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Domestic Relations

Josep Ferrer Riba
School of Law
Universitat Pompeu Fabra

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SUMMARY*

• *Introduction*

The role that tort liability should play in compensating damages caused by family members or people living together is open to question. The nature of these relationships, which tend to generate bonds of solidarity and altruism, restricts the incentives and opportunities of those affected to sue for damages. Although damages between family members are frequent and diverse, experience shows that they hardly ever get compensated in court. In practice, they are only claimed if, by doing it, the social rules that normally prevent the victims from bringing an action are not violated. This happens only when damages are covered by an insurance policy (in which case the victim is usually entitled to demand compensation directly from the insurer within the contractual terms) or when family life becomes disrupted because of a marriage crisis or the commission of serious offences (furthermore, in case of a criminal offence, Spanish law provides that the tort action must be brought by the public prosecutor -ex art. 108 LECr[1]- except either when the victim has waived or reserved its right to sue or when the offence can only be prosecuted at the request of the victim).

In addition to the moral and social rules that refrain litigation, one has to take account of some other legal barriers. In Spanish law, for instance, the one year period of limitation applicable to the action *ex Lex Aquilia* (art. 1968.2 CC [2]) combined with the lack of rules admitting suspension (art. 1932 CC) prevents spouses or other people living together, once they separate, from claiming damages caused to each other during their life in common, unless the harm has been sustained or has become apparent during the year before the separation. On the other hand, if the victim is a minor under the legal authority of the injurer, the chances that a liability claim is pursued on his behalf are slight in view of the need to appoint a guardian *ad litem* with powers to bring an action (art. 299 Spanish CC), which in practice is only feasible at the request of other close relatives. Thus, the question of the very existence of liability often becomes blurred under social rules and legal restrictions that afford a *de facto* immunity to family members (PATTI, 1984: 40-41).

This immunity, however, is being undermined by current trends, associated with liberal individualism, which enhance the personal rights of individuals within the family, promote the private ordering of marriage and other forms of cohabitation, and make it easier for a person to decide whether to keep or break up a relationship on the grounds of its individual costs and benefits (REGAN, 1999: 15-22). Such changes in the understanding of the family, which have resulted, in Western societies, in high divorce and separation rates, a great number of restructured families, and a diversification of models of family life, have also reduced the factors that traditionally hindered litigation between family members. Although the informal rules opposing this kind of litigation are still strong, the social dynamics generates more and more situations that force legal agents to ask

[1] *Ley de Enjuiciamiento Criminal* (Spanish Criminal Procedure Act).

[2] *Código Civil* (Spanish Civil Code)

themselves under what precise circumstances damages caused in a domestic setting can be tried in court (one can think, for example, of actions for damages caused by outrageous behaviour that led to divorce, or actions between separated parents for damages sustained by a common child, on the grounds of negligence in the exercise of the duty of custody). In addition to such kind of cases, mention has to be made to the more frequent conflicts in which third parties are involved: here the issue of the liability of family members appears indirectly because of the need to assess contributory negligence.

The analysis of comparative legal doctrine and case law, which this essay basically reduces to two main legal cultures of the Civil Law and the Common Law tradition, the German and the American ones -the latter as it has been developed by federal and state courts of the United States-, shows that there is a certain agreement about the existence, in the domestic and familial context, of some areas of exemption from or mitigation of liability. Yet, differences and uncertainties remain regarding the precise boundaries of such privileges, the categories of individuals who benefit from them (parents, spouses, relatives in general, people cohabiting), the kind of behaviour that the privileges are meant to include, the legal devices that are available to their implementation (immunity, flexibilization of the standards of care, defenses or grounds of justification) and particularly the reasons of legal policy that endorse their preservation.

• *Domestic Privileges and Immunities in the Civil Law and the Common Law*

Tort liability in domestic relations presents remarkable differences in the legal traditions of both the Civil Law and the Common Law:

a) In continental Europe, *the codified systems of Civil Law have not established, within their tort law provisions, any formal exception to the application of the general rules based on the existence of a domestic relation between the tortfeasor and the victim* (unlike criminal law, where close ties of kinship can mitigate, aggravate or exclude criminal responsibility: e.g. art. 23, 180.4 and 268.1 Spanish CP [3]).

However, some legal systems contain *family law provisions that lay down specific standards of care with respect to the exercise of family duties or impose compensation in case of violation of such duties.* A prominent example, quite relevant for the general scope of its rules, can be found in the German Civil Code (BGB), where §§ 1359 and 1664 set out the standard of care *quam in suis* (the level of care that people take when dealing with their own affairs) as a rule that applies to spouses and parents when carrying out marital or parental duties. In fact, the standard entails a privilege, because under the circumstances of the particular case permits limitation of liability to intentional wrongdoing and gross negligence.

Thus, the Civil Law legal systems decide whether to impose liability for damages caused between family members following two different paths:

[3] *Código Penal* (Spanish Criminal Law Code)

-One approach consists of applying specific family law rules, exclusively or in combination, if needed, with the general rules of tort law (in German law, for instance, §§ 1359 and 1664 BGB lay down only the standard of liability but not the grounds for it, which have to be traced in the tort law provisions of the Code).

-Another approach, for want of specific family law rules, is simply applying the general rules of tort liability, as the French, the Italian or the Spanish legal system do (the last, with respect to personal injury). But this technique does not mean that these systems impose compensation in the same terms as if the damage were caused by a third party: as we will explain below, the open-textured nature of tort liability rules, which are based on concepts such as "causation" or "negligence" allows the judge to take into account the typical features of the diverse family roles (Salvador, 2000a: 4), and thus indirectly to reach outcomes similar to those that can be achieved applying specific family law rules.

> The Spanish Civil Code and the Catalan Family Code have some isolated rules that establish explicit standards of behavior and impose compensation for the vulneration of family duties related to the administration or disposition of property (arts. 168, 1390 and 1391 CC and arts. 145.1 and 147.1 CF [4]). However, they do not refer to the consequences of vulnerating other duties, either between spouses or between parents and children (e.g. the vulneration of the duty of supervision, which is a frequent source of harm to the latter). On the other hand, the rules of tort liability from criminal acts (which have in Spain a separate regulation) are applicable to spouses and close relatives (see, e.g., art. 298 CP). Apart from those groups of cases (studied by ROCA TRIAS, 2000: 537-554), important areas remain, such as the one of domestic accidents or other injuries caused by negligence, that still lack a more precise legal or judicial treatment.

b) Most legal systems based on the Common Law devised general rules of immunity in favor of certain groups of individuals on account of their family ties with the victim, that gave rise to the so-called exception of domestic relations (PROSSER, 1984: 901; FLEMING, 1998: 718, 745; DOBBS, 2000: 751). The scope and diffusion of these immunities, of judicial origin and procedural nature, was very variable, as it has been their preservation until today. Their typical application has been confined to two groups of cases:

-“**Interspousal” immunity**:

The immunity between spouses originated in the older common law and was founded, according to legal historians, on the doctrine of marital unity, by which marriage determined the merger of the identity of the wife with that of the husband, both becoming a single person in law. This doctrine, of biblical echoes, which actually concealed the lack of legal capacity of women, started to crumble in the middle of the 19th century with the passing of Married Women’s Property Acts (from 1844 onwards in the United States, and between 1870 and 1882 in England). These Acts granted married women the right to own property, including the right to vindicate their property interests and to claim

[4] *Codi de Família* (Catalan Family Code).

compensation, even against her husband, for damages caused to property. The courts, however, upheld spousal immunity when it came to personal damages (either caused by intentional wrongdoing or negligence) and replaced the empty rhetoric of the marital unity doctrine by a discourse centered on the preservation of privacy and family harmony (about this period, see SIEGEL, 1996: 2161-2170). The strength of these and other arguments like the risk of fraud and collusion against insurers or the proliferation of trivial litigation, weakened throughout the 20th century and the courts (in the United States from 1914 onwards) began to whittle down the scope of the immunities until their complete abolition in many jurisdictions or their preservation in residual terms (for a comprehensive global view of the historical evolution, see TOBIAS, 1989: 361-441). The generalization of liability insurance for damages caused by traffic accidents contributed also to the decline of the immunity.

> The Restatement of Torts 2nd, in 1977, adopted the notion, then already widespread among state jurisdictions, of rejecting the immunity between husband and wife, while admitting at the same time that certain conducts might be privileged due to that relationship (§ 895F: (1) *A husband or wife is not immune from tort liability to the other solely by reason of that relationship. (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the marital relationship, is otherwise privileged or is not tortious"*).

England gave up the regime of immunities in 1962 by the Law Reform (Husband and Wife) Act, which gave each spouse a right of action against the other in tort as though they were not married. Nevertheless, English law still grants the courts a discretion to stay an action if it appears that no substantial benefit would accrue to either party, in order to prevent trivial lawsuits (LOWE / DOUGLAS, 1998: 63-64).

-**Parental immunity**.

The immunity of parents with respect to their offspring was developed by United States courts, without having any precedent in the English common law, where it never applied. The three foundational cases (the so-called "great trilogy") date back to the period between 1891 and 1905.

> The three cases are *Hewellette v. George* (68 Miss. 703, 9 So. 885), from 1891, dealing with a false imprisonment of a minor in a mental hospital by her mother; *McKelvey v. McKelvey* (111 Tenn. 388, 77 S.W. 664), decided in 1903, in which a daughter claimed compensation against her father and stepmother on the grounds of physical violence inflicted by the latter with the acquiescence of the father; and *Roller v. Roller* (37 Wash. 242, 79 P. 788), a case from 1905, which dismissed a tort action against a father who had been convicted of raping his daughter.

The three rulings support the idea that criminal and family law remedies, like the removal of guardianship or custody rights, must suffice against the offences committed by the defendants, and consider that tort law remedies are not appropriate for several reasons, such as the need to keeping the social and domestic peace, the need to grant wide discretion to parents in order to discipline and control their children, the risk of fraud and

collusion between relatives against insurers, the detriment that siblings of the victim could experience due to a depletion of the father´s assets, the possibility that the father might inherit the injured child's recovery in case that the latter died before, and the analogy to the spousal immunity (see HOLLISTER, 1982: 493-508). These reasons soon fell into disrepute and did not resist the passing of time, the transformations in society and the changes in the understanding of the family. In the end, as it happened to the immunity between spouses, the courts narrowed the scope of the parental immunity down, and replaced it with the acceptance of certain areas of latitude in the exercise of parental authority or the application of a more flexible standard to parents (the so-called "reasonable and prudent parent" standard).

> To illustrate this evolution, authors usually highlight three cases as well. In *Goller v. White* (20 Wis. 2d 402, 122 N.W. 2d 193), settled in 1963, a twelve-year-old minor in foster care claimed compensation against his foster father for serious injuries sustained in an accident for which the defendant had been allegedly negligent. The Supreme Court of Wisconsin held that parental immunity should be abrogated, except in two situations: where the act involves an exercise of parental authority over the child, and where it involves the exercise of ordinary parental discretion with respect to the provision of food and other care. As an alternative to this rule, that was considered too deferential with parents, the Supreme Court of California decided in *Gibson vs. Gibson* (3 Cal. 3d 914, 479 P.2d648,92 Cal. Rptr. 288), a case of 1971, to limit the privileges as to the exercise of parental authority. The court insisted on evaluating how reasonable the act of the defendant was, viewed in light of the parental role (reasonable parent test). This criterion was considered too burdensome for parents and soon after New York's Court of Appeal qualified it. The Court held that failure to adequately supervise a child is not a tort allowing the victim to sue his father, and a third party who is liable for the damage cannot counterclaim against the father on the grounds of contributory negligence (the leading case, of 1974, is *Holodook vs. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 1268) (about these and other related cases, see HOLLISTER: 1982, 508-527; ROONEY / ROONEY: 1991, 1166-1174; PIPINO, 1992: 1117-1133).
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> The Restatement of Torts 2nd also rejects the immunity of the father and the mother in the same terms as it rejects the immunity between spouses. The official comment to the rule points out that the intimacies of family life may affect the determination of whether conduct is negligent or not. Likewise, echoing some of the rulings cited, it is acknowledged that the exercise of parental authority requires discretion that should be reasonably protected (AMERICAN LAW INSTITUTE, 1979: 426-431)

The progressive dismissal of tort immunities has significantly reduced the substantial differences between the Common Law and the Civil Law. Although a few jurisdictions remain in the United States that still retain, more or less restricted, the old immunities, nowadays the trend is to replace them with privileges of substantive law, elaborated on a case-by-case basis, according to which the decision for imposing liability or granting a privilege depends on the definition and content of family legal duties and powers (in line with Goller o Holodook) or on specific standards of care suitable for each type of domestic relation (in line with Gibson). Therefore, as Dan B. DOBBS (2000: 757) rightly points out when analizing the rationales for parental immunity and the mechanisms to implement it -in terms reminiscent of the two options available in Europe- "the only question is whether categories like "supervision" or "parental discretion" will help judges focus on relevant

policies better than the ordinary negligence rules. The negiglence rules have the advantage of doing what courts do best by focusing on the facts and the justice of the particular case".

• *Family Status, Cohabitation, and Exercise of Family Legal Roles*

What are the relevant policies that should underpin a model of tort liability in private or family life? Should that model be implemented from tort law or from family law? The analysis of the historical evolution of comparative law suggests the opportunity of differentiating and discussing three possible rationales as a grounds for exemption from or mitigation of liability: a) the status of the tortfeasor and the victim as family members (criterion which has been paramount for decades in determining the scope of immunities in the Common Law); b) the cohabitation between the tortfeasor and the victim; c) the connection of harmful conduct with the exercise of a family legal role or the fulfilment of family legal duties (which has been a common ground for lessening liability in European law and has also been adopted by many United States courts after the abandonment of the immunities).

1. The inconsistencies of a system of privileges based on the family status of the tortfeasor and the victim.

The system of tort immunities, as it was defined by the traditional Common Law, was based exclusively on the tortfeasor being related to the victim by a *status familiae.* In its original version, where immunity was complete, the mere fact of being a spouse or a parent determined the exemption from liability without regard to other circumstances, such as the nature of the activity, the kind of damage inflicted, or the intentional character of the wrongdoing. Such immunity was indeed a very simple rule to administer by the courts, but also a quite rudimentary device, typical of an undeveloped tort law. It was historically related to a patriarchal ideology of the family, based on relations of power and submission between their members that the legal system reaffirmed under the pretence of preserving peace and privacy within the family and preventing frivolous litigation.

The truth is, however, that immunity for intentional wrongdoing encourages opportunist behaviour (BRINIG,2000: 116) and does not contribute to keeping the remainder of peace and harmony that may subsist in a family. Likewise, its extension to activities which are not essentially domestic (e.g. professional or traffic accidents) not only excludes recovery from significant losses but also hinders, for no convincing reason, both the preventive function of tort law in activities affecting third parties, and its distributive function of the cost of accidents (in so far as the immunity prevents family members from any resort to the insurance market). On the other hand, the assertion that family immunities refrain trivial suits is premised on paternalistic assumptions: because individuals wish to protect their family relationships, they are in a better position than judges and legislators to ascertain the effect of litigation on domestic life (TOBIAS, 1989:445).

These critiques, historically raised by some American tort law scholars as a reaction against a system that was deemed to be unfair, explain the gradual appearance of a series of exceptions to the immunity rules, like the exclusion of intentionally inflicted injuries, of damages sustained in the course of a business or other activities subject to strict liability and thus usually covered by insurance, and of cases of wrongful death, where there is no family peace to be preserved (PROSSER / KEATON, 1984: 902-907; DOBBS, 2000: 752, 754-755). Such exceptions progressively subverted the very nature of the immunities as exoneration rules adressed to avoid any close examination of the merits of family suits, and prompted, in the end, their abolition by legislatures or courts and their replacement with substantive criteria of exclusion from or mitigation of liability adopted on a case-by-case basis.

In addition to that, the system of immunities does not fit well with prevailing trends of modern family law, which favor the private ordering of marriage and other intimate relationships (thus multiplying the models of cohabitation), enhance individual rights in the domestic sphere, set up very intense policies of children protection, and tend to decrease the importance of family *status* (e.g. EEKELAAR, 2001:184). On the other hand, it has to be said, though, that the communitarian discourse, very sensitive to the symbolic function of legal rules, still gives support to the idea that family *status* should generate *per se* some kind of immunity. According to this discourse, the rules of immunity would contribute to a cultural understanding of marriage and other domestic relations in which the collective dimension of personal identity and its values –commitment, mutual trust and solidarity - would prevail. The so-called "adverse testimony privilege", that prevents a spouse from testifying against the other in a criminal trial for offences committed against a third party, can be explained in this way (REGAN, 1999:106-135). A similar view is held by Margaret BRINIG (2000:101-104, 127-130) who, although from a perspective of economic analysis of law, considers tort immunities as a way to promote family harmony and unity. Immunities would reflect, according to this opinion, an implicit agreement in the family - called “covenant”, as opposed to “contract", by the author- "where no one considers suing another or requires precise accountings either of money or of behavior" (*ibidem*, 129). Her defence of immunities is, in any case, very qualified (as she excludes intentional damages) and can be interpreted as a willingness to privilege domestic relations and to reinforce discretion in the exercise of family functions. We will turn to these issues in the following sections.

2. Living together as a mitigating factor of liability in domestic accidents.

The influence of domestic relations in determining tort liability can be displayed in a different manner, more in accordance with contemporary family law, by reducing the relevance of family *status* to those cases where the parties intend to litigate about the consequences of infringing family legal duties and, at the same time, by giving greater weight to the notion of cohabitation as a grounds of justification that permits exemption from or reduction of liability. By doing it, two types of privileges seem to coexist and in some cases overlap, though remaining analytically diverse. The first should stem from the

undertaking of a family role, shaped in its basic features by family law, and apply, in essence, to parents exercising parental authority or custody over their minor or incompetent children (parental privilege). The second should be linked to cohabitation, extent to all individuals living together as a family unit (or in a family-like stable relationship) and be limited in its objective scope to domestic accidents and other damages directly related to the life in common (domestic privilege).

> It is no easy task to trace the reception of this second type of privilege in Spanish case law, because people living together, as we said, tend not to sue each other for damages, except in cases of gross negligence or intentional wrongdoing which should not be covered by the privilege. One has to take account also of the one year period of limitation for tort actions (art. 1968.2 CC) and the impossibility to suspend its running during cohabitation. This easily results in the extinction of claims between people living together before their life in common comes to an end. Most legal systems in Europe take the opposite view, by providing that marriage suspends the prescription of actions between spouses, and parental authority and guardianship do the same between parents or other guardians and children (see, e.g., art. 2252 and 2253 French CC; § 204 BGB; art. 2941 Italian CC; art. 2905 and 2906 Quebec CC.)

The domestic privilege is a rule that integrates in the assessment of liability, from the perspective both of a wrongdoer and a victim, the rules of behavior and values that characterize, according to social beliefs, living together. The key notes that allow us to make such an assessment can be found along two lines of reasoning that legal scholars have put forward to support family privileges:

-In relationships of cohabitation, *people behave and interact as they are, in accordance with their natural or acquired qualities*, free from subjection to specific duties of care. Privacy brings about a more relaxed attitude in people and helps the development of personal freedom without special restrictions. This freedom entails the duty of those living together to accept each other as they are, and bars them from demanding from the others a more cautious form of behaviour than that adopted by them in their own affairs (*quam in suis*) (WACKE, 2000: 272). In domestic life, everybody needs to admit that one's interests are inevitably exposed to the influence of the others (HÜBNER/VOLPPEL, 2000:589). This idea requires applying to domestic relations a subjective standard of care: while care in business and in most social activities has an objective character, in domestic relations tort law takes into account individual abilities and shortcomings.

> A usual explanation for "*quam in suis*" can be found in the consent of the victim and in his duty to assume his own acts: the individual who chooses an untrustworthy or poorly skilled companion as a husband or wife must cope with the consequencies of its so choosing (WACKE, *ibidem*). But this argument, though admissible to a certain extent for adults living together, is not suitable to explain why the rule applies to those relations not created by consent, such as the intergenerational ones. This objection has questioned the application of such standard to parents and children (HINZ, 1992: 621). Between parents and children, *quam in suis* can be justified by reasons linked to the parental privilege, to which we will refer later.

- On the other hand, there is a principle of solidarity among family members, which can be seen in the existence of a "community of economy, destiny, and responsibility" which the

law deems worthy of being protected (DIEDERICHSEN, *apud* KNOLLE, 1999: 34: "*Wirtschafts-, Schicksals- und Haftungsgemeinschaft*"). It follows on from this principle that the victim of damage caused by another member of the family has a duty of tolerance and forbearance (WACKE, 2000: 274; BRINIG, 2000: 129) and a duty to not disturb the family peace by taking grievances to court (KNOLLE, 1999: 33, 41, with further quotations; ENGLER, 2000: 86). From this point of view, of obvious communitarian connotations, domestic relations have to be accepted as they are, regardless of their individual costs and benefits, in the belief that preserving and strengthening shared goals and common interests is as important a social aim as is protecting individual rights (REGAN, 1999: 11, 22-29).

The idea of solidarity may also appear, in some cases, in the form of a demand for fairness. According to this notion, claiming recovery against the tortfeasor with the same harshness that one would employ against a stranger has to be regarded as unfair if the defendant made provisions (food, education, and so on) to the plaintiff's benefit. This reasoning has been used to justify the mitigation of liability for parents (HOFFMANN, 1967: 1210), but it could be extended to other persons assuming responsibility for looking after the victim, be it on a formal level, as a guardian or foster parent, or on an informal level, as a step-parent cohabiting with the father or the mother). Thus, some authors have suggested that it would be fair to extend domestic privileges to cohabitants or new spouses responsible for accidents suffered by the couple's children, in order not to discourage their taking on informal duties of supervision and care in the children's daily life (LEIB, 1996: 842-844). However, fairness, as solidarity, must not apply as a defence in labor relations (see, for instance, BGH NJW 1996, 53, where the German Supreme Court fairly rejected the extension of the privilege of § 1664 BGB to a family assistant).

At the level of positive law, the extent of domestic privileges and the techniques for implementation of them depend on the dogmatic resources of each legal system. In particular, they can be implemented from either family law or tort law:

-German law shows a way to elaborate privileges of liability from the norms of family law. Court decisions have construed extensively the notion of "duties emanating from the spousal relationship" (§ 1359 BGB: "*sich aus dem ehelichen Verhältnis ergebenden Verpflichtungen*") in order to include any kind of conduct attributable to husband or wife that might cause damage in the domestic sphere (WACKE, 2000: 275). As a result, the norm has turned into a proper domestic privilege between spouses. When it comes to relations between parents and children, authors disagree and many of them tend to exclude parents in breach of their duty of supervision from the privilege of § 1664 BGB, making them liable in accordance with the general rules of tort liability (e.g. ENGLER, 2000: 92-93; HINZ, 1992: 622-623; against, KNOLLE, 1999, 67-70). In any event, the rules of family law are not always suitable as a grounds for domestic privileges because of the difficulty of extending their application to people not expressly embraced by them, thus requiring a rather forced use of analogy (e.g., cohabitants, relatives by affinity, siblings).

-The domestic privilege can also be implemented from tort law through a flexible use of the techniques of objective and subjective attribution of responsibility. In this regard, for example, there has been a proposal to exclude the attribution of certain damages by applying either the principle of consent as a grounds of justification, or the principle of assumption of risk (in case of a relationship to which parties have freely consented), and also to lessen the standard of reasonable care in domestic settings in tune with the less careful behavior which is common in private life (AMERICAN LAW INSTITUTE, 1979: 426, 430). Similarly, Spanish scholars have interpreted the lack of judicial decisions in Spanish courts about domestic accidents as a tacit evidence of a privilege that would adjust the criteria for attribution of liability to the prevailing social norms, thus circumscribing recovery of damages to deliberate wrongdoing or gross negligence (SALVADOR/RUIZ, 2000B: 46; SALVADOR/RAMOS/LUNA, 2000c: 9).

The exoneration from liability in case of ordinary negligence and the upholding of it in case of willful wrongdoing and gross negligence is a common feature of legal systems admitting any form of domestic privilege. In Germany, for instance, the rule *quam in suis* does not exempt deliberate wrongdoing or gross negligence from liability (§ 277 BGB). The discount of ordinary negligence does not seem to have an impact on the preventive function of tort liability because the loss suffered by the victim, especially if it is of a serious character, tends to have a negative impact on the welfare of the tortfeasor, who may suffer it as his own or may have to take on part of its costs through personal or financial assistance (domestic relations generate functions of interdependent utility). On the contrary, grossly negligent or fraudulent behaviour does not comply with the conditions that the granting of the privilege depends on: the freedom to behave at ease in the intimacy of one's home cannot justify foolish or reckless behavior, and even less deliberate harm. Obviously victims do not need to tolerate or show solidarity with respect to this behaviour either.

As we said, domestic accidents are the natural sphere for application of a privilege based on the notion of living together. Domestic accidents stem from acts or omissions that take place at home as a consequence of daily interaction, but the protective scope of the rule can be extended to other settings (e.g., leisure activities outside the home). In foreign legal systems, the most contested case is that of traffic accidents, about which a position prevails against considering them as a privileged activity. Taking into account the impact of this activity on traffic safety and its great potential to harm third parties, general prevention justifies keeping it under the standards of care and criteria of attribution of liability typical of car driving and not under the more subjective and relaxed ones characteristic of domestic life (see, in German law, GERNHUBER/COESTER-WALTJEN, 1994:260; and with reservations, WACKE, 2000, 277; KNOLLE, 1999: 60-63). Thus, in traffic accidents the driver is judged according to his role as a driver and not as a father, mother, son, daughter or spouse. Nowadays, the mandatory insurance coverage for personal injuries and the optional one for damages to property simplifies the problem and makes a stronger case for applying the liability rules typical for car accidents.

The same stance against domestic privileges has to be upheld with respect to professional accidents (for example, those taking place in a family business). The privilege only protects the conditions under which living together takes place, and is not meant to safeguard the exercise of economic activities whose risks are anyway susceptible to insurance.

3. Tort liability and other remedies for breach of family duties.

The study of liability privileges in domestic relations leads us finally to the analysis of the remedies which are available to compensate damages caused by omission or other forms of breach of family legal duties. To this effect, the focus of attention has to be displaced from the idea of living together as a basis for privileged treatment of family members or cohabitants to the exercise of family legal functions. The scope of these functions and the consequences attached to their infringement are determined by social norms and, on a legal level, by rules of family law which provide specific remedies (such as separation or divorce, loss of custody over children, suspension or deprivation of parental authority) and even allow, in some cases, economic compensation. As we will see, resort to compensatory remedies is however limited, especially for breach of marital duties, because modern family law rejects the coercive imposition of obligations that restrict aspects which are central to the personal sense of identity (EEKELAAR, 2001:191).

a. Liability for breach of spousal duties?

The understanding of marriage as a community of life assumed and maintained on a voluntary basis determines that spousal duties -mainly those of personal character- are not enforceable: any claim seeking to obtain specific performance of matrimonial conduct is contrary to the nature of that community (SALVADOR/RUIZ, 2000b: 47, 63). The same can be said of any form of surrogate performance: matrimonial duties can only be fulfilled by free moral decision of each spouse, and it would be incoherent to grant indirect means of enforcing them. One should also bear in mind that it is very difficult to fashion the measure of the inflicted damages, that tort actions also have a very limited power of deterrence to prevent abuses or other vulnerations of marital duties, and that interspousal suits have merely wealth redistributing effects, against which insurance is not possible (ELLMANN/ SUGARMAN, 1287-1289). It follows, therefore, that the vulneration of marital duties has only, as a general rule, the consequences prescribed by marriage law, which in Spain are limited to the right to bring an action for separation or divorce (arts. 82 and 86 CC) (see, however, LUNA/SANCHO, 1997: 103-104).

The provisions of the Spanish Civil Code and Catalan Family Code that regulate the economic consequences of a marriage break-up allow the judge to order periodical payments in favor of the spouse whose economic situation has worsened due to the separation or divorce (arts. 97 CC and 84 CF), but this sort of compensation, like any other measure that may be taken, is not linked to the reasons that justify separation or divorce or to the fault of one of the parties. In this context, the admission of compensation for

damages on account of adultery or breach of other duties that spouses owe each other, would not only increase the costs of marriage (SALVADOR/RUIZ, op. cit. 63) but also distort that legal principle, which has earned a high level of consensus among judges and scholars, and reintroduce, through the back door, a fault-based system of separation or divorce, increasing the strain in marriage crises. There are still countries in Europe whose legal systems admit compensation for material or moral damages when the cause for divorce is exclusively attributable to one of the spouses (see, e.g., art. 266 French CC), but they always do so as a specific economic consequence of separation and divorce. Spanish law has a similar rule with respect to nullity of marriage, granting a right of compensation for damages to the *bona fide* spouse (art. 98 CC and, applying the law prior to the reform of 1981, STS, 1ª, 26.11.1985). But apart from this rather exceptional case, the silence of the Code on this matter has to be interpreted against any right of recovery for damages.

> The discussion over the compensation of damages (including pain and suffering) caused by breach of spousal duties was raised in two cases decided by SSTS, 1ª, 22.7.99 and 30.7.99. In both lawsuits the plaintiffs claimed compensation against their ex-wives for economic and emotional harm suffered because of adultery and deception over the legal status of several children that had been conceived out of wedlock. Having successfully challenged their paternity, the plaintiffs sought compensation (on the grounds of contractual liability in one case, and on tort, in the other) for maintenance payments that they had made in the past and for emotional distress. The Supreme Court rejected both claims: in the case decided on 22.7.1999 it held that adultery was irrelevant as a ground for compensation and that there was no evidence, on the defendant's part, of intentional hiding the third party's biological paternity. In the decision of 30.7.1999, which did not admit the claim for restitution of maintenance payments for procedural reasons, the Court held that the only legal consequence of infidelity was its legal consideration as a ground for separation ("Otherwise, any disturbance of matrimonial life would give rise to liability for damages", FD 3).

The exclusion of compensation does not apply , however, to behaviour that causes damage to rights or interests of the other spouse that can be conceptually separated from the interest in keeping marriage together or in getting respect for its rules. Thus, harm caused to the spouse's physical or psychic integrity, health, freedom, honour, privacy or sexual freedom, as well as to the economic assets, may be compensated. Yet, the difficulty in discerning the conducts that deserve compensation from other violations of marital obligations that cannot be compensated (especially in the area of damages for emotional distress sustained by breach of duties of fidelity, respect and mutual help) explain the proposals to provide the system with more certainty resorting to the categories that have been framed by the criminal law. Criminal statutes define conducts that harm different types of protected interests, whose comission gives rise not only to penalties but to monetary compensation as well (ROCA, 2000:552-554; RAGEL, 2000: 159). Resorting to criminal law rules is also a way to acknowledge the beliefs of the majority in our societies about the greater or lesser disapproval that certain conducts deserve (domestic violence, for instance, generates nowadays greater repulse than infidelity) and may clarify which damages are to be compensated (e.g., those caused by acts of domestic violence, ex 153 CP, or by the deliberate or grossly negligent transmission of a venereal disease, ex art. 147 and

152 CP) and which not (e.g., psychic harm suffered by a spouse discovering adultery or a mistaken paternity).

Other legal systems have followed similar techniques, although not necessarily resorting to the rules of criminal law. The German Supreme Court, for instance, which has clearly denied compensation for damages arising from adultery or a mistaken attribution of paternity (MARKESINIS, 1997: 312-334), has recognized in extreme cases the right to be compensated ex § 826 BGB -for intentional causation of damage *contra bonos mores*- if adultery could be linked to a qualified intention to cause damage, as in the case where a husband was positively deceived concerning the paternity of a child (BGH 19.12.1989, NJW 1990: 706). In the United States of America, since the eighties, the removal of spousal immunity provoked a proliferation of tort litigation between spouses for intentional infliction of emotional distress, which generated serious difficulties of legal policy. State courts have moved towards admitting compensation for these kinds of damages if the relevant behavior can be appraised as especially outrageous by a jury (outrageousness test). The test requires a case-by-case examination of whether the conduct is socially so out-of-bounds as to deserve recovery (see ELLMANN/SUGARMAN, 1996: 1330-1343, proposing to limit claims to criminal conduct).

b. Omission and defective fulfilment of parental duties

The reasons that support the idea of relegating tort liability between spouses in favour of other remedies addressed to facilitate separation of the parties do not fully apply to parent-child relations. In contrast to spouses, parents and children under their authority make an unequal relationship, not created by consensus (except in the case, here of little relevance, of the adoption of children over 12: art. 177.1 CC, art 121 CF) and characterised by a strong dependency and vulnerability of children. Furthermore, exit from such relationship is extremely difficult and costly: although family law provides for coercive intervention of public authorities or courts when parental duties have been violated, such remedies only take place in cases of high risk or persistent and serious abuse or neglect of parental functions. In spite of that, there are substantial reasons that justify privileging the exercise of parental authority and, in particular, limiting the exposure of parents to tort actions, although the extent of such parental privilege varies in comparative case law and is also open to discussion by scholars both in Europe and the United States (see, largely, KNOLLE, 1999: 53-56, 70-88; PIPINO, 1992: 1127-1133; VANCE, 1995: 442-469).

The deferential treatment towards parents often overlaps with the previously examined domestic privilege enjoyed by people living together, and this explains why it is usually related to some of the reasons that justify the latter, such as the duty of solidarity among close relatives –which would reach the greatest intensity between parents and their offspring- and the purpose of protecting family peace (ENGLER, 2000: 85-86; BRINIG, 2000: 129-130). However, it seems important to keep those privileges apart. The parental privilege, unlike its domestic counterpart, only applies within the exercise of parental authority (and therefore only in relation to minors or incompetent children) and it does not

require living together (it applies, for instance, to parents not having custody of their children but that still keep parental authority and visitation rights). On top of that, it has its own justifications, that are related to the unique features of a parent-child relationship, and, in particular, to the need for latitude in the exercise of the parental funtions of upbringing, education and care of the children.

It has been held, in this regard, that a parent-child relationship is comparable to a fiduciary relationship (SCOTT/SCOTT, 1995: 2401), where it is difficult to foresee beforehand all contingencies that may arise and specify how parents have to react in each of them (leaving aside the fact that, in many cases, there will not be social consensus about it). In this setting, taking into account the deep affective bonds that a parent-child relationship generates, the most sensible approach is to grant wide powers to parents –as people do in relationships based on trust- on account of their privileged position to assess what is best for their children (parental judgement rule) (ibidem, 2438). The role of law should then be limited to establishing a set of minimal conditions to be complied with in the exercise of the parental role (e.g., food provision, compulsory schooling, health care, and so on) and supervise its observance through criminal, administrative or family law in those cases where social control mechanisms have proved insufficient. Yet, a judge should not be allowed to review *ex post* the exercise of that discretion –within the mentioned boundaries- and penalize parents for misjudgements or deviations from the prevailing social views, unless the threshold of gross negligence or intentional wrongdoing has been surpassed (in which case, discretion does not play a role anymore).

Therefore, the parental privilege would basically extend to areas where the exercise of discretion is pronounced (education, professional guidance, administration of assets), including personal supervision and decisions to determine how much independence a child should enjoy. Although no general indications about the limits of parental discretion can be given, it is possible to draw groups of cases from several criteria developed by courts by deciding whether the parental duty of care has been breached. The most important criterion, with respect to the duty of care, is the age of the child: while in early childhood the parents' duty of care is very stringent, later it becomes relaxed and is even replaced, in teenage years, by a duty of self-care. In fact, if there are reasons for contributory negligence, judges tend to attribute any reduction of or even exoneration from liability for damages sustained by a teenager to the victim's own conduct, instead of attributing it to the violation of the parental duties of care (see a case law review in FERRER/RUISANCHEZ, 1999: 9-10, and later, STS, 1ª, 30.12.1999).

The adaptation of the standard of care to the subjective aptitude for exercising a parental role can also be explained by the typically altruistic nature of the parent-child relationship and the idiosyncratic value that the child attaches to such relationship, even when parental performance could, on social terms, be rated as substandard (SCOTT/SCOTT, 1995: 2433). Assuming that parents tend to behave for the benefit of children, negligent behaviour usually can be explained either as a momentary oversight -something which is very difficult to prevent- or as a consequence of personal and social conditions of the parents -

which tort law cannot modify-. Then, the imposition of tort liability would increase the costs of paternity and maternity without improving prevention. In the worst case scenario, it could discourage parents to take on their parental duties, whose exercise is, in global terms, socially essential and very valuable for children. On the other hand, when parents' behaviour is so detrimental to children that it is not covered by any privilege and gives rise to liability, one has to think of the difficulties of implementing tort compensation within the family unit and the problems that may ensue from the limited solvency of the injurers. These factors explain the usual resort to remedies other than compensation, such as administrative or judicial measures that modify custody conditions or deprive parents from their authority over children.

A final issue which deserves attention for its practical consequences is the interference of parental privileges –like other domestic privileges- on the attribution of liability to concurrent wrongdoers outside the family circle. Familial and domestic privileges are meant to have *inter partes* effect, and their cost -the cost of family solidarity and latitude of judgement in private affairs- must not be shifted to third parties. If parents, as usually happens, bring an action in tort on behalf of their children against a third party, Spanish courts usually discount from the compensation owed to the victim the share of liability that can be attributed to contributory negligence of any of the parents (see FERRER/RUISANCHEZ, 1999: 10-11, and later, STS, 1ª, 16.5.2000). The reduction in compensation takes place whether or not the careless behavior of the parent is covered by any form of privilege: against a third party, parental negligence has to be assessed objectively, disregarding any personal circumstances.

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