**Civil liability regime for damage caused to the environment under Spanish Law**

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**SUMMARY**

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# **1. INTRODUCTION**

There is a growing awareness in our society of the need to properly preserve the environment. In fact, it could be said that it is one of the main problems we face today, and to prove it, it is enough to look at the large number of public policies that try to address it.

Environmental protection is a cross-cutting issue which can therefore be addressed from different sectors of the legal system. It has traditionally been articulated through Public Law, and specifically, in the area of Administrative Law and Criminal Law. However, it must be borne in mind that damage caused to the environment can affect private rights and interests, and in these cases, it seems logical that the individual can go to civil jurisdiction to claim for damages suffered as a result of environmental deterioration, a possibility that would be protected by the provisions of Article 45 of the Spanish Constitution, especially in its third paragraph, which provides that "*For those who violate the provisions of the preceding paragraph, under the terms established by law, criminal or, where appropriate, administrative penalties shall be established, as well as the obligation to repair the damage caused*”.

In fact, this has been expressly recognised by the Spanish Supreme Court since its important Judgment of 3 December 1987, in which it established a doctrine that would later be followed by other judgments (e.g. STS of 14 March 2005): “*the legislation on the environment and its effects is inspired, essentially administrative, and the state, autonomous and local administrations are responsible for its regulation and organization, this does not prevent the private legal system from being able and required to intervene in any problems or conflicts arising in the area of neighbourhood relations, in cases of contractual or extracontractual negligence and in any other cases involving an abuse of rights or the exercise of antisocial rights, a situation to which article 7.2 of the CC refers; the aforementioned system takes precedence in cases of conflicts between natural and legal persons of a private nature”.*

The appropriate mechanism for this will be the filing of a civil liability claim, which may be contractual (when there is some type of legal relationship between the person causing the pollution and the person suffering from it) or extracontractual (otherwise).

In these pages I will focus on extracontractual liability. Specifically, the purpose of my paper is to address the different problems that emerge to determine civil liability for damage caused to the environment in the Spanish legal system. I will begin by referring to the requirements laid down in our civil law for the civil liability system to come into play, then move on to an analysis of active and passive legitimation before civil jurisdiction and the way in which reparation should be carried out. Finally, I will close my paper with a few brief conclusions.

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# **2. CIVIL LIABILITY FOR DAMAGE CAUSED TO THE ENVIRONMENT UNDER THE SPANISH CIVIL CODE REGIME**

The fact is that the Spanish Civil Code does not contain any provision that explicitly deals with the issue of civil liability for damage caused to the environment (unlike what happens in other States, such as Germany or Italy). However, this does not mean that the possibility of claiming in civil jurisdiction for damage caused to the environment is excluded. What happens is that we must resort to the general civil liability regime contained in article 1902 of the Civil Code. (MORENO TRUJILLO, 1991: 587), which states that "*he who by act or omission causes damage to another, by fault or negligence, is obliged to make good the damage caused*". In addition, article 1908 of the Civil Code includes in its sections 2 and 4 two specific cases in which the owners of a property shall be liable for damage caused to the environment: "*by excessive smoke, which is harmful to people or property*" and "*by emissions from sewers or deposits of infectious materials, built without adequate precautions to the place in which they were*". However, in these lines I am going to focus on the general regime provided for in Article 1902 of the Civil Code, which, as I have pointed out, in the absence of specific legislation, is the one that will regulate tort liability for damage caused to the environment.

In order for the liability system provided for in the aforementioned provision to come into play, a series of requirements must be met: firstly, it is necessary that rights or interests of a private nature be damaged, since otherwise civil jurisdiction could not be used to claim for damage caused to the environment. In addition, the person causing the damage must be identifiable. Likewise, it is necessary that an action or omission be carried out and that, because of it, the environment is damaged. I will now refer to all these requirements in detail.

## ***2.1. Injury to private interests as a budget for environmental liability***

Although the environment belongs to all citizens, there may be certain assets that are owned by a specific owner. This is the case, for example, with many forests, soils, waters or other spaces or natural elements. In these cases, damage to the environment, in addition to compromising it, can damage private property and even the health of its owners. As it cannot be otherwise, in all the aggressions described, there will be a consequent obligation to repair the damage caused (SERRANO GÓMEZ, 2001: 284).

It is in these cases (and only in these) that civil law can be applied. If private rights or property are not affected, the civil liability system will not operate. This does not obviously mean that there is no environmental liability whatsoever, but that protection should be sought through other legal mechanisms established in the legal system, whether in administrative or even criminal jurisdiction (LEYVA MOROTE, 2016: 115-116).

## ***2.2. Subjective imputation of damages caused to the environment***

Our legal system includes some cases in which a system of strict civil liability is established, included in several special rules: e.g. Law 25/1964, of 29th April regulating Nuclear Energy, article 45 of which clearly establishes objective liability; Law 48/1960, of 21 July on Air Navigation, which in its article 120 establishes that "*The reason for compensating has its objective basis in the accident or damage and shall proceed, up to the limits of liability established in this chapter, in any event, including that of a fortuitous accident and even when the carrier, operator or their employees justify that they acted with due diligence*"; Law 1/1970 on Hunting, article 33 of which establishes that "*The reason for compensating has its objective basis in the accident or damage and shall proceed, up to the limits of liability established in this chapter, in any event, including that of a fortuitous accident and even when the carrier, operator or their employees justify that they acted with due diligence*"; and Law 1/1970 on Hunting, article 33.5 provides that "*every hunter shall be obliged to compensate for any damage caused by him in the course of hunting, except where the act is due solely to the fault or negligence of the injured party or force majeure*".

However, as a general rule, our system is based on subjective civil liability (as is the case with other legal systems in our environment, such as the French or Italian), and therefore reaches the owner of a thing that, by not taking the necessary precautions to cause a series of damages to the environment. Therefore, it is necessary the omission of the diligence required element indispensable for the emergence of the obligation to compensate.

In this sense, article 1902 of the Civil Code part of the liability arising from fault or negligence (LEYVA MOROTE, 2016: 116), although this criterion tends to be softened in some cases of environmental damage, such as those provided for in article 1908 of the Civil Code, which I have already mentioned.

In addition, case law has progressively evolved from the original position of tort liability based on the proven fault of the tortfeasor to a system of liability based essentially on the causation of risk. One of the first resolutions to adopt this position was the STS of May 24, 1993, which in its Fundamento de Derecho 4º states that: "*(.....) and that is why the appreciation of the subjectivist principle has been transformed, either through the acceptance of the so-called theory of risk, or through the reversal of the burden of proof, presuming any action or omission that generates a compensable damage, without it being enough to distort it, the compliance with Regulations, since these do not alter the responsibility of those who comply with it, when the security measures and guarantees are insufficient in reality to avoid harmful events*".

Therefore, it can be said that when an activity carried out by a person or company represents a source of profit for that person or company and an additional and strange risk for the rest, whether persons or goods, the compensation for damages is configured as a kind of counterpart of the utility provided by the dangerous activity, even though the damage has been unavoidable despite having taken the prescribed technical precautions (GONZÁLEZ HERNÁNDEZ, 2012: 182).

Within the European Union, the "White Paper on Environmental Liability", approved by the European Commission on 9 February 2014, is worth mentioning. It opts for the adoption of a dual liability system: a strict liability regime for inherently dangerous activities and a fault-based liability regime for damage arising from non-hazardous activities. Of course, it seems a fairly reasonable option.

In any case, the predictability of the damage is essential for the existence of fault. In fact, it is the element that allows us to distinguish fault from fortuitous case: in fault, the damage can be foreseen and avoided, whereas in the fortuitous case there is no such predictability. (DÍEZ-PICAZO Y PONCE DE LEÓN, 1999: 361; y LÓPEZ MESA, 2006: 645). On the other hand, the predictability of the result must be assessed in accordance with the personal circumstances of the tortfeasor, and in particular his age and maturity (REGLERO CAMPOS, 2008: 287).

## ***2.3. The existence of an action or omission***

Article 1902 of the Civil Code requires for its application that there be an action or omission, which in this case, must cause damage to the environment. Therefore, the existence of an action or omission is unavoidable for civil liability to be demanded (PASCUAL ESTEVILL, 1995: 861). So, once the existence of a damage has been established, it will be necessary to identify the action or omission that has caused it (DE MIGUEL PERALES, 2000: 76 y 78).

As for the action, it can be defined as any action that immediately or immediately causes the damage to be compensated (ROCA TRÍAS, 2009: 63; y SANTOS BRIZ, 1984: 102). With respect to the omission, it refers to those cases in which the subject does not take all the necessary measures to avoid the production of the damage (LACRUZ BERDEJO, 2009: 446).

## ***2.4. The existence of damage***

In order to be able to claim civil liability it is unavoidable that damage has occurred, otherwise the obligation to make reparation would be meaningless (PASCUAL ESTEVILL, 1995: 865; LOZANO CUTANDA, 2005: 13; y AMAT LLOMBART, 2008: 27). In fact, this is expressly required by article 1902 of the Civil Code: "*anyone who by act or omission causes damage to another*". In this way, the damage becomes the central axis on which the issue of liability revolves.

The concept of damage includes both damage that affects the health of the injured person and damage that causes injury to the property of that person (SÁNCHEZ-FRIERA GONZÁLEZ, 1995: 230).

For the rest, damage to the environment presents a series of particular characteristics (CABANILLAS SÁNCHEZ, 1988: 35), which allows us to distinguish them from other types of damage:

- It's irreversible damage.

- They are damages that are often linked to technological progress.

- It is damage that occurs because pollution has cumulative and synergistic effects that cause pollution to add to and accumulate among them, and accumulation along the food chain can have catastrophic consequences.

- The effects of such damage are often manifested beyond the neighbourhood (river effects under water pollution, acid rain due to long-range atmospheric transport).

- They are diffuse damages in their manifestation (air, radioactivity, water pollution) and in the establishment of the causality relationship.

- These are damages whose damages are more dispersed or diffuse. The fact of having this characteristic does not imply that they are not concrete or legally perceptible.

- They are repercussions, insofar as they imply aggressions mainly to a natural element and by rebound to the individual rights.

- Collective interests are neither exclusive nor exclusive in relation to individuals, but shared and converging within a group or group. In short, environmental damage is: continuous, cumulative, irreversible, transboundary and affects everyone (flora, fauna, environment, people). Hence, the damages caused must be taken into account in order to know when the statute of limitations for civil actions for damages begins.

## ***2.5. The existence of a causal link between the action or omission and the damage caused***

As is clear from article 1902 of the Civil Code, there must be a cause-effect relationship between the action or omission and the harmful result, otherwise civil liability could not be claimed for such damage. The problem is that on many occasions this causal relationship is difficult to prove, since the contamination is not usually due to an isolated cause, but to the confluence of several, which in many cases are difficult to individualize (CABANILLAS SÁNCHEZ, 2000: 39; and FERNÁNDEZ APARICIO, 1999: 1107). Therefore, in order to determine the existence of a causal link between the action or omission and the production of the damage, a probability criterion is used (NAVARRO MENDIZÁBAL and YANGUAS MONTERO, 2010: 243; SERRANO GÓMEZ, 2001: 287; and ROGEL VIDE, 1977: 68). In fact, this is the option that our Supreme Court seems to opt for (STS of 30 June 2000).

# **3. ACTIVE AND PASSIVE LEGITIMATION**

The passive legitimation falls on the direct causer of the damage and, where appropriate, on the insurer (article 76 of Law 50/1980 of 8 October on Insurance Contracts). When several persons are responsible for the same damage, it is necessary to determine the legal regime applicable to the obligation to compensate. In this regard, the majority doctrine is inclined to apply the rule of solidarity (GONZÁLEZ HERNÁNDEZ, 2012: 189), so that the injured party could go against any of the subjects causing the damage. In this regard, ALENZA GARCÍA points out that "*the traditional civil rule of joint and several liability is altered in the case of environmental damages in order to have a greater guarantee of reparation, since with joint and several liability the risk of insolvency of one of the parties responsible is blurred and the victim is freed from the burden of establishing the liability quota of each party responsible*" (ALENZA GARCÍA, 2005: 79).

What happens is that the identification of the person responsible is not always simple, as these are damages of a diffuse nature. In fact, we are faced with one of the main problems posed by liability for damage to the environment (PARDO LEAL, 2003: 106). And it is that those responsible for the actions combated must be individualizable, as the Supreme Court demands in its Sentence of October 27, 1990: "*(.....) This is a case of extra-contractual liability contemplated in article 1..902 of the Civil Code, and for whose existence the jurisprudence of this Chamber has demanded some purely factual elements - action or omission causing, and result damages - and other legal factors - assessment of the conduct, and relation of causality between the human action and the result produced - (...), position that is reinforced much more, when there is the circumstance that the causal connection is linked to the imputability of the agent, necessary not to reduce the causal nexus to a mere responsibility for the result*".

It may also happen that the tortfeasor is a group of companies, in which case, it seems logical to understand that, when it is not possible to identify the tortfeasor, the liability falls on the dominant company (LEYVA MOROTE, 2016: 129). Furthermore, if there is bad faith on the part of the administrators of any of the companies, the theory of the lifting of the veil may be applied (article 42.1 of the Code of Commerce), so that they will become directly liable for the damages caused.

As for active legitimation, it will fall on the victims or injured parties, who are the only legitimate subjects to initiate the process. Obviously, when the owner of the affected property is a Public Administration, it will also have standing to claim the corresponding civil liability. But in this case, it will not act in the area of Public Law, but in the area of Private Law.

# **4. COMPENSATION FOR DAMAGE**

The obligation to make good the damage involves restoring things to their former state, which is called *in natura* reparation, and, if this is not possible, the injured party must be financially compensated. The tortfeasor is therefore not entitled to choose between the two options. He is obliged to carry out the repair *in natura*, and only when this is not possible can he seek compensation (STS of 23 September 1988).

In addition, as the Supreme Court has pointed out since its Judgment of 12 December 1980, civil liability also includes the adoption of preventive measures: "(.....) the protection of rights does not contract exclusively to the reparation of damages already caused but must also extend to preventive measures that reasonably prevent further patrimonial injuries".

Finally, it should be noted that reparation includes all damages caused, i.e. both emerging damage and loss of profit (STS of 15 March 1993).

# **5. CONCLUSIONS**

Article 45 of the Spanish Constitution protects the possibility of demanding civil liability for damage caused to the environment. In fact, this has been expressly admitted by the majority jurisprudence.

Although the Spanish Civil Code does not provide for a specific regulation of environmental civil liability, it may revert to the general regime provided for in Article 1902. The application of this article requires: that private interests have been damaged, that the subject causing the damage is identifiable, that an action or omission has been carried out that involves a risk situation, that damage has been caused and that there is a causal relationship between the action or omission and the damage.

Passive standing rests with the tortfeasor. If there are several tortfeasors, they will be jointly and severally liable. As for the active legitimation, it will correspond to the individual who has suffered the environmental damage, which on occasions may be a Public Administration.

Reparation will be carried out by restoring things to their previous state, and, when this is not possible, by means of an equivalent compensation, which will include both the emerging damage and the loss of profit. In addition, the subject causing the damage shall be obliged to take preventive measures to prevent it from recurring.

To conclude, it should be pointed out that it is necessary to update the classic system of liability that establishes specific mechanisms for those cases in which there is environmental damage that threatens personal or patrimonial interests. For this reason, it would be convenient for *lege ferenda* to promote a legislative reform that foresees this issue.

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