THE THYSSEN ACCIDENT COURT CASE

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THE ACCIDENT

The Turin plant of ThyssenKrupp, one of the most important European companies in the steel industry, faced a major workplace accident on the night of 5th December 2007. On the 5th line of the steelworks, some boiling hot oil spills caught fire and hit eight workers. Their workmates immediately called for rescue, but the fire extinguishers were empty and there were no other safety tool to put out the fire.

In the early morning of the next day the first worker died. Six other workers, seriously burned by the oil, died in the following days. The sole survivor and eyewitness was an injured worker, who gave evidence during the trial.

Following the accident, the CEO and five other company directors (the responsible for safety measures, the responsible for the plant and three other members of the company executive committee) were charged with criminal offences. The CEO was charged with involuntary manslaughter with recklessness (*dolus eventualis*) while the other five were charged with involuntary manslaughter by negligence (*culpa*) with the aggravating circumstance of foreseeability. Under the Italian law, the former crime is punished much more severely that the latter.

The company was also charged with criminal offences, according to the legislative decree 231/2001 (Corporate Governance Law), which provides serious economic and interdicting penalties.

The criminal trial only ended on 15th April 2011. The CEO was sentenced a 16 years imprisonment for involuntary manslaughter with recklessness (*dolus eventualis*), while the other defendants were sentenced to imprisonment from 10 years and 9 months to 13 years and 6 months for negligent manslaughter.

Moreover, the Court's decision included significant monetary compensation for the local authorities, associations and private individuals.

The company was required to pay a fine of 1 million euros, was denied access to funds and facilitations and was no more allowed to advertise its goods; furthermore, 800.000 euros were seized and the judgment was published on national newspapers.

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Only people working in the legal field can realise the **wide range of our imprudent behaviour**, or, in other words, the great quantity of cases in which "*the haphazard construction of the human mind*"[1] – together with its **unintended side** – makes us forget prudence, procedures and rules, often resulting in damages to other people. The awareness which we have today of the ancestral motives

[1] Cfr. MARCUS Gary, *Kluge. the haphazard construction of the human mind.* Italian translation: *L'ingegneria approssimativa della mente umana*, Codice edizioni, 2008, mainly pp. 79 and following.

of this phenomenon, which comes from the evolution of the human species, is not consoling. We are mainly programmed for on-the-spot decisions, taken in urgent situations in order to face a danger[2]. One of the main – and maybe most useful – functions of the law is, in fact, that of helping people to reduce damages caused by the involuntary side of the mind, or at least to ensure that these damages are paid.

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"***14th November 2011 at 3.03 PM***": this is exactly when the 464 pages of the judgement on the Thyssen case (2007) were delivered. The unusual precision of the statement of the Court, which goes as far as to indicate the exact minute of the delivery, underlines the importance of that event.

There have been different reactions to the first-instance judgement delivered by the Court.

There will be other occasions for in-depth comments. In this paper my aim is simply to stress **two aspects**, referring (obviously) to the facts as they were described in the judgement. Since the judgement is not yet a definitive one, there could of course be room in the future for further or different considerations, especially if, on appeal, the facts as outlined in the first-instance judgement will be partially or significantly modified.

The first aspect I will deal with concerns the **relevance of many points raised in the judgement in favour of the amelioration of safety standards in companies**. The decision deals with some specific issues which do not normally enjoy high consideration in judgements, but which are in fact of extreme importance in order to guarantee safety in working conditions.

The second aspect deals with the problem, specifically a juridical one, of the legitimacy of the conviction for **recklessness (*dolus eventualis*)** of one of the defendants. The others were instead found guilty of negligence (*culpa*), aggravated by the foreseeability of the event, as it often happens in workplace accidents. The Italian penal code only defines malice (*dolus*) and negligence (*culpa*), but not that specific form of malice which some scholars identify with recklessness (*dolus eventualis*). Recklessness occurs, in very general terms, when the defendant, explicitly accepting the risk that an unwilled event might take place, nonetheless decides to take action (or to go on with a relevant omission). **On this specific aspect**, I think, **the judgement was not convincing**. In my view, it is likely that it might be modified on appeal. I will briefly illustrate the reasons for this view and the motives for which I do not reckon necessary nor useful, in order to preserve safety, for the Court to widen the standards for recklessness in workplace accidents.

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Let us now consider the first of the above-mentioned issues. There are at least four parts of the judgment the close examination of which can be fundamental to help companies enhancing their level of safety.

[2] Cfr. BONCINELLI Edoardo, *Il male. Storia naturale e sociale della sofferenza*, Mondadori, 2007, pp. 54 and following, and DAWKINS Richard, *The God Delusion.* Italian translation: *L'illusione di Dio. Le ragioni per non credere*, Mondadori, 2007, pp. 183-184.

The first part concerns the violation of the **fundamental principles of quality management,** which, according to the judgement (see for example pp. 92 and following), has happened in the company. According to all quality schemes, the efficiency of a safety system mainly depends on the ability of the company NOT to hide the accidents ("***non-conformities***") which may occur. Instead, in high-quality systems accidents are considered as chances to improve (through the use of "***corrective actions***").

What emerges from the judgement, instead, is that, after the less serious accidents which had happened before, no action had been taken towards the improvement of safety conditions. The message of the judgement is as simple as important: the constant respect of the requirements provided by quality systems – with particular reference to those concerning the handling of "***non-conformities***" through appropriate and documented "***corrective actions***" – constitutes a fundamental prerequisite for the amelioration of the safety levels in companies. This is the case even if, as often happens, implementing these "***corrective actions***" requires boring, repetitive and apparently "bureaucratic" activities. Particular attention needs to be devoted to "**Near Misses**" (accidents that "almost" occurred), in order to reduce the number of (serious) accidents as well as to limit the responsibility of the company when a serious accident actually occurs.

Moreover, it is known, at least from Charles Perrow's research on "***normal accidents***"[3], that the vast majority of accidents depends on apparently irrelevant lacks of attention and inconveniences. Each and every of these banal events, if taken alone, is (would be) relatively easy to repair in the current safety procedures framework, but the unfortunate[4] occurrence of a situation in which many of these small accidents happen at the same time can generate highly negative consequences. These consequences, which testify once again the enormous importance of chance in human history[5], are nonetheless often (although unfortunately not always) avoidable through a series of boring and

[3] PERROW Charles, *Normal Accidents: Living with High-Risk Technologies*, Princeton University Press, 1999. The author illustrates the example of the accident to the nuclear power plant of Three Mile Island.

[4] The use of the adjective "***unfortunate***" in the text is not meant to underestimate the sometimes serious negligence issues which are often involved in accidents of this nature. It is a matter of fact that the concatenation of a long series of small inconveniences not connected to one another is due to a degree of bad luck.
However, this bad luck is not at all "unlikely", if one considers the high number of companies, situations, scenarios, periods of time in which a concatenation (unusual by itself) of a significant number of inconveniences might take place. Soon or after misfortune comes: it would be statistically very strange if this occurrence would not take place (on these concepts see, for the quantitative and statistical aspects, EVERITT Brian S., *Chance Rules. An Informal Guide to Probability, Risk and Statistics*, Pringer-Verlag, 1999 and MLODINOW Leonard, *The Drunkard's Walk: How Randomness Rules Our Lives*. Italian translation: *La passeggiata dell'ubriaco. Le leggi scientifiche del caos*, Rizzoli, 2009. On the juridical side an interesting analysis is that of PERINI Chiara, *Il concetto di rischio nel diritto penale moderno*, Giuffré, 2010. For these reasons we need to strive in order to adequately prevent misfortune from happening.

[5] The concept is obviously not a new one. Even Democritus warned: "*Everything existing in the universe is the fruit of chance and necessity*". This issue is developed in a masterpiece of philosophy of science (MONOD Jacques, *Le hasard et la nécessité. Essai sur la philosophie naturelle de la biologie moderne.* Italian translation: *Il caso e la necessità. Saggio sulla filosofia naturale della biologia contemporanea*, EST Mondatori, 1970), through an urgent appeal for humanity to responsibly realise its condition: "*Man must eventually wake up from his millenary dream to discover his complete solitude, his absolute strangeness. He now knows that, like a gipsy, he stands on the limits of the Universe where he is bound to live. It is a Universe which does not hear his music, which is indifferent to his hopes, to his suffering, to his crimes*" (p. 165).

repetitive corrective activities, which, altogether, are aimed at guaranteeing order and safety in complex situations[6].

The second part is linked to the first one, because it refers, once again, to a behaviour that, according to the judgement, was aimed at "***minimizing***" – **rather than at "*proactively managing*"** – the different problems that inevitably take place in a big company. According to the judgement, **the main and constant concern was the one of minimizing – and in some cases, even of "*hiding*" –** the gravity of what happened. Moreover, the judgement (pp. 102 and following) states that the application of the internal procedures – when not concerning extremely serious accidents – implied the retardation of the authorities involvement: in fact, the alert of the fire department only took place after a complicated series of internal communications. The latter is a practice which is hard to conciliate with the **precautionary principle** – today proclaimed also by the Treaty of the European Union – which prescribes, in objectively uncertain cases, to "***err on the safe side***"[7]. If, in the many (though not serious) previous accidents, the fire brigade had always been involved, at least a part of the existing shortcomings of the fire prevention system would have probably been outlined. Consequently, the mortal accident could have maybe been avoided, with an evident advantage not only for the victims and for their families, but also for the company and for its managers.

The shortcomings in the training of workers (see especially pp. 139 and following), which, according to the Court, contributed to an aggravation of the dimension and consequences of the accident, constitute the third issue upon which I wish to reflect. According to the judgement, many workers did not have the necessary and specific training for the accomplishment of their tasks. Furthermore, **the training courses were often organized outside the regular working hours, making it consequently impossible for the company to oblige their workers to take part in them**. This seemingly happened thanks to a **"*tacit agreement with the trade unions*" (!),** which wished to avoid that, because of the training courses, some workers would lose the "shift allowance". Once again, it is evident that the amelioration of the safety standards often depends on activities which are boring, repetitive and not pleasant (like training courses), activities which the employer is obliged to promote and to make mandatory for his employees. Not even the representatives of the workers can be exonerated from a self-critical reflection upon what is possible and necessary to do in order to ameliorate safety standards. The training needs to cover not only the "technical" aspects of safety, but also the psychological ones, like the reasons behind our systematic forgetting of safety rules and procedures ("*this will never happen…*").

[6] This aspect has been recently investigated – peculiarly outlining the notable importance of the "*checklists*" - by GAWANDE Atul, *The Checklist Manifesto: How to Get Things Right*. Italian translation: *Checklist. Come fare andare meglio le cose*, Einaudi, 2011.

[7] On the precautionary principle see BUTTI Luciano, *The Precautionary Principle in Environmental Law*, Giuffré, 2007.

Finally, the judgement holds (see pp. 202 and following) that there has been a direct causal influence between the **inadequate estimation of the risks** and the serious fire which took place. The Court has conducted an in-depth and scrupulous analysis of the document of risk assessment, looking for specific flaws in its coherence. The aim of the incoherence was, according to the judges, to reach an **estimation of a "medium" rather than a "high" risk** for the production line which was later concerned with the accident. Regardless of the merits of the conclusions reached on this point in the judgement, it is possible to draw from it a fundamental lesson for the employers: the document of risk assessment does not constitute a bureaucratic necessity which can be entirely left to an "expert", without any check of coherence by the company top management. The Thyssen judgement suggests that **safety needs to come from the top management.**

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Let us now consider the second aspect which I outlined in the premise: the problem of **recklessness** (*dolus eventualis*). In the Thyssen case, one of the defendants was convicted of involuntary manslaughter with recklessness (*dolus eventualis*) rather than of (conscious) involuntary manslaughter by negligence (the latter was instead the conviction for all other defendants).

In the long part of the judgement devoted to this aspect (pp. 321 and following), the Turinese Court correctly gave an extensive account (pp. 324-327) of an essential part of the most recent relevant judgement of the *Corte di Cassazione* (the Italian Supreme Court) on the matter (**Cass. Pen., 15th March 2011 n. 10411**)

Now, **seen the above-mentioned judgement** (from which the quotations below are taken), **I reckon recklessness (in the form of *dolus eventualis*) to be very hard to find in the Thyssen case**.

In fact, according to the *Corte di Cassazione*:

- Merely "*accepting the risk*" is not by itself a sufficient proof of the existence of "*recklessness (dolus eventualis)*" ("*The representation of the entire typical fact as probable or possible is present both for recklessness and for conscious negligence*").
- In any case, recklessness (in the form of *dolus eventualis*) implies that the acceptance of risk by the individual was formulated "*in terms of high probability*".
- Consequently – and this is the most relevant aspect – "*the distinguishing criterion has to be found in the individual will*", meaning that, **while in the case of conscious negligence "*picturing the eventuality of the fact occurring as certain would have stopped the individual from taking action*", in order to convict the individual for recklessness (in the form of *dolus eventualis*) it must be proven that the defendant "*would have taken action even if he had had the certainty that the fact would take place*"[8].**

[8] This is the so-called "Frank formula": see MARRA Gabriele, *Regolazione del rischio, dolo eventuale e sicurezza sul lavoro. Note a margine del caso Thyssen*, in http://www.puntosicuro.it/sicurezza-sul-lavoro-cat-3/sentenza-thyssen-dolo-eventuale-sicurezza-sul-lavoro-art-10995/, especially p. 20.

This last requisite, namely the proof that the defendant **"*would have taken action even if he had had the certainty that the fact would take place*"**, though clearly expressed in the part of the judgement of the *Corte di Cassazione* which was quoted by the Turin Court (see p. 326), is not analysed in the Turin judgement at all. It is also hard to understand what evidence can demonstrate that the CEO "*would have taken action even if he had had the certainty that the fact would take place*". On the other hand, several aspects of the accident (for example the alarm sent during the "*board*" of 28th August 2007: see p. 315 of the judgement), show that, just as the other directors of the company, the CEO was also erroneously convinced that, until the (already planned) closure of the Turin plant, serious accidents could be avoided, notwithstanding the existing safety shortcomings. **I thus reckon it reasonable to hypothesize that, on appeal (Court of Appeal or *Corte di Cassazione*) recklessness (*dolus eventualis*) might be excluded, and substituted with (gross) negligence[9].**

We finally need to stress that **excluding recklessness is not incompatible with a strict interpretative approach towards workplace accidents.** It is sufficient to consider the following aspects: a) risk of invalidity of insurance – under the Italian law - in the case of conviction for recklessness; b) inapplicability (at the current state of the Italian legislation) of the administrative responsibility of organizations (legislative decree n. 231/2001) when all individuals concerned in the trial are convicted for a manslaughter involving a level of *mens rea* higher than (even gross) negligence for violation of the norms on safety on the workplace (while this form of responsibility of organisations is applicable in the case of any conviction for negligent manslaughter).

I have already stated that I consider possible that, on appeal, the existence of **recklessness** could be excluded, thus reallocating the accident in the more appropriate framework of **negligence**, with the potential aggravating circumstance of foresight. Moreover, for any conclusion this case may have, the **jurisprudence** on the matter of safety and illnesses on the workplace seems to have recently headed towards **a more balanced and realistic outcome**. Concerning this aspect, a judgment of the *Corte di Cassazione* needs to be outlined. Its importance has not been, in my opinion, sufficiently stressed. I am referring to the decision in ***Cassazione penale*, IV section, 3rd December 2012 n. 43786**, concerning an accident with exposition to asbestos fibres. This judgement, differing from previous interpretations, and following U.S. jurisprudence (the well-known ***Daubert*** case), brings forward the following principle of law:

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[9] Following its previous decision of March 2011, quoted above in the text, the Corte di Cassazione has intervened again on the subject, with remarks which were not always fully consistent with each other. For example:

- one of the widest possibilities to find recklessness can be found in Cass. n. 25668/2011 ("*In order to convict…recklessness is sufficient. Recklessness can normally be found in relation to the individual will, but it can also concern the intellectual element, when the individual consciously refuses to verify the existence of the elements which would make his behavior a criminal one, thus accepting their existence. For the verification of the damage caused by the accident, it is necessary and sufficient that … the acting subject foresees the probability – or even the mere possibility – that the accident may cause damage to the people … and nonetheless, undertaking the risk, decides to act.*") ;
- on the other hand, a more restrictive attitude, in line with our thesis and with the doctrine outlined in the note n. 10, is supported by Cass. n. 25960/2011 ("*Recklessness … requires a psychological attitude which, while not reaching certainty, is nonetheless above mere suspect. More than a mere … careless, negligent, or disinterested attitude is required; it is necessary to have an unequivocal situation, which imposes … a conscious choice … between action and non-action. This occurs when the individual, foreseeing the eventuality of the criminal aspect of the action, would not have acted differently even if he/she would have been certain that the criminal aspect would occur*").

"*In order to justify the existence of the causal chain between an exposition and a mortal accident, the scientific theory used by the judge needs to enjoy a* ***prevailing and shared consensus*** *in the scientific community*"[10].

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Concluding with a glance to the past, it may be useful to stress that **the idea of a particularly serious negligence, characterized by the acceptance of the risk, and thus dangerously close to the boundaries of recklessness and thus malice, is not of recent birth. And it was not born with law**. As Umberto Curi, professor of History of Philosophical Thought at the University of Padova[11], clearly explains, the first tragic hero for negligence – or for mistake – was **Oedipus**. True, Oedipus was not really "conscious" of the fact that he was committing parricide and incest. But he was not completely unconscious of his crimes either, because he had been "notified" of the risk and he had accepted it. Before killing Laius and marrying Jocaste, in fact, Oedipus had been told by the oracle his destiny, according to which he would kill his father and marry his mother. Thus, he did not fall in misfortune because of vice or evilness, but because of a mistake, because of an underestimation of risk. Or, as we would say today, because he did not listen to his lawyer, or because he did not ask him all the pertinent and necessary questions[12]. Would Oedipus be charged with negligence or recklessness today?

What is certain is that no literary work better than Sophocles' tragedy reveals the involuntary and obscure, but not necessarily innocent, side of human mind.

[10] On the subject dealt with in this judgement, see my contribution: *Il ruolo delle norme tecniche e delle evidenze scientifiche nell'individuazione delle responsabilità da inquinamento: orientamenti della giurisprudenza*, in *Rivista giuridica dell'ambiente*, 2002, ff. 3-4, p. 477.

[11] See. CURI Umberto, *Meglio non essere nati. La condizione umana tra Eschilo e Nietzsche*, Bollati Boringhieri, 2008, pp. 179-184.

[12] See NATOLI Salvatore, *Edipo e Giobbe. Contraddizione e paradosso*, Morcelliana, 2008, pp. 23-25. The author notices how Oedipus did not have the courage to "*urge the oracle*" with precise questions. Instead, he quickly ran away after having heard the vague omens.