InDret

Book Review:

Derecho de Daños, by Luis DÍEZ-PICAZO Y PONCE DE LEÓN

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- **Luis DÍEZ-PICAZO Y PONCE DE LEÓN, *Derecho de Daños*, Madrid, Civitas, 1999. 367 pages. 5,500 pesetas.**

To the undeniable merit of having published the most important civil law book of the year, we must add the fact that it has been written more than forty years after his first monograph appeared –"El Arbitrio de un tercero en los negocios jurídicos" (Third Party Adjudication in Legal Transactions), Barcelona, Bosch cop., 1957. Luis Díez-Picazo y Ponce de León is the dean of all practicing Spanish civil law professors and is so both because of his seniority in the professional ranks and his personal merits. Whoever has visited these InDret pages for study, research or professional reasons should be aware that from now on we will do without *Derecho de daños* only at our own risk. Let us take a look, then, at some of the central themes around which the author's thinking revolves.

1. A wisely chosen structure

Derecho de daños begins by dealing with the fundamental points of law (Chapters I to X) and this is followed by an analysis of the problem of where to draw the lines between contractual and tort liability, and between the latter and crime-related civil liability. It ends by addressing problems of application (Chapters XIII to XVI). This division into three parts synthesizes a cultural tradition that Díez-Picazo releases from the academic sphere and makes available to practicing lawyers. But his success in the choice of subjects comes not only from what he includes, but also from what he decides *not* to deal with, for example, the age-old distinction between liability for own actions and vicarious liability. The book is a leap forward in terms of Spanish private law culture and, in particular, in the way it discusses several of the key issues in the law of torts.

2. Introduction: a critique of case law and the distinction between liability due to negligence and strict liability

In the Introduction (pages 19 to 38), the author criticizes the case law of the First Chamber of the Supreme Court with all the ferocity to be expected of someone who knows it only too well. The very first paragraph of the book begins with the following phrase: "the law of torts is currently going through a very sensitive moment; one of blurred definition". The second paragraph talks of "vacillating case law" and immediately afterwards, the third concludes by negating it altogether: "the rulings" on tort law "are numerous and of very different ilk... No single doctrine unites them and... they often manifest patent contradictions. In terms of article 1.9 CC (sic), there is no case law in the real sense of the word" (p.19).

This charge is, indeed, a harsh one, but the examples which the author draws from recent Supreme Court case law leave no doubt that he is right. They are STS, 1ª, 22.1.1996 (fatal accident in an improperly exploited mine); 31.12.1996 (with references to the previous cases of 8.11.1990 and 8.2.1991, young man seriously injured in a bull-running festival, after distracting the heifer that charged him); 30.4.1984 (resident who, on leaving his house, was killed by a bull lagging behind the others during the village festival bull-run – a much older ruling than the others and given as a counterexample); 3.4.1997 (actor injured in bull-

corralling in which he had actively and willingly decided to take part); 17.2.1997 (children run over by a train on tracks running parallel to a beach); 22.1.1996 (motorcyclist run over by a train at a level crossing without barriers); 31.12.1996 (actor electrocuted when tripping over a power line while repairing a roof). And after narrating these cases, the author confesses his exasperation: "we never know when and according to which criteria" a decision will be made nor, therefore, whether it will be reached in accordance with a standard of liability due to negligence or one of strict liability - "out of risk", in the author's words (p.24). "In case law ... it is impossible to find criteria that will, in the future, determine the fate of cases that go before the Supreme Court" (p.37).

We at InDret are not in the least bit surprised by the above statements. Having agreed with Díez-Picazo even in the cases with which he begins his book (Trenes and Encierros), InDret some time ago put forward the argument that there are far fewer differences between liability due to negligence and strict liability than authors, legislators and judges have wished to see over the last half century (Causalidad y responsabilidad). As soon as one realizes that firstly, civil negligence is, in general, strictly external (it violates safety precautions demanded in the sector in which the defendant was acting) and secondly, many of the criteria for objective indictment restrict the scope of those potentially responsible for the damage with criteria that are identical to those of liability due to negligence, there is no doubt that the distinction becomes blurred. "There are no criteria that allow one to separate some cases from others or to anticipate which cases will be governed by one liability regime and which by another, thus any conclusions remain unpredictable" concludes Díez-Picazo at the end of the Introduction (p.37).

But is all this just the fault of case law? InDret has serious doubts that this is so. In fact, one doesn't need to be an avid supporter of economic analysis of law to see that classical legal analysis of the distinction between liability due to negligence and strict liability has closed its eyes to the basic truth that our courts always, or almost always, take into account, namely that one cannot demand that an infinite number of precautions be taken (in other words, that infinite expenses be incurred) by a social agent whose activity is considered legal and permissible. Díez-Picazo himself is open to economic analysis (see Chapters I and VIII), but aware of the ever-present threat of dry academics and in the Introduction to his marvelous "Derecho de daños" he pays the best homage to the economic analysis of tort law that I've ever read in a Spanish legal text.

On pages 31 to 36, after narrating the facts of STS, 1ª, 17.2.1997, a case in which two children were killed by a train on tracks that ran parallel to the beach on which they were playing, he cites the third fundamental point of law, according to which "the risk does not lie in the danger to the victims of being run over by a train, but on the effect that a fence along the tracks might have in a place where, although not legally obligatory, it would be prudent" (p.33). This fact, Díez-Picazo then writes (p.34), invites some comment. "Above all, one should ask on what stretch and for what distance the railway should be fenced off and how much must be invested by a company such as Renfe, that will always be loss-making. One might also question the height that the wall should have because if it is not very high, mischievous children seduced by the railway could easily jump over it.... A further issue is whether the works – the wall - that a ruling might impose on the rail company incur a cost that might have been better used in other company activities". To the reader who is familiar with *Hand's rule*, these ponderings will seem obvious. And the lawyer who is traditionally critical of *Law & Economics* should perhaps be reminded that there are still many people who write prose without realizing it.

3. Economic analysis of tort law and the concept of negligence

But of course this is not the case for Díez-Picazo who, as we've said, devotes Chapter VIII of his book to economic analysis (p.203 ff.). In spite of a somewhat surprising minor error of citation, when the US Navy becomes the US Government itself - U.S. v. Carroll Towing (159 F.2d 169 (2d Cir. 1947) is given as U.S. *Navy* v. Carroll, p. 210) -, the author gives an account of the basic literature on the economic analysis of tort law, as well as some of its best known developments, a line of thought, he writes, that "one must never, ever lose sight of" (p.217). But ultimately, "in legalistic-based systems such as Spanish law and practically all continental European law codes, the direct relationship that judges have with legal rules originating in the Law stops them from carrying out tasks that go beyond simply interpreting these rules and, where appropriate, closing the loopholes in the system. So, it is no surprise that what is known as the economic analysis of law has grown and developed in the Anglo-Saxon legal systems, which reputedly give judges greater freedom of action".

The idea that the *Civil Law* judge is more bound to written law than the *Common Law* judge gives rise to some bewilderment when applied to Spanish tort law,: Are there really any civil lawyers left who sincerely believe that the literal meaning of the general clause of art. 1902 CC actually restricts a Judge's or Magistrate's judicial decision? If there are, Díez-Picazo is not among them. At the end of the chapter, he states, without beating about the bush, "the cost of prevention... is of particular importance when defining the concept of negligence" (p.217). Learned Hand (1872-1961) had already written this in 1947.

So, let us move on to negligence (Chapter XVI, the last in the book, pp.351 ff.): "I think", Díez-Picazo writes, "that it is one of the merits of the economic analysis of Law that it establishes a relationship between diligence and negligence and the prevention costs necessary to avoid damage. To me it seems clear that when setting the parameters or standards of diligence, one should take into account the sacrifices which can be asked of people who have diligence imposed on them and, at the same time, the limits of these sacrifices. From this point of view, economic concepts are obviously effective. However, the concept of diligence seems, to my mind, more of a normative than a purely economic concept" (p.359).

But there may be a *non sequitur* here: there are not two parallel worlds, the economic and the legal, but just one, in which we all live. Certainly, the legislator can establish all manner of liability rules, but the economic standard of negligence, once set, is as regulatory as any other that might be used by the legislator or applied by the judge. To give an example: if tomorrow it is decided that medical professionals must invest, as a precautionary measure, a sum equal to, shall we say, four times the likely damage resulting from their activities ($B = 4 \times P \times L$) the new standard would be neither more nor less regulatory than any other (very close to the reality of Spanish law) by which the public place in which the doctor (an employee of the state) works is responsible, according to this criteria, but the doctor himself is only responsible for serious negligence ($B = P \times L / 2$, vid. art. 145.2 Ley 30/1992) or to another standard by which the doctor himself, in his private practice, is liable under criteria of simple negligence ($B = P \times L$). The idea that there is one regulatory and one economic world makes analysis difficult: the important thing is to identify how the various regulatory standards differ, including, as for any standard, that which results from applying *Hand's rule.*

4. The history and role of tort law

In the historical chapters of *Derecho de daños*, the very well written text (this is a feature of the writer, one of the twentieth century's best writers on legal matters) follows the traditional line of the history of dogmas, more legal literature than applied Law, up to the Enlightenment. Here, after a brief reference to the Prussian General Territorial Code of 1794 (p.81), Luis Díez-Picazo refers to the French and German civil codes of 1804 and 1900 respectively, as well as to English Law.

Chapter IV (pp.93 ff.) is much more meaty, and is devoted to the development of the code system. In it, the author carefully reviews the factors distorting a system that its developers believed had been designed so thoroughly: the comparison between actions and omissions, the emergence of liability for pain and suffering, the loss of the central place held by liability through negligence apparently pushed aside by strict, absolute or risk liability. The pages on the cultural acceptance in Spain of this latter doctrine (pp.110 ff.) – the work of lawyers such as Ángel Ossorio y Gallardo, Emilio Miñana, Agustín Herrán, Adolfo de Miguel y Garcilópez and José Castán Tobeñas – are some of the best among all the book's chapters on the history of tort law.

The author is equally right to highlight how vitally influential the work of Pietro Trimarchi has been (*Rischio e responsabilità oggetiva*, Milano, Giuffrè 1961). Among his generation, Trimarchi was probably the most lucid European analyst of the subject, someone who, if he had worked and published in the United States, would certainly be cited alongside his compatriot Guido Calabresi as one of the precursors of modern tort law.

Similarly, Díez-Picazo analyses the objectivist development of Spanish case law that,, in his view, has been taking place since the late fifties only to return to the worrying conclusion that the doctrinal reasoning behind rulings offers no guide to case law whatsoever, but is merely a set of *ad hoc* justifications for their final verdicts, whether they be condemnatory or exculpatory. "The Courts play with two interchangeable decks of cards and one never really knows when and why one game is chosen and the other isn't. When one must opt for compensation, the strict liability cards are brought out and when it is to be denied, they are taken away again" (p.122). Whatever, the rise of the due care standard, the inversion of the burden of proof, the adoption in some poorly defined cases of the strict liability rule ("risk theory"), the rule by which victims must receive compensation and persons obtaining profits deriving from an activity must bear the costs generated, all these have become the dominant doctrinal clichés in tort law over the last forty years.

These clichés suggest a process culminating in the predominance of the compensatory role of civil liability. Chapter I of *Derecho de daños* discusses the current debate on the role of tort law and how it is rightly based on the fact that we live in a physically restricted world characterized by the inevitability of innumerable social contacts of all kinds and so one must begin by affirming the necessary delimiting role of tort law (pp.41 ff.). One must separate non-compensable harms (the majority) from those which lead to claims for compensation: this is the most basic function of any Law of Torts. One must know whether the harm caused by the break-up of a love affair or simply a friendship gives grounds for compensation or not (STS 16.12.1996, Ar. 9020); if on-line journals such as InDret will, with impunity, be the ruin of those published on paper; if the same can be said in the case of an unavoidable viral infection caught, in hospital, by someone thirteen of fourteen years before medical science had identified its existence (SCR 9.3.1999, Ar. 1368) or, more simply,

if compensation can be claimed for infections that are today inextricably linked with being an intensive care patient in any Spanish hospital.

Here too, the author wonders if the Law of Tort plays any kind of sanctioning role (pp. 44 and ff.), to which he answers in the negative, in line with his position on the institution of *punitive damages*, something that Díez-Picazo sees as being outside the culture of the *Civil Law*. InDret takes a different stance in this respect, although not contrary to those outlined by the book's author: conceptually speaking, it is possible to place *punitive damages* outside any idea of sanctioning, but it is unlikely that any legal system would ever do this (Punitive Damages). Aside from discussing this issue, the author is right to reject the idea that tort law can get into line with punitive, criminal or administrative law. Neither the need for typicality or unlawfulness, nor the principle of guilt, the ratio between the seriousness of the conduct and the seriousness of the legal consequence, nor any of the basic features of punitive law are formal characteristics of tort law. Díez-Picazo, in this and other issues (proximate causation, unlawfulness), follows the long path laid down in the eighties by his disciple Professor Fernando Pantaleón, perhaps the finest analyst of Spanish civil liability law in the last twenty years: the work of a great master also benefits from that of his best pupils, in an academic synergy exemplified by these two professors at Madrid's Autonomous University.

Díez-Picazo is also right to separate the issue of the deterrent role of tort law from the punitive role (pp. 47 and ff.): as we have elsewhere pointed out (Salvador / Castiñeira, (1997)), and the author confirms, although punishment implies deterrence, the reverse is not the case – the fence that separates us and protects us from the abyss prevents accidents but punishes no-one. But Díez-Picazo does not take this affirmation to its final consequences and he is unwilling to acknowledge that the law of tort only gives good compensation when it is properly preventive - because it is only reasonable to compensate for accidents that bear a lower social cost to prevent than to cause. And after an analysis of general and special precautions, he goes on to deal with the issue in the way it deserves, from the point of view of the economic analysis of law, as discussed above (section 3). As has already been pointed out, there's no such thing as two parallel worlds, the physical and the legal: only one, in which legal and social regulations each play a certain role, for better or for worse.

The best pages of Chapter I are on the differentiation between tort law and unjust enrichment, a subject that Professor Díez-Picazo already dealt with in masterly fashion in his speech on entering the Academy - *El enriquecimiento injustificado en el Derecho español* ("Unjust enrichment in Spanish Law") (1988), the conclusions of which he gives here. The problem remains that aspirations of enrichment are the typical instrument of protection of absolute rights – unlike the possibility of compensation in civil liability, which only aims at the recovery of damages – and sometimes the real debate is not about whether the first type of aspiration should exist but rather if the object of protection is or is not an absolute right, as is famously the case for the fundamental right to honor against defamation (art. 18 CE). Díez-Picazo's work has influenced the courts and the legal world to an almost legendary degree, and will no doubt help to bring onto the everyday legal scene an issue that had hitherto been practically reserved for academic circles (Basozabal Arrue (1998) and Pantaleón Prieto (1996)). The same can be said, word for word, of his discussion of the differences between compensation for damages and the true value in takings, a subject that has been obscured by an ancient and respected legal and doctrinal tradition that bases the liability of public authorities on art. 121 and ff. of the Ley de Expropiación Forzosa (Takings Law) of 16th December 1954 (BOE nº. 351, of 17th December 1954).

5. Insurance, distribution and socialization of tort law

Chapter VII of *Derecho de daños* (pp.187 and ff.) deals with the subject of insurance and tort law. As Luis Díez-Picazo is not in favor of analyzing this system from the point of view of how it helps to reduce the cost of accidents, i.e., accident deterrence, this Chapter may be amusing to readers who are hard-core supporters of insurance theory. He prefers to begin his analysis with some thoughts on what, about a generation ago, a sector of the literature in Latin countries rather confusingly called "socialization of tort law". Undoubtedly, it is a choice that bears some historical interest and it offers the reader an attractive synthesis of a whole doctrinal tradition, but it is also one that lies outside InDret's agenda.

From the point of view of an individual, an insurance policy is an economic instrument that allows an individual or firm to replace an uncertain and high cost (the risk or contingency insured against) with a certain and reduced cost (the premium). Put another way, an insurance policy transfers risks. Socially, insurance reduces or eliminates risk by pooling a sufficiently large number of risk units so that the losses are foreseeable and can be shared.

Note that the first definition stresses risk transfer and the second stresses pooling: neither of them states that the insurance reduces costs or economic losses. In fact, any insurance policy must be managed, and this is always a costly business (typically, 10% of premiums go on administration costs). Moreover, an insurance policy can significantly increase (the cost of) accidents because, as a consequence of the insurance, people may start to behave less cautiously (if the reader doubts this, let him think for a moment how he would drive his car if he personally had to bear the costs of material or personal damages deriving from his style of driving).

However, there are reasons why insurance policies are advantageous for most human beings (see Schäfer / Ott (1995), 106 and ff. and Gary Schwartz (1998), 335 and ff.).

The first of these is that the marginal gain grows less in relation to income, or put the other way around, losing the last units of income is less painful that not having the first units: it is "less bad" to lose, every day next summer, the fourth liter that we want to drink each day than to lose all four in one go every four days. Normally, we would be willing to pay a daily premium for each liter of water in exchange for being sure of having three liters of water a day.

In other words, we humans tend to show a degree of risk aversion: in the above example, this explains why we are in fact willing to pay a little more for a liter of water each day in return for not having to lose four liters every four days.

In terms of civil liability, the insurance policy can in turn be analyzed from the point of view of the potential injurer or also of his or her potential victims.

For the injurer, insurance is an attractive option for various reasons: a gynecologist (a profession subject to great risk of lawsuits for medical malpractice) prefers to spend a considerable portion of his or her yearly income on insurance policies rather than risk losing, once or twice in his or her professional career, several years' income in an unfavorable lawsuit.

However, there are problems: civil liability is a legal system that among other things is intended to disincentivise careless behavior, but as you will already have replied to my

rhetorical question on the quality of your driving, an insurance policy can have the reverse effect; reducing the precautions taken by the potential injurer: "so what, the insurance company will pay!" This is the problem known as moral hazard that is such a blight on the economy and on the law, both of insurance and of civil liability. The problem can be mitigated: firstly, by prohibiting the insurability of willful misconduct or intentional causing of damages; and secondly, by allowing the insurance firm to use available information on the conduct of the policyholder and exercise a certain amount of control over him.

Another classic problem of voluntary insurance derives from the fact that in practically all spheres of human activity, not all social players are equally skilled: some have below-average skills and others are above average. This results in a phenomenon known as adverse selection: the more skilled people reject insurance, but the clumsier ones pursue it, society then becomes polarized and the insurance company goes bankrupt. The law can try to combat the phenomenon and in the future InDret will devote a page to some of the more successful attempts, and also illustrate past failures. For now, all we need say is that a mandatory insurance policy accompanied by public control measures of greater or lesser severity can mitigate the problem.

In theory, if tort law guarantees the victim perfect compensation, i.e., such that victims are indifferent as to whether they suffer the damages and obtain compensation or not suffer the damages in the first place (in other words, to be compensated or not aggrieved), then civil liability insurance is, economically speaking, ideal, because it leaves the victim indifferent and at the same time benefits the injurer (Shavell, (1987), 210 and ff.).

But that is not the way things are:

a) We know that Spanish civil liability law, as applied in practice, clearly under-compensates: not all victims that have a right to compensation litigate; not all those who litigate win; not all those who win are compensated for all the damages suffered.
b) Some damages cannot be compensated, for example, those causing death. Something similar occurs with very serious physical injury when it clearly reduces the victim's *quality of life* (Daños morales).
c) Tort law is expensive to administrate. Typically, for each euro spent on putting the machinery of justice into motion, only half a euro reaches the victim.

Whatever the case, civil liability (insurance) is a *third party insurance*, but the matter can also be analyzed from the perspective of the potential victim who, in turn and completely independently of tort law and the insurance policies taken out by the causer of the damage, can buy accident insurance (*first party insurance*).

In this case, the tort law analyst must bear in mind the effects of such private or public insurance policies: they are, first and foremost, subject to the same problems of moral hazard as those of the injurer's insurance, because insured potential victims will tend to be less careful than would be ideal, especially if the damage relates to property that is easily replaceable on the market. Obviously, the problem is much less if it is oneself or one's physical and mental health or integrity that is affected.

Secondly, one must take into account that some or many of the benefits brought by the victim's insurance systems may constitute rights that are separate from the compensation he may have a right to according to civil liability rules: if this is so, there may be overcompensation of damages, which may increase the moral hazard (Collateral Source Rule).

In Spain, academic legal culture has been artfully divided into guilds. What I mean here is that civil liability falls into the domain of civil law practitioners, but private insurance law is primarily studied as part of commercial law: the result is often that few civil lawyers deal with insurance and few commercial lawyers analyze tort law, a bit like if some cardiologist specialized in auricles and others in ventricles. But as we've just seen, the connection between civil liability and insurance is obvious. InDret does not intend, then, to rewrite the agenda of Spanish private lawyers but to join them up: joint study of tort law, insurance and other compensation systems can only bring benefits, but the way things are in our universities, we shall have to wait a while yet, although hopefully not too long. Meanwhile, the InDret reader should refer to the standard works of the economic analysis of tort law (Schäfer / Ott (1995) 178 and ff.; Cooter / Ulen (1996), 297 and ff., Posner (1998), 115 and ff). Two good introductions to the problems of risk management are those of Vaughan / Vaughan (1999) and Redja (1997). An interesting link on the subject is http://www.ambest.com/review/lh/index.html).

6. Unlawfulness and proximate causation

Some lawyers and of course the First Chamber of the Supreme Court, claim the need for unlawfulness in order to be able to describe an act or an omission as a source of civil liability. For Díez-Picazo (Chapter XIII, pp. 287 and ff.) this implies some confusion between unlawful conduct (that always involves violation of a subjective right) and the mere causing of damage: civil liability is related to the latter and sometimes to the simultaneous and additional requirement of negligence in which the judgment of unlawfulness would be immersed. (pp. 298).

Certainly, to justify the need for unlawfulness, case law alludes to the infringement of a hypothetical primary and very general rule – the *Neminem Laedere* principle – manifested in the second level rule of art. 1902 CC. But this justification is insufficient: art. 1902 of the CC is such a generic provision that it is not humanly possible to conceive of anything akin to typicality in the basic rule on civil liability in Spanish law. The general clause of art. 1902 is the antithesis of a type, and in the absence of types one cannot speak of unlawfulness. Up to this point, our argument is impeccable.

However, the age-old debate on unlawfulness tends to break up when we start dealing with the causes for justification, because even authors who, like Díez-Picazo, reject the need for the above-mentioned requirement, then deal extensively with the issue, advocating the regulation of at least some of the causes for justification of arts. 14 and 20 Penal Code of 1995 by civil liability, as is the case of, for example, self-defense (art. 20, nº 4 CP) (pp. 299 and ff.). The same could be said of action while exercising a right or fulfilling a duty (art. 20, nº 7 CP). As law, moreover, art. 118.1 CP does not include self-defense as one of the cases in which exemption from criminal liability "does not imply that of civil liability": the woman who stabbed and killed the person who was strangling her does not have to pay compensation to the latter's widow. Once again, the same could be said of the other cause given as justification, openly admitted by the best doctrine, i.e., action while exercising a right or fulfilling a duty. Instead, doctrinal debate on when a state of need acts as grounds for exclusion from unlawfulness (act of defense or protection of legal property of the same or higher value of that destroyed or damaged) and when as an exclusion from culpability (aggressive action or to protect property whose value is inferior to that damaged) and the very rule of art. 118.3 CP shows quite clearly that the existence of possible grounds for justification does not always rule out the obligation to pay compensation.

So what happens then? How can we give consistency to a doctrine that does without unlawfulness, but needs grounds for justification? Does it not lead to unlawfulness being shown the door of the civil liability theory building only to climb back through the window of some of the grounds for justification?

At the risk of becoming too academic, we might give in to the temptation of bringing the discordant canons into line and take refuge in proximate causation : the defensive reaction of the woman who was being strangled is not even the proximate cause because she was responding, maybe instinctively, to provocation by her would-be murderer (principle of provocation). This way, the debate on unlawfulness and grounds for justification remain in the sociological and evaluative – not legal or legislated – part of proximate causation. In civil (liability) law, there is no unlawfulness because there are no predetermined legal types and judgment of what constitutes correct conduct by the accused ultimately goes back to sociological, economic and even ethical evaluation (normative but non-legal).

In reality, the argument we're putting forward fits an old truth: the broken precaution obligations that go to define negligence (art. 1902 CC) are not generally predetermined or typified by the law either. They are duties, in any kind of dealings, arising from the internal rules of the sector in question (medicine), social expectations (products liability), sometimes from the sector's best practice, but not only from the law or the regulations, because, as we all know, mere compliance with rules and regulations does not absolve the accused if, given the circumstances of the case, he did not take the precautions that were required of him in that specific field of activity. In criminal law, the principle of legality carries a requirement of legal typicality that does not exist in civil law. This said, it now seems possible to move on from the debate on unlawfulness and Díez-Picazo's book, written in the same line as that of Professor Fernando Pantaleón in his numerous works on the subject (Pantaleón Prieto, (1990), p. 1561 and ff.), is a big step in this direction. We shall take advantage of it here and try to step even further: in order to apply the rule of art. 1902 CC, we only need say that the accused neglected a duty of care and caused damages to a third party; **infringing duties of care, which are mostly non-legal, is the substitute in civil law of criminal unlawfulness**. And we civil lawyers have no strict requirement of typicality because in tort law, we are not bound by the principle of legality. (Jakobs (1993) pp. 195 and ff.)

In fact, the argument employed above has a precedent in the development of German literature over the last half-century (see Kötz (1998), pp. 40 and ff.). In Germany, too, it was traditional to state that a certain conduct was unlawful when it infringed subjective rights or damaged legal property listed in paragraph 823 I BGB (doctrine of the unlawfulness of the result or *Erfolgsunrecht*): violation of the right or impairment of legal property is an indication of unlawfulness. However, for a long time now, the leading commentators have been pointing out that what is unlawful is not the harmful outcome itself, but the infringement of duties prior to them or breach of duties of care imposed in each case by the sector (doctrine of the unlawfulness of the action, *Handlungsunrecht*). It is known that in Germany, this argument has allowed to affirm the lawfulness of conducts that have clearly harmful results – for example, on competitors – but that in no way infringe duty of care.

The relegation of unlawfulness thereby reflects the small role played by written law in civil tort law: if, at the end of the day, only the infringement of precautionary duties is crucial, the crux of the system shifts away from written law and therefore from the State to society, which in diffused and decentralized fashion defines precautionary duties, their scope and the people or groups who must fulfill them. When the social expectations and evaluations of the precautions adopted by the various social players are assessed legally, one shall have to pinpoint, firstly, when a duty of deterrence exists and secondly, who must fulfill it (if

such and such a social agent or also the state and its agents, etc.): this last point is the task of proximate causation.

Thus, depending on how rigorously the principle of trust and the prohibition of return is interpreted (Causalidad y responsabilidad) it may allow tobacco companies or firearms manufacturers to be convicted or absolved: in general, such a decision may have to be made by the legislator, but if the latter does nothing, it would not be surprising if the issue became a judicial one and the affected parties resort to tort law so that the courts and judges decide who has to undertake preventive measures. Naturally, if these tasks (that may be up to the legislator) are not carried out, there is a patent loss of legal certainty, but as we have mentioned on another occasion, it does not appear that the legislator will regain control of proximate causation criteria – especially those of adequate causation, prohibition of return and trust.

Derecho de daños is the first book on civil law that fully deals with the issues of proximate causation (Chapter XV, pp. 340 and ff.), a concept that, although born in the world of civil law, has only been used to any great extent in criminal law. One of Díez-Picazo's, and his school's, obvious merits (another to add to the many in his book) is to have brought into Spanish civil law a doctrine which can be much better explained in a part of law that, like tort law, is not of legal origin, than in other, such as criminal law, which is governed by the strictest principle of legality.

InDret is certain that De*recho de daños* will change, to a great extent, the current situation of Spanish civil liability law regarding both the literature and the legal and judicial practice, in several of its core subjects. All for the best.

- ***Rulings of the First Chamber of the Supreme Court***

Date	Ar.	Judge appointed as Rapporteur	Parties
30.4.1984	1974	Jaime Santos Briz	José G. v. C. del R. A. Town Council, José D. & «L.A.N.» insurance firm
8.11.1990	8534	Jaime Santos Briz	Juana Rita G. & spouse v. «Persan, S.A.»
8.2.1991	1157	Alfonso Barcalá & Trillo-Figueroa	Félix P., Pedro C., José L., Magdalena B., Constantino G. and Vicente M. v. Fernando de P., Mariano de F. & Francisco R.
22.1.1996	248	Alfonso Barcalá & Trillo-Figueroa	Aurelia C. v. Dámaso G.
22.1.1996	250	José Almagro Nosete	Gregorio M. & Victoria F. v. RENFE
16.12.1996	9020	José Almagro Nosete	Mª. Luisa P. v. Ramón C.
31.12.1996	9053	Pedro González Poveda	Cristóbal M. v. «Peña del Toro Embolado», José C. & Los Barrios Town Council
31.12.1996	9476	Luis Martínez-Calcerrada Gómez	(N/A) v. «Unión Eléctrica FENOSA» & Santiago C.
17.2.1997	1426	José Luis Albácar López	Manuel S. & Teresa T. v. RENFE
3.4.1997	2729	Francisco Morales Morales	José L. v. Navas del Madroño Town Council, Cáceres Provincial Council and the Regional Government of Extremadura
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