F. GINO GORLA, A DECISION OF THE *ROTA FIORENTINA* OF 1780 ON LIABILITY FOR DAMAGES CAUSED BY THE "BALL GAME"[†]

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GINO GORLA[*]

INTRODUCTION

The purpose of this article is to present, with some comments, a decision of the *Rota Fiorentina* of 1780 which is of both historical and contemporary interest. Historically, the decision constitutes a mirror of the mores of the time and the methods used for deciding cases as well as of certain basic principles of the law in Tuscany. From the contemporary standpoint, the problems dealt with in the decision are important ones: immunity from liability in tort; a limitation of freedom of action for the owners of houses or property surrounding the place where a sport or game spectacle is *usually* played for the public; and the burden for those owners of suffering the inconvenience or *small* damages derived from the ordinary or "natural" course of the game.

The *Rota Fiorentina*[1] was one of the highest courts in the Grandduchy of Tuscany under the rule of the Medicis (until 1737) and the Lorenas. It was the most authoritative Court in the Grandduchy and enjoyed great prestige and authority in the world of the *ius commune*. The *Rota* acted at times on the commission of another Supreme Court, *Il Magistrato Supremo*, where the lieutenant of the Grandduke sat. The decision discussed probably echoes the policy of the Medicis and the Lorenas to protect the middle and lower classes against overwhelming pretensions of the nobility. The decision is given in appeal on a commission[2] by the *Magistrato Supremo* to a judge of the *Rota Fiorentina.*

The judge was Giuseppe Vernaccini, a prominent personage in the Rota and the council of the Grandduke.[3] He enjoyed the trust of the Grandduke, Peter Leopold of Lorena, the enlightened reformer of Tuscany and later the emperor of the Austrian empire. In various instances Vernaccini, by judicial decisions, assisted the Grandduke in bringing forward his reform policies, especially in the field of abating hindrances to transferability of property and promoting the progress of commerce and industry.[4]

Judicial decisions at that time were given a title. The decision discussed in this article is entitled *Marradiensis Praetensae Refectionis Damnorum*.[5] There are difficulties in the presentation of this decision due to the judicial style of the *Rotae*,[6] to the language,[7] and to the fact that we have lost the art of reading a case of those times.

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[*] Director of the Institute of Comparative Law, University of Rome, Italy.

[1] For more information about the *Rota Fiorentina* and other Tuscan and Italian Supreme Courts see Gorla, *Il Museo Guarnacci di Volterra, la Fabrica di Porcellane Ginori e i Palazzi di Firenze—dall'aurea giurisprudenza della Rota Fiorentina al codice civile del 1942*, 5 Foro Italiano 1 (1972) [hereinafter cited as *Il Museo Guarnacci*], and *I tribunali supremi degli Stati italiani, fra i secoli XVI a XIX, quali fattori dell'unificazione e del diritto nello Stato e della sua uniformazione fra Stati*, which is my report (*Relazione*) to the *International Conference* (*Congresso*) *of History of Law* held in Florence in April, 1973 [hereinafter cited as *Relazione Firenze*]. This report will be published in the volumes of the "Atti del Congresso."

[2] The Commission might be given also to a collegiate body of the *Rota*, composed of three members.

[3] For a short biography of Vernaccini see *Il Museo Guarnacci*, *supra* note 1, at 31. Vernaccini is the author of the decision on the *Fabbrica di Porcellane Ginori*, which I reported and commented on there.

[4] The Grandduke entrusted him with important tasks, such as the drafting of a project of codification that was interrupted by Vernaccini's death in 1789.

[5] 2 Collezione Completa Delle Decisioni Dell'Auditore Giuseppe Vernaccini 279 (1824).

[6] On the style of the Italian *Rotae* and other Italian Supreme Courts of those times see Gorla, *Civilian Judicial Decisions—An Historical Account of Italian Style*, 44 Tul. L. Rev. 740 (1970) [hereinafter cited as *Italian Style*]. For some peculiarities of the style of the *Rota Fiorentina* and other Tuscan Supreme Courts see *Il Museo Guaracci*, *supra* note 1, at 9.

[7] The decision is written in Italian. However, this is the Italian of the 18th century, or rather the Tuscan language of those times. It is interesting that most decisions of Tuscan Supreme Courts were written in Latin.

I have tried to overcome these difficulties by paraphrasing the text of the decision, occasionally abridging it. However, on the whole I have tried to follow the text of the decision.[8] Similarly, I have tried to reproduce Vernaccini's narration of the "facts of the case," since it is important to comprehend how the judge visualizes facts and where he puts emphasis or color; this seems to be particularly interesting in this case. The courts of the Grandduchy of Tuscany, as many other Italian courts (not all of them), had the duty to give "motives" or "grounds" for a judgment. The judgment had to be grounded ("motivated") on the basis of *auctoritates et rationes*, *i.e.*, authorities and reasons. The latter were displayed especially when the former were lacking or when they were not binding.

The authorities were, in order of importance:[9]

(1) Roman texts (which had the force of law), statutes, and legal customs. These authorities were binding (*auctoritates necessariae*) only when the provision was precisely on point and clear. If the provision considered a case similar to the case at stake, then it was a matter of an *argumentum a similibus*;

(2) judicial precedents of the Supreme Courts of the State, whose decisions, if on point, were binding as law, where there were a series of them constituting a *consuetudo iudicandi*, ie., a judicial custom;[10]

(3) judicial precedents of the Supreme Courts of other States (Italian or European), and especially the *Rota Romana*, which, besides being one of the Supreme Courts of the Pope's temporal State, was the Supreme Court of the Catholic Church legal order;

(4) the *Doctores* in their legal writings, *i.e.*, *Glossae* (of the famous *Glossa*), commentaries and treatises, *Consilia* (legal advices), and *Allegationes* or advocates' briefs when published in volumes.[11]

Authorities mentioned in (3) and (4) were not binding, i.e., they were only persuasive, even when they were on point.[12]

All authorities, binding and not binding, had to be on point, in order that they could be alleged as (pure) authorities. If they considered a case similar to the case at stake, then they were a matter of an *argumentum a similibus*, which could be a matter of discussion according to the degree of similarity. The *argumentum a similibus* was middle way between *auctoritates and rationes*, because maintaining similarity and drawing an argument from it involved a certain reasoning. In the absence of authorities on point, the *argumentum a similibus* was a way of developing or creating law. It was used largely by the Glossators and Commentators of the 12th to the 15th centuries, to adapt Roman texts to the times. Thus, *argumenta a similibus* were often artificially stretched. During the 16th to 18th centuries, Supreme Courts were at work in the various Italian States, and they used the same method of *argumenta a similibus* to develop or create the law according to the changing times. The Supreme Courts applied that method not only to Roman texts but also to judicial decisions and *Doctores*. The *jurisprudentia* of Italian Supreme Courts of the 16th to 18th centuries is filled with *argumenta a similibus* that were often

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[8] I have also maintained the italics where I have found them in the decision, taking into account the fact that Vernaccini wanted to stress the bearing of the words put in italics by him.

[9] On the duty to give "motives" see *Italian Style*, *supra* note 6, at 741; *Il Museo Guarnacci*, *supra* note 1, at 8, 16. On *auctoritates et rationes* and the order or rank of *auctoritates* see Gorla, *I precedenti storici dell'art. 12 disposizioni preliminari del codice civile del 1942—un problema di diritto costituzionale*, 5 Foro Italiano 3, 4 (1969). *See also Relazione Firenze*, *supra* note 1, §§ VI, VII.

For the purpose of the present article the description of authorities and their order has been rather simplified. Indeed, canon law, foreign statutes, and custom. also had to be taken into account. See Gorla, Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo, 5 Foro Italiano 89 (1973).

[10] In some Italian States, like Piedmont and Naples, a single decision of the Supreme Court was binding as law. However, in Tuscany and other States, two decisions (*binae judicaturae*) were sufficient to create a *consuetudo iudicandi*. On the *binae judicaturae* see *Il Museo Guarnacci*, *supra* note 1, at 10–11; *Relazione Firenze*, *supra* note 1, at § VI.

[11] *See Italian Style*, *supra* note 6. Generally, *consilia* were preferred because they were casuistic and used the same style as adopted by court decisions.

[12] However, when a *unifomis opinio* of all the Supreme Courts of the civil law world had been formed, that opinion was considered as binding, at least in some circumstances. *See Relazione Firenze*, *supra* note 1, § VII.

stretched, artificial, and acrobatic. In Vernaccini's decision that method is applied in many instances[13] because there was no authority on point. The same method was used by courts of the European States belonging to the world of the *ius commune* or civil law, and by the English courts even during the 19th century.[14]

In addition to presenting the decision, I have tried to offer some explanation and comment. For this purpose I have followed a mixed method. Most of the explanations and comments are given in footnotes to the decision; this seems to be the appropriate method to clarify or comment immediately on the pertinent points and to be brief. Other comments will be made in the conclusion, especially on the method of reasoning and the *ratio decidendi* of the decision, its bearing, and its background.[15]

THE DECISION[16]

The Facts of the Case

In the Tuscan town of Marradi since time immemorial, it was customary during the summer for a team of amateurs (*dilettanti*) to play a ball game[17] in the public square. According to a similar usage existing in other towns of Italy, the game was played mostly as an amusement or public feast for the citizens, rather than as an athletic exercise for the local youth. The owners of houses surrounding the square never opposed the use of the area for the game. It was also customary that the team would notify the owners of the day during the summer on which the games would be commenced, in order that they might adopt measures to avoid damages to their houses, especially to the windows.[18]

At the beginning of the season of 1778, the team, as usual, gave formal notice to the homeowners that the games would commence on July 24. The Fabronis, a noble family of Marradi, having restored the facade of their house located in the public square, asked the Community Magistrate for an injunction prohibiting the game or for a *cautio de damno infecto*.[19] The team, resenting the fact that one family would oppose the public games, claimed that the game had to be absolutely free and "immune" from any liability for damages as it had been in the past.

On July 20, 1778, the Community Magistrate, composed of seven members, unanimously rendered a decree that:

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[13] The method of such artificial *argumenta* is used by Vernaccini also in his decision on the "*Fabbrica di Porcellane Ginori*" and other decisions, which are presented and commented upon in *Il Museo Guarnacci*, *supra* note 1.

[14] *See, e.g.*, Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

[15] Also in *Il Museo Guarnacci*, *supra* note 1, and other essays, I have had to follow that method of footnotes comments, followed by a final comment.

[16] As I have pointed out, here I am trying to reproduce, with some paraphrase and abridgment, the text of Vernaccini's decision in its narration of the facts of the case and its "motives."

Now a problem arises concerning citations of authorities in presentation of Vernaccini's decision. According to the style of those times, each step of the reasoning is accompanied by citation of a long list of authorities to support that step; this style, notwithstanding some reactions, was used even in the presence of a Roman text or other text of a law, or of a binding *consuetudo iudicandi*. *See Italian Style*, *supra* note 6. In my presentation or paraphrase of Vernaccini's decision, I have not indicated the various authorities cited in it. However, in many instances, I have mentioned, in my footnotes, their contents and sometimes also the authorities. I have done this especially to point out when Vernaaccini was using the *argumentum a similibus* to reach the result of creating the law for the case at stake.

[17] The game known as *gioco del pallone* was not football. From the authorities cited in the opinion, the ball was launched by hand or by an appropriate gadget (*sagibulo*). *See* note 25 *infra*.

[18] Although the decision is not clear on this point, it is reasonable to assume that the windows and other parts of the houses had to be protected only during the hours of the game, which were known to the owners. The games season involved a certain burden of conduct for them, since they were required to adopt appropriate measures to avoid damages.

[19] In the *ius commune*, the *cautio de damno infecto* dealt with in the Digest 32.9 had become a kind of suretyship or warranty to be given for a person building or making a work on his land from which damages could result to neighboring property, or where it is probable that damages would result from an existing building, work, or situation of the property of that person. *See* the present articles 1171 and 1172 of the Italian Civil Code. In the Digest, the *cautio* was not a suretyship; it was a solemn promise (*stipulatio*) to be made by that person, that he shall pay those damages. Further, from Vernaccini's decision it seems that the *cautio de damno infecto* could be extended to damages probably resulting from acts other than building or making a work on land, *i.e.*, in the instant case from playing a ball game.

> The amateurs' team can continue giving such *licit* amusement in the public square; however, the question of damages is to be left open and discussed in the ordinary course of justice.[20]

On the same date, the Community Magistrate issued a decree stating that in the territory of Marradi there was no place, other than the public square, where the ball game could be conveniently played. This decree was given at the request of the *Auditore Fiscale*,[21] who asked, at the solicitation of the Fabronis, whether it was possible to find another place "adaptable" to the game without inconvenience to neighbors and the "ornament" of their houses.

No appeal or recourse was taken by the Fabronis from the two decrees. They did, however, file an action before the ordinary local court of the "*Vicario*," for a *cautio de damno infecto* and for the payment of any damages caused by the games. The *cautio* was also sought for future damages that would result from games during subsequent summer seasons. On July 26, 1778, the team gave the *cautio* by way of a personal suretyship of one citizen of Marradi, in order to avoid delay of the public amusement. However, the *cautio* was given "without any prejudice of the question of liability for damages, to be examined in the subsequent course of procedure." During the games of that season, damages of eight lire were caused to the windows and shutters of the Fabronis' house.[22] Further, the facade was soiled by the ball being dirtied in sand and lime on the ground that was used to restore the Fabronis' house, and damages were estimated at forty lire.

On January 20, 1779, the *Vicario* gave a judgment for payment of the former damages, but acquitted the team for the latter damages, since the ball was dirty due to the sand and lime heaped on the ground by order of the Fabronis. Both parties appealed to the *Magistrato Supremo* in Florence: the Fabronis asked for the payment of damages for soiling the facade, the team to be acquitted for damages caused to the windows and shutters of the Fabronis' house.[23]

The Motives[24]

(1) According to the common opinion of *Doctores* interpreting the *Lex Aquilia*, the basic Roman law on torts, the act causing damage must be committed with *dolus*, or, at least, with *culpa* in order to constitute an *iniuria* or wrong, and thereby give rise to liability for damages. There is no *iniuria* without at least *culpa*.

(2) Further, there is no *culpa* and, therefore, no *iniuria* and no liability when the act causing damage is "*licit and permitted by law*."

(3) According to the *communis opinio* of the *Doctores*, the ball game is considered a licit and permitted act which cannot be prohibited: *est de iure permissus, nec potest de iure prohiberi*.[25] Further,

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[20] The Community Magistrate seems to have been mainly a type of administrative body, which had the power of deciding administrative controversies by a "hearings" procedure. Therefore, the Community Magistrate, while denying the injunction, renvoyed the parties, for the question of damages, before the competent local court of the *Vicario*.

[21] The *Auditore Fiscale* sitting in Florence was one of the highest agents or officers of the Grandduke, who had agents in every important town. It is not clear whether the *Auditore Fiscale* considered in the decision is the main office in Florence or its agent in Marradi.

[22] The Fabrionis left the shutters open, so that damage was caused to the windows. However, it is not clear from the decision exactly what damage was caused. It might be that the shutters were freshly painted or varnished during the restoration of the house, and the ball had soiled the fresh paint or varnish.

[23] At this point, Vernaccini, after his narration of the "facts of the ease" and before exposing the "Motives," says that he has given his decision in favor of the team, after "a serious and mature study of the case as required by its *exemplarity*," meaning a new and important precedent. It is interesting to note that in other cases Vernaccini had occasion to say that even one single precedent could be binding when the decision is the product of serious and mature study of the case and is thoroughly "motivated"; if so the *binae judicaturae* are not necessary.

[24] The following paragraphs present the "motives" of Vernaccini's decision, in the order that they appear in the decision, and as they have been numbered by the reporter in the *Collezione* mentioned *supra* note 5.

[25] *See Il Museo Guarnacci*, *supra* note 1, at 16. The *Doctores* cited in the decision, in support of this principle, describe the *Ludus Pilae flatu plenae*, the game of the ball inflated with air, as was played by hands or by the *sagibulo*. Amongst the *Doctores* cited is Franciscus A. Bonfini, a great judge of the *Rota Fiorentina*, during the first half of the 18th century, who wrote

in the particular case the game is to be considered licit and permitted precisely[26] in the public square of Marradi, since there was an immemorial custom of playing it in the public square and, more importantly, because it was authorized by the Community Magistrate's decree of July 20, 1778, that there was no other place where the game could be conveniently played; this decree, for lack of appeal, has become a *res iudicata*.

(4) Therefore, since the game is an act *licit and permitted*, which in the particular case was *licit and permitted precisely* in the square of Marradi, the team was not liable for damages caused by the game to the houses surrounding the square.[27]

(5) Moreover, as was customary, the team notified the owners of the houses surrounding the square of the day on which the games would begin in order to allow them to adopt measures to protect items likely to suffer harm from blows by the ball. This notification represents an act of "diligence," to avoid damages ensuing from a licit and permitted act. Indeed, some of the *Doctores* require that even in the case of a *licit and permitted act*, *diligentia* (care) must be used to avoid damages.[28]

(6) The Fabronis ignored the notice and left exposed to possible damage items that could have been protected from harm. Similarly, they had embellished the facade of their house located where they knew the game was customarily played.[29] Thus, the Fabronis willingly exposed themselves to the damages

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on the subject in his two works, *Ad Bannimenta* and *De Fideicommissis*. In the latter work, at *Disputatio* 93 of 1733, Bonfini, at the request of the *Magistrato Supremo*, gives a kind of inventory of the various games and plays, licit and prohibited, which were in use in Italy and in the world of the *ius commune*. Amongst the licit games, beside the "*gioco del pallone*," he mentions the "*gioco del calcio*," a kind of football which was played in Florence and Lucca.

[26] The principles stated in paragraphs (1) and (2) as being of a general character were insufficient to eliminate liability, because it was also necessary to explain the legal reason why in the particular case the owners of the houses surrounding the public square had to suffer the inconvenience or the burden of conduct deriving from the games. On the other hand, if the ball game had been prohibited by law, there would have been no immunity from liability, even if the ball game bad been authorized by the local custom or the decree of the Community Magistrate of July 20, 1778. In other words, the motives alleged in paragraphs (2) and (3) are interdependent.

[27] Here the decision, besides citing again the authorities cited in paragraph (2), cites other authorities. First of all, it cites the Digest 9.2 (on *Lex Aquilia*, 7, § 4 (*si quis*). This text says that there is no *iniuria* in the case of boxing or other fighting in a public game when one of the parties is killed, because the harm is caused for the sake of glory and virtue, and not to commit an *iniuria*. Then, the decision cites *Doctores* interpreting that text; among them it again cites Bonfini. This author says that such custom (*consuetudo*) of boxing or fights excuses the fighting party (*ludentem*) from punishment for assault and battery or homicide, if the game is done without fraud (*sine dolo*) in a place established for that purpose (*in loco ordinato et consueto*); however, he adds, if harm or death is caused *in loco non ordinato*, and in an illicit game, then according to the *Lex Aquilia*, there is punishment. This citation of the Roman text, the *Doctores*, and Bonflni is an instance of Vernaccini using the *argumentum a similibus*. *See* note 13 *supra* and accompanying text. Indeed, the harm or death considered by the Roman text, the *Doctores*, and Bonfini is caused to the other party of the game and not to the public or to property close to or surrounding the place where the game is played.

[28] Here again, Vernaccini gives an example of an *argumentum a similibus* in his citation of authorities. Among the *Doctores* cited is Menochius (16th century), that when a person in a public game, permitted in a certain place, kills one of the spectators, there is no punishment, if any *culpa* is lacking. It is to be noted, first, that Vernaccini introduces here the idea that the game has to be played without *culpa*, *i.e.*, according to the ordinary or natural course of such games, and, second, that here a closer similarity is introduced, *i.e.*, the case of harm caused to one of the spectators. *See* note 27 *supra*. However, the *argumentum a similibus* is still stretched. Indeed, that spectator is a person who *willingly* puts himself in a position where he can suffer some harm deriving from the game in its ordinary course, while the owners of the houses did not put their houses willingly in such a position. However, there is a special similarity when the conduct of the Fabronis is considered, since they decided to restore the facade of their house knowing that the games were to be played in the square.

[29] This does not seem to mean that the Fabronis could never restore or embellish the facade of their house. Thus, they had the burden of doing that work during a proper time, after the season's games and not in their imminence. If the work had been done in the proper time, it would have allowed ample time for the paint on the facade and the shutter to dry. Therefore, the blows of the ball would have dirtied the facade and the shutters only with that small quantity of dust that ordinarily adheres to the ball and which could be easily cleaned after the game. This was the usual and relatively small inconvenience that all the owners of the houses surrounding the square had to suffer, in good peace, *in buona pace*.

which could derive from the game. Therefore, the text of the Digest 11 *ad legem Aquiliam* is to be applied.[30]

(7) The Fabronis raised two objections to these arguments. First, they argued that the rules of immunity from liability in case of an act licit and permitted is applicable only when, as a consequence of that act, nothing is introduced onto the neighbor's property: *nihil in alienum immittitur*.[31] This objection must be rejected. While this is true where a work to be done is new and unusual, it does not apply, however, to a work already *pre-existing and usual*.[32] Thus, the rule is not applicable in the instant case, since the ball game was not introduced *for the first time* in the public square of Marradi, nor played in a *new and unusual manner*, but rather was played in the public square since time immemorial, and it was intended that the game would continue there in the *ancient and usual* manner.

(8–11) Secondly, the Fabronis objected that future damages and the *cautio de damno infecto* for such damages were the main object of their action.[33] Therefore, they argued that the pertinent law was not the *Lex Aquilia*, concerning damages already caused and requiring *culpa*; rather, the applicable law was *cautio de damno infecto*, under which the *cautio* has to be given also for future damages deriving from a licit and permitted act even if no *culpa* occurs. This objection too must be rejected. While this might be true in the case of future damages that one fears would derive from a *new and unusual* work it is not true in the case of damages which one fears would derive from a *pre-existing and usual* work. In the latter case, the obligation of giving the *cautio de damno infecto* presupposes *culpa*, if not a *culpa in committing* something, at least a *culpa in omitting* something, that is *negligentia*.[34]

(12) Moreover, the law of the *cautio de damno infecto* has no bearing on the present case, since the object of the *cautio* is that of safeguarding against future damages deriving from *extrinsic and accidental* defects of the work, and not against future damages deriving from *natural and intrinsic* defects such as wind.[35]

(13) Because the ball cannot always be directed by the players precisely where they want and, therefore, may strike surrounding houses, this constitutes a *natural and intrinsic* defect of the ball game.[36]

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[30] The text of Digest 9.2 (*Ad Legem Aquiliam*), 11, is a case involving the following facts: In the course of a ball game, the ball was pitched with great force striking the hand of a barber shaving a customer whose throat was cut. The *jureconsult* Proculus held that the barber, not the player, was at fault (*culpa*), because the barber conducted his business near an area where it was customary (*ex consuetudine*) to play the ball game, or where people passed frequently. Thus the barber is liable for damages toward his client, although it would not be wrong to say that the client couId not complain if he permitted the barber, who keeps his shaving chair (*sellam*, not a shop) in a dangerous place, to shave his face. Here the *argumentum a similibus* seems to be nearer to the case in Vernaccini's decision. The barber had *willingly* put his trade chair in a place where it was customary to play the ball game, and in a similar manner the Fabronis did not protect the windows and embellished the facade of their house in a place where it was customary to play the ball games. Despite that fact, there are some differences between the two situations.

[31] The text invoked by the Fabronis was Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. According to the Fabronis' objection, in the ball game what is introduced in the neighbor's property is the ball launched by the players. The Roman text deals with quite different cases of "immission," *i.e.*, "immission" of smoke or water from a factory or a land onto the neighbor's property, whereas here the ball is "immitted" by a group of persons. Here we find an *argumentum a similibus* adopted by the Fabronis' lawyer and discussed as such by Vernaccini.

[32] Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* in their comments of the Digest 8.5 (*si Servitus Vindicetur*), 8, § 5. However, these authorities deal with the case of a building, construction, or other similar work. Here again we find an *argumetum a similibus*: such building or work is considered similar to the ball game.

[33] It is to be understood that the Fabronis asked for a *cautio de damno infecto* as a safeguard for damages deriving from the games during the summer seasons following the year 1778.

[34] Here the decision cites Donellus (a French author of the 16th century) in a work where, *inter alia*, he deals with cases of a house or similar work which was badly built, built with bad materials, or which the owner neglected or omitted to repair (i.e., three cases of *culpa* or *negligentia*). For this *argumentum a similibus* see note 32 *supra*. [In 2003, Maggie Wickes suggested that the distinction that Vernaccini draws is ultimately based on D.39.2.43pr. This is worth pursuing. CD]

[35] Here Vernaccini cites *Doctores* and decisions of the *Rota Romana* concerning buildings or other similar works. *See* note 32 *supra*.

[36] Here again we find an *argumentum a similibus*: that is, the *natural and intrinsic* inconveniences (so called "defects"!) of the ball game are considered as similar to the *intrinsic and natural defects* of a building or other work or to the fact that the

Thus, damages deriving from such a game cannot be the subject matter of the *cautio de damno infecto*. On the contrary, this is a damage that the owners of houses located in a public square, where a game is played, have to suffer in good peace (*in buona pace*) as a natural and inevitable consequence of the location of their houses, similar to that suffered by the owner of inferior land from the natural and inevitable flow of water from the superior land of a neighbor.[37]

SOME FINAL CONMENTS

What is the *ratio decidendi* of the case? It is interesting to reproduce here the *ratio decidendi* (the so called *Argomento*), as it was seen by the reporter of Vernaccini's decisions:

> There is no liability for damages, when the ball game, which is licit in itself, is played in a place where playing such game is equally licit, and a previous notice has been given to the owners of the surrounding houses. The harm that these houses may suffer, derives from a defect merely intrinsic and natural of the ball game.

However, something seems to be missing in this *Argomento*, that is, the fact that the ball games were played mainly as a public spectacle (*divertimento*).

Vernaccini's decision[38] imposes on the owners of the houses surrounding the place of the ball games a burden similar to a legal servitude (*i.e*., deriving from the law). The contents of it are:

(1) a burden of conduct to avoid damages, thereby substantialIy limiting the owners' freedom of action, and

(2) the sufferance of the small harms deriving to those houses from the ordinary (*i.e.*, natural and intrinsic) course of the game.

It is important to determine the reason or policy underlying such legal servitude, as imposed in Vernaccini's decision. It seems to be the fact that the ball games were played mainly as a public amusement (*divertimento*) of the people of Marradi.[39] There seems to be a policy of public interest underlying Vernaccini's decision.[40]

The *ratio decidendi* does not appear to be that the custom of playing the ball games in the square of Marradi was a *legal* custom (*i.e.*, binding as a law), because the case would have been decided on that sole basis cutting at the root any question. Further, Vernaccini's decision invokes the second decree of the Community Magistrate in order to establish the *place* where the games could be played.

I do not know of any Italian decision of present times dealing with a case similar to the one discussed in Vernaccini's decision.[41] If such a case would arise, it seems doubtful that it will be decided in the same way. Article 2050 of the Italian Civil Code is to be taken into consideration.

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exceptional blow of the winds may disrupt some part of that building (*e.g.*, the tiles) and cause that part to fall on the neighbor's property.

[37] For this rule, Vernaccini cites *Doctores* in their treatises on the law of waters. *See also* C. civ. art. 640; La. Civil Code art. 660 (1870); Italian Civil Code art. 913 (M. Beltramo, G. Longo & J. Merryman transl. 1969). This is one of the "servitudes" deriving from the situation of lands or neighbor's relations, the so called "legal servitudes" (*i.e.*, deriving from the law). Here we find the last and most significant *argumentum a similibus*, which can be considered as a metaphoric way of saying that on the houses surrounding the square there was a burden or legal servitude to suffer the inconveniences deriving from the public spectacles or "amusement" (*divertimento*) of the ball game. *See* notes 18, 29 *supra*. It is not a question of establishing which of the two, the customary spectacle or the building of the houses, preceded the other in order of time. Even if the houses were built before the establishment of the games, the owners had to suffer that servitude. On the notion of servitude see note 44 *infra*.

[38] *See* notes 18, 29, 37 *supra*.

[39] This rationale was also stressed by the decree of the Community Magistrate of July 20, 1778, that "the amateurs' team can continue giving such licit *amusement*." Further, it was stressed in Vernaccini's narration of the facts of the case, that "on July 26, 1778, the team gave the cautio ... in order to avoid delay *of the public amusement*."

[40] *See generally Il Museo Guarnacci*, *supra* note 1.

[41] There are decisions dealing, in the frame of article 2050, with sport games and competitions, like football, bowling, snow and water skiing, bicycle and motor car races, etc. Most of them deal with damages caused to participants in the game or race, or the public. At any rate, none of them deals with a case similar to that decided by Vernaccini.

> *Liability arising from exercise of dangerous activities*. Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury.[42]

The ball game is described in Vemaccini's decision as one having "*a natural and intrinsic defect*," inasmuch as "the ball cannot always be directed by the players precisely where they want," and may therefore cause some damage to the surrounding houses. A game of this type would be defined as a dangerous activity within the meaning of article 2050. It seems that this article would lead to a decision different from that adopted by Vernaccini.

On the one hand, article 2050 imposes a liability for damages deriving from dangerous activities, although they are *licit and permitted*; and that liability, from a practical (if not from a theoretical) standpoint, may be considered as a liability without fault (*culpa*).[43] This is so because of an extremely difficult burden of proof imposed on the defendant by article 2050, whereas in Vernaccini's decision the plaintiff has the burden of proving the defendant's fault.

On the other hand, to impose a burden or a legal servitude, similar to that imposed by Vernaccini's decision, would require today a statute, since it could not be imposed by judicial decisions or precedents,[44] and today the *argumenta a similibus* of the kind used by Vernaccini could not be used to reach the result of imposing such a legal servitude or burden.

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[42] Italian Civil Code art. 2050 (M. Beltramo, G. Longo & J. Merryman transl. 1969).

[43] On the theoretical question see De Cupis, *Fatti illeciti* in Commentario del codice civile a cura di A. Scialoja e G. Branca, art. 2050, at 79 n.1 (1971), and the authors cited there.

[44] Moreover, in modern times, as a principle, a "servitude" can be imposed only on land for the utility of other land, and not for the utility or benefit of a person or a group of persons (in the instant case, the ball game team or the community of Marradi for its amusement). *See* Italian Civil Code art. 1027 (M. Beltramo, G. Longo & J. Merryman transl. 1969). *See also* C. civ. art. 637; Italian Civil Code art. 531 (1865); La. Civil Code art. 646 (1870) (where "*personal servitudes*," *i.e.*, for the benefit of a person, can be only usufruct, use, and habitation).