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INTERNATIONAL PRACTICE: 2015

NO VOLUME INFO AVAILABLE

Spain: Moving Towards a Fairer Tort System?

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As it happened in the US with the infamous McDonald's coffee burn case, victims and consumers in Spain have been misled or are unaware of their right to compensation as a result of other's wrongful acts, carelessness, and negligence. Thanks to the work of associations of victims, consumers, and lawyers, we can now say that Tort Law is one of the most dynamic areas of law in Spain as the general public becomes more aware of the protection individuals are entitled to under our legal system. This, in turn, is triggering changes in the relevant regulations as well as developments in the doctrine of Spanish courts. However, this process is not free of obstacles and delays.

There are numerous circumstances in which you may have a case connected to the Spanish jurisdiction. More than 1,200,000 American tourists travelled to Spain in 2014, and total tourism will increase by more than 18% in 2015, in accordance with the statistics from February 2015. Many of the hotels in popular destinations, such as Mexico, belong to Spanish companies and quite a number of U.S.-made defective products have been sold in our country. The

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connections between our jurisdictions may be stronger than what would appear at first glance.

Where we are now?

Criteria of causation

In Spain, tort liability has evolved around the general principle of "*alterum non laedere*" which is nothing more than a general legal duty not to harm anyone. The basic principle from which the system arises is set under Art. 1902 of the Spanish Civil Code (the CC):

[T]he person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused.

This general clause of liability in tort that appears in other civil codes such as the French (Art. 1382) or the Italian (Art. 2042) is based on the traditional idea that liability arises from the fault or negligence of the person who causes the harm. The fault-based system has been recognized by Spanish Courts' decisions, which have repeatedly declared that fault liability, as established by Art. 1902 CC, remains one of the basic principles in the Spanish tort liability system. However, since the beginning of the 1940's the Spanish Supreme Court has evolved towards a system of fault liability with a reversal of the burden of proof (see, for the first decision, the judgment from the Spanish Supreme Court of the 10th July 1943). Originally, this evolution seemed to be limited to activities or conducts specifically dangerous, but over the years it has been enlarged to other areas. So, once the claimant established the action or omission of the defendant, the damage sustained and the causal link between them, the fault of the defendant is presumed and the burden of proof is reversed, requiring the defendant to overturn this presumption in order to avoid liability.

The Spanish tort system remains a fault-based system which requires in all circumstances of life a certain standard of care in terms of prudence that the courts define as "diligence required." This standard of care is assessed in consideration to the behavior adopted by the tortfeasor and the court hearing the case will use patterns, social roles (i.e., diligence of a good father), etc., to determine the level of diligence required in a given situation.

In addition to the fault-based rule of liability, there are specific situations where the court will consider strict liability without fault such as road traffic accidents, product liability, and

others. The court will therefore hold the defendant responsible to pay damages regardless of whether fault or negligence was involved in his action: regardless of the level of care, unless in specific circumstances, extraordinary factors such as *force majeure*, concur that eliminate such liability.

Limitation Period

According to Art. 1968.2 CC, the limitation period for bringing an action on the grounds of Art. 1902 CC is one year, counting from the date on which the party suffering the damage knew of the extent of the harm caused. This is a short period which has been widely criticised by legal doctrine.

The one year limitation period will start running, "from the time the aggrieved person had the knowledge thereof." This is a very broad and generic expression which presents serious practical difficulties especially when it comes to claims for personal injury. This difficulty, together with the brevity of the limitation period, has led Spanish courts to a flexible approach in favour of the claimant when establishing the starting point of the limitation period in tort claims.

The brevity of the limitation period has led the Spanish courts to apply an interruption of the limitation period. Art. 1973 CC includes a rule which, in contrast to the approach taken by other jurisdictions, has been described as particularly generous. The Rule provides that the limitation period for legal actions can be validly interrupted by:

- (i) Bringing proceedings before the courts;
- (ii) Extrajudicial claim made by the plaintiff to the defendant; and
- (iii) Any act of recognition of the claim by the defendant.

There are no restrictions as to the number of interruptions that can be validly effected and the plaintiff will be allowed to interrupt annually the limitation period until the claim is settled or lodged in court.

Assessment of damages

In Spain, since 1995, the assessment of damages for injuries suffered by victims of road traffic accidents must be quantified in accordance with the "System for the Assessment of Damages caused to people in Road Traffic Accidents." This System is also called "Bareme," which is included in the Annex

to the Law 30/1995 of Civil Liability and Motor Vehicle Insurance and later modified by the Law 34/2003 of modification and adaptation of the legislation of private insurances to the European regulations.

The Bareme is of compulsory application for victims of road traffic accidents but it is also used as guidance in other types of claims for personal injury.

The Bareme is set out in two sections and one annexe. In the first section, the Bareme sets the criteria to determine liability and compensation and, in the second, the rules for the application of the system. The annexe includes a tabular system which sets the criteria for (1) compensation for death (Table I and II), (2) compensation for permanent injuries (Tables III, IV and VI) and (3) compensation for temporary incapacity (Table V).

In the scope of non-economic damages, compensation for death is calculated depending on the number of aggrieved parties and the family relationship with the victim on the one side, and the victim's age, on the other. It is noted that those who are regarded as prejudiced parties are, always and in every case, family members.

Basic compensation for permanent injuries, which includes moral damages, is calculated based on a point system that indicates the seriousness of the injury. Compensation for temporary incapacity, a basic compensation, is set by days of hospitalization, days of total incapacity, and days of partial incapacity that the victim suffered. The judgment 181/2000 of the 29th of June from the Constitutional Court of Spain confirmed that the compensation for past loss of earnings will not be limited to the amount resulting from applying the strict formula under the Bareme in accordance with the *pro damnato* principle. Additionally, the judgment from the Supreme Court in their 25th March 2010 decision laid the criteria of full reparation of the damage caused concerning the loss of profit derived from the injuries.

It is important to bear in mind that the Bareme has not been free of controversy since its implementation, as it has been widely regarded as a limitation to the victims' right to obtain full redress of the harm suffered.

Access to the judicial system

The Law 10/2012 implied a real restriction for victims to access the court system in order to obtain the redress of the harm suffered. This law imposed on the plaintiff the payment

of court fees which could be as high as 20,000 Euros. The regulation not only implemented a barrier for victims to access justice but deprived courts from hearing thousands of claims, distorting the judges' knowledge of the reality of societal concerns.

All areas of practice in our law system rejected these court fees and so did the majority of the society (83% of Spanish citizens in accordance with the relevant statistics). As a result, this law was challenged before the Constitutional Court. We have therefore very recently seen court taxes being withdrawn in full for individuals, following the enactment of Royal Decree 1/2015 on the 27th of February this year. This is excellent news for plaintiffs as many victims had been forced to accept out of court settlements and are unable to afford claiming compensation through the courts. We are now back to the situation preceding 2012. In this regard, we have not progressed in acquiring more rights for citizens but the government has rectified and corrected a situation which limited the protection of victims.

Where Are We Heading?

Strict or Fault Liability System?

The interpretation of Art. 1902 CC by the Spanish courts has evolved towards a strict liability criteria as confirmed in the Judgment of the Supreme Court on 5th September 2007: *"it is abundant the case law confirming the validity of the general principle of tort liability based on fault, expressly referred to in Art. 1902 CC but, in recent times, many decisions, looking for the best protection of victims, moderately try to objectify the responsibility by shifting the burden of proof, based on the criterion of proximity or probation facility."* This position results in the assertion that compliance with regulations and other legal provisions is not enough to conclude that no fault has been committed as if the precautionary measures in place have not prevented the damage caused. These are revealed as inadequate or insufficient. Consequently, the courts apply a thorough assessment of the circumstances of the claim in order to conclude whether, in the light of these, fault applies to the case.

The plaintiff will have to prove the legal causation link, which is the legal criterion linking the harm caused to the tortfeasor. The proof of causation is essential, whether it operates in the field of strict or fault liability, and has to be based on evidence and not mere deductions or probabilities. However, in some instances the courts will not require absolute certainty but a probability based on the evidence available in order to hold the tortfeasor accountable.

Even though the Spanish tort system remains a fault-based system, courts tend to maintain a favorable approach to claimants by applying the strict liability criteria in many areas of law such as road traffic accidents, claims against the administration, and products liability. This, however, does not discharge the claimant from the burden of proving causation.

Further Restrictions on Limitation

We have recently learned with worry that the Spanish government intends to present before the Parliament a proposal for the reform of some rules included in the Spanish Civil Procedure Code and the Civil Code. Among the proposals the government intends to put forward are further restrictions of the one-year limitation period and the interruption periods. In this sense, Art. 1973 CC (referred above) would be amended so that the limitation period would not be deemed interrupted if, within one year from the out of court claim made by the plaintiff to the defendant, the latter fails to pay and the plaintiff does not file his claim before the court. This proposed amendment poses an extreme danger to plaintiffs as it seeks to radically limit the possibility to interrupt the limitation period during subsequent years, this being one of the few legal tools available to plaintiffs under the Spanish law to counteract a very short limitation period, allowing the plaintiff to keep his claim alive indefinitely. The consequences of this proposal would therefore be catastrophic for victims of personal injury.

Hopefully, during the parliamentary process the different political groups will submit amendments and the drafting of this reckless proposal will not result in a radical change of the protection available to victims in Spain.

Damages: a Brighter Future?

The Bareme has not been exempt from controversy and criticism. This has resulted in different social sectors and institutions requesting the revision of the current system.

Spain has enacted the European Regulations that intend to unify the criteria which govern the civil liability derived from road traffic accidents. It is therefore of utmost importance to progress in this area and adjust damages to the current socioeconomic realities. For this reason, all aspects of the Bareme have been carefully debated in the judicial commission created for this purpose. Stemming from this debate, a proposal has been formalised with the aim of unifying the relevant criteria.

Considering socioeconomics, the reform proposals of the Bareme include a considerable improvement in the levels of damages awarded to victims of road traffic accidents following the guidelines of the Fifth European Directive. In this line, the reform of the Bareme seeks the approximation to the average levels of compensation in other European countries and to compensate victims with most serious injuries in a fairer manner. One of the points of reform concerns the criteria to determine the amount of compensation for loss of earnings, paying special attention to the English Ogden Tables, which provide factors known as multipliers. These are used to assess the present capital values of the expenses derived from the accident such as care costs and future losses.

Special consideration by the Commission has been given to the most seriously injured victims suffering from medullar injuries, quadriplegia, paraplegia, coma, etc., and those with acquired brain damage such as neurological or neuropsychiatric damage, serious mental alterations, if these victims are not compensated adequately in the current Bareme. This is especially true in determining the future needs of such victims and the fact that the need for care commonly increases with time.

We expect that the new Bareme will considerably improve damages awards in Spain and look forward to its implementation expected in the coming months.

Conclusion

The general roles of tort claims in the Spanish system remain:

- a) Deter anyone who tries voluntarily or negligently to commit harmful acts against others.
- b) Prevent or avoid the occurrence of similar damage in the future.
- c) Compensate the victim to whom the damage has been inflicted.

Tort claims play an important role for the development of human rights broadly speaking and protect an individual's right to compensation. For this reason, we must continue working to make the Spanish society more knowledgeable of the rights of victims and make an impact on attitudes and regulations.

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