, 132-174 (2015); C. Alvisi, *Autonomia privata ed autodisciplina sportiva. Il Coni e la regolamentazione dello sport* (Milano: Giuffrè, 2000); according to the latter author, in the past scholars emphasised the link between the public relevance of sporting rules and the public role played by Sports Federations in sporting legal systems. See also M.P. Pignalosa, 'Ordinamento sportivo e fonti private' *Jus civile*, 646-673 (2017); the author underlines the legal contractual value of sporting rules in the light of the Melandri Decree. See also R. Caprioli, 'Il significato dell'autonomia nel sistema delle fonti del diritto sportivo nazionale' *Nuova giurisprudenza civile commentata*, 283-289 (2007). Regarding the case law, see Corte di Cassazione 5 April 1993 no 4063, *Il Foro italiano*, 136 (1994), commentary by G. Vidiri, 'Natura giuridica e potere regolamentare delle federazioni sportive nazionali'; Corte di Cassazione 11 February 1978 no 625, *Il Foro italiano*, 862 (1978).

[19] On this point see F.D. Busnelli and G. Ponzanelli 'Rischio sportivo e responsabilità civile' *Responsabilità civile e previdenza*, 286-287 (1984); G. De Marzo, n 8 above, 8-26; G. Alpa, n 8 above, 471-489.

[20] F. Albeggiani, 'Sport' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLIII, 538-599.

[21] See Corte di Cassazione 6 December 2011 no 26200, *Danno e responsabilità*, 257-265 (2012), with commentary by V. Carbone, 'La responsabilità dei genitori per carenze educative: danni provocati dal figlio minore per carenze educative'.

[22] The Court stated that sporting activities are not only admitted, but also encouraged by the legal system because of their benefits on the health and well-being for the harmonious development of the whole community. See Corte di Cassazione-Sezione V Penale 21 February 2000 no 1951, *Cassazione Penale*, 1634 (2000), with commentary by A. D'Ambrosio, 'La responsabilità per le lesioni cagionate durante un'attività sportiva'.

[23] Refer to F. Albeggiani, n 20 above, 550-554; F. Fracchia, 'Sport' *Digesto discipline pubblicistiche* (Torino: UTET, 1999), XIV, 467-477.

[24] See here: C. Pedrazzi, 'Consenso dell'avente diritto' *Enciclopedia del diritto* (Milano: Giuffrè, 1961), IX, 140.

so-called 'basic violence',[25] considered lawful within the subjective limits of the consent of the participant to the competition and the objective limits of the eligibility of the practitioner and compliance with the rules.

By virtue of this thesis, offensive behaviour that does not infringe regulations has been deemed lawful on the basis of the absence of culpability, although not technically attributable to the exercise of a genuine right;[26] while, in another view, the injuries resulting from the violation of the rules were also justified, provided that the violence was necessary for the dynamics of the game and was compatible with the protection of the practitioner's health.[27]

In this last aspect, the common interpretations in the above theories resulted, in any case, in the prohibition of acts of use of one's own body enshrined in the Italian legal system by Art 5 of the Italian Civil Code, according to which, in fact, an agreement by which the protection of one's physical integrity, consenting to permanent reductions, is substantially renounced.[28]

On closer examination, it is a measure that has rendered the application of the neminem laedere clause to sport difficult, given the absence of a normative definition of the fault in the civil code and the atypical nature of the tort of injurious damages; as will be seen below, it has led to a reduction in the role of the grounds for justification and a different relevance of illegality, placing at the centre of the evaluation of the unlawful act the equivalence of the conflicting interests so as to establish whether the exercise of the law, although apparently legitimate, does not in reality lead to an unjustified sacrifice of another equally relevant interest.[29]

Although it is clear that the aforementioned rule expresses, in any case, a general prohibition on doing as one wishes with one's own body, the definition of the scope of the rule has once again been referred to the adaptive interpretation of the case-law that still today, by virtue of the evolution of society and customs, finds itself reworking the boundaries within which to contain the aforementioned prohibition.

It should be added that, when the code came into force, the rule was inspired by a purely patrimonial logic, which had permeated all the codification, for which the body was seen as an asset external to the subject to whom it belonged and

[25] See G. De Francesco, 'La violenza sportiva ed i suoi limiti scriminanti' *Rivista italiana di diritto e procedura penale*, 597 (1983).

[26] F. Mantovani, n 3 above, 233.

[27] G. De Francesco, n 25 above, 587-591.

[28] Read extensive bibliographical references in G. Cosco, 'La disposizione del corpo tra disciplina codicistica e complessità del sistema delle fonti' *Ordines*, 108-156 (2015); S. Rossi, 'Corpo umano (Atto di disposizione sul)' *Digesto discipline privatistiche* (Torino: UTET, 2012), Agg, 216-251. See also L. Di Nella, 'Lo sport. Profili metodologici', in L. Di Nella ed, *Manuale di diritto dello sport* (Napoli: Edizioni Scientifiche Italiane, 2010), 13-64; the author stresses that the sporting activity consists in a particular performance of the body, achieved by physical movements and using sports equipment, and it can be dangerous for a person's physical integrity.

[29] About this point, refer to L. Di Nella, n 7 above, 327, and A. Lepore, *Responsabilità civile e tutela della persona-atleta* (Napoli: Edizioni Scientifiche Italiane, 2009), 106.

therefore it could be used pursuant to Art 832 of the Civil Code, albeit within the codified limit of the prohibition of a permanent and therefore irreversible reduction.

The promulgation of the Constitutional Charter marked, instead, a turning point in a personalist sense, which permitted the identification of a rule in Art 5 aimed at protecting the individual's fundamental and inviolable right to physical integrity, as an expression of the broader concept of the right to health. Consequently, the permanent lessening of it has been considered an unlawful act that also damages the primary good of health explicitly guaranteed by Art 32 of the Charter.

This development has not prevented an evaluation, in terms of lawfulness, of acts that involve parts of one's body; nevertheless, the principle that has been recognised as the foundation of these 'freedoms' is not that of patrimonialism, but solidarism, in the light of which are justified, for example, organ donations or transplants and the term 'disposition' does not seem suitable.[30]

It can therefore be said that the principle in Art 5 is a conflict between different, sometimes opposing, private and public interests.

All the more so since the right to physical integrity is complex with two meanings; positive with reference to the physical attributes of the person, such as allowing the normal performance of vital functions; and negative in relation to the absence of impairments that undermine these functions and that are not due to natural and biological causes, such as the natural course of time.

Moreover, the concept of physical integrity, as well as being relative from a chronological point of view, is also relative from the psychological point of view, since the severity of the injury is also evaluated with regard to the life of the relationship, to the non-compromise of the individual's relationships in the social groups in which they usually display their personality. In this sense, the right to integrity concerns not only the body in terms of its physical composition and essence, but also its psychological dimension.[31]

IV. Assumed Risk, the Observance of the Rules of the Game and the Relevance of the Subjective Element of Culpability

[30] Legge 26 June 1967 no 458 has also derogated from the general rule set by the Civil Code, in some cases of particular moral and social value, as in the case of kidney donation. Consider legge 4 May 1990 no 107, which states that human blood cannot be the object of alienation for profit. See M.C. Venuti, 'Novità e prospettive in materia di trapianti d'organo' *Nuova giurisprudenza civile e commerciale*, 305 (2014); Id, 'Atti di disposizione del corpo e principio di gratuità' *Diritto di famiglia e delle persone*, 827 (2001); T.O. Scozzafava, *I beni e le forme giuridiche di appartenenza* (Milano: Giuffrè, 1982), 549.

[31] Re the legal value of physical integrity, see Corte Costituzionale 18 July 1991 no 356, *Il Foro italiano*, 2697 (1991) and Corte Costituzionale 27 December 1991 no 485, *Il Foro italiano*, 72 (1993); the Court stated that this right concerns the spiritual, cultural, affective and social sphere and all activities, situations and relationships in which people express themselves in their human personality.

The case-law in civil law has adopted and distinguishes between the rules of competition as the first criterion, ie technical rules issued by the Federations under the regulatory autonomy they are recognised as having, with the aim of regulating the individual sport, and which are therefore suitable for identifying all the conduct to be considered lawful insofar as it is in compliance with them.[32]

In this way, a first type of risk likely to be accepted by the athlete has been identified with reference to the conduct of games that complies with the aforementioned rules, assuming, for example, that the athlete has accepted the risk of harmful events arising from the practice of a violent sporting activity such as boxing or martial arts, provided that such events were the product of scrupulously 'regulated' conduct by the so-called technical rules of the 'competition' (intended to prevent possible damage to athletes on the playing field – with reference to football, let us consider the prohibition on 'charging the goal keeper').

This has resulted in a relativisation of assumed risk in practice, in relation to the different sports disciplines.

That said, it should be noted that various guidelines have been developed on the relationship between the violation of the rules of competition, assumed risk and liability:

a) a first reconstruction[33] makes the area of civil liability coincide with the violation of the competition rules without further ado.

b) According to a different guideline,[34] the violation of a sporting rule does not necessarily imply the emergence of a civil liability, since it is precisely with regard to foul play that is contrary to the regulations of the sport that assumed risk would operate, which every athlete knowingly assumes when they play sport. As has been pointed out in the light of this theory, it is then up to the case-law to actually identify which actions of foul play are covered by the acceptance of risk and therefore not a source of liability and which ones cannot be justified under this reasoning.

c) Finally, it is believed that the athlete, whether or not he/she complies with the rules of the competition, and therefore must always respect the general principles of the set of rules, including, primarily, that of neminem laedere and of fair play, which requires the sportsperson to be vigilant and humane and not to act with disregard for the adversary.[35]

[32] See L. Di Nella, n 7 above, 285; and V. Frattarolo, n 8 above, 19.

[33] For example, as noted by the case-law – Corte di Cassazione 6 March 1998 no 2486, *La Responsabilità civile*, 1099 (1999) – the federal norm envisaged for the game of hockey in striking the ball (which requires the player not to play or not to try to play the ball with any part of the stick above shoulder height), is laid down to avoid the risk of accidents in the use of a dangerous instrument during the game and a violation constitutes a ground for fault under Art 2043 of the Civil Code.

[34] V. Frattarolo, n 8 above, 48.

[35] Corte di Cassazione 9 October 1950, *Responsabilità civile e previdenza*, 55 (1951), with commentary by O. Cecchi, 'Lesioni colpose nelle partite di calcio'.

Moreover, with reference to certain, not necessarily violent,[36] sports, the case-law has in fact raised the threshold of punishment, justifying, this time, conduct that possibly conflicts with the competition rules, as attributable to the so-called normal risk implicit in any sport.

The Civil Court of Cassation in the leading case submitted to the Supreme Court in 2002[37] drew up a precise guideline – which still prevails in decisions not only in civil proceedings but also in criminal proceedings – according to which, it is common knowledge that during a competition the resulting anxiety to win, physical fatigue and sometimes excessive competitive stress can lead to involuntary violations of the competition rules; in these circumstances

> 'the threshold of 'assumed risk' cannot be said to be exceeded, provided that there is a functional link between the foul play and the game action and that the foul play is not intentionally intended to harm the opponent, as there is not an open violation of the fundamental rule of sporting honesty'.

On that occasion, the Court, with regard to the game of football, considered that it cannot be in any doubt that such a game, like any sports activity characterised by

> 'competitiveness and a certain degree of physical confrontation between the participants to achieve a favourable result in the confrontation, involves a risk to the safety of the players that is inherent in carrying out the activity itself, which is certainly permitted by the law and, indeed, promoted and encouraged by the State. No violation of a rule arises, in fact, "outside" the game itself, which cannot be effectively played without energy, aggression, speed, rapidity of decisions and instinctive reactions that are generally considered incompatible with a high degree of consideration for the safety of others and with constant respect for the rules of the game, aiming at a result, the attainment for which – as has been observed – a certain degree of audacity and recklessness is indispensable'.

[36] The literature stresses that 'we can remember how on the one hand there are sports in which physical contact between the participants is practically entirely excluded, such as volleyball, tennis, most of the disciplines of athletics, and on the other hand there are instead sports in which contact and physical encounters are functionally related to the nature of the sport practised, as in the case of football, rugby and boxing. Furthermore it should be noted that there are different 'intermediate' sports, where physical contact is limited: for example basketball, which is a 'no-contact game', In practice it allows limited contact between the players, but sanctions those above a certain 'intensity threshold'. In general, however, for every sport, the rules issued by the various federations determine the contact limits-physical encounter between the participants'. See A.P. Benedetti, 'Sport violento - sport pericoloso: tra libertà di disporre del proprio corpo e risarcimento del danno', in U. Breccia and A. Pizzorusso eds, *Atti di disposizione del proprio corpo*, (Pisa: Pisa University Press, 2007), 367-376.

[37] Corte di Cassazione 8 August 2002 no 12020, *Danno e responsabilità*, 532-536 (2003), commentary by M. Della Casa, 'Attività sportiva e criteri di selezione della condotta illecita tra colpevolezza ed antigiuridicità'.

The above guidance, a clear attempt to provide the interpreter with more certain criteria for assessing liability in sport, does not seem to have completely cleared up the misunderstandings that the legal significance of the risk entail in the reconstruction of the offence, nor does it do so even today, especially in relation to culpability.

This is because if, assessing the merits of the interests made on the basis of the recognition that the risk is inherent in the performance of the activity, which is certainly allowed by the law and, indeed, promoted and encouraged by the State, involves the acknowledgment of a greater degree of predictability of harmful events which is associated with a lower preventability of these harmful events (in the sense that the harmful event is highly probable), nevertheless, the acceptance of the risk for the social benefit of the activity itself does not on its own automatically exempt either the athlete from observing the precautionary rules or the judge from verifying them.

Moreover, it should be noted that a risk that is accepted is not predetermined objectively but is based on a parameter, that of normality (of the risk),[38] which, on closer inspection, is not only an objective risk, bound to the type of sport, but also subjective, assuming for the purposes of assessing the specific risk the persona of an average sportsperson, who is prudent and aware, and who, when he/she becomes part of the sporting order or at the time of registration in the individual sporting event, knows the rules and undertakes to observe them, accepting, or assuming that he/she has accepted, the dangers associated with that activity.

In this respect, the theory according to which

> 'the assumed risk must be considered to coincide with the observance of the technical rules, which, according to an assessment made by the secondary regulations (that is, by the rules of the sport), identify the limit of the reasonable risk component of which each practitioner must be fully aware from the moment he/she decides to practise a particular sport competitively',[39]

can only denote an underlying uncertainty regarding the placement of the sporting risk in an unlawful framework; indeed, it seems that it is more likely to be situated in the area of culpability, when there is a move from the abstract assessment of the lawfulness of the sport to the genuine ascertainment of civil (or criminal) liability.

All the more so if one considers that, in the aforementioned leading case of 2002, the Court of Cassation, which states that only in a first approximation can compliance with the competition rules indicate a first distinction between what

[38] See R. Frau, 'La responsabilità civile sportiva nel calcio: collegamento funzionale all'azione di gioco, tipologia di gara e qualità dei partecipanti' *Responsabilità civile e previdenza*, 2250-2264 (2011); see also M. Della Casa, n 37 above, 532-536.

[39] R. Beghini, *L'illecito civile e penale sportivo* (Padova: CEDAM, 1999); M. Sferrazza, 'La scriminante sportiva nel gioco del calcio' *Rivista di diritto ed economia dello sport*, 49-74 (2008).

is lawful and what is unlawful in a sporting context, we are left to understand that there is no automatic connection between the violation of the sporting rule and the bypassing of the risk, at least when there is a hypothesis of a physiological development of an action carried out in the excitement of competition that is exceeded in the harmful act.

It follows in similar hypotheses, that when there is a violation of the rules it is necessary to establish whether there should be liability. Assumed risk does not seem to be able to contribute, but rather culpability, because not only can the same sports rules be considered common rules of prudence or leges artis, able to include a generic or specific fault according to Art 43 of the Criminal Code, but above all because it seems that the psychological attitude of the subject with respect to the foul play reveals it.

In fact, in the aforementioned sentence, we read verbatim that

> 'the judge, having ascertained the characteristics of the event that produced personal injury to a participant in a sports activity carried out by another participant, will affirm the liability of the agent in the case of actions performed for the specific purpose of causing harm, even if they do not include a violation of a rule of the activity performed; b) will exclude liability if the injuries are the result of an act carried out without violating the rules of the activity and if, despite the violation of the rule specifically related to the sporting activity, the action is functionally connected to it, considering that in both cases the functional link is excluded from the use of a degree of aggression or impetuosity incompatible with the characteristics of the sport practised, with the context in which the activity specifically takes place, or with the quality of the participants'.

Up to now we can say that, for the purpose of balancing the right to practise sport and the right to psychological and physical integrity, rather than having an abstract scheme of justifications, it is diligence that should be the criterion for assessing sports liability (of the athlete), from the point of view of prudence and expertise appropriate to the type of game and sporting discipline, used as criteria for considering as exempt from liability conduct directed at the action of the game and not towards the intentional harm of the opponent's physical integrity.[40]

There are two reasons for this, the first being that for which the sportsperson has always the duty to model his/her conduct on the general rules of prudence, diligence and loyalty, balancing the interests connected to the aims of the competition with the superior requirement of respect for physical integrity,

[40] Refer to A. Lepore, n 29 above, 106. According to the author it is necessary to re-evaluate the concept of diligence in the light of the constitutional principle of solidarity to protect the right to health of the athlete. See also A.G. Parisi, 'Sport ad alto rischio e lesione di diritti personalissimi. Responsabilità civile e penale', in L. Cantamessa et al eds, *Lineamenti di diritto sportivo* (Milano: Giuffrè, 2008), 307-401.

his/her own life and the lives of his/her opponents.[41]

Secondly, in this sense the case-law on legitimacy not surprisingly seems to have been evolving even more recently; in a recent ruling[42] it was stated that

> 'even for the purposes of defining non-contractual liability, fault is substantiated in the non-observance of laws, regulations, rules and disciplines, as well as in the objective violation of diligence, prudence and competence, on which the subject must base his/her conduct (even) in relationships in daily life'.

These conclusions have led to a series of reflections, fuelling a debate that is no longer dormant and that in substance relates to the identification of the content of diligence, or, as Anglo-Saxon scholars put it, the standard of care to which the practitioner is required to conform during sporting activity.

In fact, in the case referred to in the 2002 ruling, the Supreme Court came to the conclusion, which is considered questionable, that 'damage caused by the intervention of a professional is undoubtedly less than that caused by an amateur'.

In an attempt to coordinate 'compliance with competitive aims and the need to protect the person',[43] it is vitally important to establish whether and when the sporting rules are sufficient to stipulate the boundaries of the practitioner's diligence or when they are incomplete, and these gaps have to be covered by common rules. The question of the binding nature of sporting rules remains open.

Moreover, in the reconstruction of the relationship between sporting rules and the rules of ordinary diligence, it must be established whether the former reveal common rules of prudence or they constitute specific rules, ie leges artis, to justify recourse not to the bonus pater familias model but to professional diligence laid down in Art 1176, para 2, Civil Code.

Based on the assumption that the purpose of some sporting rules is to prevent harmful events[44] since even though sport is essentially a technical affair, which is expressed in competition, as a 'technical and competitive form of the game' it also needs rules intended to prevent the risk of damaging events.

For this purpose, scholars recognise that certain rules of conduct would be prescribed, especially in violent or dangerous sports.

Regarding this aspect, in the alternative between considering these rules to be real and proper public legal norms or legally indifferent technical rules,[45] a new approach has recently come to the fore thanks to a reinterpretation of the sporting

[41] Tribunale di Roma 4 April 1996, *Responsabilità civile e previdenza*, 1247 (1996), with commentary by R. Frau, 'Responsabilità civile e competizioni sportive non ufficiali: il caso della gara di scherma'.

[42] Corte di Cassazione 20 February 2015 no 3367, available at www.dirittoegiustizia.it.

[43] L. Di Nella, n 7 above, 327.

[44] V. Frattarolo, n 2 above, 19; P. Luiso, *La giustizia sportiva* (Milano: Giuffrè, 1975), 35.

[45] See, V. Furno, 'Note critiche in tema di giochi, scommesse e arbitraggi sportivi' *Rivista trimestrale di diritto e procedura civile*, 619 (1952).

phenomenon, conceived not as a set of rules, but as a system and subject of multilevel sources, which, in the light of the principle of horizontal subsidiarity and freedom of association, is framed more generally in the framework of the general legal system.[46]

Therefore, sports entities in most cases are legal persons under private law who are primarily considered incrimination centres of subjective situations in the state system, capable of acts and behaviour relevant to the rules of this system, so that, by applying the private association framework to the macro-organisation of sport, sporting rules are nothing but the product of the associative contractual autonomy of the intermediate bodies recognised by the state and of the self-regulation which is its characteristic expression in private law pursuant to Art 1322 of the Civil Code.

According to this reconstruction, it remains to be seen whether they are relevant in the context of culpability in the same way as genuine leges artis, the result of sanctioning specific safeguards, dictated and indicated by reason of the nature of the activity (possibly professional) exercised, as a type of self-discipline similar to the self-regulation codes of the professions[47] or to common prudential rules.

In the first case, they should bind experienced sportsmen, since in general the expression leges artis is used in respect of subjects technically liable for the exercise of an art or profession; thus, if you do not wish to believe that the recipients are professional sportspeople, because this expression is abused and non-technical in relation to sports law, since competitive sports cannot be strictly and technically attributed to the concept of a profession as outlined in Art 2229 of the Civil Code, therefore, since professional sport is not organically regulated, it could be recognised that the sporting rules are at least binding on all the registered competitors. However, this solution ignores the unexplored and grey area of non-competitive, amateur and para-sporting activities, which nonetheless are competitions aimed, albeit occasionally, at determining a winner.[48]

Given all of this, legal scholars consider that the recognition of diligence cannot just depend on sporting regulations, especially if these are private rules that are sometimes insufficient to preserve the health of the athlete.[49]

By virtue of this reconstruction, civil liability in sport would be based on more elastic and case-based criteria. This, however, should allow, starting from the unwritten favor legis for sporting activities, a functional and finalistic recognition of the act to verify, not only on the basis of the rules but also the principles, first and foremost that of protection of the person, if it was suitable for the purpose for which it was accomplished.

[46] n 11 above.
[47] A. Lepore, n 29 above, 126.
[48] L. Di Nella, n 7 above, 361 and 367.
[49] A. Lepore, n 29 above, 134.

To this end, the parameter for assessing conduct should be the duty of diligence related to the capabilities of the practitioner, with the damaging party bearing the economic burden of only the damage that he could and should have avoided.[50]

The conclusion should therefore be diametrically opposed to that professed in the 2002 judgment, requiring a higher threshold of diligence the higher the level of professionalism of the performer and his/her ability for self-determination with regard to the sporting event.

The exercise of the right to sport does not play a role in a civil judgment as a ground for justification in the strict technical sense because it is not automatic, as the comparison of the interests concerned cannot be the result of an ex ante evaluation by the legislator, as happens in hypotheses about exonerating circumstances in the strict sense, but from an actual balancing, meeting the external limit of the general clauses – first and foremost the abuse of rights.

V. Observations on the Limits to the Theory of Assumed Risk. The Position of the Other Holders of Qualified Positions in the Sporting Event: Organisers, Parents and Instructors

The reconstruction of the operative area of assumed risk cannot disregard the responsibility of other subjects that have qualified positions in the sporting event, in the light of abstract cases that are different from the one outlined, despite its atypical nature, by Art 2043 of the Civil Code, and based on the personal quality of the responsible person or on the qualified relationship of the subject with things or with the nature of the activity carried out; these are typical examples, which are frequently used as a reference point in sport, which appears even more noteworthy given that they are subject to a more onerous regime for the alleged injuring party.

a) This is said, for example, with regard to the position of the organiser of sporting events, who appears as the subject who has the duty of supervising the performance of the event in order to prevent damage and avert danger to the physical safety of the athletes and third parties such as the spectators. The case-law has taken a restrictive view of this. In fact, the organiser has a series of behavioural duties that are increasingly required by diligence, the fulfilment of which is intended to prevent damage, even to third parties. In particular, it is necessary to check the adequacy, danger and safety compliance of the 'technical means' used by the participants, insofar as it is believed that no complaint can be made against the organiser if, despite the fact that conformity with the regulations of the technical means used has been attested, these latter, due to their intrinsic characteristics and the use made of them, have caused damage to

[50] If allowed, refer to M. Cimmino, 'Autodeterminazione del minore e responsabilità civile' *Famiglia e diritto*, 148 (2012).

the athletes or others.[51]

The aforementioned activity requires various orders of prescriptions to be observed: those dictated by the rules of public order, with the dual aim of protecting the safety of athletes and spectators (on the one hand), and that of guaranteeing the sport as a whole (on the other), those sanctioned by sports regulations and those of common prudence.

The Court of Cassation has held that

> 'it is true that the voluntary conduct of sporting activity involves the voluntary exposure of the athlete to the intrinsic risk connected to the discipline practised, but the acceptance of the risk certainly does not exclude the liability of the competition organiser or of the sports instructor which remains in all cases in which they have violated the rules that safeguard the safety of the junior athletes (specific fault), or the rules of common prudence and diligence (general fault)'.[52]

To confirm the above it is useful to remember that there has been no shortage of scholars who even claimed that the organisation of sporting events should itself be classified as a dangerous activity, pursuant to Art 2050 of the Civil Code, taking into account a series of factors such as the presence of spectators, the intrinsically dangerous nature of the activity itself, the type of means used, and the places where the activity is practised.[53]

b) There is also considerable case-law in relation to the instructor's liability; in particular when it involves minors entrusted to instructors or experts in a sport, whether practised at a recreational or competitive level.[54]

[51] According to the scholars – see P. Dini, 'L'organizzatore e le competizioni: limiti alla responsabilità' *Rivista di diritto sportivo*, 476 (1971) – the organiser of a sporting event promotes the 'meeting' between two or more athletes, with the aim of achieving a result in one or more sporting disciplines. The legal system imposes specific obligations on the owners of the facilities and organisers to ensure the safety of all the participants and spectators. On this point see also M. Pittalis, 'La responsabilità contrattuale ed aquiliana dell'organizzatore di eventi sportivi' *Contratto e impresa*, 150-197 (2011); and on the relationship between the position of the organiser of sporting event and the qualities of the owner and manager of the structure, refer to M. Franzoni, 'Lo sport nella responsabilità civile', in P. Rescigno et al, *Fenomeno sportivo* n 8 above, 137.

[52] Corte di Cassazione 9 April 2015 no 7093, *Giurisprudenza italiana*, 1062 (2015), with commentary by P. Valore, 'La responsabilità del gestore di maneggio'.

[53] Organising motorcycle races (even if regular) on a circuit open to traffic was considered dangerous. Also considered dangerous were: the management of a go-kart track, the organisation of bob races, even in a competition approved by the competent International Federations, managing a riding school (where, in riding, a person is considered a 'beginner', or young), trampoline management, taekwondo, mountaineering, riding, hunting (due to the intrinsic danger of the vehicles used), air navigation, recreational or sports flights. On the other hand, free-weight gymnastics, 'costume' (or 'Florentine') soccer, soccer management, 'bumper car' tracks, managing a ski facility, or managing a ski lift were not considered dangerous. See S. Galliani and A. Piscini, 'Riflessioni per un quadro generale della responsabilità civile nell'organizzazione di un evento sportivo' *Rivista di diritto ed economia dello sport*, 113-123 (2007).

[54] M. Pittalis, n 51 above, 150-197.

It is known, in fact, that when teaching and when starting a sporting activity, instructors play a particular role in terms of directing and supervising their students, in the light of which, in the event of harm, their liability is configured pursuant to Arts 2047 and 2048 of the Civil Code. In this respect, it should be noted that the concept of 'preceptor' has undergone continuous evolution on an interpretative level, today including not only those who look after the education of minors in substitution of parents, but also those who are involved in a teaching activity, including, therefore, the teachers of a sporting discipline, or the school teachers of physical education.

This is a case in point that has not been free from interpretative doubts since the liability of the supervisor can be established on the basis of two different norms based on different assumptions of Art 2047 of the Civil Code, which clearly refers to the unlawful act of the incompetent, and the subsequent rule, of Art 2048 of the Civil Code, that instead presupposes the level of intent and of will of the author of the act, ie even that of a student who is a minor; a condition to be determined on a case-by-case basis, since it could entail, for a minor capable of will and intent, personal liability for the damage with his/her own assets, but jointly with their parents.

It should also be borne in mind that assessing the adequacy of the supervision is particularly delicate, and should be appraised by means of various parameters, such as taking into account the age and degree of maturity of the young athletes, in the specific case; consequently, the probability of invoking the liability of the instructor will be greater in the case of a student who is a minor and who is inexperienced in the sporting discipline, and these situations will require maximum vigilance in terms of continuity and attention.

The case-law on this aspect[55] and on legitimacy has recently held that the jurisprudential principles developed on the subject of sporting lessons and activities carried out during school time are also comfortably applicable to sports courses in private amateur associations as they are not competitive activities and are private schools responsible for teaching a sport, as in the case at issue.

The salient feature of this reconstructive position is the affirmation of the necessity that, for the purpose of configuring liability pursuant to Art 2048 Italian Civil Code, the mere fact of having organised a sporting competition for students is not sufficient, since it is necessary that the damage is the consequence of a culpable behaviour that includes an unlawful act undertaken by another student engaged in the game and also that, in relation to the seriousness of the specific case, the school did not implement all the measures necessary to avoid harm.

In the present case, the trial judge held that

> 'to understand the content of the supervisory obligation and the rules of caution and prudence that can be claimed of the sports school in

[55] Tribunale di Firenze 28 January 2018 no 180, available at www.coni.it.

> question, during the course of the lessons, it is useful to understand the true nature and the dynamics of the sport in question in relation to the age of the injured party and to the principle of expected self-responsibility; that in order to examine the liability of the tutor or organiser of a sporting event, it is necessary to determine whether the damaging event is attributable to the athlete, to the tutor's organisational or precautionary deficiencies, or falls within the scope of the so-called sporting justification'.

Lastly, under the theory of the student causing harm to himself/herself, the provision of Art 2048 of the Civil Code seems to come up against application limits.

Indeed, the Supreme Court has held that the provision of Art 2048 is inapplicable in relation to this hypothesis by virtue of the fact that its provisions could only refer to damage caused to third parties.

Therefore, with a very cogent reconstruction it has applied another provision that is not even the general one of Art 2043 of the Civil Code, but that of Art 1218 of the Civil Code, which governs contractual liability, and therefore classifies the liability of the tutor as a contractual liability, with the result that it makes matters of evidence easier for the injured party.

In more detail, the United Sections state:

> 'in terms of literal interpretation, Art 2048(2) refers expressly to the damage caused by the unlawful act of the student, which presupposes an objectively unlawful act that is detrimental to a third party. And then, since the conduct of the student who is causing harm, not to a third party but to him/herself, cannot be considered objectively unlawful (...) this hypothesis must remain outside the scope of Art 2048(2) of the Civil Code'.[56]

The hypothesis, on which the Supreme Court's theory rests, is that of social contact,[57] on the basis of which a contractual relationship is established in fact even in the absence of a contract *tout court*, but thanks to the factual assumption of the student's being entrusted to the teacher, which triggers duties to protect the student from harm.

By virtue of this reconstruction, since in general the instructor is a school auxiliary – think of educational establishments or ski schools – it is believed that a genuine contract can be found in the enrolment in the school, which determines the establishment of a contractual relationship in all respects, but only with the

[56] Corte di Cassazione 26 January 2016 no 1322, *Rivista di diritto sportivo*, 409-416 (2016) with commentary by A. Di Majo, 'Attività sportiva scolastica e responsabilità civile'; Corte di Cassazione 17 February 2014 no 3612, *Danno e Responsabilità*, (2014), 900-905, with commentary by C. Daini, 'Danno da autolesione di un allievo (minore) di una scuola sci'; see also F. Di Ciommo, 'La responsabilità contrattuale della scuola (pubblica) per il danno che il minore si procura da sè: verso il ridimensionamento dell'art. 2048' *Il Foro italiano*, I, 2635 (2003).

[57] See B. Tripodi, 'Condotta autolesiva dell'allievo e responsabilità contrattuale della scuola sci' *Danno e responsabilità* 169 (2013), commentary to Corte di Cassazione 11 June 2012 no 9347.

school.

However, since the student is entrusted to the instructor and through him/her, the contractual relationship between instructor and student is, as already mentioned, based on the social contact and is always regulated by the provision of Art 1218 of the Civil Code.

c) In relation to the damage that occurred during a sporting activity, the Supreme Court also called in parental responsibility[58] pursuant to Art 2048 of the Italian Civil Code, founded on the parents' failure to fulfil the duties set out in Art 147 of the Civil Code, which regulates parent-child relationships.

Under Art 2048 of the Civil Code, parents are required to prove that the minor was given a sound education and that adequate supervision was provided in line with his/her age, character and temperament.

It is therefore occasionally necessary, in cases of harm caused by a student to the detriment of another student, to establish

> 'whether an anomalous behaviour of this kind, that is voluntary and violent, and in any way justifiable, even if it was not committed during part of the game and in the excitement of the moment, but deliberately and when the game was at a standstill, was an indication of inadequate education with respect to the civil dictates of relationships and sporting life, the responsibility for which – in the absence of precise evidence of release – could only allegedly fall on the parents, who have failed to fulfil their duties with regard to the obligations pursuant to Article 147 of the Civil Code'.

It can be said that parents will not have to compensate for the damage caused by their child during a sporting activity if they show that they have properly introduced the child to the sport and have adequately supervised the child on the occasion of the unlawful act; and, again, when they exercised vigilance suitable for the degree of education and upbringing of their child.

If it is true that parents, in turn, have the obligation to instruct and educate their children according to the child's inclinations and natural abilities, in terms of unlawful acts, however, it is necessary to consider the other side of the picture, so that, from a viewpoint of self-responsibility and self-determination, if the minor is subject to protection, then he/she must also be considered responsible for his/her own conduct, so more attention needs to be paid to the evaluation of his/her ability to understand and take action.

Indeed, potentially and abstractly, the parents will always be responsible for

[58] Corte di Cassazione 6 December 2011 no 26200, *Danno e responsabilità*, 257-269 (2012), with commentary by V. Carbone, 'Responsabilità dei genitori per carenze educative: danni provocati dal figlio minore in una sosta della partita di calcio'. See also Corte di Cassazione 31 March 2017 no 8553, available at www.coni.it. For sporting activities involving minors, see A.G. Parisi, 'Sport minori e responsabiltà genitoriale' *Comparazione diritto civile*, 1-21 (2016); V. Putuortì, 'Manifestazione sportiva tra minori e responsabilità dell'organizzatore' *Persona e mercato*, 271-288 (2011); M. Franzoni, n 51 above, 141, and, if allowed, refer to M. Cimmino, n 50 above, 143-158.

the actions carried out by their children, with obvious implications in terms of the opportunity for compensation for damages deriving from the unlawful act of the minor.

Moreover, this rule does not differentiate between minors based on their age, so that the liability regime for an offence of a seventeen-year-old is the same as that for the same offence by a twelve-year-old (as long as both are able to genuinely understand and take action in the case concerned).

The legislator, therefore, has not provided for a graduation of liability that takes into account 'older minors';[59] nor has the case-law indicated precise interpretation criteria according to the age of the child close to acquiring the full capacity to act. This is different from other systems (for example, the French and German systems) that have a discipline similar to ours.[60]

Moreover, during the preparatory work on the current Civil Code there was also the proposal to introduce a progressive system for the minor acquiring the capacity to act, in line with intellectual and moral maturity; in the end, however, a radical solution was opted, for which, through the watershed of Art 2 Civil Code, minority was established as a condition of the person's general legal incapacity, in order to satisfy the requirements of certainty of trade, and therefore from the viewpoint of protecting economic needs.

Today this view has changed and it is necessary to be aware of it, especially in relation to adolescence. In fact, some European legislations, in identifying the age below which a child is not considered responsible, are arriving at ever lower ages.[61]

These observations seem to be consistent with the discipline of family relations, based on the change in the institution of parental authority in 'parental responsibility' carried out by the Italian legislator in 2012 with the introduction of the new Art 316 of the Civil Code, the expression of an evolving path that started with the entry into force of the Constitutional Charter and that was marked by the transition from an institutional and authoritarian conception of the family to one that considers the family as a community, founded on the mutual solidarity of its members, all bearers of autonomous subjective rights,

[59] Regarding older minors see S. Patti, 'L'illecito del quasi maggiorenne e la responsabilità dei genitori: il recente indirizzo del *Bundesgerichtshof' Rivista di diritto commerciale*, 27 (1984); and E. Maschio, 'Responsabilità *ex* art. 2048 c.c. e grandi minori' *Diritto di famiglia*, 875, (1988).

[60] F. Giardina, ' "Morte" della potestà e "capacità" del figlio" ' *Rivista di diritto civile*, 1609-1620 (2016); Id, 'Capacità d'agire', in A. Barba and S. Pagliantini eds, *Commentario del codice civile - Delle persone*, 360-394 (Torino: UTET, 2012); F. Occhiogrosso, 'Discernimento', in G. Contri ed, *Minori in giudizio. La Convenzione di Strasburgo* (Milano: Franco Angeli, 2012), 49-57; P. Rescigno, 'Il primato della capacità del minore', ibid 89-97; G. Anzani, 'Capacità di agire e interessi della personalità' *Nuova giurisprudenza civile commentata*, 509-520 (2009); G. Alpa, 'I contratti del minore. Appunti di diritto comparato' *Contratti*, 517 (2004).

[61] See M. Porcelli, 'Minori di età e rapporti giuridici non patrimoniali' *Il Diritto di famiglia e delle persone*, 581-593 (2018); S. Stefanelli, 'Verso la capacità di agire del minore: il caso degli atti giuridici in senso stretto' *Il Foro italiano*, 604-609 (2018); P. Stanzione, 'I contratti del minore' *Europa e diritto privato*, 1237-1386 (2014); G. Berti De Marinis, 'La protección de los menores en el ámbito contratual' *Revista boliviana de derecho*, 80-97 (2016).

interests and, basically, of duties and responsibilities.

VI. *Follows*: Guidelines from Recent Case-Law on Procedure and Judgments on the Merits

From these uncertainties, I still take into account the recent case-law on procedure and judgments on the merits, which does not always reach unequivocal solutions.

Recently, for example, the Supreme Court of Cassation[62] has held that

> 'the liability of a custodian of a playground where soap football is played is not excluded by the injured party's decision to use the equipment provided for by the regulation as being necessary for the performance of the sporting activity, even if the injured party may have thought it was suitable for performing the protective function required by the nature of the game'.
>
> 'A soap football player's decision to use a helmet that proved unsuitable for providing protection is certainly not down to a so-called elective risk and is not sufficient to interrupt the etiological connection between the supply of the helmet to the player and the injuries suffered by the latter'.[63]

The facts of the case originated from a harmful event that occurred following a fall occurred during a soap football match; according to the victim, who took legal action against the manager of the structure for compensation for damages due, the failure to adopt the necessary precautions and technical devices both in relation to the state of wear of the structure used for the game and to the characteristics of the protective helmet, fails on the two degrees of merit.

In fact, the Court of Appeal had found that the game's regulation required, among other things, prohibition on playing soap football without using suitable equipment, and that, the players having been made aware of the said regulation, the decision to continue playing despite the helmet having been found to be unsuitable for providing the specific protection was a ground that validly

[62] Corte di Cassazione 19 January 2018 no 1254, *La Nuova giurisprudenza civile commentata*, 1052-1063 (2018), with commentary by P. Garraffa, 'La responsabilità del gestore di un impianto di calcio "saponato" '; see also L. Ripa, 'I doveri di protezione del gestore di un impianto sportivo: verso una prospettiva relazionale della sua responsabilità civile' *Rassegna di diritto ed economia dello sport*, 131-154 (2017); the latter author criticises R. Campione, *La responsabilità dei gestori e degli utenti delle aree destinate alla pratica degli sport invernali* (Padova: CEDAM, 2009).

[63] In this case, the applicant had found that the helmet supplied to him was 'small', ie it did not properly fit the size of his head; however, according to the Court, wearing a helmet perceived as 'small' is a circumstance that can lend itself to two interpretations, both to justify a perception of a mere lack of comfort of the protective equipment, and to perceive its inability to perform the protective function. Therefore, based on common logic, the conclusion that the applicant, having taken part in the game with a helmet of smaller size than he needed, culpably decided to play and taking the risk of doing so in the absence of suitable protection, is not acceptable.

interrupted the causal link between this unsuitability and the injuries; ultimately, according to the Territorial Court, given the peculiarity of the game, consisting of sliding, the harmful event had to be attributed not to non-compliance with the normative prescription that requires the owner of items held in safe custody to adopt the appropriate precautions to avoid damage to others, but to the imprudence of the injured party.

By appeal on a point of law, the appellant criticised the contested decision, which had not recognised the defendant's liability pursuant to Art 2051 of the Civil Code, despite the fact that some circumstances were not disputed, such as the qualities of owner and manager of the structure in which the events took place acknowledged by the other party, the fact that the harmful event occurred following the fall during the five-a-side match, as well as the fact, also not disputed, that the owner had provided helmets that were not suitable for the game.

The Supreme Court accepted the appeal, excluding – censuring the subsumption error by the lower court – that the damage suffered had been caused exclusively, interrupting the causal link attributable to the condition of the helmet, by his conscious choice to use it despite having perceived its inability to perform the protective function required by the nature of the game.

The judges ruling on matters of procedure also observed that, in substance, the judges ruling on the merits would have done well to verify whether and how the practitioner's acquired awareness of the dangerousness of the game in relation to the circumstances and, in particular, to the structure for playing it and the equipment used, as well as the appropriate method of demonstrating this awareness, and whether these would be understood unequivocally and comprehensibly by the man in the street.

According to the judges of the Supreme Court, considering that the 'thing' that would have been the cause of the damage would have been the unsuitable helmet and that this had in fact been provided by the operator, the matter, as it occurred in this case, did not present the characteristics required by the abstract case that was applied, that is Art 2051 of the Civil Code; the contested judgment had therefore erroneously subsumed the factual situation under the principle of law which it declared was applicable, because it was not definitively ascribable to the conscious choice of the injured party (so-called elective risk), who, although able to realise the dangerousness of the thing using ordinary diligence, decided to use it anyway.

The ruling concerns the relevance in the specific context of the injured party's conscious acceptance of a particular type of risk and assumes the conscious acceptance by the injured party of a particular type of risk, namely using unsuitable equipment, in order to exclude the liability of the custodian of the said equipment, so-called elective risk; in the present case, while forming part of the broad issue of civil liability for sports activities, the hypothesis of damage to the athlete is attributable not to other participants and/or competitors, but to the use of

unsuitable sports equipment.

The matter, in the light of the precedents set by case-law invoked both by the judge ruling on the merits of the case and the judge ruling on procedural matters, although interpreted differently by them, is an opportunity to reflect on the real practical limits of the assumption of risk in sport, so-called assumed risk, since it is legitimate to ask whether it only pertains to the practitioners' conduct or touches upon the conduct of third parties, such as managers, and may go as far as encompassing the use of equipment and/or sports facilities.

The decision of the Supreme Court claims that elective risk, as the judges ruling on the merits already had, excludes the liability of the manager of the sports facility pursuant to Art 2051 Civil Code as custodian of the equipment provided for playing the game, in the light of the most recent case-law according to which this type of risk occurs whenever abnormal, undisputable and excessive behaviour takes place, thereby creating risk conditions unrelated to normal levels of behaviour; in similar theories, the elective risk seems to be assessed in relation to the qualities of a thing in such a way that the conscious acceptance by the injured person who, though being able to understand the danger based on his/her ordinary diligence, chooses to use it equally excludes the custodian's liability for the thing itself.[64]

In this respect, careful consideration must be given to the relationships between assumed risk and elective risk, in the light of the considerable and heated debate, in terms of theory and case-law, on sports liability, to verify the function of these types of risk in the context of the offence.

They seem to fully confirm the perplexities mentioned above of the complaints of the applicant, who, in the Supreme Court of Cassation, wonders whether the approach is correct according to which the awareness of the dangerousness of the equipment, rather than of the structures, is sufficient of itself to exclude the causal link with regard to the manager's liability, given that the injured person, as a casual player,

> 'could not have fully and by himself understood the high risk inherent in practising the sport with a helmet that later turned out to be not approved',

as it would have been unlawful to accept the risk of exposing one's mental and physical integrity to permanent injuries such as those encountered during the trial.

Focusing on an aspect of certain importance, in the light of a useful distinction between

> 'the acceptance of the risks of accidents from collisions during the game

[64] Corte di Cassazione 31 July 2012 no 13681, *Danno e responsabilità*, 717-723 (2013), with commentary by A.P. Benedetti, 'Infortunio durante una partita di calcetto e responsabilità del custode della struttura sportiva'; on the role and the liability of the manager, refer to M. Franzoni, n 51 above, 137.

and the risks deriving from the possible dangerousness of the structures',

the injured party claims that the only event that could interrupt the causal link would have been and should only be unforeseeable circumstances, that is to say a factor outside the subjective sphere of the practitioner, which he could not foresee and which therefore cannot be subsumed to the scope of accepted risk; in other words, an external element (which can also be the fact of a third party or of the injured party him/herself), qualified by the nature of unpredictability and exceptionality; however, the use of an unsuitable helmet cannot be considered in this way.

According to the applicant's argument, the predictability of the event had to be borne by the manager, who should have prevented it by supplying a suitable helmet or by stopping the game; to reason differently, it is argued, would mean placing a 'duty of oversight' of the elements of danger related to the playing area that would be too burdensome to the practitioner, since

> 'it is difficult to imagine that before any activity a normal sportsperson has the skills to be able to check the safety of the area',

not ignoring, moreover, the trust that those who use a sports facility managed by a professional operator put in its safety conditions, given that otherwise the function of Art 2051 of the Civil Code to attribute the liability to those who are in a position to control the risks inherent in the use of the thing would be eliminated.[65]

The Court of Cassation also recognises in the ruling under review the importance of the subjective aspect in the reconstruction of the offence, having regard to the psychological attitude of the sportsperson during the game, specifying that

> 'according to common experience, it must be assumed that the fact of playing with a small helmet represents an element that does not automatically justify the consequence that it was perceived as unsuitable as protection, both because although it was a small helmet this had not prevented P., evidently, from wearing it, and because the helmet being "small", precisely because this smallness had not prevented it from being worn, could also induce the conviction of playing only with a lower degree of comfort and not a lack of suitable protection.

[65] On this issue, see an interesting reconstruction about Sky Sport by L. Salvadori, 'Percezione del rischio valanghe ed errori cognitivi' *Rivista di diritto sportivo*, 143-157 (2018); the author analyses the role played in the athlete's decision by cognitive bias as overconfidence, that is an excessive confidence in the correctness of your judgements; see also U. Izzo, 'Safety and Liability in the practice of Skiing: How Law and Cognitive Sciences Shape the Driving Factor of Winter Tourism' 12 *The Entertainment and Sports Law Journal*, 3 (2014).

> In other words, wearing a helmet perceived as "small" is a circumstance that lends itself both to justify a perception of the mere lack of comfort of the instrument of preservation from danger, and to a perception of being unsuitable for performing this function'.

Therefore, the judges of the Supreme Court maintain that the different guideline is not applicable in the case in question, according to which

> 'the danger of the inert thing does not constitute the custodian's responsibility, but is simply a clue from which to return, pursuant to Art 2727 of the Civil Code, to the proof of the causal link between the *res statica* itself and the damage'.[66]

From the above it is possible to envisage a distinction between the risk of accidents and collisions in the course of the game deriving from the possible dangerousness of the structures and/or equipment. In this last case, in fact, the assumed risk would not help to exclude liability based on Art 2043 of the Civil Code; rather, it would be a case of liability for a dangerous activity or things in custody.

A very recent ruling by the Court of Tivoli seems to corroborate this.

The incident in question stems from an accident that occurred during a motorcycle race where a sportsman reported some personal injuries; in fact, when he fell near a curve, he was then run over by the other participants in the race.[67]

Following the incident, the victim asked the race organiser for compensation for financial damages (under contractual and non-contractual pursuant to Art 2050, or, subordinately, pursuant to Arts 2049, 2051 and 2043 of the Civil Code) and non-pecuniary damage incurred. This is because, according to the plaintiff, the track was built incorrectly and, for this reason, the race director was negligent as he was unable to check that the race was progressing correctly and interrupt it in the event of an accident.

The defendant claimed that he had all the certificates and all the authorisations required for the proper organisation of the sporting activity. He also stated that all of the motorcycle racers had had the opportunity to practise on the track free of charge and that the plaintiff, like all the other participants in the race, had not reported any problems with the terrain. The defendant (the organiser) subrogated his insurance company and the race director, for the defendant to be held harmless in the event of an unfavourable outcome.

The Court of First Instance classified the liability of the organiser according

[66] Corte di Cassazione 5 September 2016 no 17625, available at www.giustiziacivile.com, with comment by F. Cioni, 'Pericolosità della cosa in custodia inerte e prova del nesso causale tra *res* e danno subito dal pedone su pubblica via'.

[67] Tribunale di Tivoli 10 October 2018, available at www.coni.it, with commentary by C.G. Carriero, 'La responsabilità *ex* art. 2050 c.c. dell'organizzatore di gare motociclistiche'.

to the provisions of Art 2050 of the Civil Code.

It pointed out that, although by way of first approximation the qualification of the sports activity as dangerous is excluded in case-law for the acceptance of risk, the actual evaluation of such dangerousness is left to the trial judge, who, besides his/her judgment on the *id quod palerumque accidit*, also evaluates the prior availability (*rectius* the duty to prepare) of specific precursory measures to carry out these activities and evidently aimed at guaranteeing their safety.

The consequence of this is that causality exists only and simply in the presence of the etiological link between the exercise of the activity and the harmful event, a causal link that can be excluded from the conduct of the injured party only if this is in itself sufficient to cause the event and not also concurrent; it follows that the provision of the exonerating circumstance for the injuring party is needed because it is the only evidence that can exclude the causal link, since proof of the possible causal contribution of the injured party's conduct is not sufficient.

The court concludes that, since it is a *probatio diabolica*, it borders on being a case of unforeseeable circumstances.

In the case in point, the conduct of the motorcyclist who causes the accident when negotiating the bend is not sufficient to exclude the causal link, but it will be the proof that the injuring party, ie the organiser, has taken the appropriate measures to exclude harmful events and so it has a double function, excluding both causality and culpability.

VII. Conclusions

By virtue of the social dimension and the educational role of sport, now fully recognised by domestic and supranational law, it is appropriate to rethink the relationship between the right to participate in sport and the right to physical integrity, as between civil liability and sporting responsibility, and, lastly, the limits of the assumed risk, in view of the higher need for protection of the person.

Lastly, an aspect that is worthy of remark is that of the awareness of the inherent risk in the activity carried out, which should be a prerequisite for acceptance of the risk of suffering an injury; not only because, and not inasmuch as, this aspect is regarded as being implicitly presumed in the decision to participate in the competition, but primarily because it seems to be extended to the theory of sporting activity practised by minors, even though these are covered by the special theory of liability under Arts 2047 and 2048 of the Civil Code.

The recognition of a non-utilitaristic dimension of sport as a leisure activity, the growing attention paid to the phenomenon of sport in its non-competitive manifestations and more generally the social role of sport at community level lead us to understand the need for a renewed reflection on the limits of assumed risk, for example in relation to non-competitive, amateur and/or friendly contexts.

In any case, one cannot lose sight of the need to promote sporting activities

at every level due to their important social function, which nowadays is increasingly promoted in national and supranational policies relating to the growth of personal well-being.[68]

It has long been known that health is no longer looked at in pathological terms, that is, it is no longer identified with the absence of disease, but with a much more complex concept, namely mental and physical well-being. This is difficult to define, is constantly evolving and has long been the subject of in-depth studies conducted with the aid of the life sciences.[69]

In this way a social and relational value of the concept of well-being and health was outlined, based on the awareness that health does not depend only on the absence of biological agents that randomly cause disease, but is the result of a harmonious, natural and complete development of the individual in every aspect of his/her existence, including their relationship with the environment around them and the ability also to manage their free time through physical exercise, physical activity or sport.[70]

The opportunity for greater rigour in the evaluation of those behaviours that can jeopardise the mental and physical integrity of the individual appears to be emerging, even though these behaviours are the result of the freedom of self-determination and the exercise of personal rights.

At the same time, one cannot fail to notice a number of uncertainties and contradictions in the relationship between sporting activity, personal protection and liability.

Indeed, it is necessary to consider a difficulty in framing certain activities which, although carried out outside official contexts, nevertheless are very competitive, such as competitions between friends.[71]

In the same way, one cannot fail to highlight a fundamental contradiction inherent in the relationship between assumed risk and sporting professionalism, where the latter, because of the experience and preparation, would impose a more stringent application of the rules of liability.

[68] See A. D'Andrea, 'La funzione sociale dello sport nell'ordinamento internazionale, europeo ed italiano' *Revista dos tribunais*, 279-306 (2017); L. Ripa, 'La tutela del giovane atleta nell'equilibrio tra specificità dello sport e diritto comunitario' *Actualidad Jurídica Iberoamericana*, 190-244 (2015); F. Blando, 'Il ruolo dello sport nella costruzione della nuova Europa: ideologie e sfide' *Norma. Quotidiano di informazione giuridica*, 1-23 (30 January 2009).

[69] D. Morana, *La salute come diritto costituzionale* (Torino: Giappichelli, 2015); V. Durante, 'La salute come diritto della persona', in S. Rodotà and P. Zatti eds, *Trattato di Biodiritto*, 579-600 (Milano: Giuffrè, 2011).

[70] On the results of national and international research on human development, and according to the capability approach theory, see M. Nussbaum and A. Sen, *The Quality of Life* (Oxford: Clarendon Press, 1993).

[71] Corte di Cassazione 22 October 2004 no 20597, with commentary by R. Conti, 'Il braccio di ferro tra amici non è competizione sportiva' *Danno e responsabilità*, 509 (2005). See also Tribunale di Cassino 8 November 2017, *Rivista di diritto sportivo*, 237-257 (2017) with commentary by F. Bisanti, 'La responsabilità civile sportiva: esegesi, struttura e profili applicativi con particolare riferimento a una gara ciclistica amatoriale'.

Despite the noble aims for which sports activities are intended, contemporary society often reflects a tarnished image of it; for example, this happens when victory is sought at all costs, frustrating the idea of competition as a confrontation between athletes moved by a non-utilitaristic spirit; or when there is violence, not only physical, but also verbal or discriminatory, and finally, when violence is completely gratuitous and unjustified.[72]

Moreover, even the terminology used in case-law does not seem to be very precise, maintaining that the competition component is not incompatible with amateur sport, played for leisure and enjoyment.

For all of the above, it can be seen that adopting the criterion of balancing constitutionally significant interests,[73] such as the greater interest in promoting sports activities with the interest in preventing personal injury, appears ever more appropriate. In this sense, it may be useful to refer to the precautionary principle[74] that operates for human activities. The current state of scientific knowledge and technological progress for this does not permit a potentially harmful influence for the interests concerned to be excluded, but does not affirm it either.

The precautionary principle has been extended to any area characterised by scientific uncertainties involving fundamental human rights;[75] important applications of this are, for example, decreto legislativo 9 April 2008 no 81 on the protection of health and safety in the workplace (in particular, Art 15) and decreto legislativo 6 September 2005 no 206 (Consumer Code) in terms of safety and product quality.

In the latter case the legislation is based on the notion of a safe product, identified in what

> 'under normal or reasonably foreseeable conditions of use, including the duration and, if necessary, commissioning, installation and maintenance, does not present any risk or presents only minimal risks, compatible with the use of the product and considered acceptable in compliance with a high level of protection for the health and safety of people (...)'.

Indeed, the above principle is multifaceted: it is the basis of political and legislative action by institutions and the basis of risk management studies carried

[72] It is very important to promote the social and legal value of ethics in sport; see F. Valenti, 'Lealtà sportiva etica e diritto' *European Journal of Sport Studies*, 1-27 (2014); the author stresses that aggression has unfortunately become a necessary and essential part of the game, almost a rule of the game; in consequence, according to the Sports Code of ethics it is essential to promote fair play. The latter scholar analyses the relevance of this in the legal system by identifying its foundation in good faith. See also A. Marini, 'Etica e Sport', in P. Rescigno et al, *Fenomeno sportivo* n 8 above, 53-57.

[73] On this aspect see G. Perlingieri, 'Ragionevolezza e bilanciamento nell'interpretazione della Corte Costituzionale' *Actualidad Jurídica Iberoamericana*, 10-51 (2019).

[74] M.G. Stanzione, 'Principio di precauzione tutela della salute e responsabilità della P.A. Profili di diritto comparato' *Comparazione diritto civile*, 1-34 (2016).

[75] F. Follieri, 'Decisioni precauzionali e stato di diritto. La prospettiva della sicurezza alimentare' *Rivista italiana di diritto pubblico comunitario*, 1495-1530 (2016).

out by companies for their own benefit;[76] but according to academics, it can also be applied by case-law in cases of dispute. In fact, the Court of Justice adopts this principle in consumer protection against damage from foodstuffs.[77]

On the basis of this principle, in the event of a dispute, depending on the risk, it is necessary to assess the relationship between the probability of the event and its possible consequences to verify the compliance of precautionary rules and non-discriminatory measures, and to reverse the burden of proof.

Criminal law scholars[78] discuss the role of this principle in the reconstruction of liability on the basis of its relationship with the classic categories (causality, danger, culpability); however, it should be stressed that these traditional categories need to be reinterpreted in the light of the new phenomenology of damages; therefore, for example, in the case of the reconstruction of civil liability in sport a more adequate evaluation of the typology of the sporting risk is necessary in the light of the problematic case-law.

The negligent liability based on precaution is governed by generic precautionary rules: since there is no certainty, specific culpability cannot be construed because there is no close causal connection between the violation of the rule and the verification of danger.

The precautionary principle distinguishes between certain, uncertain or residual risks: in the case of certain risks, causation and damage are proven (scientifically), and it seems appropriate to require the implementation of specific preventive measures: given the nature of the activity carried out, it is a case of verifying whether such measures existed and whether these had been applied (see the case of the management of sports facilities and the organisation of non-competitive events).

Therefore liability will depend on the reconstruction of the causal link and on the appreciation of the compliance with precautionary rules.

In the case of uncertain risks, however, the evaluation is more difficult and in such cases the use of the precautionary principle will be more stringent since the degree of uncertainty should at least lead to a more rigorous judgment in terms of appreciation of culpability, for example in the case of extreme sports.[79]

[76] On this point see S. Pugliese, *Il rischio nel diritto dell'Unione europea tra principio di precauzione, proporzionalità e standardizzazione* (Bari: Cacucci Editore, 2017).

[77] See Case C-180/96 *United Kingdom* v *Commission*, Judgment of 5 May 1998, *Raccolta*, I, 2265 (1998).

[78] V. Militello, 'Diritto penale del rischio e rischi del diritto penale tra scienza e società', in C.D. Spinellis et al eds, *Europe in Crisis: Crime, Criminal Justice, and the Way Forward. Essays in honour of Nestor Courakis* (Athens: Ant. N. Sakkoulas Publishers L.P., 2017), 223-238.

[79] L. Santoro, *Sport estremi e responsabilità* (Milano: Giuffrè, 2008). In the case-law refer to Tribunale di Terni 4 July 2002, *Rivista penale*, 840 (2002) in which the Court states that in the case of rafting the adjective 'extreme' is a soft synonym and that other adjectives are appropriate to this sporting activity, ie deadly; according to this theory, in all extreme sports the aim of the participant is not the competition, but the risk involved and the deep thrill. We can relate the above opinion to sports such as: freestyle jet skiing; barefoot water skiing; wakeboarding, skateboarding, freestyle motocross, bicycle motocross, freestyle skiing; snowboarding.

In this case, according to the precautionary principle, since it identifies the probability (or eventuality) of a 'danger' as a harmful potential of a given activity.

Consequently, if the balanced legal goods are pre-eminent (think of health, the environment, etc) the existence of risk in sporting activities (*rectius*: danger of injury, future and potential) justifies the adoption of precautionary rules that can be traced, as mentioned, to the competition rules.

Finally, in the case of residual risk, since it is a normal risk inherent in the performance of human activities, the theory based on assumed risk case-law as a cause of justification could be applied; take the example of a football match, but one played by experienced adults.

This criterion in fact applies the general rule of *neminem laedere* flexibly, that takes into account, on a case-by-case basis, circumstances such as age, training, the degree of maturity of the sportsperson and the environmental conditions in which the competition takes place; with the potential for the parameters for assessing conduct to return to being those of the rules of common prudence.

In the case of minors or amateurs, as can be seen from the soap football judgment, we could fall back on the hypothesis of uncertain risk, and then request a more rigorous assessment of the liability of the sports equipment manager.

The idea of redrawing the boundaries of sporting liability for a more effective protection of the right to mental and physical integrity, by reason of the conditions in which the sporting practitioner finds himself, brings to mind, on the one hand, the debate on the nature, foundation and evolution of bodily rights from the standpoint of the subject's self-determination, and on the other, the issue of the attribution of risks for activities that are capable of causing harm and that are characterised by their widespread appearance in society at large.[80]

Legislative policy choices are required under the first aspect to define as much as possible the limits and content of the right to sport; in relation to the second, instead, to avoid the risk of legitimate and harmful or dangerous activities falling on society.

Under the first aspect, it evokes what has been described as a passage

> 'from the consideration of abstract man to that of man in his different phases of life and in his different states, as a child, as an adult, as a woman, as an elderly person, as a sick person, as a worker, with respect to which the content of the relative rights is redrawn, by virtue of the situation of the life lived'.

[80] In particular, scholars argue about the relationship between rights of the person and contractual freedom; G. Cricenti, *I diritti sul corpo* (Napoli: Jovene, 2008); G. Resta, *Autonomia privata e diritti della personalità. Il problema dello sfruttamento economico degli attribuiti della personalità in una prospettiva comparatistica* (Napoli: Jovene, 2005), 13; C.M. D'Arrigo, 'Il contratto e il corpo: meritevolezza e liceità degli atti di disposizione dell'integrità fisica' *Familia*, 794 (2005); S. Rodotà, 'Ipotesi sul corpo "giuridificato" ' *Rivista critica di diritto privato*, 447 (1994).

It is therefore a case of continually evolving rights whose definition is primarily in the case-law that takes into account, in this global and multifaceted contemporary society, those multi-level systems of sources, among which an increasingly dialectical and not always hierarchical relationship is being created.[81]

[81] M.A. Sandulli ed, *Codificazione, semplificazione e qualità delle regole* (Milano: Giuffrè, 2005).