

# NON-CONTRACTUAL LIABILITY UNDER SPANISH LAW (a comparative perspective with French and German Law)

UCL, March 15, 2013  
Yolanda Bergel Sainz de Baranda  
Universidad Carlos III de Madrid

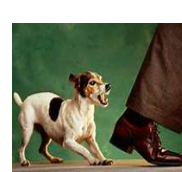
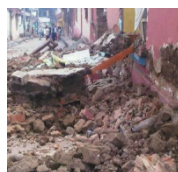


Universidad  
Carlos III de Madrid

# Non-contractual liability

Spanish General Clause: A person who by an act or omission causes damage to another, concurring fault or negligence, is bound to repair the damage caused (art. 1.902 CC)

## Examples of non-contractual liability



## Different systems of civil liability

Harmonization: European Principles of Tort Law / Draft Common Frame of Reference

# Different systems of non-contractual liability

- **Spain:**
  - General clause (1902 C.C)
  - Fault liability is the rule
- **France:**
  - General clause (1382 C.C)
  - Courts elaboration of a strict liability system for things and persons under control (1384 C.C)
- **Germany:**
  - No generalization of fault liability
  - Liability for a specific damage (§823.1 BGB “other rights”), breach of Law (§823.2 BGB) or intentional damage contrary to public policy (§826 BGB)
- **England:**
  - Tort Law. Intention or fault (strict is exceptional)
  - Particular torts with specific requirements for particular civil wrongs

# Requirements for non-contractual liability under Spanish Law

- 1. “Unlawful” act or omission
- 2. Intention, Fault or negligence / Strict liability
- 3. Damage
- 4. Causation

# 0. Capacity

- **Spain**: Doctrine: Minors and mental incapables if capable to understand the consequences of their acts. In practice 1903 CC.

Criminal liability of minors Law: not criminally liable under 14; between 14-18 joint and several liability with parents.

- **France**: Children and mental incapables are liable even if they cannot understand. In practice 1384 CC
- **Germany**: §828 BGB Children under 7 not liable. between 7-18 liable if sufficient understanding (7-10 not liable in road traffic accidents). Mental disturbance → not liable (§827 BGB)
- **England**: Children are liable (practical limits; not if the conduct is adequate to the standard of his age). Mental incapables liable if they can understand

# 1. “Unlawful” act or omission

- Unlawful act or omission:

Breach of a general rule of conduct: *alterum non laedere* (France and Spain); Germany: need of breach of a protected interest or a safety duty (in case of omission or indirect damage); England: civil wrong that allows civil proceedings

+ Positive action (all jurisdictions)

+ Negative conduct (Germany if there is a safety duty; Spain general liability for omissions (in practice if there is a duty to act); France general liability for omissions; England if there is a duty of care [unlikely])

## 2. Fault or negligence

- Also intention → normally criminal liability  
Intention in all jurisdictions (French and Spanish Law scarcely contemplate it; Germany §826 BGB; England many intentional Torts)
- Fault or negligence: any careless or imprudent act or omission that produces a damage which could have been foreseen by a prudent person. Similar in France (prudent man) and Germany (necessary care in human affairs).  
England: Tort of negligence (duty of care, breach of duty of care, causation). Germany: safety duties for omissions and indirect injuries.
- Standard of conduct: circumstances of the person, time and place (similar in France. In Germany objective standard: group of persons in such activity)

## 2. Fault or negligence

- General rule in Spain: there is no liability without fault (Germany: need of breach of a protected right, France: reduced applicability)
- Interpretation of fault by Spanish Supreme Court (currently changing):
  - Increase of the standard of diligence
  - Reversal of the burden of proof (Germany: claimant needs to proof negligence unless breach of statutory rule or safety duty)
- Special cases of liability without fault (proof of fault does not exonerate): strict liability ➡ social consideration of damage



## 2. Strict liability

- **Spain:** **specific** cases in Civil Code (animals; excessive smoke; fall of trees; things thrown from a house) and specific Laws (product liability; nuclear installations, road traffic; airplanes; hunting; environmental (limited activities); public administration)
- **France:** **general** system based on 1384 C.C for things and persons. Specific provisions in C.C (animals, buildings, defective products) and Laws (road traffic, airplanes, nuclear installations)
- **Germany:** **specific** cases (non-domestic animals) and Laws (railways, electrical & gas installations, aeroplanes, road traffic, water pollution, nuclear installations (not possession of radioactive materials), environment, medicines, genetically modified organisms)
- **England:** reduced strict liability (**general**: Rylands vs Fletcher; **specific**: Animals Act and defective products)

# 3. Damage

Obligation to compensate when the negligent conduct of the agent produces a damage

- Damage: harm to a person or loss or diminution of what a person owns caused by the fault of another person

# 3. Damage

**Spain:** Purpose of compensation: complete reparation (no punitive damages)

Requirements of damage: a) exist; b) certain; c) valuable

Elements of damage: a) value of the loss; b) loss of profit

Remedies: in kind if possible; monetary compensation (lump sum)

**France:** Purpose of compensation: complete reparation

Remedies: in kind if possible; monetary compensation

**Germany:** Purpose of compensation: complete reparation

Elements of damage: a) value of the loss; b) loss of profit

Remedies: restitution in kind; periodic payments, in practice lump sum

Punitive damages not discarded.

# Types of damage

- **Spain:** personal injuries (influence of road traffic accident tables), damage to property and moral rights or non-pecuniary loss (in general) are compensated  
Secondary victims can be compensated (affliction after the accident)  
Pure economic loss: problems of causation and determination of damage
- **France:** personal injuries, damage to property and non-pecuniary loss (in general) are compensated  
Secondary victims can be compensated (affliction after the accident)  
Pure economic loss: possible (Colmar case 1955)
- **Germany:** personal injuries and damage to property are compensated.  
Non-pecuniary loss (§253.2 BGB, if psychiatric disease)  
Secondary victims can be compensated (need of disease and close relation)  
Pure economic loss: not protected as such in § 823.1 BGB  
(maybe if intentionally or deriving from prejudice of § 823.1 rights/right to business)

# Types of damage (death)

- **Spain:** a) Claimant's own rights: the heirs do not inherit the right to ask for compensation (not even if death not simultaneous to accident)  
b) Rights of others: general recognition, even of moral rights to anybody with links of affection
- **France:** a) Claimant's own rights: heirs succeed to the right in all cases (even if death simultaneous to accident), also for moral damage  
b) Rights of others: general recognition, even of moral rights to anybody with links of affection
- **Germany:** a) Claimant's own rights: heirs succeed to the right (unless death simultaneous to accident), also for moral damage  
b) Rights of others: only funeral and patrimonial rights (when loss of financial support from the dead person). No moral damages

## 4. Causation: relation between the conduct of the agent and the damage

- **Spain**: double analysis: factual causation (*conditio sine qua non* or equivalence) + legal causation (adequate causation, general life risk, purpose of the rule)
- **France**: Certain and direct casual connection. Courts ready to see causation
- **Germany**:  
conduct = infringement of a right  $\Rightarrow$  damage  
Theories: factual causation (*conditio sine qua non*) + legal causation (adequate causation, purpose of the rule...)
- **England**: factual causation (balance theory) + legal causation (foreseeability or remoteness)

# Grounds of justification

- Interferences in the causation/Defenses for strict liability:
  - a) Act of God or force majeure (Spain/France/Germany) unforeseeable and unavoidable. Not only events of nature (dif. England)
  - b) Intervention of a third party (Spain/France/Germany)
  - c) Contributory negligence (Spain/France/Germany (§254BGB)/England Act 1955)
  - d) Fault of the victim (Spain/France/Germany)
- Lack of unlawfulness or fault/Defenses based on justifications:
  - a) Self defense (Spain/France/Germany (§227 BGB only certain legal interests justify)/England)
  - b) Necessity (France/Germany) proportional to avoid a more serious harm. Not in Spain (person benefiting)
  - c) Victim's consent or assumption of risk (*volenty non fit injuria*) (Spain/France/Germany)
  - d) Use of lawful right (Spain/France/Germany)

# Liability for others

- **Spain:** Liability for own acts (art. 1.902 CC)  
Liability for others (art. 1.903 CC): the obligation in art. 1.902 CC is enforceable not only for personal acts or omissions, but also for those of persons for whom someone is responsible. The agent of the damage is different from the person liable for it.  
1903 C.C *Numerus clausus*?
- **France:** General principle of strict liability for others
- **Germany:** No general principle of fault liability for others (it can arise under general non-contractual liability principles)
- **England:** No general principle of liability for others



# Cases of liability for others (parents/tutors)

## Spain:

Parents or tutors for children, minors or incapable persons under their guard: fault *in vigilando* (in practice vicarious liability)

## France:

Parents: strict joint and several liability (1384.4 C.C) even if no fault of the child (just need of causation) .

Tutors: general rule of strict liability for others.

## Germany:

Parents and tutors: fault (no liability if sufficient supervision)  
§ 832 BGB

## England:

Parents and guardians are not liable (but for their own negligence).

# Cases of liability for others (teachers/schools)

- **Spain:**

Owners or managers of schools for damages caused by students during school time: fault *in vigilando*. Teachers personally liable (1902 C.C). Public schools: strict.

- **France:**

Teachers: fault. If liability of teacher ⇒ vicarious liability of school. Public schools ⇒ teacher not personally liable ⇒ school liability (if fault of teacher)

- **Germany:**

Teachers: fault (no liability if sufficient supervision) § 823 BGB. At public schools fault (§ 839 BGB).

- **England:** Teachers are not liable (unless for their own negligence).

# Cases of liability for others (employers)

- **Spain:**  
Employers for damages caused by employees in the performance of their duties: fault (in practice vicarious)
- **France:**  
Employers: strict (1384.5 C.C). Employee not liable for own acts
- **Germany:**  
Employers: Fault (§ 831 BGB); in practice vicarious
- **England:** Employers strict liability for torts of employees during the course of the employment.