

## **Tort Law Sustainability: An Italian Perspective**

**Giulio Ponzanelli**

*This Article considers how the concept of sustainability might be applied in the field of tort law, with particular attention to recent developments in Italian law. When referring to “sustainable tort law,” this Article refers to a system in which liability is distributed across society through insurance. Under this framework, sustainability coincides closely with insurability. This conclusion can be considered from several different angles. First, with respect to sustainable compensation, damages must be capable of reasonable quantification ex ante, and compensation must retain its restorative function. On this view, punitive damages are not sustainable. Second, with respect to the imputation of liability, the adoption of certain liability rules approaching strict liability have made tort liability as a whole unsustainable. The Italian experience with medical malpractice liability illustrates this point: plaintiff-friendly liability rules led insurance companies to exit the market, which then ultimately necessitated legislative intervention. Third, looking forward, tort liability would become unsustainable if it provided compensation for claims that could not be insured against. The COVID-19 pandemic provides a useful illustration of this point.*

Introduction ..... 1111  
I. Three Dimensions of Non-Sustainable Liability..... 1113  
II. The Measure of Liability ..... 1115  
III. Unpredictable Risks and Liability: The Pandemic Example .... 1116  
Conclusion..... 1118

## Introduction

This Article aims to connect the expansive growth of tort law with the broader cultural embrace of sustainability as a defining principle of society. Over the last several years, sustainability has become something of a fashionable standard to which everything is expected to conform. Law has been no exception, and tort law in particular has been drawn into the ongoing discourse surrounding sustainability.

Sustainability, however, has no precise technical meaning. Instead, it functions as more of a catchword that is regarded as inherently positive and treated as carrying almost magical qualities.<sup>1</sup> For example, sustainability has been studied closely in the field of corporate law, where it is often considered through the lens of environmental, social and governance (ESG) factors.<sup>2</sup> In addition to environmental and social sustainability, there is economic sustainability. Economic sustainability seems to be directly applicable to the field of liability, where the concept of “sustainable civil liability” necessarily encompasses sustainable compensation. Applying the concept of sustainability beyond these familiar contexts requires careful reflection.

The law of torts has traditionally had to deal with two opposing interests. One is that of the injured party, entitled to full compensation for harm suffered.<sup>3</sup> The other is that of an actor who engages in a socially useful activity, but who is subject to the general principle of *alterum non laedere* (i.e., the prohibition on causing unlawful harm to other persons). Decades of scholarship on the goals of civil liability clearly show that tort liability is nothing more than a transfer of wealth from the injurer to the injured.<sup>4</sup> The injured party is compensated for all the damage they suffer: as French scholars famously put it, the injurer has a duty to repair the

---

1. See Gaetano Presti, *La Sostenibilità Nel Diritto Dell'impresa e Delle Società: L'auspicabile Ritorno Della Regolazione Pubblica*, LXIX JUS. 372 (2022); Piero G. Alpa, *Responsabilità Degli Amministratori di Società e Principio di Sostenibilità*, CONTRATTO E. IMPRESA 721 (2021).

2. The literature on sustainability in corporate law, as well as in environmental law, is boundless because sustainability has also linked to financial sustainability profiles. See, among many others, Guilia Schneider, *Prevenzione Della Crisi D'impresa e Rischi ESG: Il Ruolo Della Finanza Sostenibile*, in RIVISTA DI DIRITTO BANCARIO 327 (2022); Guilia Schneider, *Le Tecnologie Societarie Alla Prova del Governo Sostenibile Tra ESG, Diligenza D'impresa e Corporate Digital Responsibility*, CORPORATE GOVERNANCE 125 (2022); Guilia Schneider, *L'“Emergenza” Della Sostenibilità Nel Prisma del New Normal del Diritto di Impresa*, EUROPEO, IL NUOVO DIRITTO DELLE SOCIETÀ 813 (2022).

3. This principle does not benefit from a constitutional guarantee: see for further reference Giulio Ponzanelli, *La Irrilevanza Costituzionale del Principio di Integrale Riparazione del Danno*, AA.VV., *Giustizia Costituzionale e Responsabilità Civile*, Napoli, E.S.I. (2006).

4. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

damage, all the damage, and nothing but the damage.<sup>5</sup> Compensation does not eliminate the loss; it simply transfers it to another party.

Since the mid-twentieth century, as tort law has come to be regarded as serving an intrinsically restorative purpose, the role of insurance has expanded significantly. Unsurprisingly, actors engaging in potentially harmful activities typically obtain liability insurance or third-party insurance. But insurance is also considered desirable for potential victims, through damage insurance or first-party insurance.<sup>6</sup>

The straightforward consequence of this rise in insurance is that third party liability has increasingly become insurance liability. As a first approximation, liability may be considered sustainable when, in addition to fully satisfying the injured party's interest, the compensation can be shifted to the insurance company to which the injured party has transferred the relevant risk.<sup>7</sup>

Insurance makes it more likely that the injured party's right to compensation for damages will be satisfied, thereby mitigating the risk that the wrongdoer will be unable to adequately compensate the victim out of their own pocket. The American civil liability system has often been described as a paradigm of uncertainty (the so-called "American lottery") due to the often unpredictable results of a system that relies so heavily on the jury. This unpredictability extends not only to the amount of compensation to be awarded, but also to determining which of several injured parties will actually end up receiving the compensation. By allowing risk to be pooled, insurance helps to protect against this potential inequity.

For over forty years, the economic analysis of law has emphasized the internalization of risk. This raises the question of whether twenty-first-century "sustainable tort liability" should simply be equated with the "internalization of risk." In other words: is today's sustainability the internalization described by Guido Calabresi and Richard Posner in the 1970s? At that time, Calabresi and Posner were focused specifically on manufacturers' liability and, more broadly, on the wide range of accidents that might arise in modern society. Today, sustainability requires that common injuries, for example automobile injuries and medical malpractice, be compensated through an insurance mechanism, such that the tortfeasor's personal solvency is irrelevant, in this way internalizing the risk of damages through the insurance mechanism. In this general frame,

---

5. In the English literature compensation is aimed at making the injured party whole. See R.L. RABIN, *PERSPECTIVES ON TORT LAW* (1995); M.A. FRANKLIN & R.L. RABIN, *TORT LAW AND ALTERNATIVES* (7th ed. 2001).

6. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521 (1986) (stressing the advantages of first party-insurance). Among Italian scholars, see PIETRO TRIMARCHI, *LA RESPONSABILITÀ CIVILE: ATTI ILLECITI, RISCHIO, DANNO* (2017).

7. See Herman A. Cousy, *Tort Liability and Liability Insurance: A Difficult Relationship*, in *EUROPEAN TORT AND INSURANCE LAW* (Helmut Koziol & Barbara C. Steininger eds., 2001).

sustainability has become little more than a new way of describing “internalization”—that is, the ability to transfer societal risks onto those who can best control and manage the risks in a financially sustainable manner.

### **I. Three Dimensions of Non-Sustainable Liability**

In Italy, the expansion of civil liability over the last two decades reveals three distinct dimensions of sustainability: the measure of damages, the applicable rules of liability, and the scope of tort liability regarding emerging risks. Each of these three dimensions relate to the three main players of tort liability: the injured party, the damaging party, and the insurers.

The first issue concerns when the measure of damages can be considered sustainable. Sustainable damages seem to be those internalized by the tortfeasor by means of liability insurance. In this way, the loss caused by the tortfeasor is distributed across society as a whole through marginal increases in the cost of goods and services. In this way, the bilateral nature of the relationship between the tortfeasor and tort victim is broken. Instead, compensation for the damage becomes, in effect, a social cost.

The Italian Constitutional Court’s 2014 decision (No. 235) regarding compulsory insurance for traffic accidents serves as an illustrative example.<sup>8</sup> In order to ensure that tort victims’ claims would be satisfied, Italian law has provided for compulsory car insurance since 1969. In 2005, lawmakers went further, introducing a cap on compensation for minor, non-pecuniary injuries. This system was originally limited to damages caused by traffic accidents, but was later extended to medical malpractice claims.

In the case before the Italian Constitutional Court, the compensation for these “micro-permanent injuries” was about 25% lower than the compensation due for the same injuries arising in contexts other than traffic accidents and medical malpractice. This raised an obvious issue regarding the principle of equality: since the injury was the same, why should the amount of compensation be different? The constitutionality of Article 139 of the Insurance Code was thereby called into question.

The Constitutional Court, reaffirming its case law that the Constitution does not guarantee a right to full compensation for damages suffered, upheld the limitation. The Court reasoned that tort victims’ rights remained adequately protected by the insurance system, which ensured that the victim would receive compensation irrespective of the tortfeasor’s own ability to pay. At the same time, the Court noted, the limitation on

---

8. Corte Cost. [Constitutional Court], 16 October 2014, n. 235 (It.).

compensation helped to keep insurance premiums at reasonable levels.<sup>9</sup> In this way, the Court employed the concept of sustainability: by limiting compensation, insurance premiums remained affordable even to those with lower incomes, who would otherwise be unable to use their vehicles. The Court did not expressly refer to “sustainable damages,” but only to the level of premiums that would be sustainable. The Court’s reasoning was also tied to a specific sector (road traffic) that, while central to tort law, still has unique characteristics that limit the generalizability of the Court’s analysis.

The need for sustainable premiums is closely tied to compensation that can be controlled *ex ante* and understood as restorative rather than punitive. In other words, the Court emphasized that the level of compensation is tied to insurance premiums: increasing premiums for the benefit of a small number of individuals (tort victims) is a questionable choice since higher premiums may place coverage out of reach for many.

Beyond just the 2014 ruling, some argue that current compensation for tort victims in Italy remains too low to fully compensate victims for the harm they have suffered. In a recent essay, one author describes a situation of substantial “under-compensation” and the need to increase compensation in order to better protect the rights of tort victims.<sup>10</sup> In particular, the author proposes creating a general category of “over-compensatory damage” that judges may apply when a tortfeasor’s conduct is particularly reprehensible. In short, increasing compensation is regarded as one mechanism for safeguarding the rights of the tort victim and deterring tortious conduct by would-be tortfeasors.

However, compensation that exceeds the tort victim’s loss— which might be granted because the tortfeasor acted with willful misconduct or because the tortfeasor profited from their unlawful conduct—raises additional concerns, as it closely resembles punitive damages. It seems unlikely that insurance coverage obtained by a tort victim would cover damages exceeding the level of the actual loss suffered by the injured party, particularly since such damages would not be foreseeable. Damages may therefore be regarded as sustainable when they can be calculated according to the same set of criteria that insurers commonly use in order to determine premiums. Punitive damages do not seem to meet this definition of sustainability because their quantification depends on the tortfeasor’s conduct—which cannot be assessed by the insurer in advance.

From this perspective, sustainability is in tension with the deterrent function of tort liability. Certain damages cannot be sustainable—that is,

---

9. *Id.* (“[T]he particular compensatory interest of the injured party shall in any case be measured against that, general and social, of the policyholders to have an acceptable and sustainable level of insurance premiums.”).

10. See ANDREA PISANI TEDESCO, *IL PROBLEMA DELLA RESPONSABILITÀ CIVILE COMPENSATIVA. STUDIO PER UN RIMEDIO RISARCITORIO EFFETTIVO* (2022).

they cannot be borne by society as a whole, but instead fall exclusively on the tortfeasor. These are so-called exemplary damages that exceed the actual harm suffered by the injured party and which are awarded because the conduct of the tortfeasor was willful and malicious. In my view, punitive damages are therefore inherently non-sustainable, particularly where they are not foreseeable. In sum, sustainable damages are those that can be insured against, while non-sustainable damages are not insurable.

## II. The Measure of Liability

Regardless of the measure of compensation, liability becomes unsustainable when it imposes near-strict-liability on those practicing an intellectual profession. Medical malpractice serves as the principal example of this kind of liability. The rise of so-called “defensive medicine” has been a direct consequence of the excessive liability placed on healthcare providers.

In the 1980s, insurers fled the medical liability market in the United States. The cause of this mass exodus raised challenging questions. Had insurers left the market due to several well-known features of American tort law (i.e., the presence of jury, punitive damages, contingency fees), which had allowed plaintiffs to secure extraordinarily high verdicts? Or was the exodus the product of a deeper societal commitment to provide complete compensation?

After several visits to the United States during the time, I came to the conclusion that insurance companies’ withdrawal from the medical malpractice sector was entirely attributable to the structural features of the American tort liability system. At the time, I was under the impression that this was a distinctly American phenomenon, and thus would not be replicated in Europe.

Contrary to these predictions, the same phenomenon (insurers fleeing the medical malpractice market) would play out in Italy shortly after— notwithstanding the fact that Italian tort law did not provide for a jury trial or punitive damages. By the turn of the twenty-first century, in fact, the premium-to-loss ratio had inverted, with losses increasingly exceeding premiums. The main cause of this reversal lay in the stricter standard of liability imposed on healthcare facilities and healthcare professionals, which some scholars regarded as approaching a form of strict liability.<sup>11</sup> The result was a typical case of overdeterrence and overcompensation, causing insurers to withdraw from the market. Ultimately, the Italian system was not that different from the American one, since both were burdened by four critical issues in the medical malpractice sub-system: excessive liability, excessive compensation, insurance deficit, and risk-management deficit.

---

11. RAFFAELLA DE MATTEIS, *LA RESPONSABILITÀ IN AMBITO SANITARIO* (2017).

To restore “sustainability,” a reform law was enacted in 2017<sup>12</sup>. The framework introduced by the new law seems roughly balanced. On the one hand, the clearly pro-plaintiff case law is left intact. On the other hand, suggestions to adopt solutions based on a different social security system were not embraced. Instead, the reform law adopted more targeted measures, allowing for direct action against the insurance company and establishing a guarantee fund, similar to those provided for in the motor vehicle sector, for those cases where damages exceed the limit of the insurance policy. The 2017 reform law also aimed to address insurers’ withdrawal from the market by introducing mandatory insurance for healthcare facilities. At the same time, the 2017 law also enabled an alternative form of self-insurance, whereby facilities would set aside funds to meet potential claims from injured parties or their relatives. Finally, from a civil-procedural viewpoint, the 2017 law broadened the use of preventive technical assessments to enable the factual aspects of a dispute to be investigated more quickly.

The overarching aim of the reform law was therefore to restore a better balance between all actors in medical malpractice cases. It seems unlikely that this reform will immediately reduce litigation or compensation in the coming years. Nevertheless, the law has helped to expose damaging excesses within the system while also fostering greater awareness of the social costs associated with an overly expansive interpretation of tort liability rules.<sup>13</sup>

The legislature had no intention of overturning the case law that was developed over the past twenty years. On the contrary, the law showed considerable deference to those earlier decisions. Rather, the reform is aimed at fostering dialogue between all protagonists in the healthcare system.

### III. Unpredictable Risks and Liability: The Pandemic Example

Besides the amount of damages and the nature of liability, the sustainability of tort liability is increasingly threatened by novel risks—brought into sharp relief by the recent COVID-19 pandemic. In particular, it is unclear whether, and how, the rules of tort liability should account for the widespread loss of life that occurred during the pandemic.<sup>14</sup> Two main approaches seem to be emerging from current and ongoing litigation. On the one hand, the parties primarily responsible for protecting the fundamental right to health (i.e., the state, the Ministry of Health and the

---

12. L. 8 March 201 [Law], n. 24, 17 March 2017 (It.).

13. For further observations see CLAUDIO SCOGNAMIGLIO, *INGIUSTIZIA DEL DANNO, CONTATTO SOCIALE, FUNZIONI DEL RISARCIMENTO* 193 (2021).

14. For some preliminary observations, see P.G. Monateri, *Pandemia e Responsabilità Civile*, *DANNO E RESPONSABILITÀ* 657 (2021), and Giulio Ponzanelli, *Responsabilità Civile, Pandemia e Sostenibilità*, *CONTRATTO E IMPRESA EUROPA* 7 (2022).

regions) appear to be principally at fault for failing to properly prevent and manage the pandemic. On the other hand, many healthcare facilities were plagued by their own organizational shortcomings in preparing intensive care units and, more generally, in ensuring effective health protection.

The cases being filed now will not be decided for some time. But the issues being raised are already forcing scholars to confront the divide between contractual and extra-contractual tort liability. From the perspective of extra-contractual liability, responsibility for death during the COVID-19 pandemic can be traced to those in charge of health governance for failing to adequately monitor the spread of the pandemic. From the perspective of contractual liability, by contrast, attention shifts to healthcare facilities: organizational deficiencies would generally trigger liability under Article 1218 of the Italian Civil Code, unless impossibility of performance can be invoked as an exculpatory ground.

Litigation arising from the pandemic therefore offers a useful opportunity to test the resilience of tort liability. Should the huge damages caused by the pandemic remain where they fall, or should they instead be redistributed—either according to the general rules of extra-contractual liability or some other form of economic recognition?

The first large-scale lawsuit, currently pending before the Court of Rome, has already generated significant media attention. A significant number of families in Lombardy, especially in the areas hit hardest by the pandemic in the winter and spring of 2020, have brought a civil suit against the state and the Lombardy region for their “negligence” in their handling of the pandemic. The defendants, the families argue, failed to take the necessary measures to properly contain the pandemic. The central question before the court is simple: was the COVID-19 pandemic foreseeable?

There is a risk that the government may be treated as a sort of “super-professional,” whose acts or omissions are measured against a “due diligence” standard (i.e., the Italian standard of the “*buon padre di famiglia*”). But at least until March 2020, there were simply no guidelines or protocols available for the political bodies to follow—because none existed. There are, therefore, serious doubts as to whether non-contractual liability can be recognized in such circumstances—doubts which become stronger still when the claim is examined through the lens of sustainability.

As explained above, sustainable compensation is compensation that imposes a lower burden on the community as a whole, since it is a burden that is borne by all. Proper functioning of insurance is indispensable to achieving this goal.

Therefore, once again, insurance companies occupy a central role in risk internalization and distribution. But in order to fill this role, risk must be predictable. When the pandemic struck in 2020, the risk proved wholly unpredictable and therefore not insurable: not even the most perceptive or

far-sighted actuary would have been able to accurately calculate an insurance premium to reflect the resulting loss. The basic logic that underpins insurance therefore completely fell away, because the insurance model only works where there is a predictable risk. There simply was no such predictable risk when the pandemic first broke out in the winter of 2020. True, the risk became better known and more foreseeable in subsequent months, rendering liability increasingly predictable. But by then there was again no “risk” to speak of, because the damage caused by the pandemic had become certain, and therefore again not insurable.

The boundaries of tort liability have expanded considerably. But limits to tort law remain essential: without them, tort law would inevitably transform into a kind of social security system in which all harms are compensable. Not every loss, individual or collective, should yield compensation. A rule to the contrary would create a tort liability system that is unsustainable.

### **Conclusion**

To conclude, by sustainable third-party liability I mean liability that can be insured and, through insurance, be distributed across society as a whole. Sustainability therefore requires insurance coverage, but it also requires that the insurance coverage can be “sold” at a reasonable price. Premiums that are too high effectively exclude large sections of the population from access to insurance. This, ultimately, renders civil liability elusive, as individuals forego insurance and insurance companies leave the market.

There are therefore three factors that are key to realizing the principle of sustainability in tort law. The first factor concerns the need for compensation for damages to be determined *ex ante*. The ability to quantify damage with certainty, especially when it comes to non-pecuniary damage, is essential to sustainability. Of course, insisting on full certainty of damages does not entail abandoning the principle of full reparation. But only by moving in this direction can damages truly be considered sustainable.

The second factor is the need to avoid excessive liability standards, as occurred first in the United States and then later in Italy in the field of medical malpractice. Around the turn of the century, the premium-to-loss ratio had reversed, with losses progressively exceeding the premiums. The main reason for this reversal was the stricter liability standards imposed on healthcare facilities and healthcare professionals, which came close to imposing a regime of strict liability. The result was a typical case of overdeterrence and overcompensation, leading insurers to withdraw from the medical malpractice market.

The third obstacle to sustainability is the imposition of liability for wholly unpredictable risks, such as those that emerged during the COVID-

19 pandemic or development risks in the products liability sector. In such cases, liability would rest on a duty of solidarity requiring the state to provide some form of protection for the victims of unpredictable and unforeseeable events. However, it is difficult to conceive of such a model as sustainable.