

INTRODUCTION TO ITALIAN TORT LAW

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The sources of tortious liability

Sources of obligations

- **Art. 1173:** Obligations arise from: contracts, unlawful acts, or any other acts or facts which are capable of producing obligations under the law.

Contractual Liability vs. Tort Liability

Contractual liability different from civil wrongs presupposes that:

- a **binding legal relation** between involved parties **(pre-)exists**;
- the debtor did *not* carry out “exact” **performance**;
- the non-performance by the debtor caused **damage** to the creditor.

Contractual Liability/Liability of the debtor

- **Art. 1218 ICC:** The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.

CONTRACTUAL
LIABILITY
Art. 1218 ICC



TORTIOUS LIABILITY
Art. 2043 ICC



Pre-existing relation
between the wrongdoer
and the injured party



No pre-existing relation
between the tortfeasor
and the victim
(Liability of the passer-by
or the "*quisque de
populo*")

Tortious Liability

The principle of “*neminem laedere*”

- **Art. 415 KC**: Whoever by his fault caused a damage to another person shall be obliged to redress it.
- **Art. 2043 ICC** (Compensation for unlawful acts): Any fraudulent, malicious, or negligent act that causes an **unjustified injury** to another obliges the person who has committed the act to pay damages.
- **Art. 1382 FCC**: Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.
- **Section 823 BGB** (Liability in damages): (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

Requirements

- **Compensation for damage** may be claimed provided:
 - A. the conduct of the tortfeasor is either **intentional** or **negligent**;
 - B. the **damage is “unjust”** (*danno ingiusto*);
 - C. there is **causation**, i.e. the intentional or negligent conduct by the tortfeasor caused the “unjust” damage suffered by the victim.

The concept of
“unfair” damage

Damnum iniuria datum

- ***Damnum contra ius***: “Any harm to personal property or rights caused by a person...”
- ***Damnum non iure***: “...with no legal justification” (such as self-defense or state of necessity).

The “area of
turbulence”

Contract

GREY:ZONE

Tort

Debtor
Pre-existing obligation

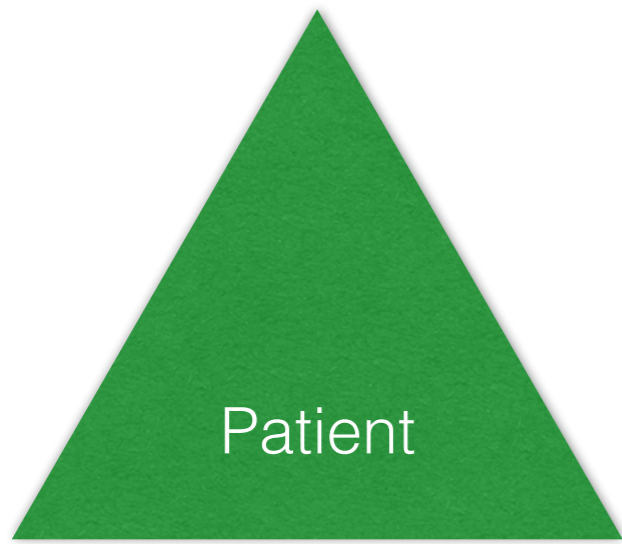
Passer-by or "*quisque de populo*"

Medical Liability

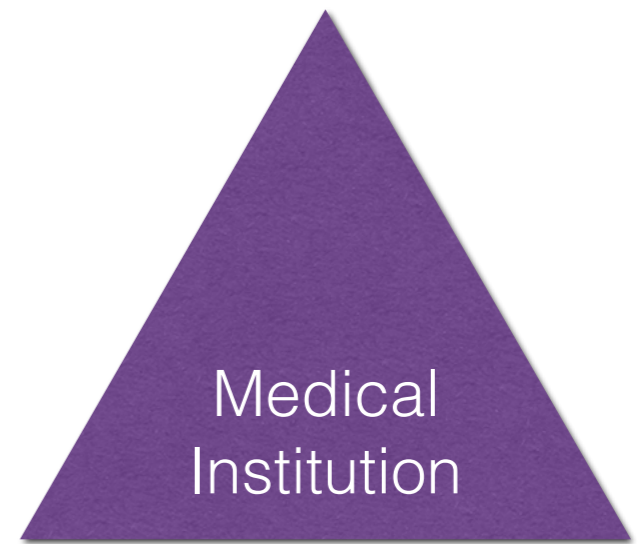
Two scenarios

The patient admitted to a hospital or a clinic:

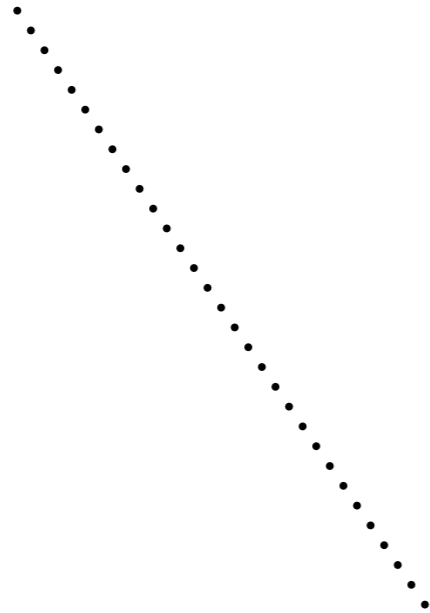
- *i)* enters into a **contract with the medical institution**, and **is treated by an internal physician** who is affiliated with the medical institution;
- *ii)* **concludes a contract with a physician** practicing their professional activity **within a medical institution.**



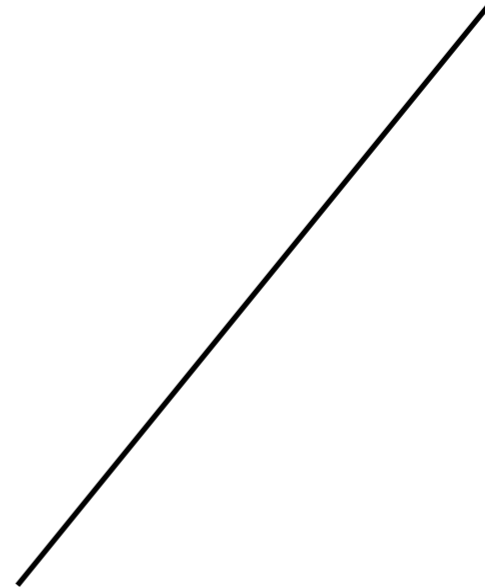
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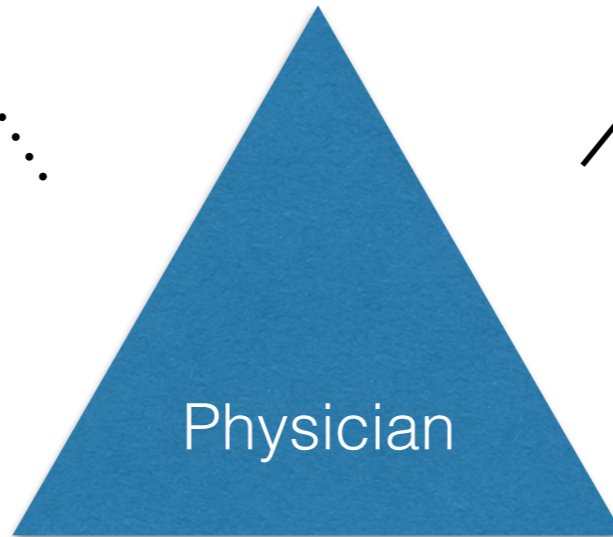
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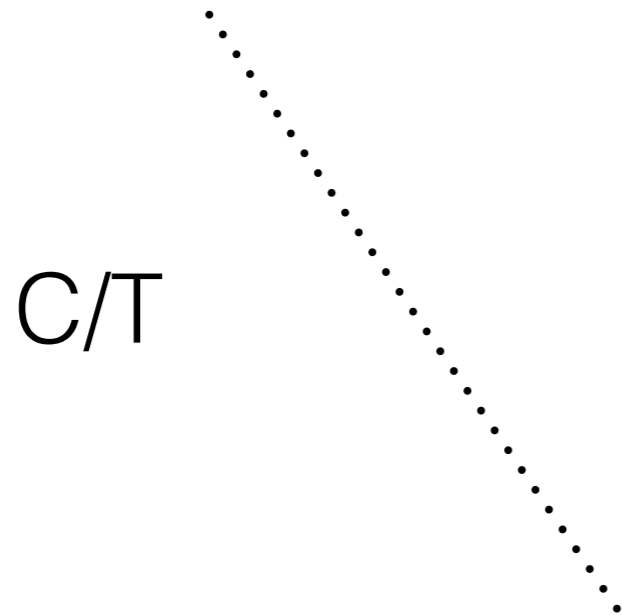
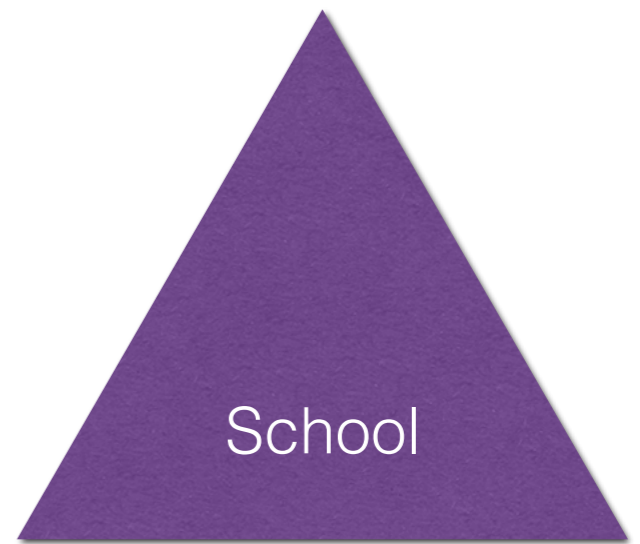
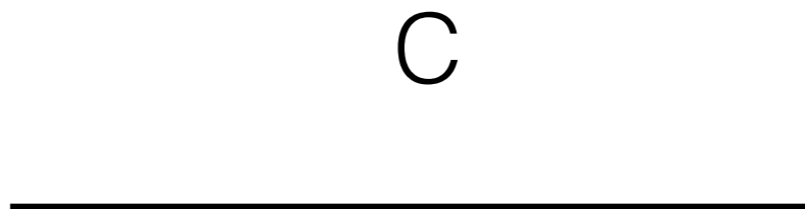
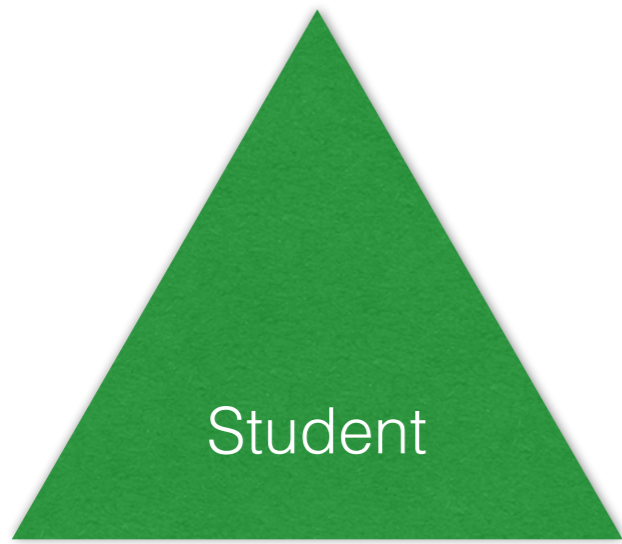
- **Patient-Medical Institution: 'Hospitalization contract' or 'health assistance contract'** (*contratto di ospedalità* or *contratto di assistenza sanitaria*), which is an innominate and 'complex' contract, as, beyond *stricto sensu* medical treatment, services related to accommodation are provided, drugs, medicines and equipment are administered, etc.
- **Physician-Medical Institution:** "labour" relationship

Patient - Physician

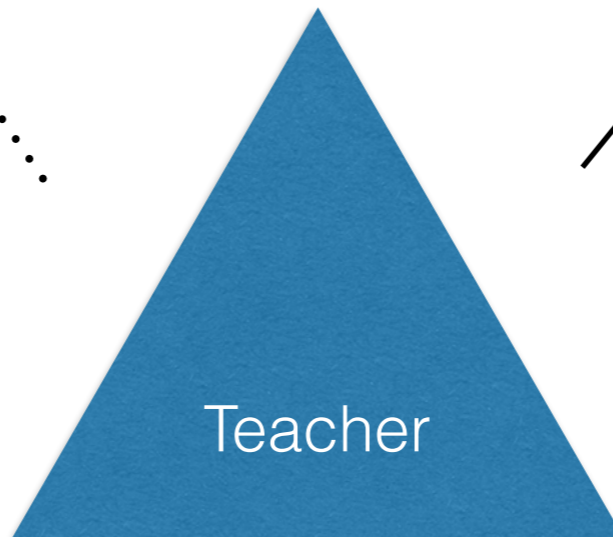
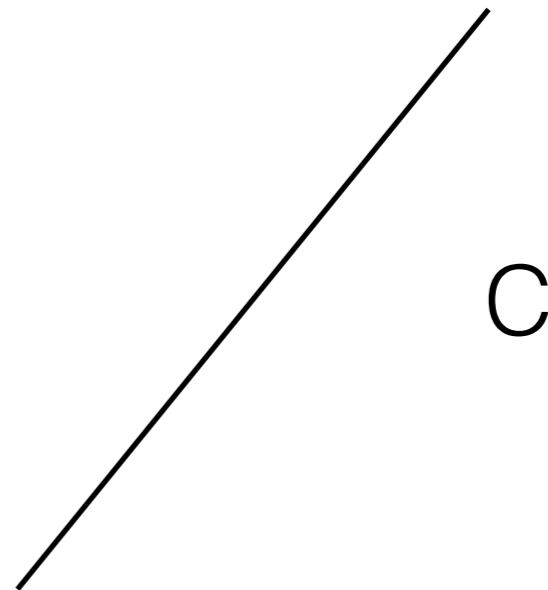
- There is no formal contractual relationship
- The so-called ‘**social contact**’ (*contatto sociale*) between the patient and the physician creates a **special relationship** giving rise to ‘**duties to protect**’ (*obblighi di protezione*, conceptually equivalent to the German *Schutzpflichten*)
- The social contact is a source of obligation: Art. 1173: “Obligations arise from: contracts, unlawful acts, or **any other acts or facts which are capable of producing obligations under the law**”
- The non-fulfilment of those “duties to protect” grounds contractual liability, ie liability for non-fulfilment of an obligation pursuant to art 1218 CC

- Thus, according to Italian jurisprudence, **both** the **medical institution** and **the physician** are **contractually liable** towards the patient
- More specifically, the medical institution is liable for both its breach of contract and for the physician's negligence – the latter being its auxiliary in the carrying out of performance (according to art 1228 CC = 430 KC)

Teachers' Liability

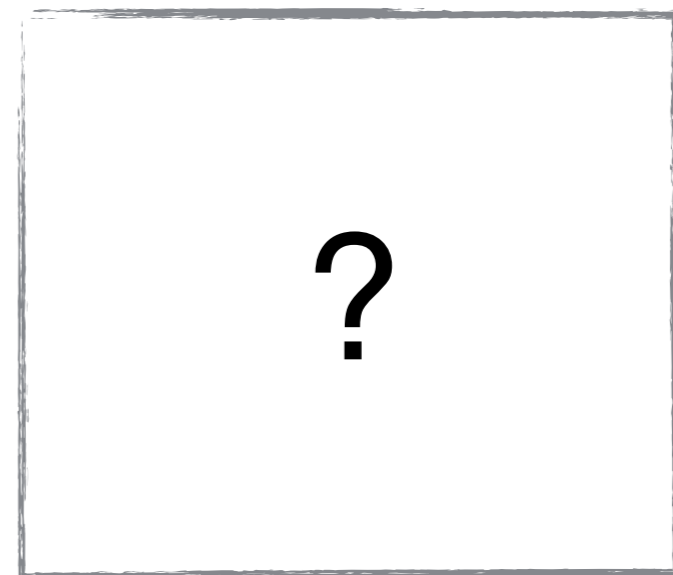
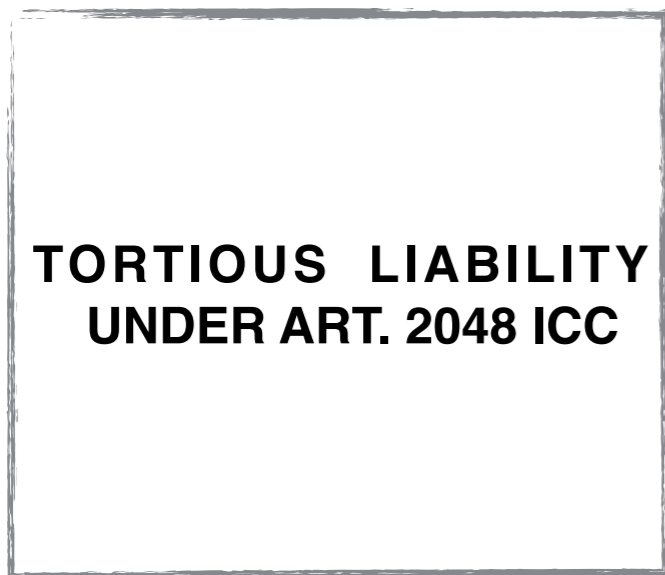


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- **Art. 2048 ICC** (Liability of parents, guardians, teachers, and masters of apprentices): (2) Teachers and others who teach an art, trade, or profession **are liable for the damage occasioned by the unlawful act of their pupils or apprentices while they are under their supervision.** (3) The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were not able to prevent the act.

What if the student
commmits a self-injury?



Tribunal of Catanzaro,
18 June 2009

Self-injurer Student

- A 17-years old student committed a **suicide** in the school's bathroom.
- Art. 2048 ICC **is not applicable** in the **case of self-injurer students** (Cass, Joint Section, 27 June 2002, no 9346).
- There is a **special relationship** between student and teachers giving rise to a liability deriving from a “**social contact**”.
- The Ministry of Education/teacher was ordered to pay damages for Euro 221.562,00 by way of compensation for **non-pecuniary loss** due to the loss of a parental relationship **on the ground of contractual liability pursuant to art. 1218 ICC**

The main difference
between contract law and
tort law

Damages awarded

- On the ground of **contractual liability** compensation for damages **is limited to the loss that could have been predicted ‘at the time the obligation arose’** (foreseeability of the loss), whereas any “cap” is provided for **tortious liability**.

Prescription/time limitation

- In the **contractual field**, the ordinary term of prescription is **ten years** (art 2946 CC), whilst the time limitation in the case of **tortious liability** is **five years** (art 2947, para 1, CC)

Burden of proof

- In **tort law**, to seek compensation for damages, the injured person has to give proof of *i.*) the damage suffered; *ii.*) the defendant's negligent or wilful conduct; *iii.*) the causation.
- In **contract law**, the burden of proof is imposed on the party in breach, i.e. the physician and/or the medical institution, with considerable advantages for the victim. Therefore, the injured person has to discharge the burden of allegation of the breach of contract: ie the victim will have to prove the existence of the contract and the damage suffered, and will *merely* have to *allege* the (qualified) breach of contract. It is up to the 'debtor' (the physician and/or the medical institution) to prove the 'exact' fulfilment of their contractual obligation.
- Therefore, if medical malpractice was ascribed to the field of torts, the patient would have to discharge a 'significant' burden of proof.