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EXTRA CONTRACTUAL LIABILITY UNDER SPANISH LAW - NEGLIGENCE

Under Spanish law the duty of care is regulated in **Article 1902 of the Spanish Civil Code**, which gathers liability for negligent acts or omissions, stating "*Anyone who through deed or omission causes harm to another, through fault or negligence, is obliged to repair the harm caused.*"

The sources of the Spanish legal system are the statutes, custom and principles of law. Reiterated judicial decisions (case law) of the Supreme Court of Spain shall complement the above-mentioned sources. "Reiterated" means more than one decision upon similar facts and reaching the same conclusion. Consequently, judicial decisions are not a source of law as such. They merely serve to interpret and complement the statutory law, custom and general principles in each particular case.

Judicial decisions frequently reiterate that the fundamental requisites of extra- contractual liability are as follows: 1) the fact of the damage suffered by whoever brings the action. 2) an imprudent or negligent action or omission on the part of the person against whom the action is directed 3) existence of causal nexus between the negligent act and the damage caused.

Spanish courts have established a precise definition: "*Act or omission, damage or loss, illegality, fault or negligence of the agent and the relation of causality between the damage and fault*".

Negligence cases area in Spain tried by a judge alone in the first instance. The standard of care expected of a particular defendant may be set by law but the question of weather the defendant fell beneath the standard is one of fact, to be determined by reference to all the circumstances of the case.

THE GOOD FATHER OF A FAMILY TEST

The doctrine enshrined in Article 1902 places the burden of the proof on the defendant, who should prove that he acted "*diligently*". The test of diligence or the duty or care required is that which should be taken by a "*good father of a family*". The defendant is the one who has to demonstrate that he employed the necessary and proper precautions to prevent the risk of damage, by complying with the precautions and cares which regulate his activity, or in case no such regulations exist, the precautions that could be understood applicable according to the nature and circumstances of the particular case.

MINORS AND DISABLE PEOPLE

Neither the mentally ill person, the minor, nor the deaf-mute can carry out illegal acts since they are unaware of their actions. Parents or guardians are held responsible for minors or incapacitated persons not only in the Civil Code, but also in the Penal Code, which governs the civil liability arising from criminal offences, imposing upon them civil liability for the acts of the deranged person, the minor under sixteen and the deaf-mute in their legal power or guardianship, except where the lack of fault or negligence on the part of the guardians is established.

DEFENCES

The Defendant can deny liability by establishing that he acted “*diligently*” or by denying causation, this is, when there is an unforeseen element into the chain of events (“*force majeure*”) or “*casus fortuitus*”. The Defendant may allege “contributory negligence” on the Claimant by establishing that the Claimant failed to take reasonable care and that this contributed either to the accident. It is up to the judge to decide the proportion of responsibility of the claimant and to reduce the amount of damages accordingly.

VICARIOUS LIABILITY

Not only may one be held responsible for ones own actions, but also for those of certain others. In determined relationships of the dependence, the person “in charge” of the dependent person must answer. Here, liability is also based on a presumption of fault due to a lack of vigilance (*culpa in vigilando*) or for fault derived from “choice” (*culpa in eligendo*). This presumption ceases when exercise of all due diligence to prevent the damage is shown.

OCCUPIERS LIABILITY

There is no equivalent in Spain to the Occupiers Liability Act 1957 and therefore the general principles contained in Art 1902 apply.

LIABILITY FOR DAMAGES CAUSED BY INANIMATE OBJECTS

The owner of a building is liable for damage arising from the total or partial ruin thereof, if this occurs through lack of necessary repairs. Owners must likewise answer for the following damages:

- for the explosion of machinery, which has not been cared for adequately, and for the combustion of explosive substances, which were not placed in a safe and suitable place.
- for excessive smoke, which is harmful to persons or to property;
- for fallen trees in transit areas, when this does not occur by reason of *force majeure*; and
- for drainage from sewers or from deposits for infectious materials, which were constructed without taking precautions without are suitable for the place where they are located.

The head of a family occupying a house, or a part thereof, is liable for damage caused by things which are thrown or which fall there-from. If any of these damages arise from defects of construction, the third party which suffers may claim against the architect or against the builder, within the legal period allowed i.e, ten years following the conclusion of construction, or fifteen years if the cause was the fault of the contractor insofar as a contractual condition.

LIABILITY RESULTING FROM THE ACTS OF ANIMALS

The owner of an animal or any person making use of the animal is responsible for such damage as the animal may cause, even when it escapes or is lost. This liability does not exist if the damage is caused by force *majeure*, or due to the fault of the party who has suffered the damage.

The owner of a hunting estate shall answer for damage to neighbouring properties arising as a result of hunting activities when he has not taken adequate steps to prevent them or when he has kept the neighbouring properties owners from preventing them.

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