Tort Liability and Other Means of Redress: "Collateral Source Rule" and Related Topics

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• *Private and Public Systems of Damage Compensation and Tort Liability*

When faced with a risk of injury, or likelihood that some event will negatively affect our well-being, we react both individually and collectively by adopting a variety of methods to face the risk:

a) As individuals, we can enter the **insurance market** with a policy that allows us to exchange the burden of risk for the payment of an insurance premium.

Public regulation of insurance (essentially a market scheme) is noteworthy. The organized coverage of risks as a business activity is highly regulated by the government: Law 30/1995, private insurance order passed by *Real Decreto* (Royal Decree) 2486/1998, November 2. The same applies to insurance as a private law contract: Law 50/1980, October 8, on insurance contract. And to particular negotiation methods: Law 9/1992, April 30, on private insurance mediation.

b) The Government has established public or collective systems of compulsory partial coverage against certain risks to one's life, health, and bodily integrity, and for some types of lost earnings.

It suffices to cite the following three examples. Work-related accidents: *régimen de accidentes de trabajo*, arts. 115 and following of the *Texto Refundido de la Ley General de la Seguridad Social* (revised social security law), passed by *Real Decreto Legislativo* 1/1994, June 20. Public-employees insurance scheme: arts. 47 and following of the *Texto Refundido de la Ley de Clases Pasivas del Estado*, passed by *Real Decreto Legislativo* 670/1987, April 30. Forced personal contributions, such as military service: art. 54 of the *Ley Orgánica* 13/1991, December 20, on military service, related to the art. 155 of the Law 17/1999, May 18, on the armed forces personnel.

Spanish Law has also created public programs to assist victims of particularly serious crimes, such as violent, terrorist, and sex crimes. The Law 35/1995, December 11, on assistance for victims of violent and sex crimes, and the *Real Decreto* 738/1997, May 23, develop regulations for a system of public assistance for victims of violent and sex crimes. The arts. 93 to 96 of the Law 13/1996, December

> 30, developed by the *Real Decreto* 1211/1997, July 28, approving the assistance and compensation regulations for victims of terrorist crimes, modified by the *Real Decreto* 1734/1998, July 31, regulates a program to assist victims of terrorist acts.*

We should observe that both systems –contract and public schemes- establish systems to transfer (consequences from the concretion of) **certain** risks, but usually offer no guarantee for the negative consequences of **just any** risk of damages.

As with everything, a **more general** (but not universal) system of legal redress for the risk of suffering any type of harm does exist:

> c) **Tort liability** provides compensation to victims of damages caused by negligence (art. 1902 C.C.), by criminals (arts. 109 and following CP), by the functioning of public services (arts. 139 and following of the Law 30/1992, November 26, *régimen jurídico de las administraciones públicas* -legal system of public administration- and of the *procedimiento administrativo común* -administrative procedure-, modified by the Law 4/1999, January 13).

The coverage provided by tort liability law in section c) is not only significantly more extensive than the partial coverage cited in a) and in b), but also includes it. In other words, the general rules of tort liability include risks of harm contemplated by both the contractual and public partial systems of compensation.

> An individual may be induced to carry insurance because he/she anticipates the risk of material damage, loss of profit, or personal injury. All or some of these may be i) caused by a car driver, liable under art. 1 of the Law of *responsabilidad civil y seguro en la circulación de vehículos a motor* (civil liability and car insurance); ii) caused in a work-related accident, the result of an employer not upholding security measures required by law; iii) caused by the manufacturer of a defective work instrument or product (Law 22/1994, July 6, on civil liability for damages caused by defective products); iv) suffered by a state employee or young man constitutionally and legally obliged to serve the military.
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> Moreover, in cases of violent, terrorist, or sex crimes, the victim should always receive a tort-law based compensation, although the tortfeasor is often unidentifiable (particularly in terrorist attacks, but also in other crimes).

This confluence of forms of redress (even if partial in some cases) should find a way of coordinating.

The compatibility doctrine appears to fulfill this need in the decisions of the different Chambers of the Spanish Supreme Court. The exception to this compatibility rule can be found in the system of public assistance to victims of fraudulent or sex crimes, under which Law 35/1995 (art. 5) anticipates the incompatibility of this type of assistance with other sources of compensation, including of course, the compensation

* The separate enumeration of private insurance (insurance contract), a coverage system required in a contractual or paracontractual relationship (work-related accidents, etc.) and a completely public system (state assistance and aid), neither implies a functional disparity, nor impedes a common theoretical treatment. To the extent that they affect the private decision to buy insurance coverage (and it is clear to me that all of them do this to some degree), they are subject to substantially similar economic analysis.

paid by the tortfeasor -clearly demonstrating the subsidiary character of the assistance system -.

- ***The Scope of Compatibility***

The Spanish Supreme Court Chambers have tried to resolve two sets of issues that may receive a separate answer with the compatibility doctrine.

One is whether a tort liability suit is precluded by the collection of insurance benefits, subsidies, compensations or assistance (public or private) by the victim.

Another problem is to what extent the funds that the victim has received through other compensation sources should be taken into account when deciding on the amount of damages that the tortfeasor should pay (and who should receive part of the amount) in a civil liability lawsuit.

The confusion between both issues is accentuated by the jurisdictional duplicity, particularly in the most relevant quantitative area- work-related accidents. This area still has many uncertainties that should be clarified. The jurisdiction of the labor laws has been affirmed by the *Sala de Conflictos de Competencia* (internal conflicts chamber) of the Supreme Court: Autos (Decisions) 23.12.1993 (RJ 10131), 4.4.1994 (RJ 3196) and 10.6. 1996 (RJ 9676).

The First Chamber, although it has recently declined its jurisdiction: Decisions, 1st, 10.2.1998 and 1st, 20.3.1998 (both cases with opinion of Martínez-Calcerrada), continues to pass compensatory claims for work-related accidents: Decisions, 1st, 3.3.1998 and 1st, 8.6.1998.

The Spanish legal system has an easy answer to the problem of whether or not to preclude liability lawsuits: the receipt of compensation (public or private) does not in any way preclude a tort claim from the tortfeasor.

With regard to public compensation for victims of terrorist acts, the elimination of a tort-suit against the criminal would be completely absurd. Terrorist groups should obviously not be beneficiaries of State funds (directly or indirectly). Moreover, Courts have allowed lawsuits against the Government for inadequate public safety enforcement (the Police did not impede or diminish the consequences of terrorist acts) filed by victims who have already received public subsidies as victims of a terrorist action:

Decisions of the Supreme Court, 3rd, 31.1.1996, 3rd, 18.7.1997 –both related to the bloody ETA attacks on the "Hipercor" (Department Store) of Barcelona- and 3rd, 27.3.1998 –bomb placed by ETA in the *Comisaría Regia* (Royal Delegation) offices at the 1992 World Fair in Seville; the sites targeted did not have equipment to detect explosives.

In the area of work-related accidents, article 127.3 of the *Texto Refundido de la Ley General de la Seguridad Social* clearly establishes the injured worker's right to sue the

tortfeasor (including the employer) for civil liability even though the Social Security benefits would have satisfied the corresponding amount due.

Historically, this has not consistently been the solution in Spain for dealing with cases that fall under these circumstances. However, it always has been when the person who caused the injury was a third party to the employment contract: the tort claim of the victim was already admitted by the Courts in the 1920s, underwent consolidation in the thirties, and was later integrated in the Work-related Accidents Act in 1956.

The action concerning employer's liability, on the other hand, was not admitted by the First Chamber (civil) of the Supreme Court until 1966 (it had been admitted earlier in the Second Chamber), and was included that same year in the *Texto Refundido de la ley de Seguridad Social* of 1966 (article 97.3, directly preceding the current article 127.3). On this evolution, see Fernando GÓMEZ, "Indemnización civil e indemnización laboral: un intento de reconstrucción", 80 RDP, 931 and following.

On the other hand, internationally (for example, Germany, U.S.A., Great Britain), benefits for work-related accidents replace the tort claim against the employer. This option is supported by the following empirical judgment: the gains in deterrence derived from keeping the civil lawsuit against the tortfeasor do not compensate the administration costs required to maintain the civil liability system in this area. If the public no-fault system uses some experience-rated insurance premium (paid by the firm based on its record and accident rate), then this empirical judgment is probably accurate. For a confirmation with facts taken from real experiences, see Michael J. MOORE, W. Kip VISCUSI, *Compensation Mechanisms for Job Risks: Wages, Workers` Compensation and Product Liability*, Princeton University Press (1990).

In any case, it is clear that the Spanish social security legislator fully supports the need to retain tort claims against employers. I doubt, however, that the decision was made with knowledge of the chosen alternative's effects.

When faced with a legislator's unclear decision in other areas, the Supreme Court has imposed the compatibility rule of public benefits with tort liability claims:

- SC, 3rd, 12.5.1998: Employee of the *Diputación de Barcelona* (Provincial Council) tripped on a broken electrical outlet cover and fractured her femur. She underwent surgery five times and now has to walk with crutches. The Supreme Court upheld the compatibility of benefits with accrued interest (according to the law for government employees), to the State's compensations for State liability, especially in cases in which the victim had contributed to the benefits.

- SC, 3rd, 3.10.1998: Draft soldier in an unstable state of health (depression, asthenia and hypertension) dies when using a gun during a firing exercise for which he had not been trained.

  For draft soldiers, the Third Chamber also recognizes compatibility in other decisions:

  - SC, 3rd, 20.05.1996
  - SC, 3rd, 16.04.1997
  - SC, 3rd, 17.04.1998
  - SC, 3rd, 08.10.1998

- ***Accumulation, Subrogation or Deduction?***

The coexistence of public and private means of compensation with tort liability lawsuits and awards needs to be organized. This is achieved through what Americans refer to as Collateral Source Rules.

In theory and in practice there are three possible alternatives:

a) To collect both compensation and full tort awards. The amount of damages from the tortfeasor would not be reduced based on the victim having already received some amount as compensation –most likely only partial- from another source. This solution is the Collateral Source Rule "par excellence" in the legal tradition of the Anglo-American Law of Torts.

This is the preferred legal option in Spain, but (only) in most Chambers and by a majority of decisions within each Chamber. In the First Chamber:

- SC, 1st, 21.03.1997
- SC, 1st, 19.05.1997
- SC, 1st, 11.11.1997
- SC, 1st, 03.03.1998

A few exceptions, old and explicit–SC, 1st, 31.5.1985, or implicit –SC, 1st, 8.6.1998- complicate the matter.

Accumulation is the rule in the Second Chamber, which introduced it more than thirty years ago under the influence of the prestigious criminal law professor and judge, Antonio Quintano Ripollés: Antonio QUINTANO RIPOLLÉS, "Seguros y responsabilidades civiles delictuales", 45 RDP, 3.

In the Fourth Chamber as well, but with a very concise line of argument:

- SC, 4th, 02.02.1998
- SC, 4th, 23.06.1998
- SC, 4th, 12.02.1999

The Third Chamber is the exception, with the accumulation rule in the minority:

- SC, 3rd, 27.03.1998, on the subsidy scheme for victims of terrorism.

b) Deduct the amount received by other sources of compensation from the amount of the damage award to be paid by the tortfeasor.

This is the deduction rule, which the Third Chamber of the Supreme Court usually follows, but not unanimously:

- SC, 3rd, 20.05.1996
- SC, 3rd, 16.04.1997
- SC, 3rd, 17.04.1998
- SC, 3rd, 08.10.1998

c) Subrogate the insurer, or in general, the third-party that provided the benefit or subsidy, in the liability claim against the tortfeasor and for the exact amount paid to the victim.

The subrogation rule has specific grounds in Statutory Law: art. 43 of the Law 5/1980, October 8, on insurance contract. Similarly, art. 127.3 of the *Texto Refundido de la Ley General de Seguridad Social*, grants in favor of the *Entidad Gestora* (Social Security Body), a direct lawsuit against the tortfeasor or his/her civil liability insurer to recover the costs of medical care and drugs resulting from the accident.

Subrogation requires the tortfeasor to pay the entire damage award (equal to harm) without any deduction. Nevertheless, the victim does not receive double payments from various sources because the private or public insurer would receive the repayment of the benefits provided to the victim in the first place.

- ***Efficiency of the Alternatives: Deterrence and Insurance Coverage***

Accumulation, deduction and subrogation should be judged on efficiency grounds along two dimensions: **Deterrence** and **insurance coverage**.

a) The first is judged according to the degree to which each alternative provides the potential tortfeasor with an incentive to adopt the socially optimal measures of reducing the probability or gravity of future damages.
b) The second, according to the degree of risk shifting from those who show risk-aversion to those who are risk-neutral, through the adequate private or collective insurance scheme.

The accumulation and subrogation rules are essentially the same with regard to deterrence. They both confront the potential tortfeasor with a damage payment that equals the loss of social welfare caused by his/her action.

In contrast, the deduction rule leads to the subtraction of the amount received through other sources from the total damage award. Thus, the potential tortfeasor is confronted with a reduced expected payment, that is less than the value of the loss in social welfare caused. This feature of the deduction rule seriously undermines the deterrence effect of tort liability.

Additionally, the subrogation rule offers better insurance coverage than either the accumulation or the deduction rule. Only the subrogation rule guarantees that the potential victim would buy full coverage against the risk of suffering harm, making it the best rule from a social welfare point of view.

Both the accumulation and deduction rules lead the potential victim to purchase a lower than optimal insurance coverage, although this inefficiency is caused by different reasons:

- Deduction converts first-party insurance into third-party insurance that favors potential tortfeasors because they no longer have to pay for all the harm they have caused. Therefore, the victim prefers a level of insurance coverage below the complete level, in order to benefit the

tortfeasor less under the deduction rule. More extensive insurance coverage leads to a lower expected damage award, and insurance coverage is not free. It is paid for either by society, or by the potential victim. The latter is the case with private insurance because it requires the payment of premia. Social insurance coverage implicitly requires payments (at least in part): for example, the salary is lowered in exchange for coverage of work-related accidents and other risks. Public subsidy schemes also cover their costs by collecting taxes. Under these conditions, the potential victim avoids the complete coverage (the best one from an optimal risk allocation perspective). This is rational behavior (although socially inefficient) based on the restrictions imposed by the deduction rule.

- Accumulation appeals to the potential victim with the possibility of receiving a double compensation (even if partial), making the transfer of income from the *"accident"* state of the world, to the *"no accident"* state attractive. This effect operates through savings resulting from a partial insurance coverage: the victim chooses a lower insurance coverage *ex ante* based on the possibility of a double compensation *ex-post*. This is the only way to balance one's marginal utility of money (the condition for an individual's rationality under these circumstances), between both states of the world, namely before and after suffering harm. But this is clearly an inefficient result in terms of risk coverage: the incentives are perverse.

  Contrary to occasional opinions by Spanish courts and commentators, it should be emphasized that the inefficiency in question gets worse the more the potential victim participates in the level of insurance coverage (through his/her insurance contributions or premia). In other words, the rule of accumulation worsens the situation by negatively influencing the victims with regard to the level of insurance coverage sought out. In a pure public subsidy system –such as the one to help victims of terrorist attacks- the inefficiency is comparatively less important (although it does not disappear because the possibility of a public subsidy indirectly influences the level of private accident insurance coverage chosen by the potential victim).

Are the savings in administrative costs, from fewer civil liability and legal claims, sufficient grounds to defend the deduction rule?

The deduction rule definitely reduces the compensation expected by the victim, provoking a decrease in his/her desire to sue. Nevertheless, I do not believe these savings would be very significant: tort liability lawsuits would not be completely eliminated –as is the case with work-related accidents in Germany or the United States- a solution that could lead to noteworthy decreases in the system's administrative costs. However, an attractive consequence of the deduction rule is that it decreases the stakes of the lawsuit and thus, "ceteris paribus," makes it less appealing to the potential plaintiff. As a whole, though, it appears to me as unlikely that this suit discouraging effect would make up the dilution of deterrence and insurance incentives caused by the deduction rule. The entire topic, however, probably deserves an empirical study.

- ***Charitable Benefits***

Up to this point, I have only dealt with coordination problems of tort liability with organized and pre-established personal injury and property compensation mechanisms in certain areas of public life.

Nevertheless, other sources of assistance to victims are just as imaginable: foundations, churches, relatives, fellow workers, friends, and neighbors may also provide the injured person with money or a material service that contributes towards a total or partial compensation of the harm suffered. In fact, almost all of the cases in question follow this course.

The efficiency analysis of the different coordination systems is also applicable to these cases. Nevertheless, some typical characteristics make the accumulation rule relatively more attractive, especially with regard to organized charitable help:

a) Presumably, a benefactor wants to help the victim and not the tortfeasor. However, we have observed that the deduction rule benefits the tortfeasor and not the victim. With this in mind, the deduction rule clearly diminishes altruism and beneficence, and is still less appealing as in the other settings.

b) If the benefactor wanted to recover the amount of the donation, he or she may always reserve subrogation of the victim's rights against the tortfeasor when making the donation. The victim then would need to comply with this if he/she wanted to accept the donation. Moreover, due to the unpredictability of the amount and origin of payments, including whether one will receive anything, the accumulation of these amounts would not significantly decrease the potential victim's incentive to insure him/herself.

- ***Spanish Supreme Court Cases***

Chamber and Date	Ar.	Judge Ponente	Parties
1st, 31.5.1985	2839	Fernández Rodríguez	Manuel F. C. v. Antonio M. M. and "La Estrella, S. A."
1st, 21.3.1997	2186	Barcalá Trillo-Figueroa	Ismael G. de A. v. Julián E. R.
1st, 19.5.1997	3885	Almagro Nosete	(Not available) v. "Coto Minero de Narcea, S. A."
1st, 11.11.1997	8972	Villagómez Rodil	Francisco de Asís M. V. v. CEPSA and TICSA.
1st, 10.2.1998	979	Martínez-Calcerrada Gómez	María Oliva B. C. v. *Sociedad Anónima Alimentaria Aragonesa*
1st, 3.3.1998	1044	Marina Martínez-Pardo	Eutimia C. P. v. Jesús Z. D., Cooperative "Agrupación Sindical San Pedro" and *Mutua de Seguros "Mesai"* (Insurance agency).
1st, 20.3.1998	1708	Martínez-Calcerrada Gómez	Trinidad F. R., María M. G., José and Álvaro P. S., and "Construcciones Pichel Hermanos, S. L." v. "Granitos Soygar, S. L."
1st, 8.6.1998	4278	Barcalá Trillo-Figueroa	Elvira R. C. v. "Lexomosa, S. A." and Juan Carlos F. G.
3rd, 31.1.1996	474	Mateos García	Victim of the attack on "Hipercor" v. *Ministerio del Interior*.
3rd, 20.5.1996	4407	Xiol Ríos	Padres de Cristóbal O. P. v. *Ministerio de Defensa*.

3rd, 16.4.1997	2689	Hernando Santiago	Sebastián C. M. v. *Ministerio de Defensa*.
3rd, 18.7.1997	6083	Sieira Miguez	Victim of the attack on "Hipercor" v. *Ministerio del Interior*.
3rd, 27.3.1998	2942	Hernando Santiago	María del Carmen de F. C. v. *Administración del Estado*.
3rd, 17.4.1998	3832	Sieira Miguez	Ramona G. S. and inheritors of Francisco del A. F. v. *Ministerio de Defensa*.
3rd, 12.5.1998	4956	Peces Morate	Margarita B. S. v. *Diputación de Barcelona*.
3rd, 3.10.1998	8345	Peces Morate	Parents of Carlos Ángel V. V. v. *Ministerio de Defensa*.
3rd, 8.10.1998	7815	Hernando Santiago	Parents of Miguel Ángel E. R. v. *Ministerio de Defensa*.
4th, 2.2.1998	3250	Cachón Villar	Widow and children of Mariano L. L. v. Excmo. *Ayuntamiento* (City Council) of Santa Amalia, "MAPFRE" and "La Estrella, S. A.".
4th, 23.6.1998	5787	Gil Suárez	M.ª Cruz L. H. and children, Alfonsa C. F. and children, and Josefa J. P. and children v. insurer "Gerling-Konzer Allgemeine Versicherungs-Aktiengeselschaft" and *Administración del Estado*.
4th, 12.2.1999	1797	García Sánchez	Widow and children of Antonio C. P. v. "Electrosur Sociedad Cooperativa Limitada", "Iberdrola, S. A." and "Generalli Cía. de Seguros".