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ANALES de **DERECHO**

FOOD MANUFACTURER LIABILITY AND THE CONSUMER'S RESPONSIBILITY

In the Italian legal system

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Resumen

Desde el principio de este siglo, el Legislador europeo, consciente de los riesgos relativos al consumo alimentario, ha ido incrementando el rigor de las normas de Derecho público, con la finalidad de ofrecer a los consumidores una tutela preventiva que asegure la seguridad y salubridad de los productos alimentarios. De ahí surge la cuestión de identificar y graduar la conexión existente entre el Derecho público que regula la seguridad alimentaria y las previsiones propias del Derecho privado en el ámbito de los daños resarcibles.

Palabras clave: *Derecho de daños, Consumo alimentario, Derecho de consumo, Derecho europeo.*

Abstract

Since the beginning of this century, European Community lawmakers, aware of the risks associated with food consumption, have been increasingly tightening the rules under public law aimed at offering consumers preventive protection to ensure the health and safety of food products. The question that the interpreter poses, then, is that of ascertaining whether, and to what degree, a connection exists between public law concerning food safety - aimed at offering consumers preventive protection against damage to human health - and the provisions governing private torts law.

Keywords: *Tort Law, food consumption, Consumer Law, European Law.*

SUMMARY: . I. THE RELEVANCE OF PUBLIC LAW FOR PROVING THE PRODUCT'S DEFECT OR THE MANUFACTURER'S FAULT.; II. THE LACK OF INDIVIDUALS' DUTY TO TAKE CARE OF THEMSELVES. III. TOWARDS RECOGNITION OF THE INDIVIDUAL'S DUTY OF SOCIAL SOLIDARITY TO ADOPT REASONABLE LIFESTYLES (CONTINUED)

I. The relevance of public law for proving the product's defect or the manufacturer's fault.

Since the beginning of this century, European Community lawmakers, aware of the risks associated with food consumption, have been increasingly tightening the rules under public law aimed at offering consumers preventive protection to ensure the health and safety of food products¹. Thus, the horizontal legislation applicable to all foods (particularly important in this context is not only Regulation (EC) no. 178 of 2002², but also the rules introducing the *Hazard Analysis and Critical Control Points* (HACCP) hygiene control system³) has been joined by the formation of specific provisions (referred to as “vertical legislation”)⁴ regarding particular categories of food products, such as for example milk⁵, eggs⁶, and pasta⁷. With reference specifically to the above-mentioned regulations – the content of which is not to be detailed here⁸ – we must first ask whether they influence the interpretation of rules under civil law, and whether, then, public law concerning food safety can help the interpreter identify operator fault or product defect. Indeed, the new features introduced in the area of rules under public law concerning food manufacture and marketing have gone hand in hand with major innovations in the regulations aimed at protecting the consumer from the standpoint of

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¹ COSTATO, *Compendio di diritto alimentare*, 6° ed., Padova, 2013, 426; TAMPONI, *La tutela del consumatore di alimenti: soggetti, oggetto e relazioni*, in AA.VV., *Agricoltura e alimentazione tra diritto, comunicazione e mercato*, Atti del Convegno di Firenze 9-10 novembre 2001, Milano, 2003, 301; PACILEO, *Il diritto degli alimenti*, Padova, 2003, 320.

² Regulation (EC) no. 178 of 2002 set out the principles and the general requirements for food safety, and instituted EFSA.

³ Legislative Decree no. 155/1997 implementing (CE) regulations no. 852 and 882 of 2004.

⁴ MASINI, *Corso di diritto alimentare*, 3° ed., Milano, 2015, 167.

⁵ D.p.r. (presidential decree), no. 54 of 14 January 1997 (Decree abrogated – with the exception of articles 19, 26 and annex C), chapter I, letter A), points 4 and 7 – by article 3 of Legislative Decree no. 193 of 06 November 2007).

⁶ Legislative Decree no. 65 of 04 February 1993, implementing Directive EC 89/437 on hygiene and health problems affecting the production and the placing on the market of egg products (decree abrogated by article [3 of Legislative Decree no. 193](#) of 06 November 2007).

⁷ D.p.r. no. 187 of 06 February 2001.

⁸ For greater depth, see, among others, PACILEO, *Il diritto degli alimenti*, cit.; AA.VV., in *Trattato di diritto privato agrario*, diretto da Costato, Germanò, Basile, Utet, 2011; COSTATO, *Il Reg. 178/2002 e la protezione dei consumatori di alimenti*, in *Nuovo dir. agr.*, 2002, 63; ID., *La sicurezza alimentare nell'Unione europea. Note introduttive*, in *Le nuove leggi civili e commentate*, 2003, I, 122.

private torts law⁹; the question that the interpreter poses, then, is that of ascertaining whether, and to what degree, a connection exists between public law concerning food safety - aimed at offering consumers preventive protection against damage to human health - and the provisions governing private torts law. First, it is a matter of establishing when the rules of diligence standardized in the horizontal and vertical legislation (as well as the so-called technical standards¹⁰, which is to say the rules issued by European¹¹ and national¹² private “standardization” bodies that set forth a “state of the art” definition in the various productive sectors) can be relevant for identifying the operator’s fault (Art. 2043 of the Civil Code)¹³, and whether – in the context of the regulations on manufacturer liability laid down in the Consumer Code¹⁴ –

⁹ It is necessary in this regard to bear in mind not only the regulations governing the manufacturer’s liability (d.p.r. 224/1988) – initially applicable only to foods processed by the industry but subsequently (with Legislative Decree no. 25/2001) also extended to “primary production” – but class action claims as well (Art. 140 *bis* of the Consumer Code).

¹⁰ Here, see BELLISSARIO, *Certificazioni di qualità e responsabilità civile*, Milano, 2011, 68; CARNEVALI, *La norma tecnica da regola di esperienza a norma giuridicamente rilevante: ricognizione storica e sistematica teorica; ruolo dell’UNI e del CEI*, in *Resp. civ. e prev.*, 1997, 257. Generally speaking, industry operators comply with these provisions voluntarily; of importance in the area of food production are the guides to good operating practise for hygiene, in application of HACCP principles (articles 7-9 of Regulation (EC) 852/2004), developed by industry associations and standardization bodies based on the requirements indicated by Regulation (EC) 852/2004.

¹¹ On this point, it bears keeping in mind that CEN (<http://www.cen.eu/cen/AboutUs/Pages/default.aspx>) is a body that, thanks to the powers attributed by Directive 98/34/EC, lays down European technical standards for all productive activities (except for electrotechnology, which comes under CENELEC’s purview, and telecommunications, reserved for ETSI).

¹² The Italian standardization organization UNI (Ente Nazionale Italiano di Unificazione (<http://www.uni.com/it>)) is a private, non-profit association which carries out a regulatory activity in the industrial, commercial, and tertiary sectors (except for electronics, which is under the purview of CEI – Comitato Elettrotecnici Italiano). The website states that a standard is “a document that says ‘how to do things well’, guaranteeing safety, respect for the environment, and sure performance. According to European Directive 98/34/EC of 22 June 1998: a ‘standard’ is ‘a technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory and which is one of the following: *international standard (ISO) European standard (EN) national standard (UNI)*” (http://www.uni.com/index.php?option=com_content&view=article&id=361&Itemid=936&lang=it&limit_start=1). Standards, then, are documents that define the characteristics (size, performance, quality, safety, organization, etc.) of a product, process, or service, in accordance with the state of the art, and are the result of the work of tens of thousands of experts in Italy and around the world”.

¹³ In this case, it will also be necessary to see whether failure to comply with the aforementioned legislative requirements is on its own enough to prove the agent’s fault, or if this circumstance simply determines a presumption of fault, aimed exclusively at inverting the burden of proof borne by the damaged party.

¹⁴ It is to be noted how rarely case law has ruled with reference to the damage caused by the consumption of foods. Particularly important among these decisions is the famous Saiwa case, in which the Supreme Court recognized the manufacturer’s non-contractual liability on the basis of Art. 2043 of the Civil Code (Cass. 25 May 1964, no. 1270, in *Foto it.*, I, 1965, c. 2098). Specifically, in that setting, the Supreme Court judges stated that the merchant – which retailed foods contained in sealed packaging as received from the manufacturer (Saiwa biscuits, in the case in point) – is not to be held liable for the damage caused by ingesting these products when spoiled, if it is ascertained that the merchant bears no fault for this (such as, for example, poor conservation of the product). The Supreme Court (*Corte di Cassazione*) also found that once the merchant’s fault with regard to the sold product’s decay is ruled out, as in the case in

food legislation can also guide the interpreter in determining when a product is to be considered safe¹⁵ (Art. 114 of the Consumer Code)¹⁶.

In this regard, it bears noting that failure to comply with food safety regulations should be automatic proof of product defect; likewise, it might be argued that the fault of the party causing the damage¹⁷ is proven in all cases where the party has failed to comply with food safety regulations¹⁸. Given, then, that violation of food safety regulations should on its own suffice to prove operator fault or product defect, it remains to be seen whether compliance with these safety standards is enough to consider a product safe, or whether this circumstance means no more than meeting a minimum level of safety that does not automatically relieve the manufacturer of liability. In other words, it is a matter of seeing whether the food manufacturer can be shielded from liability merely by demonstrating having complied with the food safety standards, or whether it is the case that while compliance with these standards is indeed a presumption of an absence of product defect, proof of this compliance is not in and of itself enough to free the manufacturer of liability whenever it is found that the manufacturer could have concretely prevented the damage event. On this point, it is to be noted that the first

point, the judge can, in exercising his or her discretionary powers, follow a logical process of presumption to link the product's spoilage to its fabrication defect as the only possible cause. Also, again by way of example, with regard to the judgments concerning the damage caused by food products, it bears noting that more recently, the Justice of the Peace in Palermo (Giud. Pace Palermo, 04 March 2011, *La responsabilità civile*, 2011, 390), in applying the regulations concerning the manufacturer's liability (Art. 114 and following of the Consumer Code), upheld the claim made against a producer of sliced sandwich bread due to consumption of the defective product that was in a clear state of decay (beyond the aforementioned cases where the product's defect may be ascribed to the product's decay, case law has on other occasions held the manufacturer liable for the damage suffered by the consumer upon discovery of a foreign body in the food, or the explosion of a bottle cap (Cass. 20 April 1995, no. 4473, in *Resp. civ. e prev.*, 1996, 672)).

¹⁵ On this point, see also AL MUREDEN, *Il danno da "prodotto conforme". Le soluzioni europee e statunitensi nella prospettiva del Transatlantic Trade and Investment Partnership (TTIP)*, in *Contratto e impresa*, 2, 2015, 389, which notes how the upcoming conclusion of the Transatlantic Trade and Investment Partnership (TTIP) suggests expanding the scope of observation to a perspective even broader and more complex than the one that embraced only the European Union's juridical system.

¹⁶ PACILEO, *Il diritto degli alimenti*, cit., 151.

¹⁷ On this specific point, with reference to the damage caused by food consumption, consider for example the decision in which, following a case of food poisoning, the judges sentenced the defendant to compensate the plaintiff's damaged health, due to its "having negligently conserved and served to the plaintiff a portion of spoiled tuna, in violation of the hygienic regulations for the sale and administration of foods and beverages" (Tribunale di Milano, 18 March 2011, in *Redazione Giuffrè*, 2011).

¹⁸ In this regard, part of the literature has drawn the distinction of compulsory and voluntary standards, underscoring that it would be necessary to consider a harmful product that was not made in compliance with the imperative safety standards established for it to be defective, while if the good does not comply with the non-compulsory provisions of law or of the standardization bodies, or with the non-binding safety standards, this nonconformity will represent exclusively an element that the interpreter will take into account for the purpose of assessing the existence of the defect (DI MARTINO, *La tutela dei consumatori: sulla sicurezza e qualità dei prodotti, anche alimentari*, in *Scritti in memoria di Giovanni Cattaneo*, Milano, 2002, 537).

interpretation set out above – the one according to which compliance with technical standards on its own shields the manufacturer from liability – appears to favour the manufacturer which, in fact, can be confident of bearing no liability whenever it has complied with public law concerning food safety¹⁹. Moreover, this solution results in assuming more predictable risk²⁰ and therefore in lower insurance costs and a lower final price of the marketed good, thus stimulating competition among businesses. However, upholding an interpretation along these lines might discourage scientific research, given that manufacturers would be led to content themselves with the level of safety set forth by the technical standards (which, moreover, are not always up-to-date) because, in order to shield the manufacturer from liability, there is no need to place on the market products with safety levels higher than those established by the aforementioned standards.

This being said, our legal system, which tends to place more and more responsibility on the manufacturer, appears to adhere to the second line of interpretation: that is, although compliance with the provisions set forth by the technical standards may constitute a presumption of the product's safety, it does not, in and of itself, guarantee the manufacturer of being shielded from liability²¹. Although case law has few precedents

¹⁹ With reference to the products in general, see CARNEVALI, *Prevenzione e risarcimento nelle direttive comunitarie sulla sicurezza dei prodotti*, in *Resp. civ. e pre.*, 2005, 15 and following, according to which “compliance with harmonized EU standards means ‘safe product,’ and ‘safe product’ essentially means an ‘unflawed’ product pursuant to Art. 5, d.p.r. no. 224/1988.” In other words, according to the author, “the product in compliance with the technical standards to which the directives refer (and therefore ‘safe’) is capable of passing the test of Art. 5, d.p.r. no. 224/1988, as to the user’s or the consumer’s legitimate safety expectations, without prejudice to any glaring gaps in the technical standards.

²⁰ The importance of knowing the required safety level in advance is underscored by TRIMARCHI, *Rischio e responsabilità oggettiva*, Napoli, 1961, 50; COMPORTI, *Esposizione al pericolo e responsabilità civile*, Napoli, 1965, 20; ALPA, *Responsabilità dell’impresa e tutela del consumatore*, Milano, 1975, 289; CARNEVALI, *La norma tecnica da regola di esperienza a norma giuridicamente rilevante*, cit. 264 and following.

²¹ With reference to medical devices, see DI LORETO, *I dispositivi medici tra regolamentazione di sicurezza e responsabilità*, in *Danno e resp.*, 2007, 2, 193. On this topic, see also CARNEVALI, *Prevenzione e risarcimento nelle direttive comunitarie sulla sicurezza dei prodotti*, cit., 2005, 15; ID., *La norma tecnica da regola di esperienza a norma giuridicamente rilevante*, cit., 1997, 257, according to which “compliance with the technical standards equals presumed existence of the safety requirements established by the special law, which equals meeting the consumer’s legitimate expectations, which equals safe product.” According to the author, compliance with technical standards is only one element the judge must assess to identify the consumer’s “legitimate” expectations, and the presumption of an unflawed good in compliance with the technical standards may be overcome if, for example, new, supervening risks not provided for in the EC directives are shown to have arisen, or the failure to update the harmonized EC standards is demonstrated. On this point, see also CUFFARO, in *Codice del consumo*, 3 ed., 2012, 623, according to which the cause for exemption from liability established by Art. 118 letter d) is valid only in the case in which the defect depends exclusively upon compliance with compulsory standards or binding administrative measures, and finds no application in the case in which the law and the regulation set minimum safety standards (as normally takes place to obtain type approval or an authorization), since in these cases the manufacturer is fully able to introduce the improvements and innovations deemed necessary to make the product safe; MATASSA, sub. Art. 6 d.p.r. no. 224 of 24 May

concerning food products specifically – consider, for example, how the Supreme Court sentenced a soft-drink manufacturer to compensate the damage suffered by the plaintiff due to an exploding bottle cap, even though the good had been manufactured in compliance with the regulations in force²² – some rulings regarding other product types appear to side with upholding this line of interpretation²³.

In this regard, it should be noted that this solution – according to which compliance with safety standards, although representing a presumption as to the product’s “conformity,” does not automatically shield the manufacturer from liability – results in more litigation in this specific matter, and in less competitiveness among companies: since they cannot plan the expenses for conducting business in terms of compensating future damage, they will have to bear higher insurance costs – costs that will inevitably be carried over to the final price of the good. However, a line of interpretation aimed, as mentioned, at not exempting the manufacturer from liability in cases where the product has conformed to the technical standards, should give the manufacturer an incentive to invest more in scientific research and to place safer products on the market. From this specific standpoint, then, this line of interpretation appears, moreover, to be in line both with the spirit of European Community lawmakers whose aim is to provide the maximum protection for citizens’ health and well-being²⁴, and with what has been stated by some European legislators; for example, the French legislature has expressly stated that “*le producteur peut être responsable du défaut alors même que le produit a été fabriqué dans le respect des règles de l’art ou des normes existantes ou qu’il a fait l’objet d’une autorisation administrative*” (Art. 1386-10), with the consequence that a product may

1988, in *NGCC*, 1989, 564 and following; FRIGNANI, *Responsabilità del produttore: il progetto di direttiva CEE e gli ordinamenti degli stati membri*, in *Giur. piemontese*, 1985, 418.

²² Cass. 03 March 2005, no. 4662, in *Danno e resp.*, 2005, 678; in the case in point, the explosion of the cap on a bottle containing gaseous liquid had injured the victim’s eye.

²³ Thus, by way of example, in line with the orientation according to which compliance with safety standards does not relieve the manufacturer of liability for the damage caused by defective products, is a ruling by Tribunale di Milano against a toy pistol manufacturer for the damage caused by a minor (Trib. Rimini 31 December 2008, in *Danno e resp.*, 2009, 4, 432; specifically, in the case in point, the damaged party, in opening a toy manufactured by the defendant, injured his eye due to a shard of rigid plastic used for the packaging). Also arguing from the same perspective is a Tribunale di Pisa decision recognizing a motorcycle manufacturer’s liability, even though the product conformed to safety standards (Trib. Pisa 16 March 2011, in *Resp. civ. e prev.*, 2011, 10, 2108, with note by Carnevali, and in *Danno e resp.*, 2012, 67, with note by Bitetto); on those occasions as well, it was held that although compliance with these safety standards was a necessary condition for obtaining type approval or market authorization, it was not enough to shield the manufacturer from liability.

²⁴ See, for example, “whereas” clause no. 2 in the Regulation (EC) no. 178/2002, which states that “A high level of protection of human life and health should be assured in the pursuit of Community policies”; “The Community has chosen a high level of health protection as appropriate in the development of food law, which it applies in a non-discriminatory manner whether food or feed is traded on the internal market or internationally” (“whereas” clause no. 8).

be considered defective even if it complies with the technical standards²⁵. This is without considering that this solution – according to which compliance with public law should not be considered a prerequisite sufficient for automatically shielding the manufacturer from liability – is also consistent with the Restatements in the United States, which endorsed what are referred to as “per se principles,” affirming that violation of the so-called “product safety regulations” determines product defect per se (or is sufficient to ascertain the damaging party’s negligent behaviour), and compliance with “safety requirements” (referred to as “compliance with regulatory safety standards”), while proving diligence and the absence of product defect, does not represent a “conclusive issue,” given that the jury can always deem the manufacturer negligent, or the product defective²⁶.

II. The lack of individuals’ duty to take care of themselves.

The very circumstance that the manufacturer may be held liable even in cases where the goods are in perfect compliance with public law means, in fact, that our system aims to place responsibility upon the manufacturer, and to give it an incentive not to place on the market goods that, although in line with the item’s safety standards, may be harmful to the consumer’s health. And thus, starting from this perspective - aimed precisely at holding the manufacturer increasingly accountable for the goods it has placed on the

²⁵ IANNUCELLI, *La legge francese sulla responsabilità da prodotto*, in *Danno e resp.*, 1999, 383; DI NEPI, *Francia 1998 e disciplina europea della responsabilità da prodotto difettoso: è stato vero allineamento?*, in *Riv. dir. impr.*, 1999, 263; GHESTIN, *Le nouveau titre IV bis du livre III du Code civil «De la responsabilité du fait des produits défectueux»*, *JCP entreprise*, 1998, 148.

²⁶ *Lane v. R.A. Sims, Jr., Inc.* 241 F. 3d 439 (5th Cir. 2001) (Federal Railroad Safety Act); *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993); *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (D.C. Cir. 1984); *Stevens v. Parke, Davis & Co.*, 507 P. 2d 653, 661 (Cal. 1973); *Gable v. Gates Mills*, 784 N.E.2d 739 (Ohio Ct. App. 2003, according to which compliance with statutory regulation is relevant, and is probative of what a “reasonable consumer” expects, but does not immunize a manufacturer from liability); *Wagner v. Clark Equip. Co.*, 700 A. 2d 38, 51 (Conn. 1997), which states that “compliance with federal regulation may carry more weight with a jury than compliance with an industrial standard, because a federal regulation has the imprimatur of the federal government.” See also *Feldman v. Lederle Labs.*, 132 N.J. 339, 625 A.2d 1066 (1993) where, with reference to drugs, it is stated that compliance with federal rules in the matter of warning information on the use of pharmaceuticals is not enough to rule out the liability of the manufacturer, which ought to have adopted additional precautions and informed the consumer from this specific standpoint as well; *Wyeth v. Levine*, 555 U.S. No. 06-1249, March 4, 2009, according to which, again with reference to the damage caused by pharmaceutical products, it is stated that compliance with the standards established by lawmakers did not shield the manufacturer from liability. *Contra*, see *Miller v. Lee Apparel Co.* 11/8/1994, which denied compensation for the damage caused by a polyester garment that had ignited in a particular situation, given that the garment in question was in compliance with federal flammability standards; *Geier v. American Honda Company*, 529, U.S. 861 (2000), concerning the damage suffered by a driver due to the lack of an airbag installed in his car; the Court stated the principle according to which the manufacturer is not liable if federal law attributes to safety standards the role of “maximum limit” of safety (in the same sense, see also *Morgan v. Ford Motor Co.*, No. 34139 (W.V. Sup. Jun. 18, 2009).

market - the problem then arises of investigating whether our system ascribes relevance to the consumer's own responsibility as well; in other words, given that more rules under public law concerning food safety have resulted in more liability for the manufacturer – which, should it fail to comply with these rules, in addition to being held accountable under civil law, is subject to liability under criminal and administrative law as well –,²⁷ it is necessary to ascertain whether strengthening the technical standards (especially those aimed at informing consumers as to the characteristics of the foods they consume) has also resulted in expanding the responsibility of consumers who nowadays are more aware of the risks associated with the foods they consume than they were in the past. This investigation takes on particular importance following the introduction of the recent regulation governing food labelling²⁸, the goal of which is to make consumers increasingly better-informed as to the composition, origin, and nutritional properties of the foods they use²⁹; in fact, EC lawmakers, aware of the growing attention given to food products, which are considered potential risk factors for

²⁷ On this topic, see FERRARI – IZZO, *Diritto alimentare comparato. Regole del cibo e ruolo della tecnologia*, Bologna, 253.

²⁸ This is Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011, on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, in OJEU, 22 November 2011, L. 304. Application of the new labelling regulations is planned starting 13 December 2014, and, limited to nutrition labelling, starting 13 December 2016. For an initial examination of the regulations, see DI LAURO, *Nuove regole per le informazioni sui prodotti alimentari e nuovi analfabetismi. La costruzione di una "responsabilità del consumatore"*, in *Rivista di diritto alimentare*, in www.rivistadirittoalimentare.it; ALBISINNI, *The new EU Regulation on the provision of food information to consumers*, in www.rivistadirittoalimentare.it.

²⁹ In practise, the new regulations intended to broaden and strengthen the previous labelling provisions; in this regard, consider how, previously, "nutrition labelling" was merely optional, and became mandatory exclusively if the label or, more generally, the advertising communication, was making nutritional claims (such as, for example, reference to a given food's low calorie content) (Directive 90/496/EEC of the Council, of 24 September 1990, on nutrition labelling for foodstuffs, in OJEU, L. 276, 06 October 1990). The choice by European lawmakers to change the previous arrangement derives from the recent debate over nutrition which has led businesses to provide increasingly precise information on food products, and national authorities to support information projects on proper nutrition so as to encourage consumers to make well-informed choices. Nutrition information has become compulsory not only in light of the growing attention to nutrition, but also because the regulations appear to consider foodstuffs as potential health risks, and precisely for that reason labelling serves not only to describe the product, but as a sort of manual on how to use the item.

The new regulations governing the nutrition declaration apply starting 13 December 2016; Foods placed on the market or labelled prior to 13 December 2016 may be marketed until the stocks of the foods are exhausted. However, in the case where food industry operators provide nutrition information on a voluntary basis between 13 December 2014 and 13 December 2016, they shall comply with the rules on presentation, and with the provisions of the regulation (in other words, food industry operators may decide to conform to the new provisions governing nutrition information prior to 13 December 2014 instead of applying the regulations pursuant to Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, provided that each provision is complied with). However, the mandatory nutrition labelling (which is to say if a nutritional or health indication is ordered, or vitamins and/or minerals are added to a food) must comply with the regulation's provisions starting 13 December 2014.

human health, and to nutrition³⁰, have on the one hand required companies to supply more accurate information on the food products placed on the market, while on the other hand developing information projects on proper nutrition, to encourage consumers to opt for more carefully considered food/nutritional choices³¹. In other words, given the ever-closer linkage between certain lifestyles and the occurrence of certain diseases³² (for example, one may consider how obesity and excess weight are factors that have a decisive impact on an individual's health, or how nutrition can influence the occurrence of certain types of tumours³³), it is a matter of ascertaining whether consumers of food products, who are increasingly aware of the characteristics of the products they are using, bear a duty to adopt a healthy lifestyle, or whether the entire liability for the damage caused by the consumption of foods potentially hazardous to one's health must continue to be borne by the manufacturer. For example, consider the case in which a person feeds constantly on products that are particularly – and above all, widely known to be – unhealthy, such as junk food, the prolonged consumption of which may result in the occurrence of certain diseases, at times quite serious; by way of example, this class of possible cases includes that in which an individual chooses to consume particularly sugary or fatty foods, which may damage the individual's health, even seriously.

To examine this problem in greater depth, it is necessary to take a brief pause, shifting our focus for a moment to public law, and to note that, in this specific context, the lifestyles adopted by the individual are in certain aspects irrelevant; in other words,

³⁰ Therefore, from this standpoint, by way of example, the aforementioned regulation, for the purposes of simplifying the food labels placed on the market and making them more comprehensible, indicates what the labels' graphical features must be, and, starting 13 December 2016, requires companies operating in the food industry to inform the consumer as to the nutritional characteristics of the marketed product.

³¹ Consider, for example, how Italy's Ministry of Health has promoted the "Guadagnare Salute" ("gaining health") project aimed at improving the population's physical well-being. As concerns businesses, communication of the indicative daily amounts of energy and nutrients for the individual products ("*Guideline Daily Amounts*") has begun.

³² An individual's lifestyle is known to have a decisive impact on his or her state of health; consider, in fact, that, according to World Health Organization (WHO) data, 86% of the deaths and 75% of the healthcare expenditure in Europe and Italy are determined by chronic diseases that share four leading risk factors – smoking, alcohol abuse, poor diet, and lack of physical activity – as their lowest common denominator

(http://www.salute.gov.it/portale/temi/p2_6.jsp?lingua=italiano&id=659&area=stiliVita&menu=programma).

³³ The World Cancer Research Fund (WCRF), whose mission is to foster cancer prevention through research and by spreading the results of that research, has formulated some recommendations for preventing cancer: 1) stay lean throughout life; 2) limit the consumption of energy-dense foods and avoid sugary drinks; 3) base your diet mainly on foods of plant origin, with relatively unprocessed cereals and grains at every meal, and a wide variety of non-starchy vegetables and fruit; 4) limit intake of red meat and avoid processed meat; 5) limit alcoholic drinks; 6) limit consumption of salt and foods processed with salt, and avoid mouldy foods; 7) aim to meet your nutritional needs through diet alone (www.ccnetwork.it/ebp_e_obesita/files/.../Dieta_e_Salute__WCRF.pdf).

within our system, from the standpoint of public law, the individual's conduct appears to be of no importance, given that the individual is considered free to enjoy the self-determination of making his or her own choices, and thus even to follow unhealthy life models. To confirm this assumption, we may consider, for example, how, within our system – unlike what takes place in other juridical settings³⁴ – the individual's lifestyles are of no relevance for the purpose of the delivery of care by the Italian National Health Service, given that healthcare must be guaranteed to all individuals regardless of how they have led their lives³⁵; in other words again, even though life habits consciously chosen by the individual result in social costs that are transferred to society as a whole³⁶, the patient's failure to comply with “responsible” life models cannot, for the Italian National Health Service, be a criterion for establishing healthcare priorities when it comes to allocating resources. While this solution leads to results in application that may be unacceptable from the standpoint of popular sentiment (in fact, in a setting where resources are scarce, those that are employed to treat a person who has led an irresponsible life might be taken away to care for someone who has instead adopted appropriate behaviour informed by the principle of prevention), it bears stressing here that the reason why it does not appear possible to modulate medical care depending on the individual's life choices lies mainly in the circumstance that our legal system appears to contain no social duty for individuals to take care of themselves. In fact, except for exceptional cases justified by the need to protect a higher interest³⁷ (consider,

³⁴In this regard, see http://www.corriere.it/cronache/08_gennaio_02/santevecchi_0885b722-b901-11dc-aa63-0003ba99c667.shtml), where it is stated that, in England, Prime Minister Gordon Brown “conceived of a ‘contract’ between citizens and the National Health Service that put the rules of behaviour in writing. This is a ‘constitution with rights and responsibilities’ based on which patients, to receive State-provided care, will have to do their part to prevent disease. In practise, smokers may be asked to quit, and the overweight to slim down.” The article also points out that “The ‘charter of rights and responsibilities connected with access to the public health service’ immediately raised the spectre of penalties being levied on patients who failed to comply by making poor lifestyle choices. As things stand, about one out of ten British hospitals refuses to perform expensive [joint](#) surgery on obese patients, or orthopaedic surgeries on heavy smokers who risk complications. In the region of North Staffordshire, for example, prior to a routine operation, patients must demonstrate not having smoked in the previous three months, and must have a given body mass index”; it must be said here that in England, very poor dietary habits have become a plague on society: in 25 years' time, one half of the British population will be obese, and 86% of men overweight, if the trend is not reversed. Insurance companies have announced they have begun offering policies discounted 75% to those who exercise regularly.” On this topic, see also http://www.ncpa.org/sub/dpd/index.php?Article_ID=20671.

³⁵ The Italian Health Service's principles (Art. 1 of law no. 833/1978), beyond universality (healthcare must be guaranteed to all individuals without distinction of social conditions and income), also include that of equality: needs being equal, everyone is entitled to the same care.

³⁶ On this point, see MAGLI, *Diritto alla salute e stili di vita: La condotta del singolo può condizionare la modulazione del trattamento sanitario*, in *Contr. e impr.*, 2015, 6, 1316.

³⁷ Again by way of example, consider the recent trends – chiefly in the United States – towards giving women the duty to adopt a suitable lifestyle (“reasonable care”) during pregnancy. In some American

for example, compulsory health treatments)³⁸, from the standpoint of public law our legal system appears to require no duty of social solidarity to adopt a healthy lifestyle³⁹; it must be noted that even though health is understood not only as a right but as a collective interest (Art. 32 Const.)⁴⁰, the individual's right to enjoy free self-determination with regard to acts affecting one's own body, and thus one's own person (Art. 32, paragraph 2 and 13 Const.) prevails over this social interest. To put it yet again in other words, once more with reference to our system's lack of an obligation to follow a prevention-based life model, it may be appropriate here to point out that a reading of the third sentence of Art. 2 of the Constitution – in which the Republic “expects that the fundamental duties of political, economic and social solidarity be fulfilled” – may give rise to a principle of solidarity. By virtue of this principle, a person (understood as “*uti socius*”) – with the aim of increasing society's development and, in particular, of securing collaboration from all citizens in order to obtain essential goods of common interest (such as, for example, scientific research, promotion of art and culture, as well as healthcare)⁴¹ – is given reasonable limits justified by the need to safeguard the general interest in requiring each person not to maintain behaviour injurious to the rights of others⁴². What is to be specified here is that although health (and therefore the individual's adopted lifestyle which, in fact, has a decisive impact on his or her well-being) represents an interest for society as a whole given that the consequences of these

States, laws have been approved allowing the authorities to arrest and limit the personal freedom of pregnant women suspected of using substances (drugs, for example) that might harm the foetus: www.uaar.it/news/2013/.../usa-quando-diritti-feto-portano-carcere-donne). On this topic, see SUMMERER, *Libertà della donna e tutela del nascituro. Il conflitto materno-fetale nella prospettiva del diritto penale*, in *Il governo del corpo*, ed. Canestrari-Ferrando-Mazzoni-Rodotà-Zatti, in *Trattato di biodiritto*, directed by Rodotà-Zatti, Milano, 2011, 1623, which notes that in Italy, it has already been affirmed that in cases where there is a risk as to the birth of a healthy individual due to the behaviour maintained by the gestating mother, the judge may impose upon her all the requirements necessary to protect the unborn child” (see Trib. min. Firenze 28 August 2004, in *Ragiusan*, 2006, 263, in which, in applying this principle, the judges, to protect the unborn child, required the gestating mother – who was in grave psychiatric conditions – to follow the directives of the competent social service).

³⁸ ALPA-RESTA, *Le persone fisiche e i diritti della personalità*, Torino, 2006, 85, which notes that our legal system tends to limit healthcare treatment; consider, for example, the regulatory developments with regard to drug addiction, and the fact that while the 1975 law provided for mandatory treatment (when drug addicts refused the medical care and assistance they needed, they were subjected to compulsory hospitalization or home outpatient care by Court order), the new law has ruled out any form of compulsoriness. On this point, see also AMATO, *Obbligo di vaccinazione tra libertà di scelta dei genitori e interesse del figlio*, in *Famiglia e diritto*, 2014, 4, 372.

³⁹ SIMONCINI-LONGO, *La Costituzione Italiana – Principi fondamentali. Diritti e doveri dei cittadini. Commento agli artt. 1-54*, ed. Bifulco-Celotto-Olivetti, Torino, 2007, 664.

⁴⁰ In fact, as mentioned on a number of occasions, protection of health is translated into social costs that impact all of society.

⁴¹ Corte cost. 31 December 1993, n. 500, in *Giur. it.*, 1994, I, 322.

⁴² In other words, then, the individual cannot demand unlimited personal freedom, but is called upon to lend mutual aid and collaboration in line with the social solidarity that was expressly recognized by law for the first time in France's Declaration of the Rights of Man and of the Citizen.

decisions may have society-wide repercussions in terms of social costs⁴³, and despite the tendency, also followed by our own system, towards placing increasing emphasis on the importance of adopting healthy lifestyles⁴⁴, the aforementioned duties of social solidarity⁴⁵ do not seem to include a general duty to take care of oneself, or even the duty to adopt a diet that focuses on prevention⁴⁶; again in other words, even if the concept of solidarity can be broadly interpreted to infer other duties not enumerated in the Constitution, and given that establishing duties in addition to those constitutionally provided for remains the exclusive province of lawmakers (although not necessarily of the State)⁴⁷, it bears noting that our system does not appear to recognize an individual's social duty to "maintain him or herself in good health"⁴⁸, since, in the conflict between freedom of self-determination and the protection of physical integrity, the freedom to decide as to the acts that affect one's own body prevails.

Therefore, if our system, in light of the above considerations, despite recognizing a "right to health," may be said to include no clear "duty to be healthy," the individual then appears free to maintain those behaviours that have the effect of negatively

⁴³ Corte Cost. 16 May 1994, no. 180, in *Foro it.*, 1994, I, par. 1634, which states, instead, that "Requiring users of motorcycles to wear helmets is legitimate, because the state's interference in the sphere of the citizen's freedom is justified to protect the health not only of third parties, but of the individual himself, whose impairment from the standpoint of disabling consequences and death impact society as a whole in terms of social costs." As concerns the social costs associated with adopting an imprudent lifestyle, see MAGLI, *Diritto alla salute e stili di vita: La condotta del singolo può condizionare la modulazione del trattamento sanitario*, cit., 1316, where the problem is raised of investigating whether the individual's conduct may affect how the health service's care is delivered.

⁴⁴ In this regard, see the above-cited conv. Law no. 189 of 08 November, of legislative decree no. 158 of 13 September 2013 (urgent provisions to promote the country's development through a higher level of health protection). This law, in addition to introducing some "provisions in the matter of the sale of tobacco products" (which, for example, raised the legal age for tobacco sale to minors from 16 to 18 years), inserts into article 14-*bis* of law no. 125 of 30 March 2001 the following Art. 14-*ter* (Introduction of the prohibition of the sale of alcoholic beverages to minors), pursuant to which "Anyone who sells alcoholic beverages has the obligation to ask the purchaser, at the time of purchase, to produce an identity document, except in cases where the purchaser's adult age is self-evident. Unless the fact is a felony, anyone selling alcoholic beverages to minors under eighteen years of age shall be subject to an administrative fine of € 250 to € 1,000. If the violation is committed repeatedly, an administrative fine of € 500 to € 2,000 is applied, with the suspension of business activity for three months."

⁴⁵ These include, for example, the right/duty to vote (Art. 48 Const.), the duty to defend the country (Art. 52 Const.), and the duty to be loyal to the Republic and to uphold its Constitution and laws (Art. 54 Const.).

⁴⁶ SIMONCINI-LONGO, *La Costituzione Italiana – Principi fondamentali. Diritti e doveri dei cittadini. Commento agli artt. 1-54*, cit., 664.

⁴⁷ Art. 23 Const. authorizes the law to impose further duties of a personal or financial nature (such as, for example, the duty to lend assistance to an injured or endangered person (Art. 593 of the Criminal Code); pursuant to a proper interpretation of the aforementioned reservation of law, it may impose additional duties only when they are functional to achieving the principle of solidarity or other interests protected by the Constitution.

⁴⁸ PELAGATTI, *I trattamenti sanitari obbligatori*, Roma, 1995, 20; SIMONCINI-LONGO, *La Costituzione Italiana – Principi fondamentali. Diritti e doveri dei cittadini. Commento agli artt. 1-54*, cit., 664; GIUFFRIDA, *Il diritto all'integrità fisica: art. 5 c.c.*, in *Le persone*, III, *Diritti della personalità*, Torino, 2000, 71 and following.

impacting his or her own physical integrity, and his or her own life. This includes the behaviour of adopting imprudent, unreasonable lifestyles that may, over time, prove seriously hazardous to one's own health; an unhealthy diet is one such behaviour⁴⁹. What is more, a paternalistic system – in which the preservation of physical integrity is

⁴⁹ Moreover, again to confirm the aforementioned assumption – and thus the individual's bearing no duty of personal responsibility – with reference to the limits to be placed on the disposability/non-disposability of one's own body (on the point, see art 5 of the Civil Code, which prohibits acts of disposing of one's own body not only when in violation of the law, public order, or decency, but also when causing permanent damage to physical integrity), it must also be said that adopting imprudent life habits – including ill-advised diets – can indeed, as time goes by, cause permanent injury to the individual's physical integrity, even compromising his or her own life; however, not only does the legal system not impose upon the individual the duty to follow healthy life models, but – from an even more general standpoint – no obligation for a person to preserve his or her own life and physical integrity even seems to exist (VERONESI, *Uno statuto costituzionale del corpo*, in *Il governo del corpo*, cit., 140; CAVASINO, *La flessibilità del diritto alla salute*, Napoli, 2012, 182; *contra*, see DI PRISCO, *Concorso di colpa e responsabilità civile*, Napoli, 1973, 90, according to which “The code recognizes the principle of the protection of physical integrity as a two-way street: not only against offenses by others, but also against the acts of the subject him or herself”); indeed, our system protects these goods only against offenses by others, through recognition of a right of the person and not – except for exceptional cases justified by the need to protect certain higher interests – against the person him or herself by imposing an obligation of behaviour on him or her (DE CUPIS, *I diritti della personalità*, Milano, 1982, 146. With reference to the right to life and to physical integrity, see, among others, also RESCIGNO, *Personalità (diritti della)*, in *Enc. giur.*, vol. XXIII, Roma, 1991, 2; MESSINETTI, *Personalità (diritti della)*, in *Enc. dir.*, Milano, 1983, 358; ONDEI, *Le persone fisiche e i diritti della personalità*, Torino, 1965, 225; MATTEI-RUSCIA-ZANINI, *Diritto alla vita e diritto all'integrità fisica*, in *Diritti della personalità. Strategie di tutela. Inibitorie. Risarcimento danni. Internet, Trattato pratico-operativo*, ed. Ruscica, Padova, 2013, 275). Specifically, with reference to Art. 5 of the Civil Code, it has been observed that, in order to ascertain whether, with regard to acts disposing of one's own body, the principle of free disposition or that of non-disposability of physical integrity prevails, it would appear appropriate to draw a distinction between cases where the effects of the act of disposition are not limited to the subjective sphere of the affected individual, but involve third parties as well (and this may occur, for example, because, to carry out the activity itself, the intervention of third parties, generally medical personnel, is required – consider surgical operations, for example – or when the act itself is aimed at placing the body or part thereof at the benefit of third parties, as with transplants), from cases where the act of disposing of the body is carried out personally and directly by the individual, with effects limited entirely to his or her subjective sphere (ALPA-ANSALDO, *Le persone fisiche, sub. art. 5 c.c.*, in *Il Codice civile commentato*, directed by Schlesinger, Milano, 1996, 252-253. *Contra*, see DI PRISCO, *Concorso di colpa e responsabilità civile*, cit., 93, according to which Art. 5 of the Civil Code protects physical integrity against the attacks that the individual may commit against him or herself, and that might permanently impair his or her integrity); therefore, while in the first case the conflict between the freedom of self-determination and the protection of physical integrity must be resolved based on a judgment of merit of the interests pursued, which takes the individual concrete case into account, in the second case – that is, if the act is implemented directly by the agent and its effects are limited to his or her subjective sphere – this conflict may be defined more generally in favour of the prevalence of the freedom to make decisions about one's own body (ROMBOLI, *Sub art. 5 c.c.*, in *Comm. c.c. ed. Scialoja and Branca*, Bologna-Roma, 1988, 241; ALPA-ANSALDO, *Le persone fisiche, sub. art. 5 c.c.*, cit., 252); on the other hand, by following a different reasoning – that is, if we were to admit the existence of the individual's obligation to take action to preserve his or her own life and physical integrity (thus a prohibition against freely disposing of one's own body) also with regard to conduct maintained by the disposing individual, with consequences directly impacting his or her own subjective sphere – then, within our system, certain cases would have to be punished which, instead, represent expressions of a de facto freedom that the State must respect, and certainly cannot eliminate. Such is the case, as for example, with acts of self-harm (which, on the other hand, outside of the cases expressly determined under criminal law, are unpunished) as well as attempted suicide, which is by no means an offence of any relevance under criminal law (SEMINARA, *La dimensione del corpo nel diritto penale*, in *Il governo del corpo*, cit., 189; DE CUPIS, *I diritti della personalità*, Milano, 1982, 104; GIUFFRIDA, *Il diritto all'integrità fisica: art. 5 c.c.*, cit., 115).

necessary as a function of the public interest, and a person is considered subjected to the State's needs – might indeed admit a solution to this question that established a duty for the individual to maintain his or her life and physical integrity even in cases where it is a matter of the individual's direct actions, with effects impacting the individual alone (lifestyles, in fact); such a solution, however, which would impose upon individuals a duty to take care of themselves, is certainly incompatible with a system like ours, founded upon the principle of personalism⁵⁰, in which the person is placed at the centre of values, and within which the State has the duty to make an effort to guarantee the full development of the human personality⁵¹.

III. Towards recognition of the individual's duty of social solidarity to adopt reasonable lifestyles (Continued).

While, in terms of public law, our legal system tends to remove responsibility from the consumer (and indeed, there is no possible way to impose upon the consumer a duty of social responsibility to adopt appropriate lifestyles, or even to maintain a safe and healthy diet), to the contrary, from the standpoint of private law, it appears that the trend is towards ever-increasing accountability, not only for the manufacturer⁵² but for consumers themselves, especially in those cases where they have been adequately informed and thus placed in a condition of making free and well-informed choices. In other words, although our legal system generally accords to individuals the freedom of self-determination, in certain settings it tends to hold the individual more accountable, recognizing his or her duty to take responsibility for his or her own choices⁵³. To

⁵⁰ In other words, the suppression of the individual's freedom of self-determination with regard to the protection of physical integrity and health – even when said acts of disposition have no impact on third parties' juridical sphere and are carried out *manu propria* by the disposing party – would conflict with the very principles of the framers of our Constitution; in rejecting a nineteenth-century idea embraced by Fascism, according to which the interests of the State were to be protected before those of individuals, they preferred to give substantial precedence to the concrete person, with the consequence that the fundamental rights of individuals, unlike the rights functional to the collective interest, are guaranteed to the person regardless of the consequences for society as a whole (VERONESI, *Uno statuto costituzionale del corpo*, cit., 140).

⁵¹ ROMBOLI, *Sub art. 5 c.c.*, cit., 241.

⁵² Which, in fact, as pointed out above, runs the risk of being held accountable for the damage even if it has placed on the market a product in perfect compliance with the technical standards.

⁵³ In our legal system, the principle of personal responsibility is grounded in Art. 1227 of the Civil Code, whose first paragraph establishes the rule that compensation for the damage ascribable in whole or in part to the damaged party is to be denied or limited depending on the common causal link, while the second paragraph imposes upon the creditor a specific duty of proper behaviour, aimed at preventing the damage caused by the damaged party's negligent behaviour (CATTANEO, *Il concorso di colpa del danneggiato*, in *Riv. dir. civ.*, 1967, I, 460 and following.; COMPORTI, *Esposizione al pericolo e responsabilità civile*, Napoli, 1965, 87, nt. 111 e 194; SAPONE, *Il concorso di colpa del danneggiato*, Milano, 2007; CAFAGGI, *Profili di relazionalità della colpa*, Padova, 1996; FRANZONI, *L'illecito*, in *Trattato della responsabilità*

confirm this thesis, one need only consider, merely by way of example, the legal relevance given in tobacco litigation to the damaged party's conduct, and that, in addressing this problem, the Supreme Court has stated that while on the one hand the consumer's imprudent behaviour – and in particular his or her negligence as to adopting measures suitable to prevent the damage from occurring – has no bearing on the decision regarding fault or no fault liability, on the other hand said conduct is relevant for the purposes of determining compensation. Compensation, in fact, may even be entirely ruled out in all cases where the manufacturer can prove that this conduct stands as an independent and decisive causative agent in the relationship between tobacco retailing and the occurrence of disease. But even more recently, again with reference to claiming damages for tobacco-related harm, it has been stated that the class action seeking to hold the company liable for exercising the dangerous activity of manufacturing and selling cigarettes without adopting appropriate measures to prevent harmful consequences for consumers is inadmissible because it is patently unfounded: on the one hand, nicotine levels in cigarettes and the use of additives are respectively identified and authorized by European law; on the other, “standing between the cause-and-effect relationship between the activity of manufacturing and distributing cigarettes and the damage event is the behaviour of the smoker/consumer/damaged party, who must be fully aware of both the health risks connected with and the addiction caused by smoking (known since the 1930s and clearly marked on every pack of cigarettes)”⁵⁴. In other words, and in line with what has already occurred in legal systems different from our own (such as in the United States, in fact)⁵⁵, the case law referred to above bears witness to a principle of self-responsibility becoming increasingly established in our system as well. This principle aims to make the damaged party aware of his or her own decisions, especially when it is a matter of life choices clearly and widely known to be

civile, vol. I, 2° ed., Milano, 2010, 115, which notes that, in the matter of damage caused by the circulation of defective products, Art. 122 of Legislative Decree no. 206 of 06 September 2005 regulated contributory negligence in producing the damage between the actions of the damaged party and the manufacturer through reference to Art. 1227 of the Civil Code; the above-cited Art. 122 of the Consumer Code also aims to uphold the principle of the self-responsibility of the victim who has wilfully exposed him or herself to the danger).

⁵⁴ Trib. Roma 07 April 2011, in *Guida dir.*, 2011, 21, 20. See also App. Roma 22 January 2012, in *Giur. merito*, 7-8, 1577, which states that “if the smoker freely chooses to smoke while aware of the risks he or she is running, including that of addiction and dependence, he or she cannot complain of the harm suffered in that manner, given that, ultimately, he or she has wilfully chosen to acquire it.”

⁵⁵ For more on “Big Tobacco litigation,” see, among others, PRINGLE, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 *wm Mitchell l. rev.* 387 (1999); JENSEN, *From Tobacco to Healthcare and Beyond-A Critique of Lawsuits Targeting Unpopular Industries*, 86 *Cornell l. rev.* 1334 (2001).

harmful to one's health, like smoking⁵⁶.

This line of interpretation – which, to this writer, appears entirely embraceable in terms of aiming to hold the individual accountable for his or her own choices⁵⁷ – also seems consistent with that upheld in the United States with regard to the damage caused by consuming junk food; indeed, while on the one hand the United States legal system is admittedly tending to devote ever-increasing attention to problems associated with consuming unhealthy foods, on the other it bears stressing that public opinion, with reference to this specific context, has yet to change, and is still anchored to the idea that any person with average prudence knows that excessive consumption of fast food is harmful to one's health. In other words, as concerns the damage resulting from the frequent consumption of fast food, the attitude of lawmakers, judges, and – above all – public opinion is that while on the one hand the population's health is a social and economic problem of particular interest, on the other hand any individual's nutrition is thought to be a “matter of personal choice,” and thus consumers, who are well aware of the consequences of poor nutrition, must bear the costs in all cases where bad nutrition results in harm⁵⁸.

⁵⁶ Compensation of the damage was denied at the first instance in the “Stalteri Case,” since the existence of a cause-and-effect relationship between the consumption of cigarettes and the occurrence of the pathology was not held to be demonstrated, as tobacco consumption was only one of the potential risk factors (Trib. Roma 04 April 1997, no. 7697 in *Danno e resp.*, 1997, 750); *Eredi v. Schiaratura v. Philip Morris Corp. Serv. Inc. e Ente Tabacchi Italiani*, decided by Trib. Roma 11 February 2000, in *Corr. giur.*, 2000, 1639 (the second instance changed the final result of the judgments; see App. Roma 15 May 2006, in *Riv. dir. proc.*, 2007, 234); also following this orientation was Trib. Napoli 15 December 2004, no. 12729, in the case *R.E. v. Ministro della Sanità, B.A.I. Italia, Philip Morris Corporate Service Inc. e Philip Morris Corporate Services Inc. e Philip Morris S.p.A.*, *ibid.*, 2005, 645. Consistent with this is Trib. Roma, 04 April 2005, in *Dir. e giust.*, 2005, 793. On this topic, most recently see Trib. Milano 11 July 2014, in *Danno e resp.*, 2015, 174. Compensation for damage caused by smoking was also denied by Trib. Brescia 10 August 2005, in *Danno e resp.*, 2005, 1210; Trib. Roma 05 December 2007, in *Foro it.*, 2008, I, c. 985; Trib. Roma 28 January 2008, no. 1828, in *Danno e resp.*, 2009, 1079. In the literature, see CAFAGGI, *Immunità per i produttori di sigarette; barriere culturali e pregiudizi di una giurisprudenza debole*, in *Danno e resp.*, 1997, 753; FACCI, *Brevi considerazioni in tema di danni da fumo*, in *Contr. e impr.*, 1999, 944; DI MARZIO, *Danno da fumo passivo e nesso di causalità: giudici divisi, sentenze contrapposte*, in *Dir. e giust.*, 2005, 65.

⁵⁷ On this point, see CALABRESI, *Il costo degli incidenti e responsabilità civile: analisi economico-giuridica*, Milano, 1975.

⁵⁸ Precisely with this in mind, state lawmakers have passed “obesity legislation” according to which a “food provider is not subject to liability for injury or death for a person's long-term consumption of the food product.” Specifically, although the matter is unregulated on the federal level (as is known, two bills have been brought before Congress – the so-called “Cheeseburger Act” – aimed at shielding the manufacturer from liability for the risks associated with consuming junk food and the obesity issues that may arise therefrom), several American states have passed laws according to which food manufacturers and distributors cannot be held accountable for harm suffered by the consumer who has made long-term use of these foods; underlying these laws is the conviction that the problems related to consuming these foods are a “matter of personal choice” of the damaged party who – although aware of the harmful consequences of poor nutrition – continues to use said foodstuffs. On this topic, see, among many, PENNEL, *Big food's trip down tobacco road: what tobacco's past can indicate about food's future*, in 27

Therefore, in light of this perspective, to refocus our attention on our own system with regard to the damage derived from food consumption, it bears noting that, in this specific case as well, due relevance ought to be ascribed to the damaged party's behaviour, as well as to the lifestyles he or she has adopted; from that standpoint, precisely in order to incentivize a demeanour that is wiser and more targeted towards preventing the occurrence of the damage event, if the damaged party has negligently contributed to producing the damage the compensation should be assessed in accordance with the criteria pursuant to Art. 1227 of the Civil Code (applicable by virtue of the reference made by Art. 2056 of the Civil Code to torts liability as well) and Art. 122 of the Consumer Code⁵⁹. Thus, in light of these principles, in the decisions as to compensating the damage caused by consuming food products, the consumer's awareness of the health hazard the product may give rise to (consider, merely by way of example, the case where the party claiming damage has consumed biscuits he or she knows are spoilt), as well as anomalous, unpredictable, or excessive use of the food product (such as for example the case where the consumer overeats a given food which, if consumed in excess, may be hazardous to one's health) might be elements that can shield the manufacturer from liability⁶⁰. Again from the same perspective, also in the

Buff. Pub. Int. L.J. 101 2008-2009.

⁵⁹ On the point, see, among others, CATTANEO, *Il concorso di colpa del danneggiato*, cit., 460 and following; CAFAGGI, *Profili di relazionalità della colpa*, cit.; DI PRISCO, *Concorso di colpa e responsabilità civile*, Napoli, 1973; SAPONE, *Concorso di colpa del danneggiato*, Milano, 2007. A distinction must be drawn between the cases of fault set out above and cases where the consumer appears to have used the product abnormally and improperly in comparison with its normal use, since abnormal or unpredictable use (consider, for example, abuse or unpermitted use) by the consumer may also be an element capable of shielding the manufacturer from liability. Thus, for example, in the case of the swing set, the Supreme Court, although unable to apply the product liability law (which had entered force after the facts of the case), all the same found it appropriate to refer to them in relieving the manufacturer of liability. According to the Supreme Court judge, the investigation of the swing's safety had to be conducted with reference to the modes of use that may be considered normal, which is to say those suggested by the imagination and vivacity of its young users, but not those resulting from abnormal initiatives extraneous to the item's typical function (Cass. 29 September 1995, no. 10274, in *Danno e resp.*, 1996, 87; in *Foro it.*, 1994, I, 251; in *Resp. civ. e prev.*, 1994, 141, 517; in *Giur. it.*, 1995, I, 2, 323, according to which "The manufacturer of an article that has caused damage is to be exempted from liability, pursuant to Art. 5 of Legislative Decree no. 224 of 24 May 1988, when it turns out that the item's defect has been manifested in connection with a mode of use thereof that is not among those reasonably foreseeable by the manufacturer"; in other words, the consumer's behaviour – in this case, it was a twelve-year-old boy who seriously injured a finger – must be among those that the manufacturer could reasonably foresee in the abstract. In the case in point, the judges, having ascertained that the plaintiff, then a boy of twelve, had stood on the swing's armrest, held that this type of behaviour was not among those that the constructor of the product and the municipality could have reasonably considered foreseeable, and found that only in the context of such a behaviour could the swing's operation reveal the lack of safety that had given rise to the occurrence of the damage).

⁶⁰ Also from the same perspective is the case where the product's defect derives from the damaged party's behaviour; in this regard, consider for example the famous Saiwa case, which stated that, where there is damage derived from the ingestion of spoilt foodstuffs, the manufacturer must be held entirely liable, unless the state of product alteration could be found by the consumer with ordinary diligence (Cass. 25

case where the consumer complains of damage resulting from the adoption of an imprudent life model that he or she could have avoided through ordinary diligence (and thus by adopting a healthier lifestyle), the damaged party should receive no compensation from the manufacturer if the victim's conduct stands as an independent and decisive causative agent in the relationship between the food trade and the occurrence of disease, which is to say in the case where the party's actions are on their own enough to determine the damage and rule out the causal link with the defendant's conduct. Indeed, given these circumstances (and analogous logical/legal arguments may be made not only in the case of unwise and excessive use of foods rich in fats or sugar, but also, for example, in the case of alcohol abuse)⁶¹, the damaged party must be held accountable for having failed to base his or her own conduct upon the principle of personal responsibility through responsible behaviour and greater awareness, given that the dangers arising from the abuse of certain substances are part of the average person's patrimony of knowledge⁶²; it is in fact a well-known circumstance that certain food products (such as those high in fat and sugar)⁶³, while not capable of causing harmful situations per se, may still be hazardous if the consumer negligently abuses them through constant and repeated use over time⁶⁴.

May 1964, no. 1270, in *Foro it.*, 1965, I, parag. 2098). On this point, see also Cass. 10 November 1970, no. 2337, in *Resp. civ. prev.*, 1971, 550, in a case in which the blade of a paper cutter, due to a manufacturing defect in the safety device, had suddenly descended from its housing, injuring the worker who had imprudently – which is to say, without first cutting off the electrical current – placed his hands in the cutting area.

⁶¹ Trib. Roma 11 April 2005, in *Danno e resp.*, 2005, 631; Trib. Brescia, 10 August 2005, in *Danno e resp.*, 2005, 1210.

⁶² Trib. Roma 11 April 2005, cit.

⁶³ Consider, for example, how the consumption of very sugary or fatty foods raises blood sugar or cholesterol levels, which can in turn lead to stroke, heart disease, and diabetes.

⁶⁴ Trib. Roma 05 December 2007, no. 23877, in *Resp. civ. e prev.*, 2008, 9, 1863.