La responsabilità da custodia della P.A.: prospettive di analisi economica del diritto

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The Liability of The Public Administration Arising From Custody in The Italian Legal System: A Law & Economics Perspective.

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Introduction.
In their celebrated article “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” Guido Calabresi and Douglas Melamed warned of the need to adopt a plurality of methodological approaches in order to gain as exhaustive an understanding as possible of legal issues.

The article by these two jurists is one of the fundamental writings on the economic analysis of law, based on which multiple lines of thought regarding the “property rules – liability rules” dichotomy were later developed. However, the authors’ irrefutable contribution was to identify the possibility of adopting a multidisciplinary method of investigating each issue, in order to reveal critical issues which would otherwise be overlooked.

In the view of the authors, the economic analysis of law was to be understood as one of the possible views of the “Cathedral”. With this expression, they were referring to the celebrated Rouen Cathedral series, i.e., the 30 paintings in which Claude Monet always painted the same object - the Notre-Dame Cathedral of Rouen - but always from a different perspective.

In other words, the authors did not affirm at all the need to select and “impose” hermeneutic options on the basis of their alleged efficiency, and rather limited themselves to highlighting how behind doubts concerning legal theory or contrasting orientations of case law there are several solutions, the adoption of which is not immune to consequences from the functional perspective, in terms of costs and benefits for the general public.

2 These legal concepts have been transposed within Italian legal literature by careful legal theory, which has had the undoubted merit of contextualizing the conceptual categories in question within a civil law system as well. In particular, see PARDOLESI, Azione Reale e Azione di Danni nell’art. 844 C.C. Logica economica e logica giuridica nella composizione del conflitto tra usi incompatibili delle proprietà vicine, in Foro Italiano, 1977, 1, 1144-1154, as well as MATTEI, La Proprietà immobiliare, Turin, 1995. Also see DI MAJO, Forme e tecniche di tutela, La tutela civile dei diritti, Milan, 2001. More generally, for an examination on the use of the L&E approach in civil law countries, see: MATTEI, PARDOLESI, Law and Economics in Civil Law Countries: A Comparative Approach, in International Review of Law and Economics, 1991, 11, 265-275.
On the relations between case law and the economic analysis of law, see PARDOLESI, Analisi economica del diritto, in Dig. disc. priv. Sect. Civ., I, Turin, 1987, 309 et seq.
Indeed, the economic analysis of law is without a doubt a perspective that underscores the value of versatility, making it possible to observe a plurality of issues relating to topics and matters of interest that are not always uniform, on the basis of an examination carried out in light of the efficiency criterion.

In Law & Economics, rules are understood not as orders, but rather as mechanisms that incentivize or disincentivize specific behaviours. The purpose of legal rules is to create a situation in which the private optimum and the social optimum coincide, so as to allow for each individual to pursue private ends while also maximizing social welfare. In other words, the rules determine the “prices” for human conduct.

The concept of “maximizing social welfare” has been developed within that segment of economics generally referred to as the “New Economics of Welfare”. Abandoning the utilitarian idea of the interpersonal comparison of utility, this discipline has affirmed that a change in which those who win could “potentially” compensate those who lose (potential Pareto improvement) is socially desirable. This is referred to as the “Kaldor-Hicks criterion”. Neoclassical economists refer to that criterion to evaluate possible changes, and cost-benefit analysis is also based on it. The fact that the advantaged can "potentially" compensate the losers means that the task of the economist (or the technocrat) is to indicate which changes to make in order to achieve an improvement in that sense, while the task of the “Prince” (i.e., the politician) is to decide whether to

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3 In particular, cf. BECKER, *The Economic Approach to Human Behavior*, Chicago, 1976, which highlights that the comparison between costs and benefits postulates that economic agents, in all areas, tend to take rational decisions; which is why the science of economics has a methodology that can be adopted and transposed in a plurality of non-uniform areas.


6 The economist FRIEDMAN D., *Hidden Order*, U.S.A., 1996, 217-223 believes that the Kaldor-Hicks efficiency criterion justifies changes even when it is impossible, “de facto” to compensate those who are worse off. Therefore, he claims that it should be affirmed that certain changes are desirable even if they do not compensate the losers, provided those who win have a greater benefit. D. Friedman claims that, through the use of the Kaldor-Hicks criterion, changes are justified that can never be transformed into Pareto improvements. The author concludes with the affirmation: “Many of my colleagues share my discomfort with the Paretian approach, but most of them continue to teach it. I prefer to admit that we trading off gains to one person against losses to another in an imperfect sort of way, instead of following the Paretian strategy of doing the same thing but pretending not to. In that respect, this part of the book is either “on the frontier” or “out of the mainstream”, according to whether one does or does not agree with it”.

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transform the change made into a “real Pareto improvement”, that is, into a change in which no one loses and someone wins. In other words, the Prince can decide, through the taxation of those who win and the payment of compensation to those who lose, to make a change in which no one loses and someone wins (i.e., a “real Pareto improvement”). Indeed, as those who win obtain an increase in wealth greater than the loss for those who are worse off, there is space to completely compensate the latter while also leaving certain individuals in a better position. The indication of the changes in which the advantaged could “potentially” compensate the losers is, according to the postulates of the New Economics of Welfare, not a political indication, as the Prince can always transform such a change into a real Pareto improvement (the latter to be considered certainly apolitical in that no one would have an interest in opposing it). The “positive” school of the economic analysis of law (or the “Chicago School”) holds that private law, particularly US common law, is set up based on the Kaldor-Hicks efficiency criterion. In other words, when the US legal system is presented with a possible rule that, for example, attributes to a party a right that results in a benefit of 3 and a cost of 10 for others, it would select the different rule that does not recognize that right.

On the other hand, the “normative” school of the economic analysis of law (or the “Yale School”) holds that private law of US common law is not efficient in and of itself, and that therefore it needs changes. In indicating the necessary changes that should be introduced in a legal system, this normative school of the economic analysis of law also relies on the concept of Kaldor-Hicks efficiency: that means that, when presented with a given rule that assigns rights and duties, it will be socially desirable to modify that rule if those who benefit from the change could "potentially" compensate those suffering from the loss.

This arrangement attributes to private law the exclusive function of maximizing the welfare (or, in Posnerian language, “the wealth”) of a society without being concerned with distribution issues, which should instead be addressed by another branch of law.

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7 The principles of the New Economics of Welfare are described in CAFFÈ (ed.) Saggi sulla nuova economia del benessere, Turin, 1956.

represented by tax law. With private law, the system should assign rights and duties while maximising global wealth, without being concerned with the manner in which benefits and costs are allocated, and with tax law it should redistribute wealth according to political criteria.

In Law and Economics, there are few who believe that wealth maximisation is a value in and of itself and requires no redistribution\(^9\). This position has been supported, almost solely, by the greatest representative of the Chicago School, Richard Posner\(^{10}\).

Obviously, the strengths of Law and Economics are at times also its weaknesses, as the models developed within Law and Economics may be excessively abstract, making it impossible to take into due consideration the issues to which legal experts are called upon to respond on a daily basis. Likewise, however, it is necessary to avoid a diametrically opposed position which denies \textit{a priori} the contribution that Law and Economics can make to legal sciences.

To the contrary, in the presence of a conflict of case law, it is deemed that the reflections of legal theory cannot completely disregard a knowledgeable examination of the effects arising from the acceptance of a specific orientation.

In this paper, we will assume that the law governed by the Italian Civil Code, as interpreted by Courts, is characterized so as to adopt solutions that respond to the criterion of efficiency. From this perspective, the hermeneutic options established with respect to the issue of the liability of the Public Administration for damages from items in its custody will be examined, in order to identify which interpretative solution guarantees wealth maximization (i.e., the social welfare).

\section*{2. The laboratory par excellence: tort liability}

One of the developments that has aroused the most interest in the literature is without a doubt that of tort liability, in relation to which Law and Economics immediately had the

\(^9\) The traditional view based on which one branch of the State should be concerned with efficiency through market regulation, while another branch should be concerned with distribution, is found in MUSGRAVE, \textit{A Theory of Public Finance: A Study in Public Economy}, New York, 1959.

\(^{10}\) In that sense, see POSNER, \textit{The Justice of Economics}, in Journal of Public Finance and Public Choice, 1987, 4, 15 \textit{et seq}. 

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irrefutable merit of highlighting the function of deterrence which the tort obligation can perform.\footnote{Particularly with reference to the examination of the issues inherent in liability for accidents, from the viewpoint of the Economic Analysis of Law, it is necessary to mention Calabresi, *The Costs of Accidents*, New Haven, 1970; trad. It.: *Il costo degli incidenti*, 1975. In Italy, moreover, there have been authors who with admirable foresight have identified the need to introduce considerations regarding the efficiency of the various possible normative solutions into the sphere of civil liability. See. in this regard Trimarchi, *Rischio e responsabilità oggettiva*, Milan, 1961; Id., *Causalità e danno*, Milan, 1967.}

In this respect, it should be noted that, in general, the civil law system has identified the transfer of damage from the legal sphere of the injured party to the legal sphere of the injuring party as a “duty” which the rules of tort liability are called upon to perform. However, the reasoning that can justify that mechanism of transfer has always been controversial, since, clearly, the charging of costs resulting from an unlawful act or deed could take place - and this has been traditionally argued - for sanctioning reasons. Therefore, the tort obligation would be understood as a penalty on the injuring party, for the injury, by others, of another’s right established and protected by the legal system. It is evident that as long as the origin of the tort obligation is identified as arising from the need to penalize unlawful conduct, the subjective element of the injuring party, i.e., culpability for his own conduct, which therefore justifies the imposition of a penalty in favour of the injured party, tends to be considered a necessary element of the action for damages.

On the other hand, from a different view, also due to the emergence of scenarios of strict liability, the possibility has been affirmed of taking advantage of the redistribution function of civil liability, as a mere mechanism aiming to restore the economic sphere of the injured party following its unjustified impoverishment by the injuring party; as tort liability should be have a “neutral” connotation and go beyond any penalizing aspect.\footnote{The definition provided in Rodotà, *Il problema della responsabilità civile*, Milan, 1967, is well known. In particular, the author highlighted a process of “laicizing” tort liability. In the world of US common law, note the position of Coleman J., *Risks and Wrongs*, U.S.A. 1992, which deems that tort liability has a function of “corrective justice”.
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Indeed, from an economic perspective, it should be highlighted that the transfer of damage should be considered a mere redistribution of resources between parties, and as such indifferent in terms of efficiency, as the purpose to be pursued is that of increasing
wealth or - more precisely as concerns tort liability - maximizing the difference between the utility enjoyed in carrying out specific activities and the costs incurred. In other words, from the viewpoint of the economic analysis of law, the purpose attributed to tort liability is essentially that of deterrence, and therefore it involves identifying mechanisms that can induce parties to take the required precautions. However, as will be highlighted below, it is possible to move beyond this traditional arrangement, to also identify an insurance function lato sensu.

In general, it is possible to claim, from the perspective of comparing costs and benefits, that an action that causes damage produces a negative externality. Following the precepts of Pigou, the damage should then be internalized within the agent, thereby achieving a situation in which the social welfare and the private welfare fully coincide, as private parties would have an interest in acting so as to maximize utility for themselves as well as the welfare of society.

Moreover, Pigou’s perspective has suffered from very heavy criticism from Ronald Coase and Law & Economics scholars who have promoted in many cases the rule of fault-based liability which, unlike the rule of strict liability, does not entail the internalization of all costs within the injurer. Indeed, with a rule of fault-based liability in force, the agent does not internalize the external costs because, with diligent conduct, it is exempt from liability (although the possibility remains that its behaviour may give rise to an accident).

Therefore, on a preliminary basis, in order to delimit the degree of efficiency (or inefficiency) of the possible legal solutions, it is appropriate to identify the variables in light of which that comparison between costs and benefits may be carried out.

All behaviours of an individual that interact with those of others may have a certain likelihood of causing damage (for example, what are defined as “dangerous activities”).

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13 Also within Italian legal theory, we tend to recognize deterrence as the main function performed by civil liability. In that sense, cf. ex multis, DI MAJO, La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente, in Europa dir. priv., 2008, 289 et seq.; BUSNELLI, Deterrenza, Responsabilità Civile e Danni Punitivi, in Europa dir. priv., 2009, 909 et seq.


15 For a detailed examination of the concepts developed by law and economics on tort liability, see COOTER, MATTEI, MONATERI, PARDOLESI, ULEN, Il mercato delle regole: Analisi economica del diritto civile, op. cit.

The categories in question were developed and defined primarily by SHAVELL, Economic Analysis of Accident Law, U.S.A., 1987, espec. Chap. I.
The damage is not evaluated by law and economics scholars only in relation to the extent of the damaging consequences, but also in light of the likelihood of it taking place. The term “expected damage” refers to the extent of the damage multiplied by the likelihood that this damage may occur. To provide a simple example of the concept outlined here, if a certain action may result in damage of €10, which has a 50% likelihood of taking place (i.e., 0.5), then the expected damage will be equal to €10 X 0.5 = €5. Alternatively, this concept can be expressed by affirming that, if that situation takes place many times, the average damage will be equal to €5.

The variable in question - i.e., the expected damage - is influenced by the precautions that each party adopts at the moment in which it acts. Indeed, it is easy to see that as precautions increase, the likelihood that the damaging event will take place decreases and therefore the extent of the expected damage decreases as well. But precautions also have a cost, and in that regard, from the perspective of Law and Economics, an initial outcome that we seek to pursue with the rules of liability is that of minimizing the gap between the expected damage and the cost of the precautions. Therefore, it is easy to understand the importance of the so-called Hand rule, according to which it is efficient to adopt a further precaution each time the relative costs are lower than the reduction of the expected damage16.

In many cases, the expression “expected damage” is used by Law & Economics scholars to refer to the damage that may take place notwithstanding the fact that the parties have taken the appropriate precautions, multiplied by the likelihood of its occurrence. Therefore, in the case that an accident may occur even in the presence of diligent behaviour by the parties (for example, because it was caused by an invisible oil stain on the asphalt), then "expected damage" refers to the damage multiplied by the likelihood of it taking place. If, for example, the likelihood that there is an oil stain on the asphalt is one out of one thousand and the damage is €10,000, the expected damage is equal to €10.

16 See LANDES, POSNER, The Economic Structure of Tort Law, Cambridge (Mass.), 1987, espec. Chap. III and IV. This volume highlights, through case law, how the Courts apply the Hand rule in marginal rather than total terms.
Therefore, it is possible to consider an initial differentiation between the two traditional rules of liability - i.e., strict liability and liability - when we seek to pursue the outcome of ensuring that the social optimum and the private optimum coincide. Such an outcome may, without a doubt, be achieved with a rule of strict liability when the accident model is unilateral, i.e., when the potentially injured party cannot take precautions (in the case, for example, of people who live below flight paths).

In these unilateral models, the rule of strict liability is efficient, as the injuring party internalizes all costs deriving from its conduct. Assuming that the parties are rational, we can expect the injuring party to autonomously decide to adopt an efficient level of precaution, i.e., to take that degree of precautions at which their marginal cost is equal to the change in expected damage (indeed, by taking precautions to that point, the agent will minimize the private cost coinciding with the social costs of accidents, represented by the sum of the cost of the precautions and the expected damage).

But in a unilateral model, even a rule of fault liability may result in an efficient level of precautions. Indeed, in the presence of this normative solution, the injuring party is liable only when it has been negligent, i.e., acted contrary to rules pre-established by the legislator or by the administrative authority (specific fault) or, more simply, when it has not acted in compliance with the criteria of care.

Therefore, when the legislator, the administrative authority or the courts are capable of identifying efficient precautions (the same that the injuring party would spontaneously choose if it were held strictly liable for the damage), the rule of fault liability can also be optimal.

Obviously, these conclusions will change if we bring the accident model more into line with reality and assume that the injured party can also take precautions.

In this different model, referred to as “bilateral”, the value of the expected damage depends on the precautions taken by the injuring party as well as the injured party. In the model in question, fault-based liability may be deemed efficient, as the injuring party in any event has an interest in taking the level of precautions laid out by legislation or the courts; therefore, if the established precautions have been taken, the injuring party cannot be held liable and - as a result - the expected damage will fall on the injured party, who therefore will in turn have an interest in taking an efficient level of precautions in order to minimize the costs that he has to incur (represented by the
sum of the cost of the precautions and the expected damage). In this case, it is necessary for the authority called upon to establish the regulations of diligence of the potential injuring party to be capable of identifying the efficient level of precautions.

To the contrary, the rule of pure strict liability does not have efficient results in a bilateral model, as the injured party has no interest in acting diligently, knowing that it will be compensated in any case by the injuring party, irrespective of any judgment as to the diligence of the injuring party’s conduct (“moral hazard”).

If we want to establish regulations governing bilateral accidents while also adopting the rule of strict liability, in order to induce the injured party to take an efficient degree of precautions, it is necessary to introduce “correctives” into that rule. An initial solution is that of the “defence of contributory negligence”, based on which the injuring party can be held liable only if it can be proved that the injured party has acted diligently. In this case, we have a rule that is symmetrical to and mirrors the fault-based rule, as there is a party that suffers no damage if it is diligent (in fault-based liability it is the injuring party; in strict liability with the defence of contributory negligence, it is the injured party). It can be claimed that, in the presence of fault liability, the residual bearer, i.e., the party that bears the expected damage (the damage that occurs notwithstanding the diligent conduct of the injuring party and the injured party) is the injured party, while with a rule of strict liability with the defence of contributory negligence, it is the injuring party.

A second solution is that of comparative negligence, according to which the quantum of the compensation for damages must decrease in proportion with the degree of culpability of the victim.

Both solutions discussed here, even the rule of strict liability, therefore make it possible to introduce incentives for the victim so as to induce the victim to take the due precautions.

2. The liability of the public administration arising from custody
A clear example of the need to also observe the opposing solutions outlined both in legal theory and in case law in light of the practical implications of the application of
one orientation over another can be seen with regard to the specific issue of the liability of the public administration arising from custody.  

For simplicity’s sake, the plurality of interpretations proposed in case law will be distilled into the “fault-based liability and strict liability” dichotomy. Therefore, we will seek to understand what the consequences of the adoption of these rules may be, in terms of efficiency, in light of the areas investigated by the science of law and economics.

Ever since the issue of the Italian Civil Code, there have been doubts as to which liability applies with respect to the rule set forth in art. 2051 of the Italian Civil Code. Indeed, this provision attributes to the custodian liability for damages deriving from the things in its custody, unless it can prove that they were caused by fortuitous events. The rule in question does not contemplate the genesis of tort obligation in relation to unlawful conduct by the injuring party, as the damage is not the consequence of its act or deed contra jus. Indeed, art. 2051 of the Italian Civil Code, after moving beyond the initial hesitations in legal theory, was interpreted as a scenario of strict liability, within which the obligation to provide compensation does not arise from negligent behaviour by the custodian, but is attributed by virtue of the presence of a causal link. The rule

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17 In legal theory, there have been multiple attempts to conduct an examination on the peculiarities of the case in question, from the perspective of the economic analysis of law. In this regard, it is appropriate to mention LAGHEZZA, Responsabilità della P.A. per omessa manutenzione delle strade: la prospettiva dell'analisi economica del diritto, Danno e Resp., 2002, 7, 12, 1201 – 1213; ID, Di Custodia, caso fortuito e responsabilità oggettiva, Danno e Resp., 2012, 3, 282.

See also IZZO, La “precauzione mancata” nella responsabilità civile: Il gestore e lo scontro fra utenti delle aree sciabili - Il commento, Danno e Resp., 2015, 4, 357, as well as BENEDETTI, Condotta del danneggiato e responsabilità da cose in custodia: spunti di riflessione, Danno e Resp., 2011, 234, which refer to a plurality of concepts, certainly related to the law and economics view, such as those inherent in the efficient level of precautions of the parties, as well as risk aversion.

18 Art. 2051, “Damage caused by things in custody: Everyone is liable for injuries caused by things in his custody, unless he proves that the injuries were the result of a fortuitous event”.


In the ruling noted above, the Court of Cassation cast the liability for damages from things in the custody of the public administration as strict liability.

The previous majority case law position had cast liability as fault-based-based in those cases, based on the violation of the duties of custody. This solution was partly justified with the tendency of qualifying the subjective element as a necessary criterion to give rise to the obligation to provide compensation, as if there could be no liability without fault-based. Therefore, there were those who associated the liability of the public administration for damages from things in its custody with the scenario pursuant to art. 2051 of the Italian Civil Code, deeming that this rule sanctioned liability for presumed fault-based, with the resulting inversion of the burden of proof. However, according to a different orientation, even the
pursuant to art. 2051 of the Italian Civil Code is understood as the expression of the principle laid out in the brocard “cuius commoda eius et incommoda”, as the custodian is held liable even if there is no negligent conduct\textsuperscript{20}.

Nonetheless, there has always been a certain reluctance, in legal theory as well as in case law, to recognize the strict liability of the public administration for damages arising from the things in its custody. In fact, traditional orientations underscored the need to recognize a degree of discretion on the part of public entities in deciding on the appropriate initiatives to be taken for state property maintenance; discretion the exercise of which could result in the obligation to provide compensation for damages only in the case of negligence by the "public" custodian, making it impossible for it to be held strictly liable\textsuperscript{21}.

From a different perspective, it has been found that at times the extent of state property prevents the effective power of custody over it and - as a result - the rule of strict liability pursuant to art. 2051 of the Italian Civil Code would not be applicable, as instead it would be necessary to evaluate the existence of the elements pursuant to art. 2043\textsuperscript{22} Italian Civil Code to identify whether normal fault liability can be attributed to the custodian\textsuperscript{23}.

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\textsuperscript{22} Article 2043. “Compensation for unlawful acts: Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages”.

Lastly, some, even recently, have highlighted the need to assess the conduct of the victim to identify whether it has allowed the unlawful event to take place. In other words, it was feared that in a strict liability scenario, the public administration would always and in any case be held liable for damages connected to a res in its custody, except in exceptional cases in which the gravity of the injured party’s conduct could be classified as a fortuitous event, or be evaluated as an event capable of breaking the causal link that connects the property in custody with the occurrence of the damage. Therefore, the injured party would have less incentive to take the due precautions.

In light of the above, to evaluate from the perspective of Law and Economics the preferability of the rule of fault-based liability over the rule of strict liability, we must first note that the liability of the public administration arising from custody has always been considered a bilateral accident model, in which not only the conduct of the injuring party, but also the conduct of the injured party, assumes relevance. In this regard, actually, it is worth mentioning that precisely with respect to the liability of public entities for road accidents, even the Constitutional Court confirmed the principle of the self-responsibility of users, who "undoubtedly bear the burden of paying particular attention in exercising the ordinary direct use of the state property, to protect their own safety".

It is certain that, if we deem that individuals change their behaviour based on the incentives given by legal rules, then fault liability in and of itself should cause users to adopt diligent conduct. And in fact, if we assume that economic agents are also rational, we must conclude that the public administration will adopt the due precautions in order
to be exempt from liability. The user, who thereby becomes the residual bearer, will in turn take all proper precautions to limit the costs arising from road accidents (i.e., the level of precautions at which the marginal cost of the precautions themselves is equal to the change, in the opposite direction, in the expected damage).

But we can also achieve the same outcome by applying a rule of strict liability pursuant to art. 2051 of the Italian Civil Code, either by classifying the negligent conduct of the user as a fortuitous event (therefore, we would have a rule of strict liability with a defence of contributory negligence) or by applying the rule of contributory negligence of the debtor pursuant to art. 1227 of the Italian Civil Code27 (thereby applying a rule of strict liability with a defence of comparative negligence).

In light of the assumptions of Law and Economics highlighted until this point, both fault-based liability and strict liability can lead to efficient results28.

In the first place, the allocation of expected damage would change: while with the rule of fault liability the expected damage would be borne by the user, with the rule of strict liability adjusted with a defence, the expected damage would be borne by the public administration.

In the second place, the burdens of proof of the parties would change29. Indeed, with a rule of fault liability, private parties would need to demonstrate that the public administration would remain excluded only if the likelihood of the occurrence of that particular accident could be placed “outside the class of damaging events typically ascribable to the sphere of risk borne strictly by the custodian based on the law”. In reality, in terms of efficiency, as well as placing importance on the provision pursuant to art. 1227 of the Italian Civil Code, a rule of fault-based-based liability allows for, like the rule of strict liability with the defence of contributory negligence, or with the defence of comparative negligence, analogous results as concerns the evaluation of the precautions adopted by the custodian and the injured party.

In other words, art. 2051 of the Italian Civil Code, interpreted in a manner compliant with the assumptions of Law & Economics, would attribute liability to the custodian, without any relevance being placed on its precautions or conduct. Likewise, however, the quantum (with comparative negligence) or the an (with a defence of contributory negligence) of the custodian’s liability are moreover subordinate to the degree of diligence of the injured party’s conduct. This does not take away from the fact that the custodian’s liability remains strict, it being necessary to exclude any investigation into the culpability of its behaviour.

27 Article 1227. “Contributory negligence of the creditor: If the creditor’s negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. Compensation is not due for damages that the creditor could have avoided by using ordinary diligence”

28 From this standpoint, it is not possible to agree with those positions put forward in the literature, defined by Laghezza, Di custodia, caso fortuito e responsabilità oggettiva, op. cit., as “neo-guilt-assuming” assumptions, with respect to the “presumed incompatibility of the strict structure of liability with cases characterized by the possible bilateral prevention of the parties”, as, placing importance only on the causal aspect as the criterion for attributing the obligation to provide compensation, the liability of the custodian would remain excluded only if the likelihood of the occurrence of that particular accident could be placed “outside the class of damaging events typically ascribable to the sphere of risk borne strictly by the custodian based on the law”. In reality, in terms of efficiency, as well as placing importance on the provision pursuant to art. 1227 of the Italian Civil Code, a rule of fault-based-based liability allows for, like the rule of strict liability with the defence of contributory negligence, or with the defence of comparative negligence, analogous results as concerns the evaluation of the precautions adopted by the custodian and the injured party.
administration’s conduct does not comply with the criteria of diligence; on the other hand, with the rule of strict liability, the public administration would need to demonstrate the imprudent conduct of the users.

4. Fault-based rule and level of activity.

However, the rules of fault liability and strict liability diverge when we introduce another variable that has not been considered until this point, i.e., “level of activity”. Clearly, this expression refers to the number of times or the duration with which a given behaviour takes place.

In Law and Economics literature, level of activity is a variable of fundamental importance, and it is assumed that every economic agent gains utility from the activity carried out; however, this utility tends to increase to a lesser extent as the level of activity rises. In other words, as the level of activity increases, the marginal utility, i.e., that deriving from the last act, decreases.

This is easy to understand as it is reasonable to assume that the interest in carrying out a given act may be significant at first, but then decrease over time once the relative conduct is repeated. Therefore, the individual may carry out that activity as long as the utility achieved is higher than the costs to be incurred.

With a rule of fault liability, the injuring party is not held liable for damages when it adopts the due precautions. In this manner, again assuming that economic agents are perfectly rational, the injuring party tends to enact potentially damaging conduct as long as the marginal benefit is equal to the marginal cost of the precautions; however, in that case, the marginal benefit may also be lower than the marginal costs incurred by the society as a whole, as the injuring party, in its cost-benefit analysis, is not motivated to

29 See PARDOLESI, Sul dinamismo connaturato alla cosa nella responsabilità da custodia, in Danno e Resp., 2010, 557, who highlights that “the decision in favour of a system of strict liability inevitably impacts the allocation of the burden of proof and the concept of fortuitous events. As concerns the first aspect, the custodian no longer bears the burden of proving that it diligently fulfilled its supervisory obligation; it will be the injured party that must demonstrate the causal link between the res in custody and the damage. So a fortuitous event, far from being concerned with the conduct of the custodian (which has substantially become irrelevant), refers to the causal aspect of the event and arises only when the damage can be associated not with the thing that constitutes its direct source, but rather with an external element, that is exceptional and unpredictable (such as the conduct of a third party or of the injured party itself)".
consider the expected damage, which will be borne by the injured party. The level of activity of the injuring party would then be excessive.

In theory, we could also deem that an excessive level of activity may be an element to be taken into consideration when evaluating the diligence of the injuring party\textsuperscript{30}. However, the level of activity, unlike the level of precautions, is a variable that the judge cannot easily observe and which, precisely for that reason, is difficult to include in the concept of negligence.

As a result, with a rule of fault-based liability, the injured party, as the residual bearer, adopts an efficient level of precautions and an efficient level of activity. On the other hand, the injuring party, aware that it cannot be held liable if it adopts the efficient level of protections, will tend to act to an excessive extent, as long as its activity generates a marginal utility for it which is equal to the marginal cost of the precautions, without having any interest in reducing its level of activity to the point at which the relative marginal benefits would be equal to the marginal social costs (represented by the sum of the marginal cost of the precautions and the expected damage).

The same reasoning can also be applied to the rule of strict liability with the defence of contributory negligence, in which case the injuring party is the residual bearer, and the injured party, having adopted all due precautions, is held harmless from any possible damage (indeed, it must be compensated if its conduct was diligent and if the damaging event occurred).

Therefore, in this case it will be the injured party who adopts an excessive level of activity, while the injuring party, in choosing its own level of activity, will act up to the point at which its marginal benefit is equal to the marginal social costs.

Therefore, the problem of an excessive level of activity arises with both rules, so that in choosing the normative solution to be applied, the legislator is called upon to evaluate which of the two activities needs to be more controlled - and sacrificed - thereby identifying who should be the residual bearer\textsuperscript{31}.

This axiom, generally referred to as the “Shavell theorem”, can be applied only partially to the issue of the public administration’s liability for the things in its custody, as the


\textsuperscript{31} This conclusion has been identified by SHAVELL, \textit{Strict Liability versus Negligence}, 9 Journal of Legal Studies 1 (1980).
public entity has the legal obligation to ensure the usability of the property in its custody for users and, from this perspective, it can be claimed that its level of activity is fixed. Here, the problem arises of defining how the public administration chooses its level of activity (and it is not necessary to construct a function of utility of the public administration to determine the marginal benefit that it obtains from each level of activity).

Therefore, the case in question has the particular characteristic of being categorized as a bilateral accident model, as the victims as well as the public administration take precautions, but only in relation to one of these parties (the potential injured party) can the additional variable of level of activity be introduced.

Put in these terms, the choice between the rule of strict liability and the rule of fault liability may be considered quite easy to make, as typically in the second case we control the level of activity of the only party that can impact that variable.

So, from this perspective, the traditional orientation which, despite the rule pursuant to art. 2051 of the Italian Civil Code, has been inclined to subsume the scenario of the liability of the public administration from items in custody within the scope of application of art. 2043 of the Italian Civil Code, is justified.

With a rule of fault liability, users, aside from taking the due precautions, will use the public administration’s property up to the point at which the marginal benefit is equal to the marginal cost of the precautions plus the expected damage.

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32 In any case, the rule of fault-based-based liability gave rise to case law perplexities regarding the system of potential exemption from the public administration’s obligation to provide compensation for damages, any time the private party was not able to demonstrate negligent conduct by the public entity; this perplexity could be found in the first place in attempts to reduce the burden of proof borne by the injured parties precisely through the development of patterns symptomatic of the negligent conduct of the public administration.

As concerns the legal theory of “pitfalls and traps”, see LAGHEZZA, Insidia e trabocchetto: un addio senza rimpianti, Danno e Resp., 2006, 1220; PALMIERI, Custodia di beni demaniali e responsabilità: dopo il tramonto dell'insidia, ancora molte incertezze sulla disciplina applicabile , in Foro it., 2008, 1, 2826; CAPUTI, Responsabilità della pubblica amministrazione per omessa manutenzione delle strade: dalle fiabe al codice civile, ossia la caduta dell'insidia e del trabocchetto e il recupero della disciplina positiva, id.,2004, I, 514.

More generally, there were plenty of those case law orientations, moreover currently in the majority, that indicated the need to establish possible strict liability on the part of the public administration. As already noted, this rule is mediated at times with contributory negligence and at times with comparative negligence, as the negligent conduct of the victim is considered, respectively, either as a fortuitous event, such so as to break the causal link, or as sharing of fault-based - pursuant to art. 1227 of the Italian Civil Code - by the injured party. The legal theory of pitfalls and traps established, strictly, a rule of strict liability with a defence of contributory negligence: if indeed the damaging event were not caused by a pitfall or a trap, then the user was considered at fault-based; the presence of the pitfall or trap, on the other
5. Rule of strict liability of the public administration and the concept of best risk bearer.

Having found the “preferability” of the rule of fault liability, as it is more suited to controlling the level of activity of the victims, the conflicting case law orientations on liability for damages from custody of the public administration require further reflection, in order to identify an economic justification (if any) underlying the different solution outlined not only by the lower courts, but also by the Court of Cassation. From this standpoint, we can introduce the concept of best risk bearer.

Indeed, until now, we have implicitly assumed that both agents involved (injured party and custodian) were risk neutral and, hence, that they evaluated the sacrifice of bearing the expected damage in the same manner. However, a “risk averse” party attributes a cost to the possibility of the event represented by the damage which is higher than the expected damage. In other words, a risk averse party would be willing to pay a sum to avoid bearing the consequences of the accident that is higher than the expected damage, as it prefers not to bear the risk of carrying out a certain activity. If risk attitude is different between parties, the allocation of residual risk to the potential injuring party or to the potential injured party changes the social welfare generated.

Therefore, in order to identify the optimal allocation of residual risk and therefore maximize social welfare, we can imagine a negotiation between the potential injuring party and the potential injured party. In fact, we can assume that rational parties would agree that the risk underlying the possible occurrence of the uncertain event should be borne by the less risk averse party. Supposing that in a certain situation the expected damage is borne by the injured party and this party is risk averse, while the injuring party is risk neutral, then both parties, if they could negotiate, would transfer the risk to the injuring party in exchange for compensation that allows both parties to be better off. It can therefore be affirmed that, hand, meant that the cost of the accident would be attributed to the public administration even if it had acted diligently.
in the presence of a risk averse party and a neutral party, the expected damage of accidents should be borne by the latter in order to maximize social welfare. Considering the scenario of the liability of the public administration arising from custody, it is easy to see that the public entity-custodian can, based on the law of large numbers, forecast for a certain period of time the amount that it will need to pay, with a high probability, if it bears the expected cost of accidents. Indeed, based on the law of large numbers, damages which are highly unpredictable if we consider the actions of a single individual become certain costs if we consider a large number of events that could give rise to the damaging event. The damage that an individual may incur by using property of the public administration is highly uncertain, but if we consider that the property is used by a large number of individuals, the sum of the costs of accidents is transformed into a certainty. From this perspective, the optimal situation would be for the public administration to bear the expected risk. Also supposing that the public administration wanted to insure itself against the risk of claims for compensation for damages, the efficient solution would appear to be that of allocating the risk to the public administration itself as, while the public administration would need to enter into a single insurance agreement, numerous insurance agreements would need to be entered into by users to cover the risk of accidents. The allocation of residual risk to the public administration would therefore generate savings in transaction costs. Moreover, the public administration itself could carry out an insurance function through the forced collection (i.e., through taxes) of premiums that are borne by the users. Therefore, from this standpoint, if we consider risk attitude, we should favour a rule of strict liability. Obviously, having defined an insurance function *lato sensu* within the public administration’s strict liability, the possibility of moral hazard on the part of users arises. Indeed, the latter, aware of the possibility of obtaining compensation for damages, may be induced not to take the due precautions. Hence, also from an “insurance” perspective, the correctives of the defence of contributory negligence or of comparative negligence still need to be maintained. In this manner, the user of the thing in the custody of the public administration will obtain compensation only if its conduct was diligent.
In this case, it is possible to justify those case law orientations which establish a system of strict liability of the public administration, without prejudice to the principle of self-responsibility of the victims, so as to prevent their negligent conduct.

But the rule of strict liability with a defence of contributory negligence, as already highlighted, does not make it possible to control the level of activity of the potential victims, which could in any event decide to use the property even when the relative marginal utility is equal to the marginal costs of the precautions but lower than the sum of the marginal costs of the precaution and the expected damage - as the expected damage is borne by the public administration.

In this case there is a trade-off between the need to control the level of activity of the users and the need to allocate the risk of accidents to the party that can best bear that risk, which in this instance is the public administration.

6. Strict liability of the public administration and power of governance over the res.

Within the case law orientation that tends toward attributing strict liability to the public administration - therefore, without the need to investigate the diligence of the public entity’s conduct - an attempt has been made to draw a distinction which, within the methodological approach in question, undoubtedly deserves further reflection. Indeed, it has been found that the public administration may be held strictly liable only if there is effectively a situation of custody of the state property, i.e., it is possible to concretely identify a power of governance of the entity over the res\(^{33}\).

However, the extent of the state property is not a sufficiently suitable element to exclude the possibility of custody by the public administration, but merely one element that the judge should take into consideration in his or her assessment, so that whether there is effectively custody by the public administration should be examined based on multiple factors and elements, such as the characteristics of the roads, how they are

\(^{33}\) In particular, with ruling no. 15383/2006, the Court of Cassation affirmed that the presumption of liability for damages from things in custody, pursuant to art. 2051 of the Italian Civil Code, does not apply to public entities for damages suffered by users of state property any time it is not possible - based on an assessment conducted by the judge in relation to the specific characteristics of the concrete case - to exercise custody, understood as de facto power over the res, over the property as a result of its characteristics.
equipped, their support systems and the instruments that technological progress provides us with over time and which, to a great extent, influence the expectations of the general public of users.

The logic underlying these decisions is that the public administration is considered to bear liability only when it can be considered the best risk avoider, i.e., the party that can concretely eliminate the risk factor at a lower cost. This means that, in the presence of a plurality of circumstances, including the significant extent of the state property, the public administration is not the best risk avoider, given the high costs it is required to incur to eliminate sources of risk.

Therefore, from this perspective, it is deemed that if the potential injured party can remove the risk of the accident by incurring costs lower than those of the public administration, it is that party that should bear the cost of the expected damage. Moreover, the economic analysis of law teaches us that it is not efficient to eliminate all possible sources of risk, but rather it is more convenient for society as a whole to leave certain risk factors in existence and incur the expected damage. In this manner, we avoid attributing to one party the costs of the precautions required to remove the risk of accidents when these costs are higher than the change in the expected damage. If certain risky events must continue to exist, as it would be too costly to eliminate them, the risk should be borne by the party that can best bear it.

7. A new perspective

In order to keep in mind in allocating risks not only the capacity to eliminate the source of risk but also the capacity to bear the risk that is not eliminated, the distinction proposed by the Court of Cassation can be reformulated by assuming that it is necessary to distinguish between “highly utilized” state property and “rarely utilized” state property. In fact, when property is used by a large number of people, a very high level of precautions by the public administration may appear to be justified from the economic perspective. If for example a road is used by a large multitude of individuals, the level of precautions aiming to prevent risk factors must be high, as this would reduce the likelihood of the occurrence of multiple damages. Instead, if a property is rarely used, that high cost of precautions is no longer justified (for example, a road that is used by a very limited number of users).
This distinction therefore takes into account first and foremost the level of use of the state property by users. If the property has a high degree of utilization, the high level of precautions taken by the public administration will limit the amount of expected damage, as the likelihood of the occurrence of the damage has decreased as a result of the precautions taken by the custodian. Therefore, inefficiencies caused by an excessive level of activity of the users would be attenuated, as the expected damage that they do not take into account in their actions is of a limited amount. If the problem of the level of activity of the potential injured parties is not highly relevant from the standpoint of economic efficiency, then the optimal rule is that which guarantees the allocation of the remaining risks, even in the presence of diligent conduct, to the best risk bearer which, as has been seen above, is the public administration. As a result, with respect to state property used by many, a rule of strict liability with the defence of contributory negligence appears to be the most efficient, even if it is based on "second-best" logic. On the other hand, if state property is used by a limited number of people, it would be efficient to require a low quantity of precautions from the public administration. It would not be justified for the public administration to eliminate the majority of risk sources and therefore bear high costs for precautions for a low number of users. In this case, a rule of strict liability would lead users to choose an excessive level of activity, in the sense that they would not consider the expected damage, which would be high, in making their decisions. In such situations, it may be more efficient to control the level of activity of the potential injured parties rather than obtain an optimal allocation of risks. Therefore, again based on a “second-best” logic, the rule of simple negligence would be more efficient. In this case, it can be assumed that a legal system inspired by the principle of economic efficiency should establish the strict liability of the public administration with the corrective of the defence of contributory negligence for property used by many, while it should establish the rule of fault liability of the public administration for property used by a limited number of people. The result reached with these arguments can be represented with a few examples: considering a park in which people can take a walk, those who follow the marked path are insured

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34 Following the model of Whittman, First Come, First Served: An Economic Analysis of "Coming to the Nuisance" 9 Journal of Legal Studies 557 (1980) it must be established, with a view to economic efficiency, which property “should be used by a multitude” and which “should be used by few”. The reasoning described here may also be formulated based on that model.
against the risk of accidents, in the sense that, if they suffer from damages even though they acted diligently, they must be compensated by the public administration. However, those who venture out into areas off the path, even if they act diligently, will have to incur the damage if an accident occurs. In this manner, the selection of the alternative path is disincentivized when the private benefit is not very high. Or, imagine that an individual needs to choose whether to spend his or her free time in a highly visited park or in another isolated park. In the first case, if the individual acts diligently, the damage that takes place due to an accident will be borne by the public administration. In the second case, even if the individual acts diligently, he or she must incur the damage.