

# InDret

## *Vicarious Liability and Liability for the Actions of Others*

### *II*

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### ***Abstract***

The two traditional branches that regulate civil liability in Spain are the Spanish Civil Code of 1889 (sections 1902, 1903 and 1904) and the Spanish Criminal Code of 1995 (section 120), they determine the harm caused by actions or omissions that are neither crimes nor misdemeanors and those deemed to be, respectively.

This work analyzes vicarious liability or liability for the actions of others as one of the legal mechanisms anticipated to overcome civil liability once it has been determined that the principle of individual liability –due to negligence or strict liability– is impractical given the limited solvency of the majority of individuals responsible for a damage. In order to deal with the intrinsic limitation that is found in individual civil liability, the law applies a variety of mechanisms: to limit liability or increase the number of persons liable for the injury caused. The latter is made easier by the fact that there are usually multiple reasons for an accident, *which in turn makes it plausible to place, using legislation, the liability for the consequences on a number of people.*

Vicarious liability is only one means of finding a solution to the problems which arise in individual liability. There are others, such as joint and several liability or vicarious liability, in instances of crimes or misdemeanors that exist alongside the former. However, the practical application is very similar in all cases: increase the number of people who are potentially liable until a solvent organization is found, or the member of employers and unions that are subject to compulsory insurance.

## **1. Vicarious liability or liability for the actions of others as a mean of overcoming the principle of individual liability**

According to the most general principle of the Spanish law of torts, civil liability is derived from an individual's acts or omissions. This is laid down in section 1902 of the Civil Code, which states: *He who by act or omission causes injury to another due to fault or negligence is under the obligation to repair said injury caused.* Traditionally, the basic model of civil liability has been the unilateral causation of torts and the obligation on the individual responsible to pay compensation

One of the topics most discussed in the civil law doctrine during the 20<sup>th</sup> century was to assert the crisis faced by the general clause of liability due to negligence, and the correlative expansion of the principle of strict liability. However, fault, understood as objective fault, that is to say, as a breach of the duties of care as stipulated by the law and the rules of each sector is in good health and has not been replaced by the principle of liability without fault, well at least not if strict liability is understood as liability derived from the mere material causation of harms.

The doctrinal debate between those who believe in fault and objectivists present the categories of fault and strict liability from two opposite viewpoints, one could almost say ridiculously so: fault, such as specific and subjective fault and the principle of liability without fault, as mere naturalistic causation of injury. The case law from Spanish Supreme Court (1<sup>st</sup> Chamber, Private Law) remains pragmatically halfway between both extremes and talks of "quasi-objectivism" of liability, where the fault systems from the breach of a duty of care and the causal liability is moderated by criterion of imputation as, especially, the proximate causation.

In reality the crisis of the general clause of section 1902 CC is not so much the decline of liability due to negligence, as recognition of the non-viability of individual liability in the majority of cases. The idea that the starting point in civil liability is unilateral causation of harm by a sole tortfeasor is simply not true:

- a) Firstly, accidents usually occur for a number of reasons, that is the total cause can almost always be broken down into a series of partial reasons and consequently tortfeasors -without the participation of whom the accident would not have occurred. The paradigmatic model of the law of accidents is the multilateral causation of harm and not unilateral causation. This permits legislative solutions that are also different to individual liability. Almost all of which have in common the search for the individual who is solvent amongst those who are liable, this being the sole means by which civil liability can be effective in practice.
- b) Secondly, in the absence of comprehensive accident insurance (and compulsory), the majority of those persons potentially liable for harm caused are not able to face up to the generic liability for negligence for which, according to the Civil Code, they are

potentially liable. Section 1902 of the Civil Code is impracticable law because the majority of the persons to which it is applicable have limited solvency.

- c) Thirdly, there is no human activity whatsoever that is not open to a certain degree of lack of care in the execution of any professional or personal activity, with the ensuing result of it becoming, in the long term, impossible to eliminate negligence. The management of the risk of negligence requires the placing of the activity in question within the framework of a work collective activity in which precautionary measures can be accumulated or superimposed and the different mechanisms which are dependant upon a number of persons that carry out different functions within the organization and assume the risk of individual human error. A legal system that is based on individual liability for simple negligence is a system against the human behavior itself.

There are various solutions that make it possible to overcome the principle of individual liability and resolve the problems of solvency that arise in persons liable for the damage, some of the more usual are: insurance, limited liability and the increase of the group of those liable for the damage.

1. **Insurance** and, more precisely, compulsory insurance. There is an obvious connection between civil liability and insurance. An insurance policy is an economic instrument that allows an individual to substitute an uncertain, as well as high, cost (the risk or contingency that is insured). Thus, we can view insurance as transferring risk. Nowadays, it is not possible to take part in the majority of economic sectors without being covered by some form of insurance, for, at least, part of the possible consequences of an accident.

This is what occurs, especially, in the circulation of motor vehicles (section 1 Real Decreto 7/2001, 12 January, under which the Regulation governing civil liability and insurance of motor vehicles were approved) and in general, in all sectors regulated by a Standard of objective liability.

2. **Limited Liability**, which is generally applicable under European laws, including that of Spain, and which allow those potentially liable for the tort to see the maximum compensation to which they may be made to pay and thus adjust the insurance premium they have to contract accordingly.

There is a peculiarity in this material under Spanish law, in that it is the only European legal system that has caps that are binding in nature, for compensation personal injuries derived from car accidents. The annex of the Ley 30/1995, 8 October, concerning Ordinance and Supervision of Private Insurance introduced a system of calculation of compensation (including damages for pain and suffering) into Spanish law, that the judges have to apply in all cases concerning liability that arise out of the circulation of vehicles (see Jesús Pintos Ager, *Baremos, seguro y derecho de daños*, Civitas, Madrid, 2000).

3. In Spain (as in other European countries) the **increase of the group of those liable for the harm** came about via **joint and several liability and vicarious liability** and through **both at the same time**. The more persons that are made liable for the same tort the more likely it is that the victim will receive the compensation to which they are entitled. Likewise, if all of those liable are joint and severally so, some would cover the insolvency of the others and save the victim the costs of trying to find the different level of liability of each of the co-responsible. The vicarious and exclusive liability of the manager of a complex organization –with the limited possibility of reimbursement against the direct tortfeasor- constitutes what can be seen as probably the best system of providing an answer to the challenges of individual liability. However, and as we shall see below, the Spanish legal system has not come to this solution in a uniform manner.

In effect, the general solution under the Spanish law of torts (as in other European law) has been to establish **liability for the actions of others**, an institution which brings together clear assumptions of vicarious liability as well as others. In fact, vicarious liability is embedded in the much wider, and vaguer, category of liability for the actions of others. Whatsoever the case, this has become a *third party insurance* in favor of the potential victims of torts caused by those persons another would have to respond for. Clearly, it is preferable to have a system that places liability onto someone who as well as being in a better position to get insurance, also has control over those risks that could cause us injury. However, Spanish law concerning liability for the actions of others has not culminated this development.

Moreover, initially joint and several liability superseded vicarious liability and, with a few exceptions, the plaintiff could claim compensation from the direct tortfeasor as well as from the principal who responded in their vicarious position. However, the development of the rule has led to the expulsion of joint and several liability from the regimen of vicarious liability, in such a way that, as we saw in Spanish administrative law (*Vicarious Liability and Liability for the Actions of Others I*), the principal responds directly and exclusively without the victim being able to sue the agent and immediate tortfeasor.

## 2. Civil and Criminal Rules governing Civil liability for the actions of others

In *Vicarious Liability and Liability for the Actions of Others I*, we had the opportunity to explain the drama of the Spanish law of torts: three different legal rules (civil, criminal and administrative) with their respective jurisdictions share the rules of deterrence and compensation of damages. We considered the legal rules governing liability of Public Administration (arts. 139 and ff. of Law 30/1992), paradigm of vicarious liability and, as such, the end of the diluting process of individual liability in organizational liability. Thus now we proceed to analyze the same process using the stipulations of the civil rules (sections 1903 and 1904 CC) and criminals (section 120 Cr. C).

## 2.1.Reasons for the existence of two sets of rules that are almost identical, one in section 1903 of the Civil Code and the other in section 120 of the Criminal Code

There is a **historic reason** for the duplicity of the regulations: in Spain the **criminal codification preceded that of the civil and civil liability derived from crimes and misdemeanors have always been regulated in the Criminal Code** independent of the strictly civil rules.

The Criminal Code of 1822 was the first to regulate the matter and when decades later the Civil Code of 1889 was enacted, its section 1092 referred to the Criminal Code for all that concerning civil liability as a result of a crime or misdemeanor. The best doctrine (Pantaleón, (1993), p. 1973 y ss.) maintains that the double regulation of civil liability in the Civil and Criminal Codes is equal to a case in which the same entitlement is covered by two or more different rules (*Anspruchnormenkonkurrenz*). A theory by virtue of which a civil or criminal Judge may uphold the claim of the plaintiff based "on whatsoever regulating rule of the same, contained in the Civil Code or the Criminal Code, the Spanish Supreme Court although it has not been alleged by the injured plaintiff." However, 1<sup>st</sup> Chamber, Private Law, of the Spanish Supreme Court shall not apply this theory systematically –for instance, in the area of statute of limitations- and, in any case, its practical application is limited by the insuperable differences that exist between both laws. Thus, as Yzquierdo Tolsada (1997, p. 55) states, the liability of the principal in section 1903 Civil Code, but pointing out those significant differences that there are between the two.

The existence of specific rules –and that of preferential application- for the recovery of damages in those cases that are a consequence of crimes and misdemeanors have a significance that goes beyond the historical anecdote: if the injury has been caused intentionally or have affected the physical integrity of the victim it is impossible to imagine that the Criminal Code does not classify the behavior of the tortfeasor as a crime or misdemeanor. Grave physical harm is covered under criminal jurisdiction and, in absence of the reservation of a civil action or, where there is none, in those cases where it exists, no action can be bought before a civil judge, once the criminal process has not been finalized.

The double regulation – civil and criminal- imposes some peculiar procedural rules that must be outlined in order to understand how the system works. Thus, section 112 of the "Ley de Enjuiciamiento Criminal- LECrim" (Code of Criminal Procedure) provides *Should only the criminal action be executed, the civil shall be understood to be also used, provided that the injured party neither renounces or expressly reserves the right to exercise said action once the criminal trial has terminated, should it take place*. Should the victim reserve the civil action to be exercised before a judge of that jurisdiction, section 114 LECrim imposes the interruption of all procedures of this nature until the criminal jurisdiction has been pronounced: *Once a criminal trial has been started in determination of offence or misdemeanor, there can be no lawsuit for the same act; if one is underway it shall be suspended, in the place where it is at that time, until a final decision is given in the criminal proceedings*.

As well as historical, there are **legislative reasons** that explain the diversity of the rules: in this work we defend the thesis that the traditional rules of liability for the actions of others have developed until they have become **rules for the liability of organization**. This is what has occurred with the case law of the civil rules and the legislation of the criminal rules.

In effect, the civil system of liability for the actions of others, foreseen in section 1903 of the Civil Code of 1889 –amended in 1981 and in 1991 for those case concerning the liability of parents and teachers- define liability as:

- a) **Direct:** the victim can sue from those liable for the damage without the need to do so against the tortfeasor himself.
- b) **Negligent:** in our Civil Code the negligence of the principal, parent, and the guardian is subjective, even when it concerns a presumed fault, or more precisely, with reversal of the burden of proof of fault. If the injury has been caused by the person for whom any of the aforementioned group are liable, the former is presumed to be at fault except when, as provided for in the last paragraph of section 1903 CC: *those persons above mentioned prove that they applied all of the duty of care expected from a good father in foreseeing the injury.* That is to say, when they prove that they supervised those persons under their responsibility as a good father would have done or he who supervised those dependent on him in accordance with this standard. The duty of care of a good father that is referred to in the last subsection of section 1903 is that measured in relation to the area in which the person in question executes his activity.

In the Civil Code the canon of liability in vicarious liability is negligence with reversal of the burden of proof of fault. The law makes the presumption that the final damage produced is due to the fact that the principal, parent or guardian has not adopted sufficient precautions to foresee the injury. However, case law has been progressively stricter in its determination as to whether or not sufficient steps were taken, and, in practice, has tended to strict liability for the acts of another. However, despite this, at no time has it given a general confirmation that the standard of vicarious liability is an strict liability one, as occurs, for instance, in *Common Law*.

There do exist however indications that there is a change in this tend. Recent case law has applied a test that gives weight to consistent benefit in the avoidance of the accident, with the cost of adopting the necessary precautions in order to achieve this and if, in practice, this would stop the development of the activity proceed to the reversal of the claim. This is the equivalent to applying a standard of negligence.

- c) **Non exclusive liability:** Unlike what occurs with liability of Public Administration, the victim of the injury has redress against the direct tortfeasor. Case Law has not limited the victim's action in this respect.
- d) **Joint and several liability:** in Spanish case law a co-originator for the same harm is joint and severally liable if the level of blame of each has not been proved. According this rule, the general civil regime for the liability of others is at the same time both vicarious and joint and severally. This means that the victim can seek redress against the tortfeasor, the liable or both. Should there be a number of people who respond for the acts of another, all of them shall do so joint and severally before the victim. This is what would occur if parents (if both parents fulfill the legal requirements they would be joint and severally liable), various owners or directors of an establishment or

company or the owners of a non-university institution of education were determined to be liable.

In the same way that in contracts, the person liable for the actions of others assumes the risk of insolvency of the tortfeasor, the cost of his identification and those of litigation along with the other co-debtors. What is required is to ensure that the insolvency of the tortfeasor does not leave the victim without protection when there has been a breach of a duty of care attributable to the person which the law declares to be liable. Bearing everything in mind, the different sub-systems governing liability for the actions of others are not homogeneous and the rules of the internal relationship between the tortfeasor and the liable has a number of variations in relation to joint and several liability.

Thus, the most significant difference is that the claims actions attached to all passive relationships of joint and several liability is not the same for all of those liable for the actions of others. Generally speaking, the only reimbursement claim that is recognized is that in favor of employers against their employees who are the direct tortfeasors, when it is proved that they acted intentionally or grossly negligent. Finally, in the case of parents or guardians, the Civil Code does not foresee any reimbursement whatsoever against children or pupils respectively.

If the rules of liability for the actions of others in the Civil Code of 1889 have undergone slight changes, the equivalent rules in the Criminal Code have, on the other hand, experienced profound amendments in the recent Criminal Code of 1995, which regulates civil liability derived from crimes or misdemeanors committed by another to a standard of liability:

a) **Subsidiary**: those who are civilly liable shall be so in defect of those criminally liable for the commitment of crimes or misdemeanors. Although it shall not be necessary to claim against both in the criminal procedure, in any case civil liability shall be exercised by the Public Prosecution Authority. Once the compensation has been paid, the reimbursement by the same logic of the secondary liability presupposes the insolvency of the tortfeasor.

b) **Strict**: generally speaking, the criminal rules do not foresee the possibility of proving the due diligence of the person who has subsidiary liability. In the criminal rules, unlike what occurs in the last paragraph of section 1903 Civil Code, there is no general clause whatsoever that foresees the possibility of exoneration of liability when it is proved that the necessary precautions were taken. When we deal with subsidiary civil liability of parents and tutors we see that for this case there is a rule of extension of the liability based on due care.

The civil and criminal rules of liability for the actions of others included in sections 1903 and 1904 Civil Code and 120 Criminal Code regulate in a similar way heterogeneous hypothesis

only having in common the existence of a dependency relationship or subordination between the tortfeasor and the person liable for the damage. In fact, the different groups of hypothesis can be put into two different categories of **dependency**: that resulting from a **family relationship** or equivalent and that initiated in a **labor or professional relationship**.

## 2.2. Liability due to personal dependency: parents and tutors

The two main rules of section 1903 Civil Code are dedicated to parents and tutors:

*Parents are liable for the damages caused by children that are in their custody.*

*Tutors for the damages caused by the minors or disabled adults under their control and in their presence.*

The equivalent criminal rule is much wider and, unlike the Civil Code, distinguishes in relation to the age of the tortfeasor for whom the parent or tutor must respond. When a criminal offence committed by a minor is reported the Organic Statute 5/2000, 12 January, regulating the Criminal Liability for Minors, section 61.3 of the law provides:

*When the person liable for the acts is a minor, his parents or guardians, carers, legal guardians or guardians in fact, in that order, shall be joint and severally liable for the harm caused. When these were not in intentional tort or grossly negligence, their liability may be reduced by the judge according to each case.*

The Organic Statute regulates a special procedure in which the victims of crimes caused by minors can sue compensation for the damage suffered. There is nothing that stops the injured party, as in the general rules, reserving the exercise of the civil action, once the criminal process has finished, before a civil judge. (Durany Pich, *Las reglas de responsabilidad civil en el nuevo Derecho penal de menores*, InDret 01/00)

In those cases where the crime or misdemeanor has been committed by some adult person, but who is incompetent, they shall be civilly liable for those for which they may have been criminally liable. (section 120.1 Criminal Code):

*The parents and tutors, for the damages caused by the crimes and misdemeanors committed by those older than eighteen that are subject to their parental authority or guardianship and that live with them, provided that they are negligent.*

The rule is complemented by that laid down in section 118.1 Criminal code that foresees subsidiary civil liability of parents and tutors in those instances in which the tortfeasor has been found immune from prosecution.

*Are also liable for the crimes that committed those who are immune from prosecution those who have within their authority or custody in law or fact, provided that it has been determined that*

*there is negligence on their part and without prejudice to the direct civil liability that those immune from prosecution are liable for.*

*The judges and courts shall determine, in an equitable manner, the amount to which the said subjects shall be liable.*

In all cases **custody** is a legal requirement in order to establish the parents liability for the acts of their children.

The rule of parental liability as contained in section 1903 Civil Code was modified by Law 11/1981, 13 May, in the reform of the Civil Code concerning lineage, parental authority and rights in property arising out of a matrimonial relationship. Prior to the reform, the requisite of the Civil Code was “living together” and the father alone was liable as the mother was not the principle holder of parental authority. The reform made left the rule applicable to tutors in fact: they are liable for the acts of those pupils under their authority and in their company.

The most important consequences of the term ‘custodian’ is that the parent who does not live with the minor does not become automatically free from liability (Navarro Michel, p. 67). The parent that at the time of the causation of the injury had –or should have had- control of the minor will be liable, independent of the corresponding faculties under law or sentenced in the judicial decision. Real custody prevails over that of legal custody. InDret has already had the opportunity to explain that, in the Spanish law of torts, parents are always liable for the simple fact of being parents (Durany Pich, *Padres y maestros*, InDret 01/00).

In this sense, section 139.3 of the *Family Code of Catalonia* (Catalan Law 9/1998, 10 January) foresees that when the parents do not live together “ (...) *those obligations to look after has to be exercised by the one of the two, either the father or the mother, that has charge of the minor at all times, be it because their has been granted habitual residence by fact or in law or because the child is in their company due to the regimen of communication or relationship that has been established.*”

Including those cases when the father or mother demonstrates that the child that is under age or of legal age but has a disability and is in their presence acted against the instructions that the father or mother had given them. The greater freedom that minors enjoy in our society results in an increase of the area of liability of the parents.

However, the Spanish law does not foresee **reimbursement action** in favor of the parents and guardians against the patrimony of their children and pupils. In relation to the injuries that occur within the family environment or within relationships of cohabitation, the role of remedies of compensation under the Spanish law itself are certainly questionable (Ferrer Riba, *Domestic Relations*, InDret 04/01). However, in relation to civil liability it is difficult to reconcile that the Civil Code gives better treatment to those who can choose their employees and together adjust their wage or salary, the working conditions and the characteristics of the service that they are going to supply, in comparison to a person who has decided to bear children or accepts the responsibility of being a tutor.

Under Spanish law, parents and tutors respond to a much greater degree than employers: a regimen of direct liability is applied to the former that is quasi-objective and lacks reimbursement. The diversity of the treatment is paradoxical: no employer would hire employees if the majority of their profits went exclusively to the employees or third parties. However, having, bringing up and educating children is an activity that, at least to a large extent, benefits the child and third parties. Thus, in our culture having and educating children creates an infinite number of positive elements. It is clear that the activity of employees as well as those of children who are minors or pupils can cause damage to third parties. However, as the law places a greater degree of liability on both parents and tutors than on employers, it seems obvious that this is excessive.

### **2.3. Liability stemming from professional dependency: employers and school owners and teachers**

In accordance with the civil and criminal rules for the actions of others, employers -owners and directors of an establishment or company- and teachers and officials of non-university education establishments –all said and done employers- are liable for the harm caused by their employees and teachers respectively. However, the civil and criminal rules and regulations are not homogeneous.

The general rule of the liability of employers for the actions of their employees, when it concerns behavior not deemed to be offences or misdemeanors, is laid down in the third rule of section 1903 Civil Code:

*The owners and directors of an establishment or company are equally liable in respect of the harm caused by their dependants in the execution of the service for which they were employed or while their functions.*

In cases where the employees commit actions regulated by in the Criminal Code those persons who employed them shall be liable, in accordance with sections 120 Criminal Code:

*Natural or legal persons working in whatsoever type of industry or business, for the crimes and misdemeanors committed by their employees in the execution of their functions or administrators in the execution of their responsibilities or services..*

Section 120.3 Criminal Code widens the liability of the employer when subsidiary civil liability is imposed on the following:

*Individuals or organizations, in the case of crimes or misdemeanors, committed in establishments of which they are the owners, when those who administer or direct, or their dependants or employees, have infringed the police regulations or the provisions of the authority that are connected with the punishable act that has been committed, in such a way that this would not have occurred without said breach.*

The rule of section 120.3 CP is much wider than the general one of employer liability for the actions of his employees. In particular, it makes employers liable for offences that occur in their establishments when they themselves or their employees have infringed the duty of care in each business and could have avoided the execution of the criminal act. (Salvador Coderch, *Causation and Liability*, InDret 01/00). It's a rule of Negligence per se.

Section 120.2 Criminal Code regulates a special case of civil liability arising from crimes or misdemeanors of others for,

*Individuals or organizations who are owners of publishing companies, newspapers, magazines, radio stations or television or whatsoever other means of mass media, spoken or visual, for the offences or misdemeanors committed using the means of which they are owners, with the exception of that laid down in section 212 of this Code.*

And for those non-university teaching centers of education, consider the fifth paragraph of section 1903 Civil Code which provides:

*Those persons or entities that are owners of a non-university centers of education are liable for the damages occasioned by their students who are minors during those periods in which they are under their control or under the supervision of the teachers of the school while they are carrying out school, out-of and complementary activities.*

The Criminal Code lacks a specific rule that covers the liability of owners of educational establishments; in 1995 the legislator considered that there was no difference between the owner of an institution of education that is liable for the deficiencies in control the teachers they have under contract and an employer that is liable for the damages occasioned by his employees, that is both are employers.

In ***Vicarious Liability and Liability for the Actions of Others I***, we explained the basic model of **principal-agent**. What was outlined there is applicable here, that is the relationship between an employer and his employee is a sub-group -and, without doubt the most frequent- of the peculiar distribution of incentives that economic theory explains under the heading of an agency relationship. As we explained, the principal is liable for the torts caused by the agent if there is a relationship that entitles the former to control the acts of the latter, and if the damage has been caused in the execution and development of the activity of the first entrusted to the second or with occasion of the same.

It is now time to consider some case law that has been developing in relation to a **relationship of dependency** and for **the execution of the obligations that go beyond those of social types or roles** originally contemplated in the Civil and Criminal Codes.

*a) Relationship of Dependency*

Employer -or better yet, principal- in the Criminal Code and owner and director -with real power of control and organization- and owner of a non-university institution of education, in the Civil Code is liable for the damages occasioned to others by their employees. The most usual business dependency relationship is of a **labor** nature, which is it is characterized by the “voluntary provision of services as an employee and within the scope of the organization and administration of a company“ (section 1 of Employees Statute).

The Spanish legal criteria of the Employees Statute brings to mind the criteria of dependency in vicarious liability of the employer and the organization itself as in the *Common Law*: the first question of whether or not the tortfeasor acted independently and assumed the risks and obligations such as the benefits of the company or activity; the second of whether or not the supposed agent formed a part of his principal's organization (Fleming (1998) p. 416). The aforementioned criteria have superseded those of control which only asked if the principal decided the manner in which the activity would be executed (Fleming (1998) p. 414). One of the reasons why the last criteria has been considered inadequate is because it excludes those cases of technical autonomy of the worker or employee or, as occurs often nowadays, of the technician in a strict sense and that, principally, is subject to *lex artis*, and that does not receive instructions from anyone in his area of work (Wicke (2000) p.224). From this point of view, the tests of the organization and the employer put an emphasis on economic dependency and not the technical.

However, the relationship of dependency in the case law of the Spanish Supreme Court (1<sup>st</sup> Chamber, Private Law), and even more clearly in 2<sup>nd</sup> Chamber (Criminal Law), does not only deal with labor relationships, but also on many occasions takes the criteria of control into consideration, which often, continues to be decisive given that the relevant question is, Who exercised control not only over the task to be performance but also over the method of performance? (Fleming (1998) p. 419).

The case law maintains a very wide notion of dependency: a labor connection is not necessary, nor a legal relationship, nor does it have to be permanent, indefinite or long lasting, nor does the relationship itself have to be a legal one. There is also no requirement that the dependency relationship be based on benefit to the principal and that includes the mere relationships of willingness or good-neighborliness. The conditions of the dependency relationship are much wider than those of a labor relationship.

Spanish case law, similarly to the German, Italian and French and the *Common Law* (Barceló Doménech (1995), Fleming (1998), Wicke (2000), Dobbs (2000)), have elaborated a series of indexes, whose concurrence or not allows, respectively, the affirmation or negation of a dependency relationship. Thus a relationship of dependency is considered to exist, and subsequently third liability for third party, when the principal:

- Regulates the **time and place of work**, as well as free time and holidays.
- Reserves the functions of **control, vigilance or direction** of the entrusted work.
- Provides **instruments and necessary means of work**.

- Assumes the **economic and financial risks** of the activity.

There is no dependency when, with everything, in the archetypal case of **contractor or supplier of independent services**: does not carry direct liability (in the civil rules) nor subsidiary (in the criminal rules) for the principal that entrusts a piece of work to an independent contractor, neither in the supplier of the services that are contracted with an automatic supplier or a service company nor –with even more reason not to– in the simple purchase of goods.

*A claim, in 1<sup>st</sup> Chamber of the Supreme Court, 14.5.2001 (Ar. 6204), against a hospital for the injuries that a gynecologist negligently caused to a newborn was resolved in this sense. The medical practice did not form a part of his / her medical functions in the hospital: after paying rent he / she carried out part of his / her medical practice in the hospital installations. There was no relationship of dependency and, as such no principal was vicarious liable.*

A person is not considered to be an independent contractor if they act autonomously in a formal manner, when, in fact, they are subject to the control of the person against whom the claim has been made or they form a part of their organization.

That is what 1<sup>st</sup> Chamber of the Supreme Court decided, among other things, 19.6.2000 (Ar. 5291). In that case the Supreme Court confirmed the decision of the inferior courts and declared the centre for aeronautical training that employed the flying instructor liable. Although the instructor was self-employed, he worked within the scope of the company and followed the instructions they gave him. The company was liable for the death of the instructor, a trainee pilot and a third person that was accompanying them when the plane in which they were flying had an accident.

*b) Performance of their responsibilities and services (Scope of employment)*

As well as the relationship of dependency, in order to attribute the injury to the principal, section 1903 CC provides that said injury be caused **within the scope of the service for which they have been employed, or as a result of the same**. Thus, the agent has to have acted within the framework of the relationship of agency or as a result of it. There has been wide judicial interpretation, both in civil and criminal. Therefore, the problem is not whether the **extra-limitations** of the dependent, but up to what point this should be done.

The best doctrine (Barceló (1995) p. 314 and ff.) has systemized the case judicial criteria that allows for the setting of limits of the scope of the extra-limitation necessary to make the principal liable. Legal texts set a limit to the functions of those entrusted with the execution of work. The employer is not liable beyond that. However, the legal texts do not define what should be considered to be the functions for the running of the company itself. As the reader can imagine, there are infinite scenarios. Below is a classification of the groups of cases:

- **Explicit character of the instructions**, authorizations, and prohibitions the principal has made. Obviously, the agent's conducts falls within execution of his responsibilities or the execution of the task if they correspond to the instructions or the authorization

expressed by the principal. However, what occurs if the behavior in question has been expressly forbidden? This disobedience may exonerate the principal from liability if following the instructions would have meant the avoidance of the damage.

- It is not necessary to speak of exoneration when the prohibition is clearly contradicted by the remainder of the instructions or, including, by the same system of incentives inherent in the agency relationship. Even less when, beyond that provided in section 120.4 Criminal Code, it allows determination of fault on the part of the principal.

A classic example is the *pizza* business that adjusts its business policy, that guarantees delivery within a maximum period of time (“*You will pay nothing, if your order is not delivered within half an hour*”), with the instructions given to the rider that deliver them (“*The rules of the Highway Code are rigorously complied with*”) and the repercussion in their salary should the pizza not be delivered in time (“*If the pizza is no delivered within the period stipulated, the cost of the same shall be deducted from your salary*”). It becomes clear that it is not enough to prove that there has been illegal behavior that the rest of the business policy and wages of the company encourages: *Domino’s Pizza*, of the store, cancelled its guarantee of delivery within half an hour of the order when a jury gave a verdict against them of punitive damages for the amount of \$ 78.000.000 (USA) in favor of the plaintiff that had been knocked down by a *Domino’s* driver (Michael Janofsky, ‘Domino’s Ends Fast-Pizza Pledge after Big Award to Crash Victim’, New York Times, 22 December 1993, in Jonathan Hadley KOENIG, *Punitive damages “Overkill” after TXO Production Corp. v. Alliance recourses: The Need for a Congressional Solution*, 36 Wm. and Mary. L. Rev. 751, 752 n. 7 (1995)).

- **Non delegable duties.** The principal has a duty of care which can not be avoided by entrusting a third-party to execute the work. The inability to delegate stems from considerations such as the intrinsic nature of the risk of the activity or the particular risks associated with the execution of the same, the dangerousness of the object (explosives, poisons, non-flammable or corrosives materials, gas etc.), the place where the activity is to be carried out or, finally, for the mere legal qualification as a dangerous activity (Dobbs (2000) p. 923). In general, the contracting out of the activities under the control of the person to be sued, but dangerous and whose execution is given to an (insolvent) independent contractor, does not remove the liability of the principal.

The Spanish Supreme Court, 1<sup>st</sup> Chamber, 31.1.2001 (Ar. 537), confirmed the liability of the company Repsol Butano S.A., titleholder of the national distribution service of gas cylinders for the accident that caused the death of the occupants of a apartment. The tap of the gas cylinder were not closed properly and the insulation work that the victims themselves had carried out in the aided in the accumulation of gas in the home. It was of no benefit to Repsol that their area distributor could not have detected the danger associated with the refurbishment of the home.

- The **intentional tort** of the agent. In Spanish case law it is traditional to consider the principle of the prohibition of reimbursement and exonerate the liability of the

employer in those cases in which their employee has caused intentional tort by using the instruments from work or under the cover of the tasks they have been told to execute. The principal is liable, however, for the deceitful deviation of behavior of their agent if these were foreseeable, even more so if the activity they were asked to perform was dangerous to others. Similarly, if the action of the agent was due to an access of enthusiasm or with the intention of favoring the interests of their principal or it was executed with the apparent authority of their principal or the image that their position in the company gave them.

The most usual example in Spanish law is that of subsidiary civil liability of the State for the crimes or misdemeanors committed with official weapons by State Law Enforcement Officials (Lloveras i Ferrer, *Policías que disparan*, InDret 01/2000).

*c) Reimbursement in favor of the principal*

We have already had the opportunity to explain that there is joint and several liability for the actions of others foreseen for relationships of professional dependency. As provided by section 1904 CC:

*The person who pays for the damage caused by their dependents may seek reimbursement.*

*When it concerns non-university centers of education, the owners can seek reimbursement of the amount paid from the teachers, if said action causing damage occurred intentionally or grossly negligent in the exercise of their duties.*

Despite the legal provision, Spanish case law does not know much litigation concerning reimbursement actions exercised by principals against their agents. This may be due to the fact that insurance acts as the corrective of the system and acts as a disincentive to these types of claims; perhaps because, after all, the law of contracts already contains provisions for this and permits the parties to adjust the contents of the contract to the liability that each assumes.

The civil rules in force concerning liability of education establishments are due to the reform of Law 1/1991, 7 January, the reform of the Civil and Criminal Codes in the material concerning the liability of teachers. The reform anticipated the solution that would be applied years later to Spanish civil servants: it is not the civil servant that is liable but the Administration, and reimbursement is only possible in cases of intentional tort or grossly negligence. The comparison is not problematic. At present non-university education is, mainly, in the hands of the State: provided by civil servants in state-run or independent schools. The civil rules in the material are residual.

The action of reimbursement has been removed from the law of torts as it is resolved in the law of contract or labor law. In practice, employers never seek reimbursement against their employees: there is no such case in the case law of the Supreme Court of the last five years. In fact, it makes no sense whatsoever for an employer to sue their employee in the civil area if they have not fired him or her earlier, and normally the threat of dismissal or disciplinary procedure is enough. Practice is sensible: claims for civil liability are very expensive and the

labor relationship would not support a lawsuit. Employees, on the one hand, usually prefer to spread the costs associated with their tendency to cause injury over time; they are, clearly, risk-averse. On the other hand, no repeated individual activity is exempt from the eventuality of simple negligence: the lack of care of an individual can not, as we shown, be avoided in the long term. A significant decrease and, should it be feasible, the neutralization of a risk is only possible within the framework of complex organizations. In fact, the cause of accidents of this type is not usually unilateral, nor is the primary tortfeasor considered attributable: the risk is, typically, that of the company, associated with its activity, and not only that of the employee.

### 3. From Dependency to Control

In the pages above we have examined shortly the Spanish vicarious liability. We have used the basic model of principal-agent, the paradigm of which in Spanish law is the liability of Public Administration. We have concluded with the rules concerning civil and criminal liability of parents, guardians, employers and owners of education establishments. The reader has been able to verify that there are multiple and a variety of circumstances of each of the potential persons liable for the actions of others. In fact, some of the contradictions that arise in treating situations that are so different in the same way have been outlined.

However, from a purely analytical point of view, we have to endorse the long standing rules of the Codes and admit that they took into consideration something which is still under discussion in contemporary doctrine: the **need to distinguish between tortfeasor and the person accountable** in those cases when the harm has been caused by failure to implement duty of care and in those, in the absence of a rule of liability for the actions of others, the victim must take on board the insolvency of the tortfeasor. For the same reason, the set of rules are applicable to the same distinction between tortfeasor and the person accountable to situations not covered by sections 1903 Civil Code and 120 Criminal Code. This is what occurs, as shown with liability derived, in general, from the ownership of goods.

**There is no general rule of owner's liability for harms caused by abnormally dangerous things or animals** in the Spanish Civil Code of 1889 (*gardien de la chose, Halter*). The Code only includes specific manifestations of those principals laid down in sections 1905 (liability of animal owners even though they were lost or had escaped) and 1910 (liability of the head of a household for the harm caused by things that fall down or are thrown from there). However, the case law from the Supreme Court has turned to the rules of liability for the actions of others in **cases where the harm caused for the use of a thing has been caused by a person different from the owner or usual possessor of said thing**.

An initial general rule was developed by criminal case law that for years decided hundreds of serious car accident cases that meant crimes based on carelessness by the car-drivers. The criminal courts in their desire to find a solvent liable person has condemned the owner of the vehicle to be joint and

severally liable for those accidents caused by its driver, dependent, relation, or any other kind of user that is connected with the same. In 1995 the criminal legislator codified the rules of case law in section 120.5 CP, anticipating subsidiary liability of *Individual or organization who are the owners of vehicles that are likely to create risk to third parties, for the crimes and misdemeanors committed in the use of the same by their dependents or representatives or authorized persons*. The rule is that of *sedes materiae* which is the most generic of the doctrine of *gardien de la chose* in the Spanish law in force.

The Law of Torts of in complex society in which the individuals interact in order to achieve different interests (and often conflicting) is inevitably evolving towards the imputation of damages based on the ownership of things and relationships and not by means of more or less strict criteria of causality or avoidance. We can affirm that, as such, agency, dependency and propriety are governed by the same rules as those of damage recovery.

In the Spanish legal system, liability for the actions of others is not removed from the causation of harm. On the contrary, the law makes a presumption of its participation in the same through negligent behavior that consists in not having avoided, when you should have done so, the damage. In other words, a real case of liability for the actions of others is no longer a reproach but a legal guarantee in favor of the victims, that determines who participates in the area in accordance with some of the legally foreseen roles

Effectively, the classic perception of vicarious liability as a regimen in which the principal is accountable for an agent who was entrusted with the execution of an activity is unclear when we want to apply this to an agent that carries out his / her functions in a complex organization. In an organization, the functions of control and supervision break down into an infinite number of agency relationships. Vicarious liability thus becomes yet another cost of company activity, that is, a premium that the company pays in favor of the potential victims of torts as a result of the company's activity; a compulsory insurance that that the law grants the victims of injury caused by organizations. The company is nothing more than a joint and several debtor, which takes on board the risk of the insolvency of its collaborators and the cost of compensating the victim.

Concerning the liability of the organization, the paradigm is no longer principal-agent, but that of liability for all harms as a result of the activity of the organization of which it is titleholder or the goods that make up its patrimony. The paradigm is now that of civil liability of the manufacturer for harm caused by defective products.

In accordance with Act 22/1994, 6 July, Manufacturer's Civil Liability for Defective Products (hereinafter LRPD), manufacturers and importers (and in specific cases suppliers) are liable for the injury a defective product cause once, in this case, it has been put on the market. The law will make the person who creates a source of danger (in this case, the defective product) independent of the event that gave rise to the injury caused. Thus, in any case the claim for damages shall be directed against an liable person who presumably is solvent and, above all,

easily identifiable. The intention of the rule is to protect consumers, even though it raises the price of the final product.

The liability stems from of the ownership of the organization and falls on the company itself. The relative control that the manufacturer or importer can exercise should either be over the products that they manufacture -or put on the market and over those people that participate in these activities– is sufficient to make them accountable for the injuries ultimately caused.

According to the LRPD, the liability of principals of those organizations that manufacture or import defective products that cause injury is:

- a) **Direct, strict and limited:** in accordance with section 1 LRPD, *The manufactures and importers shall be responsible, subject to that laid down by this Law, for the damage caused by the product defects that, respectively, they manufacture or import.* The liability is not, however, absolute, at least not in the majority of cases. When the defect has caused personal injury, section 11 LRPD foresees that: *In the regimen of liability foreseen by this Law, the global civil liability of the manufacturer or importer for death or personal injury caused by identical products that have the same defects shall have a limit of 6.310.671 euros.*
- b) **Joint and several liability** for all those liable for the tort but **with no reimbursement** against the tortfeasor. According to section 7 LRPD, *by application of the present Law those persons liable for the same tort shall be so joint and severally.* Thus when there are a number of manufacturers or importers liable for the damage the victim will be able to sue any of them indiscriminately. Whoever pays the compensation shall exercise the action of reimbursement against the others.

However, the Law does not expressly recognize the action of reimbursement for the person liable against the member of their organization liable for the defect that caused the harm. The rules that govern this relationship are no longer the law of torts, but those of the law of contract.

In this manner, the rules of the liability of organizations converge with those of biggest service company: the Public Administration. From a conceptual point of view, there is no difference between the vicarious liability of private companies and that of public bodies. Both regimes pursue the same objectives: to efficiently distribute incentives, overcome the insolvency of the person liable and offer the injured party an efficient protective regime. Both organizations, from public law and private law, move from liability for the actions of others to liability of complex organizations such as themselves.

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