The Eternal Dilemma Between Possible Intent and Conscious Fault: A Recent Case-Study in Italian Jurisprudence

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Abstract

The essay tends to identify the conceptual, substantive and procedural boundary that distinguishes possible intent and conscious guilt, since the difficult definition of intent in criminal doctrine, is referred to the psychological discipline, which has so far provided uncertain information and assessments. The research will be structured through the response to the following arguments. The question will be about the probability of the event or the reasonable doubt about the event represented by the agent. Which of the two criteria is preferable? What is the difference between probability and doubt of the event? What does it mean to "accept the event"? In the expressions "accept the risk" and "accept the event" the term acceptance has different meanings. It is useless to distinguish acceptance of the risk and acceptance of the event if the same evidence is then sufficient to prove both the former and the latter. Willfulness can only occur when there is acceptance of the risk of an event? How can the risk be translated in terms of reasonable doubts? On these questions we will try to clarify and achieve the objectives set out above.

Keywords*: possible intent, theory of crime, causality, doubt, will*

I. Introduction

A young man in his twenties is wounded by a gunshot in his girlfriend's house. Her father shot him, inadvertently, as the result of a joke. The bullet has pierced the young man in correspondence of the middle third of the right arm, following an unfortunate parabola: from the shoulder to the lung, up to the heart, without escaping. The boy is still alive, but none of those present in the house, almost all belonging to the family of the girlfriend, call the emergency room: if not later, to warn that a man is sick. They are also reported to have false information about the causes of the illness, both on the phone and on the arrival of the health workers. They ignored the decisive circumstance and transported the patient to the nearest emergency response structure, unable to reconstruct the real dynamics of the event. It is already late when the doctors of the structure, after further incomprehensible delays, learn the truth from the responsible. A desperate transport to the hospital began but the accumulated delay, compared to the entity of the injuries, caused the death of the young man.

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The facts can be divided into phases. In the first phase is the culpable shot that triggered the lethal causal course, i.e. the culpable action capable of killing, attributable only to the perpetrator of the wounding. In the second phase, on the other hand, there is the subsequent concurrent conduct, both omissive and active, which hindered the effective rescue of the injured person, resulting in his death. The relevant issues in terms of legal qualification relate solely to the second phase.

The question arises as to whether the conduct as a whole should be qualified, in the regulatory assessment, as an "omission" (i.e. "omissive" action) or as an "action" (i.e. "commission" action); whether, in the event of opting for "omission" (i.e. "omissive" action), a position of guarantee can be established, with a related obligation to prevent pursuant to Article 40 C.p. (Italian Criminal Code), or whether such omission can at most integrate the extremes of the case of failure to provide assistance (if necessary, aggravated pursuant to Article 593, paragraph 3, C.p.)[2]; whether, having affirmed the existence of a position of guarantee and the correlated obligation to prevent pursuant to Article 40, paragraph 3, C.p., the death of the victim was intentional, by way of possible willful misconduct, on the part of the identified guarantors, with consequent liability for voluntary homicide by omission (Articles 40, paragraph 2, C.p. and 575 C.p.)[3].

II. The case-study

For the Assize Court of Rome between the obligation to take action (Article 593 C.p. and the obligation to prevent (Article 40 C.p.) there is a merely quantitative distinction: the objective seriousness of the fact and therefore the seriousness of the injured person's condition, his not occasional finding, the performance of mendacious acts, the degree of deviation from the dutiful conduct makes it possible to go from omission to assist to manslaughter, to go "well beyond" the milder offence, integrating the more serious offence, even in the face of a duty with identical content.

However, the origin of the obligation to prevent does not depend on the "seriousness" of the omission, nor does the position of guarantee have a quantitative, rather than qualitative, dimension; the same applies to the differences between the obligation to prevent and the obligation to rescue, which are not situated at the level of the seriousness of the injuries, the occasional nature of the finding or the degree of remoteness from the dutiful action, but are rooted in the decisive watershed of the position of guarantee.

The judgement of first instance had in fact linked the obligation of guarantee with the duty to ensure adequate assistance to anyone who comes across an injured person in need of assistance, but with considerable ambiguity and inaccuracies:

1) for the apparent reference to a particularly serious infirmity as the generative element of the duty of guarantee;
2) because of the requirement that the person must come across the injured person 'not occasionally';
3) because it was stated that the defendants had engaged in conduct that was 'not only omissive within the meaning of Article 40 C.p., but also commissive

[2] G. Marinucci, E. Dolcini, *Corso di diritto penale* [Criminal Law Course], IIIrd ed., 2001, p. 501; M. Donini, *Teoria del reato*, in Digesto/pen., XIV, 1999, p. 7.

[3] F. Bricola, *Teoria generale del reato* [Theory of the crime], in Noviss. Dig. Ita., Utet, Torino 1973; G.P. Demuro, *Studi di diritto penale. Il dolo* [Criminal law studies. The willful misconduct], vol. 1-2, Giuffrè, Milano, 2010.

by omission, in terms of the failure to provide information to the institutional guarantors, as if the expressions used referred to different institutions in Italian legal system;

4) for the conclusion that the ascribed conduct, "seriously negligent, imprudent and damaging to the rule that imposed an obligation of guarantee, went "well beyond the mere omission to provide assistance, rather integrating "the more serious crime under Article 589 C.p.

On the contrary, the grounds of the appeal identified the basis of the position of guarantor in the very general principle of *neminem laedere,* which would have imposed a different conduct from the one held due to the seriousness of the dangerous situation and its foreseeable deterioration.

In addition, on the basis of constant case law, the defendants could well have activated even lesser powers than those of enforcement, in particular powers of solicitation. It was concluded that the defendants had a precise and autonomous obligation to guarantee that they would immediately come to the aid of the injured person and would not conceal any useful circumstances from the rescuers[4].

Finally, the Court of Cassation objected that the basis of the position of guarantee cannot be rooted in the general duty not to damage the legal sphere of others", because this duty is imposed on any member and, therefore, has "no selective capacity for the constitution of qualified obligations to act[5]. On the one hand, in fact, the aggravating event referred to in paragraph 3 of Art. 593 C.p. must be linked by an etiological link with the previous omission, while, on the other hand, the principle of culpability remodelling every hypothesis of objective responsibility in terms of responsibility by fault[6]. This is the case for involuntary manslaughter, for the offence referred to Article 586 C.p. and for offences aggravated by the event, including the case referred to Article 593, paragraph 3, of the C.p., which requires that the aggravating event of the failure to provide assistance must also be imputed on the basis of negligence, like the corresponding constituent element of manslaughter.

The motivation starts by emphasizing a fact: the non-ordinary survival of the victim in the face of a gunshot wound, with the consequence that "for a long period of time. In short, the entire motivation is constructed according to an escalation of factual and logical references, whereby the normative consistency of the position of guarantee is framed with increasing definition as the legally relevant evidence grows[7].

On a subjective level (Article 593 par. 2 C.p.), the Court of Assizes of Appeal had rejected the exception, stating that the case in question punishes anyone who fails to provide assistance after having "found" an injured person, but not anyone who, through his own conduct, is responsible for aggravating the injured person's condition

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[4] Corte d'appello di Roma, Sez. I, 29 January 2019, (dep. 1st March 2019), no. 3, in Giurisprudenza Penale Web, 2019.

[5] Cass. pen., Sez. I, 7 February 2020 (dep. 6th March 2020), P.M. e altri [P.M. and others], n. 9049, *La Cassazione sul caso Vannini: i rapporti tra omicidio mediante omissione e omissione aggravata dall'evento morte in un noto caso di cronaca* [The Supreme Court on the Vannini case: the relationship between murder by omission and omission aggravated by the death event in a well-known news cas], in Sist. Pen., 23 April 2020.

[6] M. Donini, *Il dolo eventuale, fatto-illecito e colpevolezza* [The eventual willful misconduct, unlawful act and culpability], in Dir. pen. cont. no. 1/2014.

[7] G. Ubertis, *La ricerca della verità giudiziale* [The search for judicial truth], in G. Ubertis (ed.) *La conoscenza del fatto nel processo penale* [The knowledge of the fact in the criminal trial], Milano, 1992, p. 15, P. Ferrua, *Il 'giusto processo'* [The 'due process'], Bologna, 2012, p. 71.

by violating the rules of caution imposed by the position of guarantor (second instance ruling).

The Court of Cassation rejected this assumption: the defendants had in fact "found themselves" in front of an injured person because the requirement of "finding oneself" is not to be understood in a literal sense, still presupposes only direct material contact with the object of the finding, which is independent of prior co-presence. Thus, the defendants ran towards the bathroom when they heard the shot and "found" a wounded man there; and the same applies to the shooter because, if the shot was fired accidentally, he "must have been surprised by an event that was not foreseeable for him and, like the others, found himself in the presence of a wounded man".

III. Possible intent between doctrine and Italian jurisprudence

Conduct, action, omission, duty of assistance and duty of guarantee constitute the gateway to willful misconduct (or possible intent), i.e. the person who culpably causes an injury must, for that reason alone, attempt to mitigate the consequences; otherwise, he is liable as if he had intended the initial injury, i.e. as if he had been the guarantor of the injured good from the outset.

The term "possible intent" generally means the lack of a contradictory relationship between will and event; in fact, the subject decides to act even at the cost of causing a criminal event through this corollary: "it may be so or otherwise, it may happen so or otherwise, in any case I act"8. The risk is accepted following a deliberation with which the agent consciously subordinates a specific legal good to another9.

The conscious guilt is configured instead when the sure forecast of the damaging consequence would have determined the abstention from the action, that is when the acceptance of the risk, by the subject agent, is a subjective attitude referable to the concept of mere imprudence or negligence[10].

However, these definitions do not calm the doctrinal and jurisprudential debate regarding the general theory of "eventual" culpability[11]. Doubts have been fueled first of all by the *ThyssenKrupp* sentence (Cass.pen S.U.38343/2014) which establishes the revaluation of the volitional profile of the intent through balancing, the recognition of the probative moment[12]. Well, the judgment opens the season of the practice of the indicators of the possible intent that change according to the 'offense of reference and it is a clear example of the first judgment of the Court of Assizes of Appeal of Rome in the case *Vannini* subsequently annulled with reference by the Supreme Court and reformulated by the same Court of Appeal. Beyond the outcome of the proceedings, it is interesting to note that in the first sentence of the Court of Assizes of Appeal in the case in question, Frank's formula was adopted. This formula is a hypothetical judgement on what the agent's behavior would have been if he had foreseen the event as certain[13].

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[8] G. Cerquetti, *Il dolo* [The willful misconduct], Giappichelli, Torino, 2010.

[9] L. Eusebi, *Il dolo come volontà* [The willful misconduct as act of will], Morcelliana, Brescia, 1993.

[10] K Jaspers, *La questione della colpa* [The question of guilt], It.transl., Milano, 1996, p. 52.

[11] R. Bartoli, *Luci ed ombre della sentenza delle Sezioni unite sul caso Thyssenkrupp* [Lights and shadows of the ruling of the Joint Sections on the Thyssenkrupp case], in Giur. It., 2014.

[12] G. Fiandaca, *Le Sezioni Unite tentano di diradare il "mistero" del dolo eventuale* [The United Sections try to clear up the "mystery" of possible fraud], in Riv. It. Dir. Proc. Pen., 2014.

[13] A. Aimi, *Dolo eventuale e colpa cosciente: il caso Thyssen al vaglio delle Sezioni Unite* [Possible willful misconduct and conscious negligence: the Thyssen case under consideration by the United Sections], in Dir. Pen. Cont. no. 1/2014.

Going back to the *Thyssen* sentence, in order to confirm the culpability of the possible intent, it is essential to be able to affirm that the agent would not have held back from the illegal conduct even if he had been aware of the certain occurrence of the event according to the First Frank formula. In other words, the prediction of an event, in terms of possibility, integrates malice only when the prediction of such an event in terms of certainty would not have held back the agent, nor would it have assumed the significance of a decisive counter-motive. Therefore, in order to sustain a responsibility by way of possible malice, it should be affirmed that in the *Vannini* case, from the beginning, from the moment of the shooting, there is a link of awareness-acceptance of the death event; however, the requests for help made in an unacceptable and mendacious way would remain meaningless. Frank's Second Formula guides the judge's assessment through a hypothetical judgment of a particular psychological state. The mental state is relevant for malice if it is such as to induce the subject to act even in the face of a substantial change in the factors relevant to the decision, such as the passage from the possibility or doubt to the certainty of the occurrence of the damaging event[14].

By accepting the risk, one accepts the event: this would seem to be the decisive criterion for the distinction between possible intent and conscious fault[15].

IV. The Italian Supreme Court's opinion

The ruling of legitimacy raises three issues: a) action/omission; b) position of guarantee; c) possible intent which are interconnected. In fact, the configurability of the position of guarantee is only relevant where the first alternative is dissolved in the sense of "omission", because in the case of "action" the lethal event is not lethal, because in the case of "action" the lethal event can be charged on the basis of the mere etiological link: whoever causes the death of a man by means of an active conduct is liable for murder regardless of the circumstance that he has or has not assumed the role of guarantor[16].

Similarly, the question relating to the possible intent is only relevant by affirming the existence of the position of guarantee. In the absence of a valid position of guarantee, in fact, the causative inaction of death integrates at most the case of omission to rescue (art. 593 C.p.), within which the event. Art. 593 C.p., together with the aggravating circumstance of paragraph 3, stifles the temptation of the judge: not coming to the aid of the unfortunate victim is something different from the will to kill, just as the duty to help is something different from the obligation to guarantee.

In particular, the Court of Cassation maintains that the same resulted, in a unitary consideration and despite the intertwining of active and omissive conduct, in the omission of a timely solicitation of useful assistance It is now necessary to verify the validity of such an assumption, especially in the light of the false information reported by the protagonists of the case to the health care workers. should the active interruption of another person's life-saving causal course be equivalent to the omitted

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[14] O. Di Giovine, *Diritto penale e neuroetica* [Criminal law and neuroethics], Padova, Cedam, 2013

[15] D. D'Auria, *Fin dove il dolo eventuale? Qualche riflessione, traendo spunto dal "caso Thyssenkrupp"* [How extent is the willful misconduct? Some reflections, drawing inspiration from the "Thyssenkrupp case], in Leg. Pen., 2013.

[16] F. Antolisei, *Manuale di diritto penale. Parte generale* [Criminal law handbook. General part], Milano, 2003.

interruption of a lethal causal course? Who prevents the rescuer from "rescuing", with violence, threat or deception, and puts in place an "active" or "omissive" conduct?

This question, which does not seem to torment Italian doctrine, is the subject of some foreign studies[17]. There is an almost unanimous solution that the "interruption of the rescuer's work of others" should be qualified as an "action", despite the hypothetical structure of the relative judgement of causality, conduct that interrupts the rescuer's action of others, which, in turn, interferes with a lethal causal process. In fact, the injury has its own external cause; it was about to be neutralized, but human conduct "prevented its impediment" (so-called double prevention)[18]. Its essential elements are: an interruptive conduct of a salvific factor that, in turn, would have interrupted a causal course of injury[19]. If this is the minimum framework of the phenomenon, the salvific factors involved can be indistinctly human or natural: a lifesaver to the shipwrecked person can be offered both by a lifeguard and by a favorable sea current.

The same must be said with reference to the causal course of injury: the shipwreck, by etymological sense, is such because the victim of the accidental crash of a ship, but an individual can be in the same condition also because of being thrown into the sea by someone. According to the well-known dogmatic premises, the two causal courses, one injurious and the other saving, one real and the other hypothetical, can occur with a variable rate of statistical probability, also by virtue of the possible psychological nature of the interrupting action. In fact, the distinction between action and omission is not to be interpreted in a physical sense, as is now accepted in many quarters, but through the criteria of the nature of the precept violated and the dimension of the risk: if the overall conduct of the subject violates a "prohibition" to act with the result of introducing a new risk factor for the legal asset, there will be an "action"; vice versa, the conduct of those who limit themselves to not contrasting a risk factor already present in the reference situation, against a "command" that obliged them to intervene, will have the value of "omission".

Based on the case history of "double impediment", the distinction is as follows: if the rescue action has not yet been implemented, if the lifebuoy has not been launched, if the doctor has never been able to provide effective rescue instruments, then the risk of injury has never been mitigated: therefore, it does not derive from the interruptive "action" of the agent. On the contrary, if the rescue action is already in progress, the subject who interrupts it re-exposes the asset to the original risk factor, which is equivalent to qualitatively changing its dimension: the subject "acts" and not "omits"[20].

It follows that it is inappropriate to resort to the doctrinal elaboration in question in order to evade the critical issues that may arise on the side of the position of guarantee, at least in the presence of the typical situation described by art. 593 paragraph 2 C.p. In relation to the author of the shot, the intent, in fact, as a general

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[17] E. Niethammer, *Ungeschriebenes Strafrecht* [Unwritten criminal law], in ZstW, 55, 1936, p. 745; G. Vassalli, *La giurisprudenza penale germanica in materia di analogia* [The Germanic criminal jurisprudence in the matter of analogy], in Riv. Dir. Pen., 1935, p. 15); R. Hohn, *Die Wandlung im Staatsrechtlichen Denken* [The change in constitutional thinking], Hamburg, 1934; G. Fornasari, *I principi del diritto penale Tedesco* [The principles of German criminal law], 1993, Padova, pp. 4-5; P. Nuvolone, *La riforma del paragrafo 2 del Codice Penale germanico* [The reform of paragraph 2 of the Germanic Criminal Code], in Riv. It Dir. Pen., 1938, p. 530.

[18] M. Ronco, *La riscoperta della volontà nel dolo* [The rediscovery of the will in willful misconduct], in Riv. It. Dir. Proc. pen., 2014.

[19] S. Prosdocimi, *Dolus eventualis* [Dolus eventualis], Giuffrè, Milano, 1993.

[20] M. Ronco, *Riflessioni sulla struttura del dolo* [Reflections on the structure of willful misconduct], in Riv. It. Dir. Proc. Pen., 2015.

principle, must embrace the entire typical fact: if it is murder, it must embrace the action and the event. Therefore, only the concomitant malice is relevant, which consists in the will that supports the action and persists until the event occurs. It is not authentic malice the will that embraces the event, but not the conduct (so-called subsequent malice); or, vice versa, the will that embraces the conduct, but not the event (so-called antecedent malice).

In these cases, the fact in its entirety is culpable: the action or respectively the event, have not been the object of voluntary projection[21]. Therefore, there are two options: either the author of the shot is called to answer for the intentional omission subsequent to the previous culpable action, breaking the event into two parts and restoring the concomitance between intent and the typical fact; or, by reading the conduct of the accused as a whole and omitting to distinguish between a before (culpable) and an after (intentional) act, one is exposed to the censure of intent subjective[22].

V. Judgement's lesson: the relationship between legality and causality

The law can produce ex novo legally relevant positions of guarantee, but the impeding obligations which are its responsibility are identified and regulated by the most varied preventive sources ex art. 43, par. 3 C.p., on which the original dogmatic approach is based[23]. Furthermore, on the one hand, the constitutional provisions are attributed the same value reserved to the law, and on the other, the role of autonomous source is attributed to the previous dangerous activity. If the first extension devalues the profile of determinateness, degrading legality to the role of a bare formal qualification (as the same seems to fear), the second openly contradicts the premises adopted. In fact, procedural legality is a necessary antecedent to the judge's ruling on the application of the incriminating rules. The demand for legality undergoes a physiological decline.

This is particularly true in relation to the definitions of the fundamental categories of criminal law, such as the notions of intent, guilt and premeditation. The certainty and equality of treatment that they aim to guarantee can be validly ensured by scientific elaboration, which, in areas such as that of the fundamental notions, is characterized by diffusion, stability and ponderability that are even greater than the law.

The ascertainment of causality concerns only a few criminal offences (e.g. personal injury). Nevertheless, for reasons of regulatory economy, the institution of causality is today regulated once and for all in the general part of the criminal code, specifically in articles 40 C.p. and 41 C.p.[24].

Again, according to the general rules, causally oriented cases can be committed by omission, under the conditions indicated, also in this case once and for all, in Article

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[21] M. Bertolino, *Il nuovo volto dell'imputabilità penale. Dal modello positivistico del controllo sociale a quello funzionale-garantistico* [The new face of criminal imputability. From the positivistic model of social control to the functional-guarantee model], in Ind. Pen., 1998, p. 360.

[22] G. Fiandaca, E. Musco, *Manuale di diritto penale. Parte generale* [Criminal Law Handbook. General Part], Bologna, 2008.

[23] G. Vassalli, *"Nullum crimen sine lege"*, in Novissimo Digesto Italiano, Appendice, V (1986), pp. 292-304.

[24] F. D'Alessandro, *La certezza del nesso causale: la lezione "antica" di Carrara e la lezione "moderna" della Corte di cassazione sull' "oltre ogni ragionevole dubbio"* [The certainty of the causal link: the "ancient" lesson of Carrara and the "modern" lesson of the Court of Cassation on "beyond any reasonable doubt"], Riv. It. Dir. Proc. Pen. 2002.

40, paragraph 2, C.p. And again: homicide is relevant in the context of distinct criminal offences, which can be committed with intent, negligence or premeditation[25]. Other offences, such as personal injury, may be intentional or negligent. Most offences, on the other hand, are only punishable as intentional, unless otherwise provided for (Article 42 paragraph 2 C.p.). One thinks of the definitions provided for in Article 43 C.p. and of the institutions, among others, of the so-called *suitas* of conduct (Article 42 C.p.) and of the error of fact as a factor of exclusion of intent (Article 47 C.p.)[26].

With reference to the legislative definition of guilt, it can be observed that it was originally contained in the rules dedicated to homicide and personal injury, although this definition, as a rule, also applied to other culpable offences[27].

VI. Conclusion

The brief discussion shows that causality and doubt lead to the development of a new volitional theory. Frank's formula is a dangerous "pre-judgement" which may jeopardize reasonable doubt. This consideration derives from the problem of proving the volitional moment of the possible intent referred to Frank's formulas.

The theme of doubt is therefore immediately highlighted also by the "criterion of proof" of Frank's first formula, found in the *"ThyssenKrupp*" trial, which starts from the question of what conduct the offender would have assumed if he had been certain of the realization of the typical event[28]. In other words, it is assumed that culpability due to the concrete prediction of the unplanned event corresponds to the culpability of the culpable offence and not to the more serious culpability that characterizes the intentional offence. Therefore, it is assumed that culpability due to the concrete foresight of the unplanned event corresponds to the culpability proper to a culpable offence and not to the more serious culpability that characterizes an intentional offence.

Notwithstanding the volitional theories (the acceptance of risk and the theory of consent), the determination of intent represents another issue concerning the correct configuration of the psychological element of the offence. Also, in this case the doubt on the intentional or culpable nature of culpability may result in reasonable doubts at the procedural level. In case law, the assessment of willfulness is considered a complex cognitive and logical procedure, because it aims at reconstructing an essentially psychic fact, not perceptible to the senses.

The ascertainment of malice is fundamentally based on the elements of the objective legal case (modalities of time, space and place that characterize it in concrete terms) and on the elements that relate to the personality of the agent, to his character,

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[25] G.A. De Francesco, *Dolo eventuale e dintorni: tra riflessioni teoriche e problematiche applicative* [Dolus eventualis and surroundings: between theoretical reflections and application problems], in Cass. pen., 2015.

[26] A. Regina, *La regola b.a.r.d. nel diritto penale sostanziale. Interferenze con la struttura del reato* [The b.a.r.d. rule in substantive criminal law. Interference with the structure of the crime], in Giur. merito 2008, p. 3032).

[27] M. Ronco, *Il reato. Struttura del fatto tipico. Presupposti oggettivi e soggettivi dell'imputazione penale. Il requisito dell'offensività del fatto* [The crime. Structure of the typical fact. Objective and subjective assumptions of the criminal charge. The offensiveness requirement of the fact], vol. II, Zanichelli, Bologna, 2011.

[28] G. Di Biase, *Il nuovo volto del dolo eventuale. Tra criterio del bilanciamento e prima formula di Frank* [The new face of possible fraud. Between the balancing criterion and Frank's first formula], in Ind. pen., 2015.

to his moral and intellectual figure, understood as 'revelatory indices' of malice, indicators relating to the conduct. Ergo, Frank's formula is intended to offer a criterion for determining the content of the normative concept of intent[29].

Furthermore the doctrine has pointed out that the hypothetical reference is used as the most suitable inductive means to capture an actual psychological situation: the circumstance that the agent would have acted despite the certainty of the result, indicates, in those who have acted representing the possibility of causing the event, a particular psychological attitude, different from that of the subject who, although having decided to act in awareness of the risk, faced with the certainty, would have abstained from the event foreseen and desired as a consequence of the action or omission (Art. 43 C.p.)[30]. Article 43 C.p. defines the psychological element of the offence that is decisive for distinguishing willful misconduct and guilt: the existence or non-existence of the will. Jurisprudence[31] has interpreted the will as the elaborating thought, motivated by an objective, which is resolved in intention, will", but this is not enough to delimit the boundary between conscious guilt and possible willful misconduct. The state of doubt is the pivotal point for a correct definition of willful misconduct and conscious negligence: doubt, in addition to being the window that opens to the moment of proof, is the substantive expression of the procedural criterion of *b.a.r.d. (beyond a reasonable doubt)* and therefore this is the most correct way to conduct the investigation.

The volitional theories and the different psychological conceptions of possible intent and conscious guilt seriously undermine this guideline[32]. These forms of culpability are radically different, antithetical, in that there is the structural diversity of the prediction "the event is different; the scenario of human action is different; the psychological impulse is different". According to the "Cassata" ruling, therefore, in the eventual willful misconduct there must be a situation of probability of the event, which must however be considered from a subjective point of view, i.e. the way in which the concrete agent saw the possibility of the verification of a result of the conduct. Intentional intent and conscious negligence differ in this respect.

Finally, the following considerations may be noted. Possible willfulness is to be sought in the psychological attitude of the person who represents the concrete possibility of the realization of the fact of crime and accepts the risk of its occurrence (there is acceptance of the risk of the event): by acting without having overcome the state of doubt, on the possible concrete occurrence of the fact, despite its representation, the subject wants the fact itself. In conscious negligence there is a prediction followed by a counter-prediction, i.e. by a negative prediction on the occurrence of the event, the agent, despite foreseeing that his conduct is likely to cause an unlawful event, carries it out anyway, having reached a negative prediction about the possibility that the event will actually occur, in the specific context of the circumstances in which he

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[29] L. Eusebi, *Verso la fine del dolo eventuale? (Salvaguardando, in itinere, la formula di Frank)* [Towards the end of the possible fraud? (Safeguarding Frank's formula on the way)], in Dir. Pen. Cont. no. 1/2014.

[30] L. Eusebi, *Formula di Frank e dolo eventuale* [Frank's formula and dolus eventualis] in Cass. S.U., 24 aprile 2014 / Thyssenkrupp, in Riv. It. Dir. Proc. Pen., 2015.

[31] F. D'Alessandro, Sez. IV, 25 September 2001, no. 1585/02, *S. and others*, in Riv. It. Dir. Proc. Pen. 2002, 737. Criminal Court of Cassation, Section 1, 12 October 1993, no. 748/94,

Cassata.

[32] M. Pisani, *Riflessioni sul tema del "ragionevole dubbio"* [Reflections on the topic of "reasonable doubt"], in Riv. It. Dir. Proc. Pen. 2001, p. 1245. N.N. Taleb, *The Black Swan. The Impact of the Highly Improbable*, New York 2007.

operates. On the contrary, by overcoming the state of doubt about the occurrence of the event, the subject would have been in malice. Therefore, when the subject represents the possibility of the damaging event, but trusts in its concrete non-occurrence, there will be conscious fault or fault with foresight.

References

1. Aimi, A., *Dolo eventuale e colpa cosciente: il caso Thyssen al vaglio delle Sezioni Unite* [Possible willful misconduct and conscious negligence: the Thyssen case under consideration by the United Sections], in Dir. Pen. Cont. no. 1/2014.

2. Antolisei, F., *Manuale di diritto penale. Parte generale* [Criminal law handbook. General part], Milano, 2003.

3. Bartoli, R., *Luci ed ombre della sentenza delle Sezioni unite sul caso Thyssenkrupp* [Lights and shadows of the ruling of the Joint Sections on the Thyssenkrupp case], in Giur. It., 2014.

4. Bricola, F., *Teoria generale del reato* [Theory of the crime], in Noviss. Dig. Ita., Utet, Torino 1973.

5. Cass. pen., Sez. I, 7 February 2020 (dep. 6th March 2020), P.M. e altri (P.M. and others), n. 9049, *La Cassazione sul caso Vannini: i rapporti tra omicidio mediante omissione e omissione aggravata dall'evento morte in un noto caso di cronaca* [The Supreme Court on the Vannini case: the relationship between murder by omission and omission aggravated by the death event in a well-known news cas], in Sist. Pen., 23 April 2020.

6. Cerquetti, G., *Il dolo* [The willful misconduct], Giappichelli, Torino, 2010.

7. D'Alessandro, F., *La certezza del nesso causale: la lezione "antica" di Carrara e la lezione "moderna" della Corte di cassazione sull' "oltre ogni ragionevole dubbio"* [The certainty of the causal link: the "ancient" lesson of Carrara and the "modern" lesson of the Court of Cassation on "beyond any reasonable doubt"], Riv. It. Dir. Proc. Pen. 2002.

8. D'Alessandro, F., Sez. IV, 25 September 2001, no. 1585/02, *S. and others*, in Riv. It. Dir. Proc. Pen. 2002, 737. Criminal Court of Cassation, Section 1, 12 October 1993, no. 748/94, Cassata.

9. D'Auria, D., *Fin dove il dolo eventuale? Qualche riflessione, traendo spunto dal "caso Thyssenkrupp"* [How extent is the willful misconduct? Some reflections, drawing inspiration from the "Thyssenkrupp case"], in Leg. Pen., 2013.

10. De Francesco, G.A., *Dolo eventuale e dintorni: tra riflessioni teoriche e problematiche applicative* [Dolus eventualis and surroundings: between theoretical reflections and application problems], in Cass. pen., 2015.

11. Demuro, G.P., *Studi di diritto penale. Il dolo* [Criminal law studies. The willful misconduct], vol. 1-2, Giuffrè, Milano, 2010.

12. Di Biase, G., *Il nuovo volto del dolo eventuale. Tra criterio del bilanciamento e prima formula di Frank* [The new face of possible fraud. Between the balancing criterion and Frank's first formula], in Ind. pen., 2015.

13. Di Giovine, O., *Diritto penale e neuroetica* [Criminal law and neuroethics], Padova, Cedam, 2013.

14. Donini, M., *Il dolo eventuale, fatto-illecito e colpevolezza* [The eventual willful misconduct, unlawful act and culpability], in Dir. pen. cont. no. 1/2014.

15. Donini, M., *Teoria del reato* [Theory of the crime], in Digesto/pen., XIV, 1999.

16. Eusebi, L., *Formula di Frank e dolo eventuale* [Frank's formula and dolus eventualis] in Cass. S.U., 24 aprile 2014 / Thyssenkrupp, in Riv. It. Dir. Proc. Pen., 2015.

17. Eusebi, L., *Il dolo come volontà* [The willful misconduct as act of will], Morcelliana, Brescia, 1993.

18. Eusebi, L., *Verso la fine del dolo eventuale? (Salvaguardando, in itinere, la formula di Frank)* [Towards the end of the possible fraud? (Safeguarding Frank's formula on the way)], in Dir. Pen. Cont. no. 1/2014.

19. Ferrua, P., *Il 'giusto processo'* [The 'due process'], Bologna, 2012.

20. Fiandaca, G., *Le Sezioni Unite tentano di diradare il "mistero" del dolo eventuale* [The United Sections try to clear up the "mystery" of possible fraud], in Riv. It. Dir.Proc. Pen., 2014.

21. Fiandaca, G., Musco, E., *Manuale di diritto penale. Parte generale* [Criminal Law Handbook. General Part], Bologna, 2008.

22. Fornasari, G., *I principi del diritto penale Tedesco* [The principles of German criminal law], 1993, Padova.

23. Hohn, R., *Die Wandlung im Staatsrechtlichen Denken* [The change in constitutional thinking], Hamburg, 1934.

24. Jaspers, K., *La questione della colpa* [The question of guilt], It.transl., Milano, 1996.

25. M. Bertolino, *Il nuovo volto dell'imputabilità penale. Dal modello positivistico del controllo sociale a quello funzionale-garantistico* [The new face of criminal imputability. From the positivistic model of social control to the functional-guarantee model], in Ind. Pen., 1998.

26. Marinucci, G., Dolcini, E., *Corso di diritto penale* [Criminal Law Course], IIIrd ed., 2001.

27. Niethammer, E., *Ungeschriebenes Strafrecht* [Unwritten criminal law], in ZstW, 55, 1936.

28. Nuvolone, P., *La riforma del paragrafo 2 del Codice Penale germanico* [The reform of paragraph 2 of the Germanic Criminal Code], in Riv. It Dir. Pen., 1938.

29. Prosdocimi, S., *Dolus eventualis* [*Dolus eventualis*], Giuffrè, Milano, 1993.

30. Regina, A., *La regola b.a.r.d. nel diritto penale sostanziale. Interferenze con la struttura del reato* [The b.a.r.d. rule in substantive criminal law. Interference with the structure of the crime], in Giur. merito 2008.

31. Ronco, M., *Il reato. Struttura del fatto tipico. Presupposti oggettivi e soggettivi dell'imputazione penale. Il requisito dell'offensività del fatto* [The crime. Structure of the typical fact. Objective and subjective assumptions of the criminal charge. The offensiveness requirement of the fact], vol. II, Zanichelli, Bologna, 2011.

32. Ronco, M., *La riscoperta della volontà nel dolo* [The rediscovery of the will in willful misconduct], in Riv. It. Dir. Proc. pen., 2014.

33. Ronco, M., *Riflessioni sulla struttura del dolo* [Reflections on the structure of willful misconduct], in Riv. It. Dir. Proc. Pen., 2015.

34. Taleb, N.N., *The Black Swan. The Impact of the Highly Improbable*, New York 2007.

35. Ubertis, G., *La ricerca della verità giudiziale* [The search for judicial truth], in G. Ubertis (ed.) *La conoscenza del fatto nel processo penale* [The knowledge of the fact in the criminal trial], Milano, 1992.

36. Vassalli, G., *"Nullum crimen sine lege"*, in Novissimo Digesto Italiano, Appendice, V, 1986.

37. Vassalli, G., *La giurisprudenza penale germanica in materia di analogia* [The Germanic criminal jurisprudence in the matter of analogy], in Riv. Dir. Pen., 1935.

Pisani, M., *Riflessioni sul tema del "ragionevole dubbio"* [Reflections on the topic of "reasonable doubt"], in Riv. It. Dir. Proc. Pen. 2001.