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INTRODUCTION TO SPANISH PATRIMONIAL LAW

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I. BASIC FEATURES OF SPANISH TORT LAW

Tort law (*derecho de daños, responsabilidad civil extracontractual* or *aquiliana*) constitutes one of the major areas of the law of obligations. It aims to compensate for the damage caused by given persons to others. It is a case of liability because an obligation to compensate the damage arises, resulting from art. 1089, 1092 and 1093 CC. This responsibility requires the concurrence of three requirements, namely an action or an omission, damage and a causal link between the action or omission and the resulting damage [1]. The core provision in Spanish law is the fault-based art. 1902 CC. It establishes a system of general clause ("Anyone who, through his/her act or omission, causes damage to another by his/her fault or negligence, is obliged to repair the damage caused") that has forced the Courts to search for series of rules and standards (What degree of fault? Which kind of conduct? Does damage include pain and suffering?), since the behaviour which can cau e damages and the damages susceptible of being caused are innumerable. Therefore, unlike German law (§ 823 BGB), there is not a closed list of protected interests. In addition, case law has given a broad interpretation of art. 1902 CC, so that, in principle, the Spanish tort law provides compensation for all kinds of damage, unless the interest is not legitimate.

Tort law is, however, very heterogeneous. In the Spanish legal system we find different solutions inspired by contradictory principles as a consequence of the legislative evolution through the interpretation of case law. Thus, liability can be based only on fault, in other situations the so-called "theory of risk" is applied, finally, often statutes can establish a system of strict liability. Several systems of liability operate together, working in different ways according to the interests protected.

1. Contractual and non-contractual liability

The first distinction to be drawn refers to contractual and non-contractual liability. From a pure theoretical point of view, the distinction should be easy to draw: contractual liability arises where there was a previous contractual relationship between plaintiff and defendant, whereas non-contractual liability arises where such relationship did not exist. Although the aim of both types of liability is the same, namely compensation for the damages caused, there are important differences concerning their respective legal regimes. Thus, the period of limitation (prescription) of the claim for contractual damages in fifteen years (art. 1964 CC; ten in the civil law of Catalonia, pursuant to art. 121-20 CC Cat), whereas the claim for non-contractual damages expires after one year (art. 1868.2 CC; the period is three years in the civil law of Catalonia, art. 121-21.d CC Cat) [2]. Another important feature of non-contractual liability is that tortfeasors are solidary obligated to compensate the damage, according to well-established case law, whilst obligations are separate where liability has a contractual origin (art. 1137 CC). By contrast, the distinction has no bearing in relation to the recoverable loss or the burden of proof. In addition, the Supreme Court often recalls the so-called "unity of the civil fault" [3], which also tends to minimise the distinction between the two systems of liability, and applies some contractual provisions to tort cases [4].

Spanish case law has evolved from the so-called theory of the absorption, according to which both systems of liability are incompatible, the contractual liability being the more prevalent, to the admission of an option in favour of the plaintiff between the two regimes. Nowadays, the Supreme Court also admits that the plaintiff presents the facts leaving the decision on the applicable rules to the court, i.e. contractual or extracontractual rules [5].

2. Plurality of jurisdictions

Besides the plurality of legal rules, one of the features of the Spanish law of torts is the plurality of jurisdictions that can decide cases on tort. The CP contains a set of rules on liability arising from a behaviour that constitutes a crime. The labour courts also have jurisdiction on cases of harm caused by labour accidents. Finally, the liability of public bodies is governed by separate rules and decided by the administrative jurisdiction.

[1] TS 29.12.1997 (*RJA* 9602), 25.9.2003 (*RJA* 6826), 2.4.2004 (*RJA* 2051), among many others.

[2] See further *infra, sub* II, V and VI.

[3] TS 3.5.1999 (*RJA* 3426), 25.5.2000 (*RJA* 3381), 4.7.2000 (*RJA* 5924), 10.6.2004 (*RJA* 3605).

[4] For example, art. 1104 CC concerning the standard of care in order to favour the victim. See TS 22.4.1997 (*RJA* 3249), 6.5.2004 (*RJA* 1683), 18.6.2004 (*RJA* 4431), 22.9.2004 (*RJA* 5681).

[5] TS 12.5.1997 (*RJA* 3835), 19.5.1997 (*RJA* 3885), 17.7.2002 (*RJA* 5911). Consequently, a decision cannot be reversed on the grounds of inconsistency *(incongruencia)* if the court applies contractual rules instead of the extracontractual ones alleged by the plaintiff (and conversely).

2.1. *Liability ex delicto*

According to art. 1093 CC, liability arising from crimes or misdemeanours shall be governed by the dispositions of the CP. This provision came into being through historical circumstances: the CP was passed before the Civil Code, so that the later merely referred to the former. The current CP in force since 1995 contains the regulation of liability *ex delicto* in art. 109 to 125. It becomes apparent from art. 109.1 and 116.1 that liability does not arise from the commission of a crime, but from the damage caused by the commission of such a crime [6]. The consequences of this duality of regulations according to case law are:

a) The claim for damages can be brought either before the criminal court as part of the main action or separately before the civil court. The civil claim extinguishes, however, if the criminal court declares that the facts from which liability should stem did not exist [7]. Where the plaintiff reserves the claim for compensation of damages to be brought before the civil court, the latter is bound by the facts that have been proven in the criminal procedure, but not by its legal qualification therein [8]. In the words of TS 31.1.2000 [9], absolutory judgments only mean that the behaviour is not punishable according to the criminal law, but they do not exclude it from being a source of civil liability.
b) Since art. 109.1 CP refers to "the laws", the period of prescription of the claim for damages arising from a crime is not the one-year limitation period of art. 1968.2 CC for tort claims, but the general period of fifteen years (art. 1964 CC) [10].

2.2. *Liability of public bodies*

Art. 139.1 LRJAP establishes that public bodies are strictly liable for the damage that "results from the normal or abnormal operation of the public services" [11]. Therefore, public bodies are liable in tort irrespective or the lawfulness or unlawfulness of their acts. Art. 145 and 146 LRJAP provide that the claim can be only brought against the Administration, and not against the specific civil servant that has caused the damage. Nevertheless, the administration can recoup from the servant who caused the harm

[6] Also TS 30.12.1992 (*RJA* 10565) and 22.12.1999 (*RJA* 9487).
[7] TS 22.12.1999 (*RJA* 9487).
[8] See TS 31.12.1999 (*RJA* 9621).
[9] *RJA* 228.
[10] TS 4.7.2000 (*RJA* 5924), 20.11.2001 (*RJA* 9487), 31.1.2004 (*RJA* 444). See further *infra, sub* X.
[11] It must be taken into account that the tortious liability of public bodies has constitutional rank (art. 106.1 CE).

intentionally or by gross negligence (art. 145.2 LRJAP). Public bodies are also liable for the damage caused by the personnel who work for them in the performance of their duties, regardless of whether the tortfeasor is a civil servant or not, by concessionaires of public services and by private contractors carrying out public works. Only force majeure (art. 139.1 LRJAP, which embraces fortuitous event according to most authors) and development risks exclude the liability (art. 141.1 LRJAP). Only administrative courts have jurisdiction to decide on claims against public bodies, although the civil chamber of the Supreme Court still decides on facts carried out before the LRJAP entered into force [12].

2.3. *Labour accidents*

Another jurisdictional duplicity occurs in work-related accidents. The decisions of the first chamber of the Supreme Court had moved from asserting the jurisdiction of the civil courts to accepting the exclusive jurisdiction of the labour courts, as a consequence of several decisions of the internal conflicts chamber. But the decision of 3.10.2001 [13] began another line of decisions, according to which the civil courts have jurisdiction where the plaintiff bases his/her claim on art. 1902 and 1903 CC and not exclusively on the breach of the employer's safety duties. As for the question of whether a tort liability suit is precluded by the collection of insurance benefits, compensations or assistance (public or private) by the victim, the answer is that the receipt of compensation (public or private) does not in any way preclude a tort claim from the tortfeasor. It should benoted that public and private co-existent means of compensation must be organised. Although the tendency has been the accumulation of awards, the civil chamber of the Supreme Court shows in recent times a more nuanced approach [14].

3. Aims of tort law

Tort law is governed by the compensation principle. The main function of an award of damages is to compensate the victim for the loss he/she suffered as a consequence of the defendant's wrong. Whatever the nature of that loss, the sum of money he/she receives is deemed to repair or compensate the damage caused by the wrong-

[12] See for a concise summary of the legal and jurisprudential evolution TS 8.3.2004 (*RJA* 1815).
[13] *RJA* 7551. A concise summary of the evolution of the case law is offered by TS 31.12.2003 (*RJA* 2004\367).
[14] See TS 31.12.2003 (*RJA* 2004\367), 11.3.2004 (*RJA* 901), 29.4.2004 (*RJA* 2092), and Fernando Gómez Pomar, "Tort Liability and Other Means of Redress: «Collateral Source Rule» and Related Topics", working paper available at http://www.indret.com.

doer [15]. Damages do not fulfil a punitive function. Hence, fault can be presumed without breach of the constitutional presumption of innocence [16]. As for the function of prevention, especially concerning torts against privacy and honour, the amount of the damages usually is too low to provide a disincentive [17].

II. From fault to "quasi-strict liability": the evolution of the Spanish case law

The Supreme Court has turned around the interpretation of art. 1902 CC, shifting away from a fault-based system to a system of "quasi-strict liability". Certainly, art. 1902 requires fault, and nominally the Supreme Court has not set aside this requirement, but in practice there is a marked tendency to favour compensation of damage to the victims (the so-called *pro damnato* rule). As the same Supreme Court has acknowledged, "case law remains in theory loyal to the fault doctrine (...). However, the practical solutions to be found in the decisions show an evident tendency to favour the victims at the expense of a darkening of the requirement of fault" [18]. Case law has resorted to a set of mechanisms in order to achieve this aim [19]. These mechanisms can be used cumulatively by the courts in a decision:

a) *The reversal of the burden of proof.* The defendant's fault is presumed, and consequently the burden of proof is reversed, since it is for the defendant to prove that his/her behaviour was completely diligent. The plaintiff needs only to focus on the proof of the damage, the defendant's act or omission and the causal link; if the defendant is incapable of convincing the court of his/her diligence, the claim will be upheld [20]. Although some provisions in the CC already reversed the burden of proof [21], nowadays the reversal has become a general rule.

b) *The exhaustion of the diligence.* According to consistent case law, the fulfilment of all obligations and measures legally established to avoid or prevent damages is not enough to escape liability. Causation of the damage in spite of the adoption of such legal measures is evidence of their inadequacy and, therefore, of the liability of the defendant [22].

[15] TS 12.5.1997 (*RJA* 3835), 13.2.2003 (*RJA* 1045).

[16] TS 8.7.1997 (*RJA* 6013), 20.10.1997 (*RJA* 7272).

[17] Pablo Salvador Coderch, M.T. Castiñeria Palou, Carlos Gómez Ligüerre, *Prevenir y castigar* (Madrid, 1997).

[18] TS 12.4.2002 (*RJA* 2607).

[19] See Cavanillas, *La transformación, passim;* Díez-Picazo, *Derecho de daños*, p. 188 ff.

[20] Among many others, TS 7.10.1991 (*RJA* 6891), 2.4.2004 (*RJA* 1671), 4.10.2004 (*RJA* 5981), 15.11.2004 (*RJA* 7232).

[21] Art. 1903 *in fine*, 1908.1 and 4.

[22] TS 9.2.1996 (*RJA* 953), 7.4.1997 (*RJA* 2743), 22.4.2003 (*RJA* 3545), 1.10.2003 (*RJA* 6206).

c) *The risk theory.* Anyone who takes risks in their daily life must compensate any resulting damage caused. This theory requires the defendant's behaviour to be dangerous, although this is a very difficult concept to pin down. It has also been applied to economic activities, so that the undertaking that obtains a profit from such activity must compensate for resulting damages [23].

d) *A casuistic approach to diligence.* The Supreme Court has applied art. 1104 CC —a provision dealing with contractual liability— to tort law, so that the defendant is not required to perform to a standard of diligence, but a diligence adequate to the circumstances of the persons, the time and the place [24]. Therefore, even *culpa levissima* becomes a sufficient ground for liability.

Case law has repeatedly stated that the general rule of the reversal of proof does not apply to medical liability. Accordingly, the plaintiff must prove that the health professional or the hospital did not meet the required standard of care [25]. The physician is under an *obligation de moyens*, and therefore he/she is not obliged to heal the patient. Nevertheless, the Supreme Court has also paved the way for victims to prove medical negligence. Thus, strong duties of information are imposed on health professionals, as well as the duty to co-operate in furnishing proof of facts [26]. In addition, the Supreme Court applies the rule *res ipsa loquitur* in cases of "disproportionate result", i.e. where after a routine operation the patient suffers extraordinary harm. The Supreme Court quotes as comparative sources of inspiration the French *faute virtuelle* and the German *Anscheinsbeweis* [27].

III. Tort liability for one's own conduct

1. Acts and omissions

Art. 1902 CC deals with liability for one's own conduct. This provision refers to two types of conduct: acts and omissions. "Action" embraces any positive activity carried out by the tortfeasor. More problematic is the notion of "omission". Not every inactivity can lead to tortious liability. Liability is clear where the omission takes place

[23] TS 17.2.1997 (*RJA* 1426), 18.12.1997 (*RJA* 9105), 24.4.2002 (*RJA* 5105).

[24] TS 22.4.1997 (*RJA* 3249), 3.5.1997 (*RJA* 3668).

[25] TS 15.10.1996 (*RJA* 7110), 25.6.2003 (*RJA* 4261).

[26] TS 17.5.2002 (*RJA* 6748), 8.9.2003 (*RJA* 6065), 22.6.2004 (*RJA* 3958). Duties of information are especially important in wrongful conception cases (TS 29.5.2003, *RJA* 3916; 7.4.2004, *RJA* 2608). See also M. Martín Casals, J. Solé Feliu and J. Ribot Igualada, "Compensation in the Spanish Health Care Sector", in J. Dute, M.G. Faure, H. Koziol (eds.), *No-Fault Compensation in the Health Care Sector* (Wien, 2004), p. 334.

[27] TS 17.11.2004 (*RJA* 7238). See also, among many others, TS 8.5.2003 (*RJA* 3890), 15.9.2003 (*RJA* 6418), 7.10.2004 (*RJA* 6229).

in the course of an activity; for example, the tenant who does not care about the maintenance of the electricity system [28]. According to Díez-Picazo, the omission might be qualified at the same time as causation and as negligence [29].

Usually, the act or omission is required to be negligent and unlawful.

2. Fault

Art. 1902 CC requires fault for liability to arise. Fault includes intention to harm *(dolo)*, although the latter is not expressly mentioned. As for the notion of fault, case law takes into account both the foreseeability of the damage [30] and a standard of diligence *(diligencia de un buen padre de familia)* adequate to the circumstances of the persons, the place and the time (art. 1104 CC) [31]. The defendant is thus liable when he/she did not foresee the causation of the damage and when he/she failed to take the necessary precautions in order to avoid the causation of the damage. However, the reversal of the burden of proof of fault has to be borne in mind.

A precondition for fault is that the tortfeasor is conscious of his/her acts. The Supreme Court refers to "capacity of fault". This means the capacity to understand what damaging others means. Age is a relevant factor in order to assess the "capacity of fault", that is, age is relevant in determining what the minor ought to have reasonably foreseen, but the decisive element is the "natural capacity" or maturity of judgment. Capacity is presumed in all persons that are of age (18 years old: art. 12 CE and 315 CC).

As for minors, the Supreme Court has not established fixed rules in relation to their capacity of fault. Rather, it follows a casuistic approach. Thus, the decision handed down on 15.12.1994 [32] accepted the contributory negligence of a ten-year-old boy who instead of being at school was playing in a building under construction, where he died. On the contrary, the decision of 19.6.1997 [33] held the regional education administration exclusively liable for the injuries suffered by a twelve-year-old boy-scout who entered a closed zone because "for his scarce age he could not be aware of the risk he was running".

Mentally handicapped persons are not excluded from being liable in tort, although they can not be criminally liable (see art. 118.1.1 and 120.1 CP). If the insane person

[28] TS 18.12.1997 (*RJA* 9101). The Railway Company RENFE is liable because the train had no system to avoid passengers opening the coach doors while it was in progress (TS 6.11.2003, *RJA* 8270).

[29] Díez-Picazo, *Derecho de daños*, p. 288.

[30] Thus, TS 18.5.1999 (*RJA* 4112), 15.7.2002 (*RJA* 5911), 10.6.2004 (*RJA* 3605).

[31] TS 31.5.2000 (*RJA* 3923), 24.5.2004 (*RJA* 4033).

[32] *RJA* 9421.

[33] *RJA* 5423.

has been judicially declared as an incapable person, a guardian must be appointed, who shall be liable under art. 1903 CC. If he/she has not been appointed, the liability of those who should have sought a declaration of incapacity is at stake. The decision of 5.3.1997 [34] refused the liability of the parents of a paranoid schizophrenic son of full age, who shot three boys, because they were never informed of his mental illness and their son had not previously shown any violent behaviour. There is an important argument against holding a paranoid schizophrenic person's parents liable: as sufficient evidence that they form a causal link is lacking, since a declaration of incapacity could not have avoided the shooting.

3. Unlawfulness

Art. 1902 CC does not mention unlawfulness among the conditions of tort liability. However, most legal authors and case law consider that unlawfulness is a further condition for liability. Academic commentary does not agree on what unlawfulness exactly means. The prevailing opinion considers that it is connected to illicitness of behaviour, which consists in the infringement of the general duty not to harm others *(neminem laedere)* [35]. However, Pantaleón [36] has given two convincing reasons to refuse unlawfulness as a general requirement of tort liability. On the one hand, Spanish tort law is not a system of a typified list of protected interests, but one of general clause, so that all damage is reparable (unless the interest is unworthy of protection). On the other hand, as mentioned above, the aim of tort law is compensation of the damage, and punitive damages are excluded. Occasionally, even the Supreme Court has stated that liability can arise without unlawfulness by the tortfeasor [37].

IV. Liability for damage caused by others [38]

A person can also be liable for the acts or omission of another person, according to art. 1903 CC. But this liability arises from that person's own fault (either *culpa in vigilando* or *culpa in eligendo)*. Fault is rebuttably presumed (art. 1903 *in fine*), aim-

[34] *RJA* 1650; comment by M.A. Parra Lucán in *CCJC* 44, p. 775-804. See also Sofía de Salas Murillo, *Responsabilidad civil e incapacidad* (Valencia, 2003).

[35] TS 11.10.1990 (*RJA* 7860), 24.3.1995 (*RJA* 2403), 16.12.1999 (*RJA* 8978), 8.5.2003 (*RJA* 3890).

[36] Pantaleón, art. 1902 CC, p. 1993-1995. Along the same lines, Roca Trias, *Derecho de daños*, p. 72-73.

[37] TS 8.11.1990 (*RJA* 8534), 29.1.2003 (*RJA* 616), 29.4.2004 (*RJA* 2092).

[38] See M. Martín Casals and J. Solé Feliu, in J. Spier (ed.), *Unification of Tort Law: Liability for Damages Caused by Others* (The Hague-London-New York, 2003), p. 231 ff.

ing at a better protection of victims, but in fact rebutting the presumption is really difficult if one looks at case law; in fact, the courts even speak of "quasi-strict liability" [39]. Therefore, a person must compensate the damage caused by others insofar as he/she did not meet the required standard of care necessary to foresee and avoid it. Liability is imposed upon certain persons (such as parents, guardians, owners or directors of establishments or companies or owners of schools) who are liable for damage caused by other persons to whom they are tied by family, professional or educational relations of dependency. The main feature of these relations is the existence of a hierarchical or subordinate situation between the person who is held liable and the other who directly caused the harm [40]. Hence, the former exerts some sort of control or supervision on the latter's behaviour, from which *culpa in vigilando* or *in eligendo* may arise.

1. Liability of parents and guardians

Parents are liable for the damage that may be caused by minors (art. 1903.2 CC). The Spanish Supreme Court usually holds parents liable on the basis of two principles: *culpa in vigilando* and *culpa in educando*. Accordingly, parents must always control the normal activities of their children while they are under their custody [41] (*culpa in vigilando*) and even when they do not have direct custody (i.e. the child is playing alone in a park and harms another child) they would be liable because they should have educated their child better (*culpa in educando*). Parental liability requires the children to be under the guard of their parents. As children are under guard until they are full of age or emancipated, this implies that parents are liable for the acts of their seventeen-year-old sons and daughters, even if they cause damages while they are in a discotheque in the early hours of the morning [42].

These two tough principles should be understood in the following way:

a) Parents have direct, joint and several liability (if the child is under their custody), which means that the victim can sue them directly (and not necessarily the minor first).
b) There are three requirements that apply to parents' liability:
   — The minor must have been objectively negligent, his/her behaviour must have been foreseeable and he/she should not be able to be liable for that behaviour [43].

[39] TS 29.3.1996 (*RJA* 2203), 17.7.2003 (*RJA* 6575) in relation to undertakings; TS 28.7.1997 (*RJA* 5810), 11.3.2000 (*RJA* 1520) in relation to parents.

[40] Martín Casals and Solé Feliu, p. 232.

[41] They lose it, for example, when they deliver their child to the school. See below sub 2.

[42] Court of Appeal of Albacete 28.7.2004 (*JUR* 243409).

[43] Court of Appeal of Málaga 19.4.2000 (*JUR* 196251).

   — If one of the parents does not have the custody of the child at some point in time (i.e. parents are divorced and they have his/her custody at different times such as alternative weekends, half of the holidays, etc.) he/she is not liable for the behaviour of the minor.
   — To escape (which has revealed to be rather complicated) *culpa in educando* or *culpa in vigilando* several factors can be taken into account although they are not causes for freeing the parents from their liability: the age of the child, his/her mood, habits, mental health, grade of intellectual development, education, etc.; number of children of the couple and their economic resources [44]; the neighbourhood where the family lives, sources of danger in the area, dangerous games and toys.

The regime for mentally disabled people is similar to that of minors but in relation to their tutors or guardians (art. 1903.3 CC).

Concerning tort liability arising from a crime, art. 118.1 CP establishes that parents who have incapable children under their re-established authority and guardians are liable for negligence, irrespective of the liability incurred by the son/daughter or ward themselves. Minors between fourteen and eighteen are subject to the *Ley Orgánica de Responsabilidad Penal de los Menores*. Under this statute, minors are jointly and severally liable with their parents, guardians and legal or de facto carers. The court is entitled to reduce the amount of the compensation if parents and guardians have not intentionally or grossly negligent fostered their children's behaviour, but such a decision would be unlikely [45].

2. Liability of educational institutions

According to art. 1903.5 CC, which was modified in 1991 [46], owners of educational centres are liable for damages done by their pupils while they are under the vigilance and control of teachers, regardless of where they are or what they are doing. It is their responsibility to prove the proper running of the (private or semi-private) educational centre (i.e. infrastructure [47]) for which they would be liable directly via art. 1902

[44] TS 29.12.1962 (*RJA* 5141).

[45] See, for example, Court of Appeal of Alicante 30.5.2003 (*JUR* 223270), León 21.4.2004 (*JUR* 151422), 7.10.2004 (*JUR* 274059).

[46] The two main modifications were that 1) no longer public educational centres would be liable through the civil law procedure but through the contentious-administrative one, like for the medical liability; 2) and that from then onwards the owners of (private or semi-private) educational centres would be liable in first place, instead of the teachers, though these are the ones that lack control on the pupils.

[47] Court of Appeal of Cantabria 6.2.1996 (*AC* 333).

CC, and the behaviour of the teachers in control of their pupils [48] as well as the organisation of the centre (i.e. employment of good and sufficient staff and teachers), for which they would be liable via art. 1903.5 CC. In some cases they would also be liable for breach of contract (parents-school for the education of their children), via art. 1104 CC [49].

Liability would be a consequence of several facts:

a) Damage caused by a minor to other minors, to third parties or to himself/herself. This is a clear case of *culpa in vigilando* (lack of due surveillance) of the teachers but the liability derived from it is assumed by the owner by the centre [50]. In TS 21.11.1990 [51], a sudden fight between two children broke out, which was unforeseeable, so the owner of the private centre was not liable for the damages derived from it; if the school were a public one, it would have been liable due to the strict liability of the Public Administration. In some cases, fights at schools are considered partially the responsibility of the parents (although they do not have the custody at that point in time) for *culpa in educando* (they should have educated their children better) [52].

b) Damages caused by teachers and other staff to minors. It is always clear that corrective measures must be proportioned, and never harm the minor's physical or moral integrity (for Catalonia, see art. 143.3 CF). In this case, the centre's owner would be responsible either via art. 1903.4 or art. 1903.5 CC, but he/she can thereafter sue the immediate tortfeasor, if he/she has behaved improperly via art. 1904 CC.

c) Centre infrastructure. If the centre meets all administrative requirements related to electricity installation (plugs, etc.), lights, accesses, emergency exists, stairs, etc. its owner is exonerated for liability arising from infrastructural matters [53]. However, if the centre has structures (walls, pillars, etc.) that may be potentially dangerous to minors (especially when they are at an early age) the centre's owner would be liable for such damages [54].

This liability of art. 1903.5 CC is during all school-time (and also just before starting it —if minors are left in the school by their parents— or after it —in case children follow programmed activities like sports, languages, tutorials, computers,

[48] TS 21.11.1990 (*RJA* 9014), Court of Appeal of Álava 31.7.1999 (*AC* 7558). For public educational centres, see the explanation about the liability of the Public Administration above sub I.2.2.

[49] TS 20.12.1999 (*RJA* 9356).

[50] High Court of Extremadura 16.3.1999 (*RJACA* 673).

[51] *RJA* 9014.

[52] For example, TS 22.1.1991 (*RJA* 304), Court of Appeal of La Coruña 2.2.1998 (*AC* 3967). But that was not the case in Court of Appeal of Castellón 26.1.1999 (*AC* 187).

[53] Court of Appeal of Almería 22.11.1999 (AC 8291) and 19.9.2000 (JUR 274337)

[54] See for a kindergarten TS 20.12.1999 (*RJA* 9356). See also Court of Appeal of Álava 31.7.1999 (AC 7558)

etc. [55], regardless of whether the damaging fact is committed in the classroom [56] or in the playground [57], where dangerous games should be avoided and surveillance is more relevant). It also covers lunch time at school [58] or outside of the school building [59]. The educational institution is also liable for damages caused by skiving students. External activities (like day-trips or transport to or from the school) are also included in this liability.

To sum up, Spanish courts take into account the age of the minor [60], a dangerous environment [61], the character of the minor [62], the development of adequate activities and adequate instruments to the age of the minor [63], and exclude unforeseeable reactions of the minor [64]. The centre's owner is mainly responsible for any damage committed by minors in those circumstances, but there may be some co-responsible parties, for example, the parents (for *culpa in educando* [65], for their negligence in treating the child once they have been warned by the school that he/she is ill or has suffered an accident [66] or for taking part in games and activities in the school [67]), minors proven to have enough understanding (opposed to kindergarten children [68]), teachers and other staff of the school [69], insurance companies [70] of the licensee of services to the school (catering companies, bus companies, etc. [71]).

[55] TS 3.12.1991 (*RJA* 8910).

[56] TS 20.5.1993 (*RJA* 3718).

[57] TS 10.10.1995 (*RJA* 7186).

[58] TS 21.11.1990 (*RJA* 9014).

[59] TS 15.12.1994 (*RJA* 9421).

[60] Whether more or less quantity and quality of surveillance is needed; see TS 10.10.1995 (*RJA* 7186).

[61] Due to infrastructural or architectural matters and in relation to activities within the centre or out of the building; see Court of Appeal of Cantabria 6.2.1996 (*AC* 333).

[62] Especially active children need more supervision, TS 15.12.1994 (*RJA* 9421).

[63] TS 21.11.1990 (*RJA* 9014).

[64] But this rule is only applied to private or semi-private schools as the liability of the Public Administration in public schools is higher, including any fortuitous case.

[65] See above sub 1.

[66] Court of Appeal of Murcia 22.11.2000 (*JUR* 2001\31345).

[67] Court of Appeal of Navarra 4.6.2001 (*JUR* 227405).

[68] See TS 20.12.1999 (*RJA* 9356).

[69] But only in a second stage, once the centre's owner has satisfied the victim, he/she can sue teachers or other staff to recover what he/she had already paid if they have behaved with malevolent intent or with gross negligence via art. 1904.2 for teachers or via art. 1904.1 for other staff.

[70] On the basis of the Insurance Contract Act. See TS 15.12.1994 (*RJA* 9421), Court of Appeal of Cantabria 6.2.1996 (*AC* 333). The mechanism is the *solve et repete* one: the insurance company may be sued in the first place and must pay and in some cases; it can thereafter sue the school).

[71] Court of Appeal of Álava 31.7.1999 (*AC* 7558).

3. Liability of employers

Art. 1903.4 CC establishes the liability of employers (physical or legal person) for the acts of their employees on the basis of two grounds [72]: *culpa in eligendo* (the entrepreneur has given to this particular employee the post, which means that the former should be, in principle, the person responsible for the facts of the latter) and *culpa in vigilando* or *in controlando* (employers should control and supervise the activity of their employees) [73]. There are also economical and practical reasons to hold employers liable: they are normally more solvent than employees. In addition, case law invokes the economic profit theory: if employers obtain profit, they must bear risks. Also because they are normally the person who deals with third parties, it is more efficient that entrepreneurs be the person liable for the mistakes of his/her employees. Art. 1904 CC, provides employers the possibility to sue in cases where they have misbehaved [74].

There are three main requirements to appreciate this type of liability:

a) There must be a dependent relationship between the entrepreneur and the employee [75].
b) The harm should have happened within working hours and because of the work itself.
c) The act of the employee should have been negligent [76].

For liability to arise there has to be a relationship of dependence between employer and employee. A hierarchical relationship is not necessary; it is enough that the employee develops his/her activity within the economic organisation of the employer. Case law has extended liability to subcontractors [77] and even to notaries [78]. Since case law requires fault on the employee, legal writers consider that the plaintiff is free to sue the employer, the employee or employer and employee jointly [79], in which case they are solidary liable.

[72] See TS 29.2.1996 (*RJA* 1612).
[73] Though with limits like in TS 30.12.1980 (*RJA* 4815).
[74] TS 26.10.2002 (*RJA* 9183).
[75] TS 4.1.1982 (*RJA* 178), 4.4.1997 (*RJA* 2639).
[76] TS 13.10.1995 (*RJA* 7407).
[77] TS 16.5.2003 (*RJA* 4756).
[78] TS 6.6.2002 (*RJA* 6755): "as the notary's office it is a unitary complex of professional activity under the direction of the notary, he/she must is answerable for the harm caused by his/her employees in the scope of their own functions". See also TS 19.7.2003 (*RJA* 5387).
[79] Javier Barceló Doménech, *Responsabilidad extracontractual del empresario por actividades de sus dependientes* (Madrid, 1995) p. 335; De Ángel, *Tratado*, p. 365.

4. Liability for owners of vehicles

Art. 1.1.5 LRCSCVM [80] holds the owner of a vehicle liable for damages arising from road accidents where a relationship provided for in art. 1903 exists between him/her and the actual driver. On the other hand, art. 120.5 CP establishes the vicarious liability of owners of vehicles for damages resulting from crimes committed by employees and authorised persons driving the vehicle. Thus, it is the formal owner of the vehicle who incurs liability, not the driver who actually controls the vehicle when the damage is caused. It is still under discussion whether the lessee or the leasing company is liable where the vehicle has been acquired under a financial leasing or renting agreement.

5. Liability of public bodies

Art. 139 ff LRJAP provide for strict liability of public bodies for the acts of their servants and other employees in a very broad sense. The victim has to bring the claim against the public body. The administration can later recover the compensation paid from the tortfeasor, but only so long as he/she caused the damage intentionally or with gross negligence [81].

This is applicable to public educational centres, hospitals and to damages caused in the provision of a public service.

V. Damage

The Civil Code does not contain a definition of damage. Since the Spanish Civil Code constitutes a system of general clause, damage can be defined as the violation of any legally relevant interest. Damage must be certain and proved by the plaintiff; merely hypothetical damage is not recoverable [82]. The interest must be worthy of legal protection.

The main distinction to be drawn is between material and non-material damage.

1. Material damage

Material damage covers both *damnum emergens*, that is to say, a reduction in a person's assets, and *lucrum cessans*, that is to say, the loss of an increase in those as-

[80] Passed by Royal Legislative-Decree 8/2004, of 29 October.
[81] See Jesús González Pérez, *Responsabilidad patrimonial de las administraciones públicas* (Madrid, 2004)[3].
[82] See only TS 26.3.1997 (*RJA* 1864).

sets that would have occurred had the harmful act not taken place. The reality of the damage does not exclude compensation for future damage, provided that it is foreseeable with sufficient certainty. Certainty is also a requirement for *lucrum cessans:* there must be a real probability of obtaining the profit. Dreams of earnings cannot be compensated [83]. In both cases the plaintiff must provide at least the basis for the quantification of the damage, otherwise the application shall be dismissed (art. 219 LEC). A peculiar category of pure economic loss is not recognised in Spanish law and is treated the same as any other damage [84].

The birth of an unwanted child cannot be grounds for a damage claim [85]. Nevertheless, major expenses are compensable, especially where a handicapped child is born [86]. Non-pecuniary damage arising from wrongful conception and wrongful birth is also recoverable.

2. Non-pecuniary loss

Although it is not provided in the Civil Code, case law has traditionally accepted compensation for non-pecuniary loss. Compensation is provided nowadays in art. 110 and 113 CP (*"perjuicios morales"*). Non-pecuniary loss is legally presumed where the rights of personality are infringed (art. 9.2 *Ley Orgánica* 1/1982, of 5 May, on the protection of Reputation, Privacy and Own Image). According to Martín, Ribot and Solé, the following headings of non-pecuniary loss are reparable: *pretium doloris* or the pain resulting from bodily or mental injury; the grief suffered as a result of such an injury or to a beloved person, including their death; aesthetic damage [87]. The Supreme Court has declared that non-pecuniary loss cannot arise where only economic interests have been infringed [88]. Since non-pecuniary loss arises from the infringement of the rights of personality, non-pecuniary loss appears linked to personality and not to capacity; therefore, even persons that cannot feel the grief (patients in a permanent vegetative state) are entitled to compensation for non-pecuniary loss [89]. Legal persons are also susceptible to non-pecuniary loss [90].

[83] TS 30.10.1993 (*RJA* 9222), 26.9.2002 (*RJA* 8094), 14.7.2003 (*RJA* 4629), 28.10.2004 (*RJA* 7208).

[84] See specifically Miquel Martín-Casals and Jordi Ribot, "Compensation for Pure Economic Loss under Spanish Law", in W.H. van Boom, H. Koziol and C. Witing (ed.), *Pure economic Loss*, (Wien-New York, 2004), p. 60 ff.

[85] TS 11.5.2001 (*RJA* 6197; a healthy child), 7.6.2002 (*RJA* 5216; a handicapped child).

[86] TS 6.6.1997 (*RJA* 4610), 23.12.2002 (*RJA* 914).

[87] Miquel Martín Casals, Jordi Ribot and Josep Solé, "Non-Pecuniary Loss under Spanish Law", in W.V. Horton Rogers (ed.), *Damages for Non-Pecuniary loss in a Comparative Perspective* (Wien, 2001), p. 194.

[88] TS 31.10.2002 (*RJA* 9736).

[89] Court of Appeal of Lleida 3.5.2003 (*RJA* 110235).

[90] TS 20.2.2002 (*RJA* 3501).

Loss of a chance is also recoverable. Case law seems to consider it a specific type of non-pecuniary damage, since it is not possible to establish what would have been the situation had the chance —for example, that for the success of a business— not been lost [91].

3. Assessment of damage

The Supreme Court consistently considers the assessment of damages to be a question of fact that belongs to the decision of the courts of instance. Hence, the decisions of lower courts can only be reversed if the basis employed for assessing the damages were erroneous [92]. As for non-pecuniary loss, case law acknowledges the lack of objective parameters in assessing it, and refers to equity and reasonableness of awards [93]. In the case of non-pecuniary loss arising from the infringement of the rights of personality, its assessment must take into account the gravity of the infringement, its spread within the media and the presumed benefit obtained by the tortfeasor [94].

More controvertial has been the subjection of personal injuries to tariffication. A tariffication scheme (usually known as *baremo*) was legally introduced in 1995 as an annex to the law relating to the ordering and supervision of private insurance applicable to traffic accidents. The Supreme Court declared that courts were not bound by the tariffication scheme [95]. The *baremo* was challenged before the Constitutional Court, on the basic grounds of the violation of the fundamental rights to equality and life. The Constitutional Court upheld the *baremo* in its essential points, and considered that only one limb of a table of the scheme was contrary to the Spanish Constitution. Moreover, the tariffication scheme was considered binding for the assessment of personal injuries caused by traffic accidents. Needless to say, the decision received strong criticism [96]. The tariffication scheme has been ultimately modified by the Royal Legislative-Decree 8/2004, of 29 October (LRCSCVM) [97].

4. Reparation of damage

According to art. 1902 CC, the tortfeasor must compensate the damage. There are two possible means of reparation: compensation in kind and compensation in money.

[91] TS 11.11.1997 (*RJA* 7871), 8.4.2003 (*RJA* 2956), 9.7.2004 (*RJA* 5121).

[92] TS 18.2.1997 (*RJA* 1240), 11.4.2002 (*RJA* 931), 14.7.2003 (*RJA* 5991), 21.5.2004 (*RJA* 3533).

[93] TS 24.9.1999 (*RJA* 7272), 2.4.2004 (*RJA* 2607), 18.6.2004 (*RJA* 3629).

[94] TS 20.7.2001 (*RJA* 8402), 7.7.2004 (*RJA* 5237).

[95] TS 26.3.1997 (*RJA* 1864), confirmed by TS 24.5.1997 (*RJA* 4323) and 19.6.1997 (*RJA* 5423).

[96] For an overview in English, M. Martín Casals, "An Outline of the Spanish Legal Tariffication Scheme for Personal Injury Resulting from Traffic Accident", in H. Koziol, J. Spier (ed.), *Liber Amicorum Pierre Widmer* (Wien-New York, 2003), p. 235 ff.

[97] See, for further details, *infra sub* VIII.2.

The choice of means is up to the victim, provided that compensation *is natura* is feasible. Compensation in kind is expressly foreseen in art. 110.1 CP. Art. 9 *Ley Orgánica* 1/1982 provides for the publication of the decision that declared the infringement of the plaintiff's right to reputation or privacy.

In practice, compensation in money is the rule. Compensation consists in the award of a lump sum equivalent to the damage caused. The court, however, may grant also a life annuity or even combine a capital and an annuity [98]. Multiple tortsfeasors are solidary liable. Therefore, the victim is entitled to sue only one of them (there is no *litisconsorcio pasivo necesario,* that is, there is no obligation to sue all tortfeasors jointly) [99].

VI. Causation

For liability to arise art. 1902 CC requires a link of causation between the act or omission and the damage. Causation is also a requirement in statutory cases of strict liability (art. 5 Act 22/1994 on product liability, LRPD). Spanish case law has not developed a consistent theory of causation; rather, it has followed a casuistic approach, without adhering to a concrete causal theory. The distinction between causation in fact and causation in law [100], for example, has found hardly an echo in the Supreme Court decisions [101]. When the Supreme Court resorts to a causal theory, it usually refers to adequate causation, that is to say, damage is the natural consequence in a relationship of necessity between the act and the damage [102]. But, occasionally, the Supreme Court mentions the "but for" test (the *conditio sine qua non* theory) [103].

1. Proof of causation

Proof of causation falls on the plaintiff. Although, in general, the Supreme Court does not accept conjectures, sometimes it is ready to alleviate the evidential requirements. On the one hand, it admits proof based on presumptions: A pavilion where competitions were to take place as part of the 1992 Olympic Games was burnt down. There was no direct proof of the cause of the fire but inside there were only some employees of the defendant company working with a disk wheel and the fire begun once the workers left [104]. The company was held liable. Along the same lines, the Supreme Court has referred to a "judgment of qualified probability" where the exact cause of the damage is unknown but one only possible explanation of it appears [105]. But the alleviation of proof has led to technically inadmissible decisions. TS 24.7.2001 [106] held a grape juice bottler and the owner of a bar jointly liable. Caustic soda instead of grape juice was served and caused severe injuries to a young boy who drank it. The decision disregards causation: caustic soda was introduced in the bottle either by the bottler or by the bar owner, but not by both at the same time, so only one could be blamed for the fatal result. More correctly, TS 26.11.2003 refuses that the defendants could have incurred joint and several liability in a case of alternative hypothetical causation [107].

2. Multiple tortfeasors

As mentioned above, multiple tortfeasors are solidary liable. According to art. 116 CP, when multiple tortfeasors must compensate damages, the court must determine the respective share of causation. This share is however only effective in the internal relationships among the tortfeasors, since the victim is not obliged to sue all of them jointly, but is entitled to lodge the claim against only one of them.

More difficult is the decision where an undetermined member of a group has caused harm. There is no general rule in the Civil Code, and only the statute on hunting liability provides for joint and several liability of all members of the group. However, there is a stream of opinion favourable to the extension of joint and several liability in such cases [108]. Market share liability has not been applied by Spanish courts.

[98] TS 17.3.1998 (*RJA* 1122): the Supreme Court awarded a sum of €180,000 and an annuity of €33,900 up to the limit of €1,500.000 claimed in the application for a tetraplegia resulting from a motorcycle accident.

[99] TS 4.4.1997 (*RJA* 2639), 13.12.2003 (*RJA* 2004\189), 27.5.2004 (*RJA* 3545), 12.7.2004 (*RJA* 4667).

[100] Fernando Pantaleón Prieto, "Causalidad e imputación objetiva", in Asociación de Profesores de Derecho Civil, *Centenario del Código Civil*, II (Madrid, 1990), p. 1561 ff.

[101] TS 24.5.2004 (*RJA* 4033) distinguishes causation in fact as matter of proof and causation in law as a legal matter which can be reviewed in cassation and which concerns the efficiency of the material causation in order to generate the damage.

[102] TS 3.7.1998 (*RJA* 5411), 2.3.2000 (*RJA* 1306), 29.5.2003 (*RJA* 3913), 11.11.2004 (*RJA* 6898).

[103] TS 29.12.1997 (*RJA* 9602), 3.12.2002 (*RJA* 10414).

[104] TS 26.1.2000 (*RJA* 227).

[105] TS 29.4.2002 (*RJA* 4971): death by asphyxia of two women from smoke inhalation as a result of a fire in the neighbouring flat where a dressmaker stored some pieces of cloth.

[106] *RJA* 8420. Comment by Rafael Sánchez Aristi in *CCJC* 58.

[107] *RJA* 8354. A brand new truck was sent to a garage to install some accessories. Some days later the truck burnt down on unknown causes. The Supreme Court reverses the judgment of the Court of Appeal, which held liable the seller and the owner of the garage. "A decision holding liable the defendants in the case of alternative hypothetical causation is inadmissible", concludes the Supreme Court, and since causation was not determined against any of the defendants the claim was dismissed.

[108] See, for example, De Ángel, *Tratado,* p. 864 ff, Roca Trias, *Derecho de daños,* p. 160-161, and Court of Appeal of Cordoba 19.9.2001 (*JUR* 316294).

3. Contributory negligence

As we will see later, one of the defences available to the plaintiff is the victim's exclusive fault *(culpa exclusiva de la víctima)* [109]. None the less, it is also possible that the person who suffered the damage has only contributed in one way or another to that damage. Although there is no provision in the Civil Code [110], which establishes contributory negligence [111] as a general rule, case law admits its existence. The consequence of contributory negligence is the reduction of damages in proportion to the victim's grade of participation in the causation of damage. Nevertheless, it is difficult to ascertain from case law any criteria about the quantification of the victim's contribution. All that is clear is that participation under ten per cent is irrelevant [112]. Contributory negligence can be attributed not only to the victim but also to those who might be responsible for the victim's acts and omissions, namely parents [113].

VII. Company sphere liability

1. Product and service liability

1.1. *Product liability*

Currently, this type of liability is regulated by Act 22/1994 (LRPD). This is a type of strict liability (no need to prove the negligence of the tortfeasor) in which the claimant only needs to prove the existence of the defect in the product, the damage itself and the causal relationship between the defect and the damage (art. 1 and 5 LRPD). The defect can be presumed and may be related to the design, information or fabrication.

[109] *Infra, sub* IX.2.

[110] See, by contrast, art. 114 CP. See also art. 9 Act on Product Liability (LRPD) and art. 1.1.2 Royal Legislative-Decree 8/2004, of 29 October (LRCSCVM).

[111] For a long time the Spanish usual expression has been *"compensación de culpas"* (literally, compensation of faults). The Supreme Court seems to abandon this inadequate expression in favour of "concurrencia de culpas" (TS 6.5.2004, *RJA* 1683) or of "responsabilidades" (TS 11.7.1997, *RJA* 5605) and other similar ones.

[112] See for further details M. Martín Casals and J. Solé, "Contributory Negligence under Spanish Law", in U. Magnus and M. Martín-Casals (ed.), *Unification of Tort law: Contributory Negligence* (The Hague-London-New York, 2004), p. 173 ff.

[113] For example, TS 26.3.2004 (*RJA* 1952). An eight-year-old boy died by electrocution while playing in a railway station. The Supreme Court states that the mother —who was the plaintiff— did not take care of where her son was from afternoon until evening —the fatal accident happened by 20:00. The Supreme Court considers a ten per cent mother's contributory negligence.

The defective object can be any chattel, including gas, electricity and blood (art. 2 LRPD) [114]. The claimant may be any person affected by the damaged product, not only a consumer, who can claim for personal damages, economic loss (i.e. hospitalisation), non-pecuniary damages related to death or injuries (including damages for pain and suffering) and in a limited way, for personal belongings [115]. The claim may be only directed against the manufacturer or the importer (if the former is not within the EU) or, if these are unknown, against the supplier [116]. The manufacturer or importer may not be liable if:

a) They have not circulated the product (i.e. circulated products due to piracy).
b) They produced the chattel correctly and there is another cause for the defect (subsequent defect).
c) The product was not produced to be sold (i.e. personal presents).
d) The defect in the product was unknown owing to the stage of development of scientific and technical knowledge (development risks).

Moreover, if there is contributory negligence by the claimant, the liability of manufacturer, importer or, in its case, supplier may be reduced or extinguished (art. 9 LRPD). The plaintiff may only claim within 10 years from the circulation of the product or within 3 years of receiving the injury (art. 12 and 13 LRPD).

Despite the evolution of the Spanish law of torts and the new Spanish Procedural Act 2000 (LEC), which allows some kind of class action in order to protect the rights of consumers groups [117], no claim based on massive and general damages from tobacco-related diseases [118] (unlike the US, for example) or from unhealthy food-related diseases has succeeded thus far [119].

[114] The most famous Spanish case on this field was the *Rapeseed oil case*, which dealt with a massive poisoning in 1981 due to adulterated rapeseed oil, which finished in several court resolutions [TS 23.4.1992 (*RJA* 6783) and TS 26.9.1997 (*RJA* 6366)]. There are cases for any kind of products, like defective containers [TS 22.5.2001 (*RJA* 6467)], candies [TS 10.6.2002 (*RJA* 6198)], medicines [Court of Appeal of Valencia 22.11.1997 (*EDJ* 17287)], vehicles (for defective airbags, seat belts, brakes, tyres, etc.) [TS 19.9.1996 (*RJA* 6719), Court of Appeal of Vizcaya 9.2.2002 (*AC* 104)], food, toys, fireworks, etc. A complete list may be found at *www.indret.com*.

[115] If there are other pecuniary losses (including the defective product itself), one can claim only through the way of general rules in art. 1902 CC, without the benefits of Act 22/1994, LRPD (i.e. objective liability, limited proofs needed, etc.).

[116] He/She is also liable if he/she knew that the product he/she was selling was defective.

[117] Art. 6.1.7, 7.7, 11, 13.1, 15, 78.4, 221, 222.3, 256.1.6 and 519 LEC.

[118] Unlike the situation in the US in cases like *Norma R. Broin et al. v. Phillip Morris Inc., et al.* (641 So. 2d 888, 892 (Fla. 3d DCA 1994), 654 So. 2d 919 (Fla. 1995)) and *Engle v. R.J. Reynolds Tobacco Co* (Case No. 94-8273 (Fla. 11th Cir. Ct. 2000). Contrast them with the Spanish Court of Appeal of Alicante 7.1.2003 (JUR 44458).

[119] Although unsuccessful, the US *Pelman v. McDonald's* 2003 (237 F.Supp.2d 512) case revealed new trends in law of torts world wide.

1.2. *Service and advice liability*

Unlike the case of product liability, there is no specific Act about service liability, so there is a complex net of Acts and legal dispositions in Spanish law depending on the type of service or advice and depending on who is the damaged subject (claimant). These are the possible applicable laws:

a) Liability for breach of contract, in cases where a service or advice contract exists. These are typical situations in liberal professions, like solicitors and barristers. They may be liable only for their due behaviour and never for a concrete result (art. 1101 and 1544 CC). Public notaries (TS 5.2.2000 [120]) and judges (art. 292 to 297 LOPJ) have special regulations.

b) There is a common regulation for all users of services in the *Consumers and Users general Act* 1984 (LGDCU) [121], which has been applied especially to cases of medical negligence [122], poisoning in restaurants [123], damages at leisure parks [124] and highways [125].

c) In case of concurrence of a defective product and a defective service, the claimant can choose to whom he/she wants to claim: to the manufacturer (for the former), to the person who renders the service (for the latter) or to both of them. In each case different laws are applied according to what we have said for defective products and for defective services [126].

2. Liability of corporations' and funds' managers

2.1. *Corporations' managers liability*

The general regulation for corporations' liability states that companies having legal personality will be liable for their acts with their own estates (art. 1911 CC). Managers of corporations may also be personally liable for their misbehaviour. Moreover, in case they breach the law or the articles of the corporation and this breach results in losses for the corporation itself, shareholders or third parties may bring a claim against them (art. 133 to 135 LSA).

[120] *RJA* 251.

[121] Despite its name it is only applied to users of services but never to consumers.

[122] See *infra. sub* 5.

[123] TS 18.3.1995 (*RJA* 964).

[124] Court of Appeal of Madrid 1.12.2001 (*EDJ* 70505).

[125] Court of Appeal of Tarragona 12.12.1998 (*EDJ* 38241).

[126] TS 24.9.1999 (*RJA* 7272). This was a case of unwanted pregnancy because of a defective contraceptive device and medical negligence. Both the hospital and the company that issued the defective contraceptive device were liable for damages. See also TS 5.10.1999 (*RJA* 7853), 11.2.1998 (*RJA* 707).

The managers' duty is to maintain equilibrium between the conservative policy of the debenture holders and the riskier tendencies of the shareholders. They should not be liable for concrete results but should be liable for their behaviour: they have the onus to act with the diligence of a reasonable entrepreneur. They may also be liable after they finish their relationship with the company (i.e. they cannot reveal company secrets).

2.2. *Funds' managers liability*

Broadly speaking, in Spain two types of financial funds exist: those which are co-owned by the investors (such as collective investment funds, real estate investment trusts (REITs)-like devices and pension funds) and those in which investors have a credit right against the fund (such as those which are related to mortgage and assets securitisation).

As well as other problems of legal nature these financial funds have, the claim the investors have against the management society in case of mismanagement is rather weak when compared to similar financial structures in other countries (i.e. the chance that beneficiaries under an English trust have to "trace" goods that have been mismanaged or unlawfully sold by the trustee). Their protection is very basic (only a personal, unsecured and unprivileged claim), which is the one in art. 1902 CC for mismanagement, in application of, among others, art. 46.4 Investment Institutions Act 35/2003, for the first type of funds, and art. 5.8 Act 19/92, on the Regulation of Immovable Investment Societies and Funds and Mortgage Titularisation Funds, for the second type.

3. Liability for exploitation and practice of risky activities

Here we deal with organised activities that bear some kind of risk to the participants or to third parties (i.e. spectators). The most common ones are those related to sporting events, fairs, leisure parks, bull fights, fireworks exhibitions and swimming pools.

Sports participants (including referees) may sue for their damages only through art. 1902 CC, so strict liability does not apply in this field as neither does the doctrine related to defective products and services, because theoretically sportsmen should bear their own risk —and therefore their own liability— in practising a particular sport [127]. This is the basic rule. The liability of the sports entrepreneur before sportsmen only exists if he/she is negligent with the facilities (badly conserved or dangerous facili-

[127] TS 22.10.1992 (*RJA* 8399), 27.4.1998 (*RJA* 3262), Court of Appeal of Teruel 28.6.2000 (*EDJ* 2000/54284) and Vizcaya 15.3.1999 (*EDJ* 1999/26846).

ties [128], bad organisation of the event or not enough safety measures [129]), when another sportsman is negligent [130] or in cases where the sportsman is an apprentice [131].

Art. 63 to 69 Sports Act 10/1990 deal with the liability of organisers, club managers and owners of facilities (sports entrepreneurs) before spectators. Their liability does not need negligence of these agents. They bear the intrinsic risk for the sport activity; their liability is only excluded if damages are produced exclusively due to the negligent actions of spectators. There may be concurrence of liabilities in cases where facilities are not fully secure and damages arise as a result of the spectators' behaviour [132].

Apart from sport events, other organised risky activities have peculiar liability systems. Spanish courts do not agree as to what the applicable regime to leisure fairs and parks should be. On the one hand, there are those who think that the liability of the entrepreneur should be strict, regardless if he/she has been negligent, or, at least, that the burden of proof should be reversed (the entrepreneur should prove that he/she has behaved correctly) since he/she is making an economic profit from the activity [133]. On the other hand, some court decisions suggest that a customer taking part in this activity is aware and willing to bear the inherent risk and, consequently, the liability of the entrepreneur should be limited to his/her duty of care in relation to the correct working of the facilities [134].

Bull fights are regulated by Act 10/1991, where the requirements to organise this type of spectacle are set out. The Supreme Court of Spain does not have a clear doctrine on the liability regime in case of damages caused by bull fights. Sometimes it considers that the entrepreneur should not be liable because it is the spectator who has put himself/herself in danger by entering the arena [135], whilst in other cases it considers that the entrepreneur has created the risk (the bull fight itself) and that he/she should be liable for any damages to spectators [136]. Bull fighters (toreros) have a similar liability regime to other sportsmen.

Swimming pools and water leisure parks are another common source of accidents. Blame is usually attributed either by establishing the negligence of the entrepreneur, either because he/she has not observed the public rules governing this sort of facility (i.e. lifeguards, size and depth of the swimming pools, building materials,

[128] Court of Appeal of Girona 2.12.1999 (EDJ 1999/52966), Álava 17.1.2000 (*AC* 923), Teruel 26.1.2001 (*AC* 26).

[129] TS 30.10.1992 (*RJA* 8186) and Court of Appeal of Vizcaya 15.3.1999 (*EDJ* 1999/26846).

[130] Court of Appeal of Huesca 20.12.1997; art. 73 to 85 Act 10/1990.

[131] Court of Appeal of Salamanca 19.11.1998 (*EDJ* 1998/27263).

[132] TS 19.11.1999 (*RJA* 8291).

[133] Court of Appeal of Tarragona 12.2.1999 (*AC* 470), Badajoz 13.5.1996 (*AC* 867).

[134] Court of Appeal of La Rioja 31.1.1997 (*AC* 775), Lleida 9.4.1999 (*AC* 766), Tarragona 12.1.1999 (*AC* 457).

[135] TS 13.2.1997 (*RJA* 701).

[136] TS 31.12.1996 (*RJA* 9053), 5.12.2000 (*RJA* 9887).

etc.) [137], or by evidence of misbehaviour (misuse of swimming pools [138]). When it is only a matter of negligence of the victim, the entrepreneur will not be liable [139].

Finally, the risk for a firework spectacle should be borne by the entrepreneur unless the victim is proven to be exclusively negligent [140].

4. Environmental damage liability

Environmental damage liability in Spain is not yet fully developed. Basically, it is not clear who is the victim in cases of environmental damage (that is, who has suffered the damage) and therefore who would be the beneficiary of the compensation (the environment itself, all Spaniards, the future generations, only the neighbours). A main problem is the lack of specific legislation for environmental damage liability, which must be extracted from general rules and principles.

Like many other jurisdictions, Spanish regulation and jurisprudence on this matter is based on the principle of "polluter pays".

The starting point for the protection of the environment in Spain is art. 45 CE, to which art. 1902 and 1908 CC are linked. Art. 1902 is the general one for damage liability, art. 1908 stipulates that the owner of a machine, building, factory, instrument, etc. is liable for the explosion of machines, the inflammation of explosive substances, smoke that damages people or properties, the downfall of trees and smells coming from warehouses or residual waters. Both articles are used by the TS [141] as dead-end for any liability for environmental damage. The Spanish Constitutional Court [142] has applied the expression "sustainable development" by which environmental protection and economic development should be considered together (art. 130.1 CE).

Consequently, a specific patrimonial or personal damage is currently needed in Spain to sue somebody for environmental damage privately (apart from, of course, the administrative penalties which may be imposed by the mere fact of the pollution) [143]. There are two ways to sue for this cause:

a) Art. 1902 and 1908 CC are sometimes applied together with art. 1906 (damages caused by game) and art. 590 CC (which is related to where potentially dangerous buildings can be built). Some decisions have reversed the burden of proof requested by art. 1908 CC, so that it is for the owner of the dangerous

[137] TS 23.11.1982 (*RJA* 6557), 14.6.1984 (*RJA* 3242).

[138] For example, TS 23.2.1995 (*RJA* 1107).

[139] TS 22.7.1997 (*RJA* 5524).

[140] TS 21.7.1998 (*RJA* 6196).

[141] TS 13.6.1988 (*RJA* 4872), 22.5.1995 (*RJA* 4088).

[142] Decisions of 4.11.1982 (*RTC* 64), 26.6.1995 (*RTC* 102), 12.12.2000 (*RTC* 306).

[143] TS 16.1.1989 (*RJA* 101).

property to prove that his/her action has not only been legal but also adequate in the circumstances [144], however this is not always the case [145].

b) Misuse of law (art. 7.2 CC) [146].

c) New trends in case law tend to apply art. 18, 43 and 48 CE (right to intimacy, health and healthy environment) to relationships between neighbours. Case law also applies limits to art. 348 CC (right of property), according to art. 33.2 CE (social meaning and finality of the right of property) [147].

Requirements to be successful in the claim are:

a) There must be a negligent human activity (carried out by a physical or a legal person) [148], or a failure to act (omission) [149].

b) This activity should be illicit, which means either against the law or against the principle *alterum non laedere* (nobody can harm somebody else).

c) A causal link between the activity (or omission) and the damage must exist [150].

d) There must be a personal or patrimonial damage (consequential damage or damage for loss of profit).

e) The claim has a one-year limitation period running from the time the victim came to know of the damage (art. 1968.2 CC).

The result would be, in the first place, the reparation *in natura* if it is possible. If it is not, then the victim would be compensated through payment [151].

As it may be seen, the Spanish legislator has a huge task in implementing (before 2007) the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, which establishes a more comprehensive and complete framework for liability environmental damage. It implements a subjective (requires negligence of the tortfeasor according to art. 8.4 of the Directive) liability for the tortfeasor (the polluter), who will pay the prevention (art. 5) and/or remediation (art. 6) costs (art. 8.1), to be carried out by the competent national authorities together with any actions to minimise further damage (art. 6). The tortfeasor would avoid payment in the case of a third party doing the damage or in the case of him/her obeying an order of a public authority (art. 8.3). These prevention and/or remediation expenses should be paid by the tortfeasor within 5 years to the national authority that has

[144] TS 27.4.1981 (*RJA* 1781), 17.10.97 (*RJA* 7269) —which estates that meeting all administrative requirements to develop the activity does not exonerate from being liable— and Court of Appeal of Valencia 6.5.2003 (*JUR* 188735).

[145] Court of Appeal of Murcia 13.5.2003 (*JUR* 239992).

[146] TS 3.12.1987 (*RJA* 9176).

[147] TS 29.4.2003 (*RJA* 3041).

[148] TS 14.2.1994 (*RJA* 1468).

[149] TS 8.2.1991 (*RJA* 1157).

[150] Court of Appeal of Córdoba 20.3.2000 (*AC* 910).

[151] TS 15.3.1993 (*RJA* 2284).

undertaken them (art. 10). In order to ensure this repayment, member estates shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive (art. 14.1).

Catalan law is more developed than Spanish one, though it neither achieves the purposes and protection of the Directive 2004/35/CE. There is a special Act (Act 13/1990), which regulates the *actio negatoria* (art. 3.1). This is an action to stop (through the use of any technically and economically feasible measure) and compensate any interference (substances, vibrations, radiations, heat or noise that alter natural resources like the air, the soil or the water, according to Catalan Act 3/1998) to one's property from neighbouring properties [152]. There are some limits to this action:

a) If the interference is a consequence of the normal use of the neighbouring property, one can only sue for the stopping of the nuisance but not for the closing down of the economic or industrial activity.

b) If the damaging activity has administrative permit, one cannot sue for its closing down but only for a compensation for damages caused [153].

c) If the victim is obliged (by contract or by law) to suffer the damage (art. 1.2).

The *actio negatoria* (which prescribes in 5 years) foresees that it is the tortfeasor who should prove that his/her activity is legal and adequate, while the victim must only prove the existence of the damage. The interference must be permanent (if it is only sporadic, the victim cannot sue through this action but through art. 1902 CC). Anyone who is in possession of the damaged property can use this action (not only the owner, but also the usufructuary and anyone who is legally in possession of the land).

The following may be achieved by this Catalan *actio negatoria*:

a) The stopping of the disturbance and the re-establishment of everything to the situation before the interference.

b) Compromise by the tortfeasor so as not to create any further foreseeable disturbances in future.

c) Economic compensation for the damages.

5. Liability for hunting

Basic regulation deals with two matters and is provided for both in art. 1906 CC and in the Hunting Act 1/1970:

a) Owners of a hunting facility (and collaterally the owners of the land where it is established) are liable for the damages caused by the animals held there (art.

[152] High Court of Catalonia 21.12.1994 (*RJA* 1498) and 17.2.2000 (*RJA* 8160).

[153] High Court of Catalonia 3.10.2002 (*RJA* 2003\650).

33.1 Act 1/1970); for example, damage to neighbouring agricultural fields [154] or damage to motor vehicles while they are being driven [155].

b) Every hunter is strictly liable for damages caused by the hunting activity itself (art. 33.5 Act 1/1970).

6. Medical negligence

Medical negligence can be sued against it three different jurisdictions, depending on the type of negligence:

a) Administrative courts (art. 139 to 144 Act 30/1992, LRJAP). In the case that the doctor (or nurse or other professional related to the medical field, depending on who is the tortfeasor) is a public servant (or similar) working for a public health institution, that is, an institution owned by the Public Administration. There are no peculiarities in relation to the general liability of the Public Administration [156].

b) Criminal courts. In the case that the negligence constitutes a criminal offence, art. 109 to 122 CP are applied. Special rules for damages resulting from an offence are established (i.e. injuries).

c) Civil courts. Claims must be brought before the civil courts where the tortfeasor or the health institution is not related to the public administration, but where they are private institutions; art. 1101, 1902, 1903.4 CC and art. 28 LGDCU (in this case, fault is not required [157]) and Act 22/94 (LRPD) are applied. The first two articles are of application depending whether there is some kind of contractual relationship between the patient and the health institution or the health professional. If there is, 1101 CC is applied; if there is not, art. 1902 CC applies [158] (the main difference being the limitation period of the claim; if art. 1101 CC is applied, then he/she has 15 years; if art. 1902 is applied, there is only 1 year; this period always starts once the patient is fully recovered).

Because of the special character of this service, medical negligence is based on the behaviour of the health professionals, which means that it is their adequate behaviour which is relevant, rather than the final result (if the patient is finally fully recovered or not). Moreover, it is always the patient who has the burden of proof [159]. The "adequate behaviour" of doctors and other health professionals is referred to in our jurisprudence with the Latin expression "*lex artis*", which means the usual conduct in

[154] Court of Appeal of Murcia 1.7.2004 (*EDJ* 2004/125509).

[155] For example, Court of Appeal of Tarragona 4.2.2002 (*EDJ* 15862).

[156] Supra, *sub* I.2.2.

[157] See, for example, TS 1.7.1997 (*RJA* 5471).

[158] TS 22.2.1991 (*RJA* 1587), 11.11.1991 (*RJA* 8720).

[159] TS 4.2.1999 (*RJA* 748).

a similar case, attending to the personal features of the patient, the features of the medical speciality, the complexity of the operation and others. The decision of the Supreme Court handed down on 25.4.1994 [160] has summed up the requirements:

a) The doctor (and any other health professional) must use any resources available to him/her by health science as well as any other knowledge he/she has.

b) The patient must be informed about the chances of success of the medical intervention, what resulting effects there might be and which treatment will be necessary after the intervention [161].

c) The doctor must continue treating the patient after the intervention until he/she is fully recovered and must inform him/her of the consequences of giving up the treatment.

d) If it is a matter of a chronic disease, the patient must be informed of the preventive measures that he/she has to adopt.

There are currently only three cases in which health professionals and doctors may be responsible for damages as a result of their actions (and not only for their behaviour): dental surgery, plastic surgery and contraceptive surgery [162].

7. Liability for faulty construction

Since Act 38/1999 (LOE) is in force (2000), the legal framework for damages due to faulty construction is clearer and more structured than before, which is concentrated mainly in art. 17 and 19 LOE.

In fact, before the enactment of this Act, this liability evolved thanks to court decisions on the basis of art. 1591 CC, which although still in force has a much more limited scope. Nowadays it only applies to constructions that are beyond the scope of the Act and to situations not foreseen in it, such as damage to people, chattels or other buildings arising because of faulty construction).

LOE foresees the liability of all participants in the construction of a new building [163] or a relevant refurbishment or alteration of any type of construction for damages that may appear in the construction itself (art. 17.1 LOE). Art. 8 to 16 LOE describe each of the participants in a construction project and its functions and obligations —which are directly related to their liability— like the architect, the quantity surveyor, the developer, the constructor, the foreman or the buyer.

The virtue of art. 17 LOE is the creation of three periods of suspicion or presumption. Any damage that appears in the building within 10, 3 or 1 years, depending on

[160] *RJA* 3073.

[161] TS 7.3.2000 (*RJA* 1508).

[162] See, for example, TS 28.6.1999 (*RJA* 4894).

[163] And any structures described under art. 2 LOE, hardly everyone like hospitals, schools, for industrial, commercial or residential purposes.

the type of damage, is presumed to be caused by the participants in its construction (and thereafter the liability is distributed jointly and severally among them according to their own rôles and obligations during the construction period) [164]. A period of 10 years is applied to damages to the main structure of the building (foundations, pillars, frameworks, etc.), while a period of 3 years is applied to damages in constructive elements and facilities that may affect the habitability of the building. Finally, the one-year period applies to components and decorations. During these periods, the participants in the construction are strictly liable (there is no need that they have misbehaved) [165] and they can only claim that damages have arisen by force majeure or that they have been done by somebody else or by the buyer himself/herself. The owner of the damaged property can sue for this type of damages for up to 2 years after the damages appeared.

To assure the satisfaction of the victim, art. 19 LOE establishes a compulsory insurance for the participants in the construction.

VIII. Strict Liability

1. Liability for animals and chattels

1.1. *Animals*

Art. 1905 CC establishes that the possessor (not only the owner [166]) of an animal is liable for any damage it does. It is a case of strict liability [167], because the possessor is assuming the risk by having the animal. In defence only the victim's exclusive fault and force majeure can be claimed. Art. 1905 CC does not apply where the claimant assumes the risk of practising a sport in which animals are necessary [168].

Recently the Act 50/1999 was passed, which covers only potentially dangerous animals. Art. 1905 CC together with the need to acquire an administrative license and a compulsory insurance, establishes strict liability even clearer.

1.2. *Chattels*

The head of the family is strictly liable for any damage arising from things being thrown or falling from his/her house [169]. Other "chattels liability" relates to products and defective buildings, which have already been explained above.

164 Court of Appeal of Tarragona 20.9.2004 (*JUR* 310348).

165 It is not the case for art. 1591 CC, which used to require and still requires (when it is applied) negligence of the tortfeasor.

166 TS 15.3.1982 (*RJA* 1379).

167 TS 28.4.1983 (*RJA* 2195), 12.4.2000 (*RJA* 2972), 29.5.2003 (*RJA* 5216).

168 Riding a horse, TS 16.10.1998 (*RJA* 8070), unless the animal has been negligently trained.

169 TS 6.4.2001 (*RJA* 3636).

2. Liability for motor vehicle accidents

This is one of the most common cases of liability in tort. It is regulated in the LRCSCVM (Royal Legislative Decree 8/2004), which establishes a double liability system for damage derived from an accident (in private or public ways of any category, garages, car parks, etc.) with a motor vehicle (cars, motorbikes, trailers, etc.) (art. 1.1 LRCSCVM): damage to persons, which is a strict liability (for the mere risk of driving a motor vehicle) and damage to property, which requires negligence of the driver (via art. 1902 CC).

The main responsible person is the driver of the motor vehicle (art. 1.1 LRCSCVM [170]) but the owner of the vehicle can also be responsible (or analogue situations like a qualified possessor) if one of the relationships listed in art. 1903 CC exists between him/her and the driver [171]. The liability of the latter is subjective only and so requires the standard duty of care (*buen padre de familia*) [172].

In case of damage to persons, the driver (and the owner, if that is the case) of the guilty vehicle is always liable, except in cases of:

a) The victim being negligent. There are some additional requirements to use this defence: 1) the only negligent party should be the victim [173]; 2) the driver must have acted absolutely correctly and according to driving rules and the traffic situation; 3) the behaviour of the victim was unforeseeable for the driver [174]. When two vehicles collide, Spanish courts consider that there is no strict liability and that each driver must prove that he/she has acted correctly [175], although there are exceptions to this rule (i.e. invasion of another lane) [176].
b) Force majeure. This must be external (alien to the driving activity itself; it is not applicable where a piece of the vehicle breaks [177] or where a tyre bursts [178]), unforeseeable [179] and unavoidable (it is not, for example, an accident derived from intense fog [180] or any derived for climate conditions because they are considered as fortuitous and covered by the compulsory vehicle insurance).

170 See also TS 30.12.1992 (*RJA* 10565).

171 See above sub IV.4.

172 TS 16.10.1989 (*RJA* 6923).

173 For example, a drunk pedestrian in TS 28.9.1993 (*RJA* 6655).

174 For example, a pedestrian suddenly rushing into the road [TS 8.3.1994 (*RJA* 2202)].

175 TS 28.1.1994 (*RJA* 574).

176 For example, TS 9.6.1993 (*RJA* 4472).

177 Court of Appeal of Valencia 10.5.2001 (JUR 198016).

178 TS 19.10.1988 (*RJA* 7588).

179 For example, a pedestrian rushes onto the road and forces a vehicle to manoeuvre and as a result of this collides with another vehicle [TS 17.11.1989 (*RJA* 7889)].

180 TS 24.5.1997 (*RJA* 4323).

c) Third party fact. To be treated like a case of force majeure, it must be unforeseeable and unavoidable (i.e. pedestrian rushing onto the road resulting in two cars colliding).

Commonly there is contributory negligence (both vehicle driver and victim), which leads to a moderation of the liability and therefore of the indemnification (related both to damages to people or to things, and to all types of expenses including hospital or burial) [181].

The last chapter of the LRCSCVM establishes the system for the valuation of damages caused to persons in driving accidents. This is a closed, systematic and clear system divided in 6 Tables related to the valuation of:

a) Death (Tables I and II). Table I includes property damage, pain and suffering, and determines who can be considered as injured party. Table II deals with other damages arising from the death).
b) Injuries (Tables III, IV and VI). Table VI refers to each type of injury and the punctuation given to each one depending on their importance according to medical criteria. Table III gives a price to the points given to each injured, which is weighted depending on the age of the victim. Table IV applies other criteria to adjust the amount).
c) Temporary disability (Table V refers to days off work in or out the hospital).

The systematic nature of these tables designed to evaluate the level of damage in case of death or injuries helps the Courts to establish an objective and equal treatment to all cases based on medical knowledge. They are nearly always used for motor vehicle accidents and quite often also used to other types of situations that end in death or injury.

Two closing points. Firstly, every motor vehicle, which is based in Spain (i.e. with a Spanish number plate), must be insured by its owner (if he/she fails to fulfil this obligation and drives the vehicle, he/she incurs an administrative fine) (art. 2 and 3 LRCSCVM). The compulsory accident insurance policy (SOA) always has the same contents, which are legally foreseen. It covers damages caused by the vehicle and its driver throughout the European Economic Area, with quantitative limits on the amount payable for damaged persons or things (art. 4 LRCSCVM) but it does not cover damages of the insured vehicle itself or the driver's relatives (art. 5 LRCSCVM).

The second one is the Compensation Insurance Pool (*Consorcio de Compensación de Seguros, CCS*) (art. 11 LRCSCVM), which is a governmental institution that acts in two main fields:

a) It operates as a safety net for cases where the guilty vehicle is unknown or has stolen the vehicle or is insured by an insolvent insurance company; it must also pay the victim when there is a controversy about which insurance company is to pay.

[181] TS 17.5.1994 (*RJA* 3588), 6.5.2004 (*RJA* 1683).

b) It works as an insurance company insuring vehicles owned by the Public Administration and when a concrete vehicle which cannot find any other insurance company. In all of these cases, the victim has a direct claim against the CCS (art. 8.3 LRCSCVM), who can thereafter sue for damages against the owner of the uninsured vehicle, the thieves of the stolen vehicle, etc.

3. Air transport

This type of contractual liability is regulated in art. 115 to 125 Act 48/1960 and is related both to passengers and merchandise [182] in flights within Spain. The liable legal (i.e. flying company) or physical person is the carrier (art. 92 and 116).

Liability is strict [183]. It covers any damage suffered by passengers (to themselves or to their luggage) on boarding, during the journey or disembarking and damage suffered by merchandise from their delivery. It also covers damages suffered by people or things on land as a result of the airoplane flying, taking off, landing or losing cargo [184].

The claims for the amounts due by the carriers for this reason are privileged before other claims derived from the accident (art. 119). The carrier must have an insurance contract, there are limits for the amount of the indemnification (art. 116 to 120) and the victims have 6 months to claim from the date of the accident [185].

4. Nuclear energy

It is regulated by art. 45 Act 25/1964. The exploiter of a nuclear plant or any other facility that deals with nuclear energy is liable for nuclear damages that he/she may cause. This is also a case of strict liability, with a maximum amount (which is established by law; in case of accident the maximum amount is €1.800.000) and which must be insured.

There is no liability where:

a) Damages are caused during a war or a natural catastrophe.
b) Radioactivity is applied for a therapeutic finality (only via art. 1902 CC).
c) Damages are caused to employees of the exploiter and they have been qualified as "occupational injury or illness".
d) Damages are caused to the facility itself.

Where the victim has been negligent, the liability of the exploiter may be reduced or even extinguished.

[182] TS 31.5.2000 (*RJA* 5089).
[183] TS 17.12.1990 (*RJA* 10282).
[184] TS 10.6.1988 (*RJA* 4868).
[185] TS 10.6.1988 (*RJA* 4868).

IX. Defences

The defendant may avail himself/herself of a range of defences in order to escape liability. Some are complete defences, and some others —like contributory negligence— amount to a reduction of damages.

1. Force majeure and fortuitous event

Force majeure and fortuitous event entail non-existence of fault, since they are unforeseeable or unavoidable facts. There is no general tort rule excluding liability in those cases. Only art. 1905 and 1908.3 CC refer to force majeure [186]. Hence, case law has resorted to art. 1005 CC, a contractual provision. Case law requires the proof of the unforeseeable or unavoidable character of the fact [187]. Cases include for force majeure lightning [188] and for fortuitous event cases of a specific bacteria, the "clostridium perfringens" [189].

2. The victim's exclusive fault

The victim's exclusive fault excludes the liability of the defendant. There is no causal link between the damage and an act carried out by the defendant; on the contrary, the only causal link that can be established is liked to the victim's own behaviour. For example, the tractor driver who crosses the railway level crossing without paying attention to the coming train [190] or the adolescent who climbs to the top of an electricity tower [191]. Cases of consent or assumption of risk can be included here. The commonest case law examples are the injuries suffered by adults while taking part in bullfights *(sueltas de vaquillas)* [192]. This defence presupposes the victim's capacity for fault [193].

[186] However, there are various references in statutory law. For example, force majeure is established as a defence in art. 1.2 Royal Legislative-Decree 8/2004 on civil liability and insurance in the circulation of motor vehicles (LRCSCVM), and in art. 45.3 Act 25/1964, of 29 April, on Nuclear Energy (which mentions wars and natural disasters such as earthquakes).

[187] TS 12.7.2002 (*RJA* 6045), 4.11.2004 (6717).

[188] TS 15.12.1996 (*RJA* 8979).

[189] TS 7.6.1994 (*RJA* 4897).

[190] TS 30.4.2003 (*RJA* 3872). A similar case is TS 20.9.1997 (*RJA* 6608). Level crossings where visibility is not adequate can give rise to contributory negligence on the railway company (TS 24.4.2003, *RJA* 3531).

[191] TS 24.1.2003 (*RJA* 612).

[192] TS 13.2.1997 (*RJA* 701), 3.4.1997 (*RJA* 2729), 17.10.1997 (*RJA* 7629), 25.9.1998 (*RJA* 7070), 8.11.2000 (*RJA* 8499), 14.4.2003 (*RJA* 3706).

[193] See *supra, sub* III.2.

3. Self defence

Reasonable defence of oneself, of one's property, or that of other people if appropiate excludes liability, according to art. 20.4 and 118.1 CP.

4. Exercise of a right

Damage caused as a result of the exercise of a lawful right does not amount to liability unless it is a case of abuse of rights (which is proscribed by article 7.2 CC). The typical example is lodging a claim with a court, which does not give rise to compensation for damage unless the plaintiff lacked a *iusta causa litigandi* [194].

5. Necessity

Necessity negatives criminal liability, provided that the harm inflicted on the claimant is less serious that the damage avoided to another and that the necessity does not arise from the defendant's own negligence. But it does not completely exclude liability in tort. According to art. 118.1.3 CP, whoever has benefited from the prevention of the damage is held liable in proportion to the harm that has been avoided. Prevailing legal opinion considers that this would be better interpreted as a case of unjustified enrichment [195].

X. Limitation of actions

According to art. 1961 CC, "actions come into prescription for the simple lapse of time provided by law". Prescription fixes a temporary limit to the exercise of rights. This implies that the debtor can refuse to perform his/her obligations when the period of prescription has lapsed. The debtor can avail himself/herself of the defence of prescription if the creditor claims performance once the prescription period has elapsed. Claims based in tort prescribe within one year. Courts have moderated the brevity of this period, since the commencement is linked to the knowledge of the possibility of the claim and of the extent of damage. Thus, concerning claims for personal injuries, prescription does not begin to run until the victim knows of the existence and the extent of the harm exactly [196]. If a criminal proceeding was opened by reason of the facts

[194] TS 30.6.1998 (*RJA* 5286), 10.12.2002 (*RJA* 29003\121), and De Ángel, *Tratado*, p. 283.

[195] Díez-Picazo/Gullón, *Sistema*, p. 554; De Ángel, *Tratado*, p. 285.

[196] According to the certificate of medical discharge granted to the plaintiff, unless the after-effects are already unknown. See TS 13.2.2003 (*RJA* 1013), 7.4.2003 (*RJA* 2800), 22.7.2003 (*RJA* 5851).

from which damage arises, prescription does not commence until the victim knows of the judicial decision that ends it [197]. In the case of continuous damage, prescription does not commence to run until the definitive damage is known [198].

On the other hand, it should be remembered that where liability arises from a fact that constitutes a crime, since the CP does not establish a specific prescription period, the Supreme Court considers that the limitation period is fifteen years [199].

Statutes may establish different periods of limitation. For example, product liability is subject to a prescription period of three years (art. 12 LRPD).

The Act 29/2002, of 30 December, First Act of the Civil Code of Catalonia, introduces a brand new regulation of prescription with a number of interesting novelties in the Spanish legal landscape. Now, tort claims prescribe within three years (art. 121-21). As for the commencement of the period, prescription does not begin until the creditor acquires knowledge of the identity of the debtor and of the facts from which the claim arises, or could have acquired such knowledge by taking reasonable steps (art. 121-23). It should also be noted that the Catalan legislator also resorts to a long-stop period *(termini de preclusió)*. The maximum length of the period of prescription is thirty years, irrespective of the claim [200].

[197] TS 26.9.1997 (*RJA* 6708). 20.10.1997 (*RJA* 7272), 27.2.2003 (*RJA* 2150), 12.5.2004 (*RJA* 2736).

[198] TS 28.1.2004 (*RJA* 153).

[199] See, recently, TS 31.1.2004 (*RJA* 444).

[200] See Antoni Vaquer, "The new regulation of prescription in the civil law of Catalonia: more modernised than principled, but still Spanish", in Antoni Vaquer (ed.) *La tercera Parte de los Principios de Derecho Contractual Europeo/Principles of European Contract Law Part III.* (Valencia 2005), p. 495 ff.

PART V

PROPERTY LAW