GUILT, RISK AND CIVIL LIABILITY IN SPAIN

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1. INTRODUCTION: ON THE RESPONSIBILITY IN GENERAL.

The term liability corresponds to the «subjection of a person who violates a duty of conduct imposed in the interest of another subject to the obligation to repair the damage produced» (Díez-Picazo & Gullón, 1990, p. 591) comprising two main types of conduct, criminal offenses (or offenses) and civil wrongs. Hence the Art. 1089 of the Civil Code (CC) -approved by Royal Decree (RD) of July 24, 1889- provides that obligations arise -in addition to the law, contracts and quasi contracts- of criminal and civil illicit acts or, what is equal, of those *"... unlawful acts and omissions or in which any kind of fault or negligence is involved"*. As it is known the crime or criminal offense is any act or willful or reckless abstention penalized by law, as expressed in Art. 10 of the Criminal Code (CP) approved by Organic Law (OL) 10/1995, of November 23 -whose reform operated by OL 1/2015, of March 30, has come to suppress the faults that, since old, were contemplated in the Lib. III CP (although some of them have now been incorporated in Lib. II CP as minor offenses)-, which is why they overcame an earlier conception of crime that only identified it with that «unlawful action» of the person carried out «with intention to harm» (Escriche, 1840, p. 198). The budget inherent in the crime is that it must always be typified as such in the CP (principle of legality) which recalls Art. 1 CP *"No action or omission that is not foreseen as a crime by law prior to its perpetration..."* pronouncing in a similar direction, but with greater amplitude, Art.

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25 of the Spanish Constitution (SC) when it states: *"1. No one may be convicted or punished for actions or omissions that at the time of their production do not constitute an offense, misdemeanor or administrative infraction, according to the legislation in force at that time. 2. Punishments involving deprivation of liberty and security measures shall be directed towards re-education and social reintegration and may not consist of forced labor..."*. Criminal offenses are therefore socially reprehensible behaviors that are tried to avoid under the threat of imposing a penalty or punishment to those who commit them in such a way that the criminal responsibility fulfills both a deterrent and a sanctioning function, defining the CP crimes from which derives the application of that supreme form that may be the coercive power of the State, that is, the criminal penalty, which is why the CP is considered as a kind of «negative» Constitution (see paragraph 1 of the preamble CP).

On the other hand, civil liability (CL) derives from the commission of an unlawful act of this nature that may or may not be typified in the CP (that is, an offense characterized both by its possible typicity and by its eventual atypicality) being classified historically this CL contractual and noncontractual. The first one stems from the violation of a duty of behavior imposed in a previous obligation or contract appearing, in essence, collected in Art. 1101 CC[1] with regard to relations subject to private law and in Art. 225.2 of Royal Legislative Decree (RLegD) 3/2011, of November 14 -approval of the Revised Text of the Public Sector Contracts Law-[2] for the assumption of nonobservance of an administrative contract, attending, in both cases, the *lex vis privata interpartes* that have contractual obligations (Art. 1091 CC)[3]. On the other hand, the extracontractual CL or *aquiliana* (so named because it comes from the old Lex Aquilia III century BC) derives from the production of damages to others for violating one of the postulates that base the natural law (in particular, the principle *naeminem laedere*, *alterum non laedere* or, what is equal, the duty not to harm anyone) that imposes on everyone a generic obligation not to cause harm to third parties. In this regard, Art. 2: 101, entitled "Recoverable damage", of the so-called *Principles of European Tort Law* (PETL), drawn up by the European Group on Tort Law[4] establishes that the damage *"...requires material or immaterial harm to a legally protected interest"*. Within this non-contractual CL,

[1] That establishes the duty to indemnify the damages caused to those who fail to fulfill their obligations by intention, negligence or delay and those that otherwise contravene the same.

[2] According to which the failure of the Administration to comply with the obligations of the contract will determine for the latter, in general, the payment of the damages that for that reason are borne by the contractor.

[3] *"The obligations arising from contracts have a force of law between the contracting parties, and must be fulfilled according to the terms thereof"*.

[4] Also called *Spier-Koziol Group* or *Tilburg Group* constituting a European group that brings together relevant jurists.

the primordial precept is Art. 1902 CC[5] adopting a general system of subjective responsibility so that the generic and elemental criterion -or title of imputation of damages-[6] to declare responsibility is fault[7], unlike other special regimes where negligence is ignored to declare someone responsible.

As it is also known, the requirements of this non-contractual CL are four: the performance of an act or omission, the existence of a certain damage, the necessary causal relationship between the act or omission and the damage produced and, finally, conduct of the person who caused the damage is guilty[8]. However, the division between the two CL species, contractual and aquilian, seems to disappear today on the basis of the so-called «accumulation theory or choice», which maintains that there is an eclectic zone between them, and therefore the court is free to appreciate the concurrence of one or another species of CL with support in the principle *iura novit curia* in order to seek a better defense of the wounded -*pro damnato*-, however, the distinction continues to have relevance (Santos, 2000, pp. 590-592) for the different legal limitation period established for one or the other and also because Law 1/2000, of January 7, on Civil Procedure (LCP) delimits both the principle of congruence of the sentence (Art. 218.1) such as the principle of preclusion of the allegation of facts and legal basis in respect of the claims relied on by the applicant (Art. 400.1). Nevertheless, jurisprudence has, on certain occasions, received what it calls the doctrine of «the unit of civil guilt» (Santos, 2000, pp. 596-604) because, after all, the contractual LC as the aquilian CL has as main objective to repair damages appreciating between both strong interrelations that allows to the doctrine and jurisprudence to speak of the existence of a Torts Law.

[5] Whoever by action or omission causes harm to another, through fault or negligence, is obliged to repair the damage caused

[6] The «imputation criteria» of liability define whether the damage caused must be borne by the victim, injured or damaged, or if, on the other hand, there is another responsible person who assumes the reparation of the victims. Therefore, this criterion or title of imputation constitutes the legal reason that establishes when the author is obliged to repair the caused damage. The various titles of attribution are usually grouped into two main classes which, in turn, admit certain variants: a) subjective or guilty, used in the regime of subjective responsibility or guilt characterized by attributing the damage to the subject that caused it by fault or b) Objectives, used in the objective liability regime characterized by ignoring the culpability to challenge the responsibility (ie, the fault of the subject is not necessarily relevant to declare their responsibility).

[7] Art. 4:101 PETL *"A person is liable on the basis of fault for intentional or negligent violation of the required standard of conduct"* adding Art. 4:102 *"(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods"*.

[8] It can be consulted Albaladejo, 2011, pp. 924-939; Lacruz *et al*, 2002, pp. 448-500; Díez-Picazo & Gullón, 1990, pp. 598-607; Parra, 2011, pp. 865-901, Beltrán & Orduña *et al*, 2010, pp. 191-193 or Atienza, 2015, pp. 562-574.

Finally, Art. 1092 CC refers to the *"... civil obligations arising from crimes"* to that established in the CP, Tít. V, Lib. I (Arts. 109 to 126) «Civil liability arising from crimes and procedural costs» also consecrating a CL *ex delicto* -which is normative of a civil nature despite being located in the CP- cohabiting in Spain, therefore, a duality of CL regimes depending on whether or not they came from the commission of a crime, which was rooted in a historical error because the delay in the promulgation of the CC up to 1889 caused that, on a transitional basis, the first Spanish CP, of July 9, 1822, contained rules pertaining to CL derived from the commission of crimes, however, after the publication of the CC, this was meaningless, although the successive CP´s continued to persist in this chronic defect maintaining this double regulation. In any case, the CL *ex delicto* will proceed as long as the injured party does not incline to demand it before the civil jurisdictional order (Art. 109.2 CP)[9].

2. VARIATION JURISPRUDENTIAL WITH RESPECT TO TITLES OF ATTRIBUTION.

The traditional system of extracontractual CL designed by the Spanish CC is chaired by the idea of fault of the producer of the damage, therefore, it is a subjective CL (or by its own fact) as provided by the old Art. 1902 CC (precept that is heir of Art. 1382 *Code Napoleón*) and, in principle, was also established in Art. 1903 CC (relative to the CL for other people) reflecting the predominant individualist ideology at the time of the Codification, based on an agrarian and artisanal economy, so that this subjective CL came to satisfy the interests of an expanding industry and, above all, those of the business class. The civil tort was conceived, in the mid-nineteenth century, as the illicit action that causes harm to another, but that has been done without intention deriving from it the obligation to repair the damage, so that everyone responds for the damage caused by carelessness, imprudence or lack of skill[10].

Under such premises the main lines of the CL that based the majority of legal systems -codified or not- until the end of the nineteenth century were, in essence, the three that follow: I.- CL is not appreciated if there is no intent or, at less, fault of the agent causing the damage. II.- The victim or injured party must demonstrate the fault of the agent causing the damage in order to be compensated -which, at times, was almost impossible to carry out-. III.- The CL fulfills a sanctioning function of the culpable behavior and, at the same time, another

[9] So that the injured party can, in any case, demand civil liability before the Civil Jurisdiction.

[10] Law 24, Tit. 22 of Part III, Law 7, Tit. 14 and laws 22nd to 26th, Tit. 15 of Part VII, vid. ESCRICHE, 1840, pp. 198-200.

dissuasive or preventive function of possible harmful behavior pursuing more moralize the individual behaviors than to assure the victims the reparation of the damages (Díez-Picazo & Gullón, 1990, p. 592, with appointment of Viney). However, the need to adapt this CL system to social needs was soon noticed, so factors such as the Industrial Revolution, the constant mass production and new sources of energy, the realization of risk-generating activities and the demographic growth entailed an increase in the possible dangerous, risky and, of course, harmful situations.

As we have indicated, in this context it was very difficult for the victim or injured person to demonstrate the exact origin of the damage, especially in cases of work accidents, and even more, the agent's fault, which meant that many damaging events were not repaired (particularly those derived from industrial and commercial activities). To all this was added the decline of individualist thinking and the generalization of an ideology of a social nature that underlined the importance of the compensatory aspect of responsibility and the need to shift the cost of accidents among those who benefited from the productive activity of damage, which led to formulating the theory of risk as a basis for CL. It begins to maintain then that the subject that creates a risk must assume the consequences of its activity, regardless of whether or not it is their fault. As proof of this, Art. 1908 CC established the CL of the owner[11] and, shortly afterwards, the same thing happened in the French Law of Work Accidents of 1896, warning of a progressive tendency towards the objectification of CL that, from its beginning, was based on guilt.

One of the first defenders of such a conception was Raymond SALEILLES, following, above all, his works *Les accidents du travail et le responsabilitè civile* (1897)[12] and *L'individualisation de la peine* (París, 1898) maintaining the determination of a penalty adapted to the nature of the person who is going to suffer (building the risk thesis and including it in the theory of imputation) arguing that the greater the risk assumed, the greater the potential benefits and, therefore, its consequences in those cases of failure. For SALEILLES to persist in the idea of guilt means, in practice, to equate responsibility to a

[11] Picking up, in essence, the owners of the damages caused will also respond: 1º.- For the explosion of machines that had not been taken care of with due diligence, and the inflammation of explosive substances that were not placed in a safe and adequate place; 2º.- Excessive fumes that are harmful to people or property; 3º.- Due to the fall of trees placed in transit sites, when it is not caused by force majeure; 4º.- By the emanations of sewers or deposits of infectious materials, built without proper precautions to where they were. Nevertheless, most authors and jurisprudence consider that this precept includes in its ordinal 1º and 4º a subjective or culpability responsibility, while that expressed in its nº 2º is objective. On the other hand, in case nº 3 of the same article, there is no consensus, since the doctrine tends to maintain that it is a matter of fault responsibility, while the jurisprudence maintains that it is a case of strict liability.

[12] Díez-Picazo, 2000, p. 153.

sanction or punishment and such extreme does not proceed in the specific civil sphere where, once a damage has occurred, the great problem consists, in fact, in pointing out the subject who must proceed with its reparation rather than imposing a sanction or punishment on the person causing the damage. Such theoretical construction undoubtedly had numerous social advantages being followed in Germany by authors such as ERZSBACH, BIENENFELD and ESSER. Thus, for LARENZ responsibility for risk was carried out through the generalization of special legislation related to rail transport, the circulation of motor vehicles or the imputation of liability for the simple possession of an animal[13]. In Italy, Art. 2050 of the *Codice Civile* is initialed «Responsabilità per l'esercizio di attività pericolose»[14] which constitutes an open structure since to establish if an activity is dangerous it is not enough to indicate that it is included in the special regulations, but it is considered dangerous activity that presents, by its nature or by the characters of the means employed, a relevant probability of damage or strong offensive potential, so that its determination in each case is made in concrete on the basis of common experience [15]; whereas in Common Law jurisprudence, Strict Liability has long been referred to as claims for damages that are not necessarily based on fault[16].

The doctrinal majority considers the change of the guiding principles of the Tort Law (going from the responsibility for fault to the restitution of the damage to favor the formulas *pro damnato* or *favor debitoris* in order to favor the damaged based on the notion that, therefore, generally, all the damages and risks that the modern social life favors should give rise to a compensation except when there is an extraordinary reason why the injured person should be relegated only to the damage) had as a result a certain tendency to socialize the risk that it has materialized in certain social protection systems -such as the one established by Social Security-; in certain market maneuvers (which transfer business risk to the public through manipulation of prices, including, in the amount of the product itself, the cost of the risk in the event of causing possible harm); in the requirement of civil liability insurance to be able to carry out certain dangerous activities (among others, the circulation of motor vehicles, the exercise of hunting or air navigation); in the introduction of economic aid of a reparative

[13] Díez-Picazo, 2000, pp. 154-156.

[14] According to which: *"Chiunque cagiona danno ad altri nello svolgimento di un'attivita' pericolosa, per sua natura o per la natura dei mezzi adoperati, e'tenuto al risarcimento, se non prova di avere adottato tutte le misure idonee a evitare il danno"*.

[15] Perlingieri & D´Amico, 2014, pp. 922-924, pointing out that in order to be released from liability, the person carrying out the dangerous activity runs the burden of proving that he adopted all the appropriate measures to avoid the damage, understanding Italian jurisprudence this formula «in modo rigoroso».

[16] Díez-Picazo, 2000, p. 157. In fact, the Cap. V of the Principles of European Tort Law (PETL) is titled «Strict Liability».

nature destined to certain injured groups (to which they respond today, for example, Law 32/1999, of 8 October, on solidarity with victims of terrorism or repealed RD 288/2003, of March 7, which approved the regulation of aid and reparations to victims of terrorism offenses); in the establishment of taxes to clean up the environment (as a sample it is worth citing Law 12/2014, of October 10, on the tax on the emission of nitrogen oxides into the atmosphere produced by commercial aviation, the tax on the emission of gases and particles into the atmosphere produced by the industry and of the tax on the production of electrical energy of nuclear origin); in the application of the classic CL system to legal persons (as it happens in the administrative sphere since the so-called patrimonial responsibility of the Administration is no more than the CL of the latter once it has overcome the old anglo-saxon principle of irresponsibility contained in the expression «The king can do no wrong» -understood as that the king or the Administration could not commit illicit- by virtue of the already repealed article 133 of the regulation of the Law of forced expropriation, approved by Decree of April 26, 1957 and articles 40 to 42 of the also repealed Law, of July 20, 1957, on the Legal System of the State Administration) or in the creation of funds borne by groups dedicated to certain irrigation activities or, even, by the Government -what is the same, for everyone- in the event that the legally established CL was not enough to cover the eventual compensation for damages (which is reflected in the current for example, in Art. 5 of Law 12/2011, of May 27, on civil liability for nuclear damage or produced by radioactive materials).

It must be admitted that in Spain the adaptation and subsequent evolution of the initial system of CL through fault has proceeded from the jurisprudence because, starting from the same Art. 1902 CC, the decisions of our courts have raised socializing doctrines of responsibility for risk (in a singular way in the sine of business activities), investment -or, better, modification- of the *onus probandi* or burden of proof (De las Heras, 2005, p. 51) contained in Art. 217 of the Civil Procedure Law[17] (CPL, which our courts relate to the risk or danger of the activity carried out by the subject so that it will correspond to him to prove his diligence in each specific case), of disproportionate damages (which implies, after all, a variant of the rule *res ipsa loquitur* -that is, that things speak for themselves- based on presumptions of guilt allowed by Art. 386 CPL [18]) or, finally, demanding a lot of criteria of

[17] Precept entitled «Burden of proof».

[18] Precept entitled «Judicial presumptions». For DÍEZ-PICAZO, 2000, p. 159, the application of the doctrine *res ipsa loquitur* refers, sometimes, to a social reproach of the production of the damage rather than to the behavior of the implicated person, perhaps not knowing that all the damages deserve some social

diligence higher than can be derived from the same legal texts (as could be the content in Art. 1104 CC)[19]. Consequence of this is noted that, sometimes, the element of guilt is lost in the sphere of the CL so that, under this perspective, the modern Tort Law finds its true *ratio essendi* in the need to protect the person and their goods (not only patrimonial, but also moral and corporal) against the risks that social progress entails and the unavoidable increase of dangerousness, moving away from the notion of sanction for the production of an illicit act or, as the case may be, unlawful. DÍEZ-PICAZO maintains that risk liability is a jurisprudential right created *praeter legem* by the courts without any support in legal texts which (Díez-Picazo, 2011, p. 282), in our opinion, is not entirely accurate due to Arts. 217 and 386 CPL in relation to the Art. 1902 CC, as will be seen, this responsibility has been developed by our courts and, therefore, is based on the aforementioned precepts.

The current importance of the Tort Law is to symbolize that tool of safeguarding the personal sphere through which the transgressions that affect the rights of the personality in its numerous projections are repaired, thus, the first two ordinals of Art. 2:102 PETL, entitled «Protected interests» indicate: *(1) The scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection. (2) Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection....”*.

Since the last century we have witnessed a change in the CL field because the main protagonist is not the one that causes harm to another (Art. 1902 CC), but rather is the victim or harmed by the damage the illegality of the damage itself being more important than the illegality, sometimes imaginary, of the behavior that provokes it.

In summary, the main function of CL is not to punish unlawful acts but to compensate the injustice of the damages (restorative function derived from *restitutio in integrum*), that is, the main purpose of CL is to repair the damage caused and not, necessarily the moral reproach to whom it is obliged to compensate, although, sometimes, it is also carried out (sanctioning function). For this reason, along with this basic function, the CL also fulfills a preventive function of future damages (prevention function), allowing its rules to indicate the degree of diligence or care that different agents must observe in each sector (as opposed to what

reprobation and that we all dislike the fact that produce, but that the fault is not in the damage but in the behavior that causes it, which is different.

[19] The fault or negligence of the debtor consists in the omission of that diligence that demands the nature of the obligation and corresponds to the circumstances of the persons, the time and the place. When the obligation does not express the diligence that has to be rendered in its fulfillment, the one that would correspond to a «good father of a family» will be demanded.

happens in EE.UU. thanks to punitive damages) and whoever is declared civilly liable must not pay the victim or injured party an additional amount, regardless of compensation for the damage, as a private fine (Parra, 2011, p. 362). However, there is some exception as happens, for example, with Art. 164 of RDLeg 8/2015, of October 30, approving the Consolidated Text of the General Law of Social Security that establishes a surcharge of the economic amounts derived from an accident at work or occupational disease -in charge of the offending businessman- if the damages derive from the violation of norms on occupational safety or health (therefore, in addition to the repair of the damage is also pursued sanction the damage and also prevent future accidents).

This evolution of the classic CL system in Spain has found concreteness in numerous legal texts that favor and simplify the compensation of damages to the victim through a system of strict liability. At the same time, due to the increase of special laws on damages, the very broad Art. 1902 CC is taking a more residual nature although, both doctrinally and jurisprudentially, it is still considered as a starting point and foundation of our entire CL system (Beltrán & Orduña *et al,* 2010, p. 191).

In this displacement of Art. 1902 CC has also influenced the preference of the so-called CL *ex delicto* (aforementioned, Arts. 109 and ss. CP) and the patrimonial responsibility of the Administration (established, by all, in Art. 106.2 SC[20] from which derives its patrimonial responsibility that, in reality, is civil in spite of its legal name -or *nomen iuris*-) when the production of damages is directly imputed to it or it turns out to be responsible for those caused by the personnel at its service.

However, the criteria for the objective imputation of harm should not be confused (which serve to examine in any CL class, whether subjective or objective, the damages that can be attributed to a certain conduct, that is, criteria that are used to solve issues related to the causal relationship between the conduct and the damage caused) with the objective criterion of the risk used to attribute to an individual the obligation to repair damages that were not caused by his fault or negligence or, at most, not only by its exclusive fault, for what the CL that derives from it will be objective or quasi-objective, also existing risks and others that are voluntarily accepted by the injured party.

[20] Individuals, under the terms established by law, will be entitled to be compensated for any injury they suffer in any of their assets and rights, except in cases of force majeure, provided that the injury is a consequence of the operation of the services public.

It is then noted that objective liability and responsibility for risk do not turn out to be equivalent expressions in full -despite the similarity, on numerous occasions, of its consequences- [21] and that, ultimately, the fault of the agent in the provocation of the damage has not been displaced, on the contrary, in the CL.

3. ABOUT LIABILITY FOR RISK.

The CL by risk is the creation of jurisprudential doctrine (Art. 1.6 CC)[22] based on the conception that the one that originates a risk and benefits from it must respond to its consequences, which is traditionally reflected in the formulas *ibi emolumentum ubi onus* or *cuius commodum, eius incommodum* what applies to many claims for damages resulting from work accidents, hazardous activities or defective products (Parra, 2011, p. 390). This CL by risk emanates from the technical progress of modern life that does not coincide, without more, with a responsibility without fault although the latter is not always necessary because the fault or negligence of the agent is not essential in this type of responsibility. In contrast to the classic theory that there is no responsibility without fault, it is admitted that damages arising from certain activities or behaviors, even if they are lawful and tolerated, must be attributed to those who have generated, through them, risks or dangers for third parties.

In Germany, ESSER defined CL by risk as the obligation to respond for the danger posed by itself, that is, the imputation of damages to the area of responsibility of the person obliged to repair it through the principle of the control of danger and the characteristics of the specific risks inherent (Santos, 1973, pp. 609-610). This expands the traditional sphere of CL, increasing the repair possibilities of the damage produced, tending, consequently, to increase the sense of responsibility. Thus, the doctrinal majority and the legislation itself admit a progressive «substantivity of responsibility for misfortunes (*für Unglück*)» based on «facilities and behaviors to which a risk to the community is attached» (Santos, 2000, p. 588).

The German doctrine also distinguishes liability for risk of the call «*Eingriffshaftung*» or responsibility for lawful and permitted attacks or transgressions where the basis of the duty to compensate lies in commutative justice -and not in the unlawfulness of the act or even in the attribution of a certain risk- that the one who protects his interest to the detriment of the right

[21] Santos, 1973, p. 610, it points out the non-coincidence between objective liability, without fault or risk, noting that even DEUTSCH, starting from the difference between subjective imputation (supported by the individual's fault) and objective imputation (which covers the assumptions of presumption of fault, the adequate causality and responsibility for risk) based on the «collective existence of man, rightly excludes liability for causation of civil liability rules».

[22] *"…The jurisprudence will complement the legal system with the doctrine that, repeatedly, establish the Supreme Court to interpret and apply the law, custom and general principles…"*.

of a third party, even if permitted, must compensate the injured party being an example of this *Eingriffshaftung* the patrimonial responsibility (Santos, 1973, p. 611) of the Administration derived from the mentioned Art. 106.2 SC. The risk liability is based on a principle of positive imputation in which, although the criterion of objectivity based on the creation of a risk prevails, it does not rule out the lack of voluntariness with respect to the fact that causes the damage. The risk criterion, in general, covers a double meaning, on the one hand, from an economic perspective it is applicable to the damages caused by performing a lucrative activity carried out as a company (that is, in a continuous and organized manner) in whose sphere the damages are considered inevitable but foreseeable -and hence the mandatory obligation of insurance imposed by the legislator- while, on the other hand, the risk is similar to the danger serving then to base the compensation of the damages caused by the deployment of activities, whether or not they have a lucrative purpose, which, being themselves unsafe, entail a high probability of causing harmful consequences despite not being carried out continuously or organized (Atienza, 2015, pp. 576-577). In this respect the PETL initiate their Cap. V (signed «Strict liability») seeking to delimit those activities that are considered «Abnormally dangerous activities» establishing in his Art. 5:101: *"(1) A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it. (2) An activity is abnormally dangerous if a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and b) it is not a matter of common usage. (3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage. (4) This Article does not apply to an activity which is specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention"*.

In a more skeptical way, Albaladejo considers that risk liability is not a third kind of liability that exists alongside fault and objective liability, but is one or the other, depending on the case. Thus, it maintains that it will be objective in the cases established by law in which the person, being or not guilty, is liable for the damages caused by the risk he created. In other hypotheses it will be at fault if, when creating the risk, it is presumed that the damage has been caused by the guilty behavior of the person responsible, but the responsibility is based on the production of the damage caused by the risk created and the fault of the agent. No matter how much the fault is presumed, the agent can be released from liability if, against

presumption, he proves that he was not guilty; and if this demonstration is not admitted, we will be in the presence of the strict liability (call for risk)[23].

As it could not be otherwise, it has been our jurisprudence that defines the meaning and scope of risk liability as follows:

1º. The mere creation of a risk is not enough to declare, without further ado, the responsibility of the one who creates it, not even when the person carrying out the activity pursues a lucrative purpose. In order to declare someone responsible for the damage, the guilt that characterizes the subjective responsibility is also required, an essential presupposition of our order in accordance with what is established in Art. 1902 CC with the provisos, of course, legally provided. The production of a damage by materializing the risk created is not equivalent to a demonstration of the agent's fault (otherwise it would be an objective responsibility or result). Consequently, whether or not the agent is at fault (Art. 1104 CC) constitutes a legal assessment derived from comparing the conduct that causes an injury and that required by the order. The fault, therefore, is equivalent to a behavior not adjusted to the models of expertise and diligence required according to the circumstances of people, time and place, keeping in mind that the simple observance of the regulatory standards of care or safety do not eliminate the possible fault of the agent.

2º.- The term risk has several meanings which is of great importance to determine the degree of diligence required in each specific case, therefore, if the risk generated by the behavior displayed can be classified as usual or ordinary (where the so-called general risk of the life in society that can give rise to damages not attributable to anyone because, after all, risks exist in all areas of life, even in the case of tiny or unqualified risks) it is not possible to demand extraordinary skill and diligence, also taking into account if the injured party has voluntarily assumed the risk of a specific activity[24]. On the other hand, when a risk is created higher than what is considered normal (as is generally the case when carrying out a qualifying dangerous activity), the rules relating to the required expertise and diligence are

[23] Albaladejo, 2003, pp.13-14.

[24] As an example we can cite the case of an accident due to the practice of diving in which the applicant, after receiving a theoretical class taught by the instructor, suffers after the immersion dental damage for which he claims. The Judgment of the Provincial Court of Las Palmas of June 11, 2007, Section 5, García de Yzaguirre, dismisses the claim stating (in its Ground of Law 2) that in the realization of sports activities freely assumed by seniors of age, the theory of risk and objective liability should not be applied should the requirements of subjective responsibility or fault be met.». In another case involving golf, the Supreme Court Judgment of March 9, 2006, Civil, Seijas Quintana states that the idea of risk, based on the exploitation of activities, industries, instruments or hazardous materials, and the benefits that are cannot be transferred to sports, not organizational, to base a liability regime other than the fault. See also Fernández Costales, 2000, pp. 227-249.

proportionally increased, allowing the person responsible for damages to be imputed other more severe measures of care, but which are required in this specific case. In short, the damage is then objectively attributable to that fault in the performance of the dangerous activity.

3º.- The performance of an activity of an insecure or dangerous nature and from which damages derive to third parties may also entail imposing on the person who carries it the burden of proving his diligence, that is, the absence of fault (thus modifying the *onus probandi* -or burden of proof- what it is even contemplated in Art. 4: 201 PETL)[25] so that, in the opposite direction, regarding the exercise of activities not qualified as dangerous, the general rules of the burden of proof contained in Art. 217 CPL, therefore incumbent upon the plaintiff to prove the certainty of the facts from which ordinarily it appears, according to the applicable legal norms, the legal effect corresponding to his claims (Art. 217.2 CPL) what connected with Art. 1902 CC is equivalent to that it will be for the injured party to prove, as a general rule, the fault of the person who harms. However, Art. 217.6 CPL provides that the rules relating to the burden of proof are applicable whenever a legal provision expresses does not distribute with special criteria the burden of proving the relevant facts so that it may happen that a specific norm causes the defendant to be charged with the burden of proof the demonstration of the specific diligence required to prevent the damage or that the aforementioned rules relating to the *onus probandi* are modified according to the principles of availability and probative facility contained in Art. 217.7 CPL according to which *"For the application of the provisions of the preceding paragraphs... the court must bear in mind the availability and evidentiary facility that corresponds to each of the parties to the litigation"*

4º.- Also by using the judicial presumptions of Art. 386 CPL: *"1. From a fact admitted or proven, the court may presume the certainty, for the purposes of the process, of another fact, if between the admitted or proven and the alleged there is a precise and direct link according to the rules of human judgment... 2. Faced with the possible formulation of a judicial presumption, the litigant harmed by it will always be able to practice evidence to the contrary",* a court can attribute the damage caused to the fault of a subject when, according to a maxim of experience and attended to singular characters of the damage, the latter is related to a class of results that usually arise from negligence or negligence provided that the

[25] Provides Art. 4:201 PETL, inserted in Chap. IV and titled «Reversal of the burden of proving fault in general»: *"(1) The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity. (2) The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur".*

defendant does not provide the court with any clarification of the cause of the damage that, as an exception to the maximum of the experience used, could Discard the intervention of fault or negligence on your pArt.

Under this perspective, for all, Judgment of the Supreme Court no. 185/2016, of March 18, Room 1, Section 1, Pantaleón Prieto collects abundant jurisprudence, resolution dictated by a claim for injuries against a nightclub where the plaintiff stepped on a glass that stuck in his foot (vid., especially, his 5º reasoning).

Both criteria of imputation of civil liability (subjective criterion of fault and objective criterion or, at least, quasi-objective of the risk) appear, in addition, contained in the PETL whose general norm –or Basic norm- is found in its Art. 1:101 according to which *"(1) A person to whom damage to another is legally attributed is liable to compensate that damage. (2) Damage may be attributed in particular to the person: a) whose conduct constituting fault has caused it; or b) whose abnormally dangerous activity has caused it; or c) whose auxiliary has caused it within the scope of his functions"*.

4. REFERENCE TO THE LEGAL FRAMEWORK OF LIABILITY FOR RISK.

We can highlight some of the various legally established liability assumptions that respond to the demands of modern life (susceptible to causing greater risks) so that the Law adequately interprets social conscience, increasing the cases in which, as an exception to the general rule that presides in the civil sphere (both in the CC and outside it) «this objective liability is accepted under the protection of those who suffer the damages that the aforementioned risks may cause» (Albaladejo, 2011, p. 940). As indicated in Art. 5:102 PETL: *"(1) National laws can provide for further categories of strict liability for dangerous activities even if the activity is not abnormally dangerous. (2) Unless national law provides otherwise, additional categories of strict liability can be found by analogy to other sources of comparable risk of damage"*. Well, apart from the CL derived from Art. 1908 CC - previously referred to - we can mention, without exhaustive intention, the following assumptions of CL[26]:

4.1. Damages caused by animals: The main rule is constituted by Art. 1905 CC according to which the possessor of an animal, or the one who uses it, is responsible for the damages it causes, even if it escapes or mislays it. This responsibility will only cease in the event that the

[26] In addition to the bibliography indicated we continue in this section, mainly, De las Heras, 2017, The responsibility for risk in http://rua.ua.es/dspace/handle/10045/71573

damage was caused by force majeure or by the fault of the person who suffered it. As it is clear from the precept, as a general rule, the possessor who uses the animal generating the damages is held responsible. As it is clear from the norm, as a general rule, the possessor who uses the animal that generates the damages is held liable -article considered to be the most severe and «demanding of the civil text in order to claim responsibility for the production of damages»- (Ramos, 2000, p. 674); not enough, in principle, the mere possession of the animal but the jurisprudence requires that the possessor obtains a service or benefit of any kind for the use of the animal –so that if a certain service or benefit obtains a person other than that which is the then the animal owner would be the one who answered-; however, the possessor of the animal has also come to understand who has «his government and who is responsible for its surveillance»[27], being indifferent to the type of animal in question «domestic or wild or fierce» provided that the animal «is subject to the ownership or control of someone» (Ramos, 2000, p. 677). If there were several possible responsible for the damages caused, they will respond civilly and jointly, all of them[28]. Regarding the owner of the animal, given the faculties that derive from their right of ownership, if the facts that prove otherwise are not proven, it can be reasonably presumed that it will be the one who responds to being the de facto holder of the animal and, in addition, who is served of the. In any case they are excluded, for the purposes of CL, the simple servants of the possession (as, for example, the employee who walks a dog or the workers of the agricultural entrepreneur)[29].

As you can see this CL is objective or no fault, in particular, is a responsibility arising from the risk caused by particularly dangerous things such as domestic animals, so that it is considered that who has control and get the benefits "that the animal reports, it must also bear the cost of the damage it causes –*ubi emolumentum ibi onus*-[30]. Only exoneration of CL due to force majeure or exclusive fault of the aggrieved in the production of the damage, although in some occasion only the latter has been taken into account in order to reduce the indemnity *quatum*.

[27] Lacruz *et al*, 2002, p. 511, as well ALBALADEJO, 2011, p. 963 –for which any possession or use that corresponds to a person" on the animal "makes him / her liable, as long as it lasts, for any damage caused (exempting the owner from liability). Likewise Atienza, 2015, p. 596, nevertheless, this last author denies CL of whom, p. eg, put a horseshoe to a horse indicating Lacruz that, in this case, it is incumbent on the possessor a custody obligation.

[28] In this direction the Art. 9:101 PETL: *"(1) Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons…"*.

[29] Albaladejo, *ibídem*, Díez-Picazo & Gullón, 1990, p. 630.

[30] Peña, 2001, when commenting on said article, p. 2130.

Under this angle the Judgment of the Supreme Court nº. 848/2007, of July 12, Civil, Villagómez Rodil, resolves an issue in which a worker went to a house to repair an appliance and when crossing the farm, being the access door open, was attacked by a dog that he caused serious injuries even knowing the existence of the animal so he «voluntarily accepted a risk situation that was sufficiently known», however, the defendant – owner of the dog- «had full knowledge of this situation... must have adopted the necessary and precise precautions» which is why there is a concurrence of risks and plural guilt, stating, on its foundation 1, that Art. 1905 CC establishes an objective CL so it is effective responsibility for the risk posed by the possession of animals, that is, it is the responsibility inherent to such personal situation (sentence of 29.5.2003) «...establishing a presumption of consequent final responsibility. The obligation to respond for the damage caused by animals, more specifically by domestic or feral dogs, is becoming more and more demanding at present, due to its frequency and cruelty of results, to the point of constituting social alarm», however it has happened almost all times, which forced us to adopt necessary measures and thus with a Roman precedent (*actio de pauperie*), our Historical Law was concerned with the issue and the *Fuero Real* (Book IV, Title IV, Law XX), forced the owner of the tame animals to compensate the damages caused and Part. VII, Fílulo XV, Laws XXI to XXIII imposed to the owners of fierce animals the duty to have them well guarded, including the compensation the lost profit (sentence of 12.4.2000).

On the other hand, Law 50/1999, of 23 December, on the Legal Regime of the Tenure of potentially dangerous animals –developed by RD 287/2002, of March 22- has come to establish a series of measures with the objective of reducing the risks created by such animals, including infractions and sanctions of an administrative nature in the case of non-compliance, whose Art. 13.9 provides that *"The responsibility of an administrative nature provided... is understood without prejudice to the liability in criminal and civil proceedings"*[31].

4.2. Damages caused by things thrown or fallen from a house: The CL derived from such damages is contemplated in Art. 1910 CC: *"The head of the family that lives in a house or part of it, is responsible for the damages caused by the things that are thrown or fall from it"*. The precept is limited to damage caused by objects that are thrown or fall and do not obey construction defects or lack of repairs since for these latter assumptions other rules are foreseen (specifically, Arts. 1907 and 1909 CC based on a subjective CL or fault). Regarding

[31] Regretting Ramos, 2000, p. 680, that Law 50/1999 has missed the opportunity to regulate unitarily the various aspects related to the possession of companion animals and their social interaction, thus saving the brief precepts dedicated to them by the Civil and Criminal Code.

the expression «head of the family» the jurisprudence understands who, by any title, dwells a dwelling as a main character with respect to the people who live with it forming a family or another social group, so that if it is a family they will be parents, outside of this case all adults who inhabit the house should be considered as such if all are situated on an equal footing[32] (eg, brothers, friends or students who live together). If there were several «heads of family» they all respond in solidarity. The majority of the doctrine and jurisprudence consider that the responsibility of such precept is of an objective nature (that is to say, by risk), without prejudice to the fact that the head of the family can later claim against whoever is the true cause of the damage. It is enough for the plaintiff, therefore, to prove that he has suffered damage by an object thrown or fallen from a dwelling and the «head of the family» will only be exonerated from CL if he proves force majeure or the sole fault of the victim[33].

The Supreme Court Judgment nº 1243/2007, of December 4, Civil, Marín Castán analyzes the case where a person died as a result of the blow suffered by the fall of a flower pot from the window of a rented house, expressing that «...the jurisprudence of this Chamber is clear to exclude from its scope "the landlord of the house, which obviously does not live in it" (SSTS 6.4.01 and 22.7.03)» so another type of considerations «...do not save the responsibility of the tenant according to Art. 1910 CC».

4.3. Damages caused by the circulation of motor vehicles: The doctrine considers that the CL arising from damages caused by the possessor of a motor vehicle is a liability for risk because it derives from the mere fact of the possession and use of the vehicle without the classic concept of fault. The RDLeg 8/2004, of October 29, approved the current Revised Text of the Law on CL and Insurance in the circulation of motor vehicles (TRLRCSCVM, modified on several occasions) collecting paragraph 1 of its Art. 1.1: The driver of motor vehicles is responsible, by virtue of the risk created by the driving of these, of the damage caused to people or property due to traffic, clarifying paragraphs 2 and 3 of the scope of such responsibility distinguishing, respectively, the hypothesis of damages to persons and damages to goods or things:

- In the event of damages to persons, the responsible driver can only be exonerated when he proves that the damage is due, exclusively, "... to the conduct or negligence of the injured party or to force majeure foreign to the driving or operation of the vehicle; the defects of the vehicle or the breakage or failure of any of its parts or mechanisms "will not be considered as

[32] Peña, 2001, pp. 2135-2136, Parra, 2011, pp. 949-950.
[33] Peña & Parra *ibídem.*

cases of force majeure" (which excludes the fortuitous event, even though a certain doctrinal sector assimilates it to force majeure, *ex Art. 1105 CC*). A system of assessed compensation is also established because *"Damages and losses caused to persons as a result of bodily harm caused by acts of circulation regulated in this Act, shall in all cases be quantified in accordance with the criteria of Title IV and within the indemnity limits set out in the Annex"* (Art. 1.4 TRLRCSCVM modified by Law 35/2015, of September 22, which reforms the system for the valuation of the damages caused to people in traffic accidents).

Regardless of the fact that, in its case, the exclusive fault of the victim in the production of damage can be seen, two singular rules apply in this matter:

1ª) Applicable for damages to persons and things, consisting in the fact that if the victim has only contributed to causing the damage, the compensation will be reduced according to the concurrent fault up to a maximum of 75%, presuming such contribution in the production of damages when the victim due to lack of use or improper use of belts, helmets or other protective elements, it does not comply with safety regulations and causes the aggravation of the damage (Art. 1.2 TRLRCSCVM, first paragraph).

2ª) Only applicable for damages to persons and established as an exception, so that compensation is not eliminated or reduced when there are injuries due to exclusive or concurrent fault of non-driving victims of vehicles that are under 14 years old or that are not imputable (due to suffering a physical or intellectual deficiency), however, the action of repetition against the subsidiary responsible (parents, guardians and other physical persons who must respond legally) is excluded. However, this second rule does not apply when the child under 14 years of age or non-attributable persons contribute intentionally to the production of the damage (Art. 1.2 TRLRCSCVM, second paragraph). In the case of material damage (ie, things) is returned, however, to the subjective CL or fault so that the driver responds *"...to third parties when it is civilly liable according to the provisions of Arts. 1902 and following of the Civil Code, Arts. 109 and following of the Penal Code, and according to the provisions of this Law"* (vid. Art. 1.1 TRLRCSCVM, third paragraph).

Apart from the driver's CL, Art. 1.3 TRLRCSVM also establishes two cases of quasi-objective liability of the owner of the non-driving vehicle when: A) Is linked to the driver by any of the relationships regulated in Arts. 1903 CC -direct being its responsibility then- and 120.5 CP -subsidiary responsibility-, ceasing this responsibility of the owner if he succeeds in demonstrating "... that he used all the diligence of a good father to prevent the damage";

exoneration reason identical to that provided in Art. 1903 CC with which it is foreseeable that in practice it constitutes, sometimes, a true diabolic trial or of very complex demonstration and, others, a forecast neglected, in general, by our courts. B) If the vehicle did not have the required insurance, in which case the owner responds jointly and severally with the driver of all the damages unless he proves that the vehicle had been stolen. For this purpose, Art. 11.1.c) TRLRCSCVM states that it corresponds to the Insurance Compensation Consortium, up to the amount of mandatory insurance, to compensate for personal and material damages caused in Spain by a vehicle that is insured and has been the subject of theft.

The Art. 2 TRLRCSCVM refers to the duty to underwrite the compulsory insurance of the vehicle that corresponds, as a general rule, to its owner and, by exception, to a third person, establishing that the owner of motor vehicles that have their usual parking in Spain is obliged to keep in force an insurance contract that covers, up to the amount of the mandatory insurance limits, the CL of the previous precept. Only the owner of such obligation is released when the insurance contract is concluded by any person who has an interest who must express the concept in which they contract (Art. 2.1). Of course, in addition to the mandatory coverage, the insurance policy of CL may include, on a voluntary basis, those other coverages freely agreed by the policyholder and the insurance entity in accordance with the regulations in force (Art. 2.5). Direct action against the insurer and under an annual statute of limitations is also granted to the injured parties or their heirs for the satisfaction of the damages and losses (paragraph 2, Art. 7.1). In accordance with Art. 3 TRLRCSCVM the omission of the duty to subscribe this compulsory insurance entails the prohibition to circulate, the deposit or seal of the vehicle with charge to its holder plus a monetary sanction.

4.4. Damages caused by the Hunt: It is evident that the "hunting action", defined in Art. 2 of Law 1/1970, of April 4, of Hunting, is a dangerous activity that entails to a greater or lesser extent risks. The Art. 33 of said legal norm -entitled "Liability for damages"- includes in its number 5° that any hunter is obliged to compensate the damages caused by the exercise of hunting, except when the act was due solely to fault or negligence of the injured or force majeure. In hunting with weapons, if the perpetrator of the damage caused to the persons is not known, all the members of the hunting party shall be jointly and severally liable. On the other hand, Decree nº. 506/1971, of March 25, develops said law reiterating in its Art. 35.6.a) the same idea adding that defects, breaks or failures of hunting weapons and their mechanisms or ammunition are not considered cases of force majeure -therefore, it seems that the fortuitous case is excluded- while their letter b) establishes that in hunting with weapons, if

the perpetrator of the damage caused to the persons is not known, all the members of the hunting party shall be jointly and severally liable. For these purposes, only those hunters who have practiced hunting on the occasion and place where the damage has been produced and who have used weapons of the kind that cause the damage are considered as members.

For its part, RD nº 63/1994, of 21 January, which approves the Regulation of the Insurance of Civil Liability of the Hunter, of obligatory subscription (repealing, in turn, Art. 52 of the aforementioned D. nº 506/1971) establishes: *"1. The insurance of civil liability of the hunter, of obligatory subscription, constitutes a specialty of the insurance of civil responsibility that has for object the cover, inside the limits fixed in the present Regulation, of that in which the hunter can incur with weapons with occasion of the hunting action. 2. Every hunter with weapons must, during the hunting action, be insured by a hunter's liability insurance contract adapted to this Regulation. The hunting license can not be obtained without having accredited the previous conclusion of this insurance contract or practicing the exercise of the same without the existence and fullness of its effects..."* (Art. 1). Said compulsory subscription insurance must cover, within the national territory and within the quantitative limits determined by said Regulation, *"...the obligation of every hunter with weapons to indemnify the corporal damages caused to persons during the hunting action"* including such bodily harm caused both by an involuntary firing of the weapon and those caused *"...in time of rest within the limits of the hunting ground, while it is practicing the exercise of the same"* excluding, however, of those cases *"... in which the hunter is not obliged to compensate because the fact was due solely to fault or negligence of the injured or force majeure. Defects, breaks or failures of hunting weapons and their mechanisms or ammunition shall not be considered force majeure"* (Art. 2).

Under this angle, for all, the ruling of the Provincial Court of Málaga nº 106/2008, of February 25, Sec. 4th, López Fuentes resolves a hunting accident in which one of the hunters made up to two shots with his rifle in front of what he considered an animal and that, however, turned out to be a person who was crouching and who left badly wounded, being appreciated an unequal concurrence of blame in the production of damages. With quotation of abundant jurisprudence it declares its Legal Basis 2º that to the reckless action of making a shot without verifying that the objective is a hunting animal is added, in addition, the fact of being shot at a distance of 30 visual meters with a rifle of great caliber provided with a visor that, logically, approaches the field of vision and, with it, the object on which it shoots. Therefore, it is considered unjustifiable for an expert hunter such as the defendant and even

any other person who wields a rifle to shoot at such a short distance from the target without fully and undoubtedly verifying that it was a hunting animal it is indifferent that the wounded man was crouching or standing, being reprehensible the behavior for the simple fact of shooting on an object that is only identified as a «brown spot», so the fact of finding the victim stopped, crouching, walking or stop does not serve as an excuse to diminish or increase the negligence committed, because the slightest requirement of human prudence advises not to make any attempt at «something» about which one does not have the absolute certainty that it is an animal of hunting.

The same ruling highlights, with abundant jurisprudence, the failure of the defendant to respect the instructions received by the organizers and the applicable regulations (specifically, Art. 53.3 of D. 506/1971, of March 25), maintaining that the Compensation of guilt occurs when the cause of the damage and the victim are involved in the creation of the accident, with the degree of concurrence established and with the corresponding moderation of responsibility, but if there is no exclusive fault of the victim and is shared by the victim. The *quantum* must be distributed proportionally, being the moderation of responsibility prevented in Art. 1.103 CC discretionary power of the judge, not reviewable.

Regarding the reversal of the burden of proof in hunting accidents, this judgment reminds us of the relevance of liability for fault as the risk does not constitute the only reason for the obligation to repair the damage and although Spanish civil jurisprudence has evolved making objective civil liability said change is made moderately, recommending an inversion of the burden of proof and highlighting the required diligence, depending on the circumstances of the case, but without converting the risk into the sole basis of the obligation to compensate and without excluding so absolute the classic principle of culpability, so that these solutions are requested by the increase of dangerous activities proper to technological development and by the principle of putting in charge of those who obtain the benefit, compensation for the damages suffered. In summary, that the objectifying tendency of responsibility needs a conclusive proof regarding the nexus between the behavior of the agent and the production of the damage, in such a way that makes clear the guilt that obliges to repair it and this need for justification can not be invalidated by an application of risk theory, the objectification of responsibility or the reversal of the burden of proof.

4.5. Damages arising from Air Navigation: Law 48/1960, of 21 July, on Air Navigation incorporated into our system a series of modifications *"...as in matters of liability in the event of an accident, whose need was a manifest requirement, since the provisions of our Civil Code*

are already insufficient, which obliged us to contractually establish, for internal traffic, the compensation system of international traffic" (3rd paragraph of its preamble), which was specified in those Conventions ratified by our country such as the Convention for the unification of certain rules relating to air transport -signed in Warsaw on October 12, 1929 and amended in The Hague on September 28, 1955- or the Convention of Rome, October 7, 1952.

This law establishes -Arts. 115 to 125 of his Cap. XIII *"Responsibility in case of accident"*- quantitative limits to compensation for the liability regime that contemplates that the reason for compensation is based objectively on the accident or damage proceeding *"...up to the limits of liability that in this Chapter are established, in any case, even in the case of accidental accident and even when the carrier, operator or its employees justify that they acted with due diligence"* (Art. 120); However, such quantitative limits do not apply in the event that damages are caused by intent or gross negligence of the carrier, operator or their dependents in accordance with the provisions of the following precept, in which: *"... the carrier or The operator shall be liable for its own actions and those of its employees, and may not rely on the limits of liability set forth in this chapter, if it is proven that the damage is the result of an act or omission by you or your dependents, in that there is fraud or serious fault. In the case of employees, it must also be proven that they were working in the exercise of their duties".*

Actually, it must be understood that this rule is only in force with respect to damage caused to the goods and also to compensate *"...the damages caused to persons or to things that are found on the surface of the earth by action of the aircraft, in flight or on land, or as far as it is detached or thrown"* (Art. 119). It can also be applied to the damages caused by aircraft when they are not used for transportation, recognizing, also, *"...the right of the owners or occupants of the underlying assets to be repaid in accordance with Chapters IX and XIII of this Law, the Law 37/2003, of November 17, international treaties and Community Law, of the damages and losses caused to them as a consequence of their duty to support air navigation"* (Art. 4.1 of Law 48/1960).

Outside this area, the Convention for the unification of certain rules for international air transport, made in Montreal on May 28, 1999, must first be taken into account[34], applicable to

[34] Díaz Alabart, 2000, p. 207, calls the «Warsaw system» the one comprising the Warsaw Convention of 1929, the Hague Protocol of 1955, the Guadalajara Convention of 1961, the Protocol of Guatemala of 1971, the four Protocols of 1975 and the Montreal Convention of 1999.

"...all international transport of persons, baggage or cargo made on aircraft, in exchange for remuneration. It also applies to the free transport carried out on airplanes by an air transport company" (Art. 1), which establishes certain rules on liability, especially in its Cap. III entitled *"Liability of the carrier and measure of compensation for damage"* (Arts. 17 to 37). Secondly, the European Community signed the aforementioned Montreal Convention and, in order to adapt it to Community law, approved Regulation (EC) nº 2027/1997 of the Council, of October 9, 1997, on the Liability of Airline Companies regarding the air transport of passengers and their luggage[35] -modified by Regulation (EC) nº 889/2002 of the European Parliament and of the Council of 13 May 2002- thus obtaining a desirable legal uniformity in the matter, so that:

- For the international air transport of persons, baggage or cargo, the Montreal Convention ratified by Spain is applicable, being in force in our country since June 28, 2004, except for the two following extremes (Art. 57 of the Convention to which it refers remits the Instrument of Ratification of our State) so that such Convention will not be applied: *"...a) To international air transport carried out directly by Spain for non-commercial purposes with respect to its functions and obligations as a sovereign State; or b) The transportation of persons, cargo and luggage made for their military authorities in aircraft registered in Spain, or leased by Spain, and whose total capacity has been reserved by the Spanish authorities or on their behalf"*. The CL provided in Chap. III of the Agreement is, in general, of an objective nature as it is clear from its Art. 17: *"1. The carrier is liable for damage caused in the event of death or bodily injury to a passenger for the sole reason that the accident that caused the death or injury occurred on board the aircraft or during any of the boarding or disembarking operations. 2. The carrier is liable for damage caused in the event of destruction, loss or damage to checked baggage solely because the event causing the destruction, loss or damage occurred on board the aircraft or during any period during which the checked baggage was in the custody of the carrier. However, the carrier will not be liable to the extent that the damage is due to the nature, defect or vice of luggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage is due to his fault or that of his dependents or agents... "*.

- For air transport, both communal and internal, of persons and baggage, the Montreal Convention also applies, in essence, because the first precept of Regulation 2027/1997

[35] About this Community Regulation and the Montreal Convention see Díaz Alabart, 2000, pp. 220-224.

provides: *"This Regulation develops the relevant provisions of the Montreal Convention in relation to the air transport of passengers and their luggage and establishes certain complementary provisions. It also extends the application of those provisions to air transport within a Member State"*. However, the obligation of insurance also refers to Art. 3 of the Regulation, stating that *"The insurance obligation referred to in Article 7 of Regulation (EEC) No 2407/92 as regards liability for passengers implies that Community air carriers must be insured to an adequate level to ensure that all persons entitled to compensation receive the full amount to which they are entitled under this Regulation"*.

4.6. Nuclear damages: It establishes Law 25/1964, of April 29, on Nuclear Energy in paragraphs 9 and 10 of its preamble: *"... In anticipation of the future and upon accepting International Agreements on the subject, all Spanish companies must be admitted to Spanish law. aspects that refer to civil liability in the case of nuclear accidents, the coverage of the risk and the way to claim the compensation to which it may arise, providing the greatest possible legal protection to the injured party and favoring, on the other hand, the development of the nuclear industry ...The principle of strict liability has already been included in Spanish legislation in the field of occupational accidents, and that of limitation has already been admitted in air and maritime law when dealing with the responsibility of the owners of ships. These principles carry with them the regulation of the corresponding insurance, which must meet special conditions"*. This norm has been affected by Law 12/2011, of May 27, on civil liability for nuclear damage or produced by radioactive materials that repeals chapters VII (except for Art. 45 to which gives new diction) VIII, IX and X of Law 25/1964.

According to Art. 45 of Law 25/1964 *"The operator of a nuclear installation or a radioactive installation shall establish a financial guarantee for the coverage of civil liability derived from nuclear accidents involving nuclear substances, as well as accidents that produce the emission of ionizing radiations that involve radioactive materials that are not nuclear substances, under the conditions determined by the specific regulations on civil liability for nuclear damage"*, in a similar sense is pronounced Art. 12.1 of Law 12/2011 which symbolizes, precisely, such specific regulations dealing with regulating civil liability in this venue in accordance with the guidelines contained in both the Paris Convention of July 29, 1960, on civil liability in the field of nuclear energy as in the Brussels Convention of January 31, 1963, both amended in February 2004 and whose Protocols were ratified by Spain on November 18, 2005.

Pursuant to the first paragraph, section II of the preamble to Law 12/2011 *"... The Paris and Brussels Conventions establish as a fundamental principle the strict liability of the operator for nuclear damage caused as a result of an accident in a nuclear installation regardless of the cause of origin, within the limitations and in the conditions established therein. The Paris Convention determines the minimum mandatory liability that the operator must face, while the Brussels Convention establishes supplementary compensations, up to a certain limit, to compensate the victims or repair damages in case the damage exceeds the responsibility set for the first one".* The 2004 Protocols have retained the same compensation structure for nuclear damage, however, increasing the amounts of such compensation for each accident and installation.

The purpose of Law 12/2011, therefore, is to establish the regime for civil liability for nuclear damage, *"...without prejudice to the provisions of the Convention on Civil Liability in the field of nuclear energy of July 29, 1960, modified by the Protocols of January 28, 1964, November 16, 1982 and January 12, 2004 (hereinafter, the Paris Convention) and the Convention of January 31, 1963, supplementary to the previous one, modified by the Protocols of 28 January 1964, November 16, 1982 and January 12, 2004 (hereinafter, the Brussels Convention). The clauses contained in the aforementioned agreements will be directly applicable to nuclear facilities and transports of nuclear substances. 2. Likewise, Title II of this law establishes a specific civil liability regime for damages caused by accidents that cause the emission of ionizing radiation that may occur in the handling, storage and transportation of radioactive materials that are not nuclear substances"* (Art. 1).

The Art. 4 of Law 12/2011 establishes the principle of objective liability of the operator as follows: *"1. The operator of a nuclear installation shall be responsible for the nuclear damage defined in this law during the storage, transformation, handling, use in any form or transportation of nuclear substances. This responsibility shall be independent of the existence of fraud or fault, and shall be limited in its amount up to the limit indicated in this law. 2. When nuclear damage is caused jointly by a nuclear accident and by an accident of another nature, the damage caused by this second accident, insofar as it is not possible to separate it with certainty from the damage caused by the first accident, shall also be considered as damage under the responsibility of the operator for the purposes of the application of the previous section of this article. 3. If the responsibility for the nuclear damage falls on several operators, they shall be jointly and severally liable for the damage occurred up to the limit of coverage indicated..."*, nº 4 and 5 of such provision to quantitatively limit the responsibility of

the operator, according to the cases, whose amounts will be updated by the Government *"...when the international commitments make it necessary or when the passage of time or the variation of the consumer price index it advise to maintain the same level of coverage"* (Art. 4.6). The Art. 6 of this rule excludes certain damages by providing, in its ordinal 2nd, that if the operator proves that the nuclear damage is due, in whole or in part, *"...to the act or intentional omission or gross negligence of the person who suffered them, the competent jurisdictional body may exonerate the operator totally or partially from his responsibility towards that person"*. In conjunction with his Art. 15.1 the operator of the nuclear installation responds to the injured parties as follows:

1º.- In the case of personal injuries, for a period of 30 years computed since the nuclear accident.

2º.- In the case of any other nuclear damage, during a period of 10 years since the nuclear accident took place.

In any event, the action to demand compensation for damages caused by a nuclear accident prescribes 3 years from the moment the injured party became aware of the nuclear damage and the responsible operator or, as the case may be, from the moment in which it was due reasonably have knowledge of it. Those who deduct indemnification action within the previous periods *"...may make a complementary claim in the event that the damage is aggravated after these periods, and provided that no final judgment has been issued by the competent court"* (nº 2 and 3 of its Art. 15).

It is worth quoting the judgment of the Supreme Court nº 1/2002, of January 16, Civil Chamber, Villagómez Rodil issued (before Law 12/2011) within the framework of a claim for damages caused in a fish farm when the defendant uses the Tajo River to cool a nuclear power plant causing an increase in the temperature of the waters that caused the mass mortality of the trouts produced by the plaintiff. The Court considers that the origin of the damage was established, the causal relationship with the result produced is not presented as a probabilistic judgment, but true, without forgetting that the nuclear power plants represent in themselves a notorious risk that imposes the adoption of all the measures, even exceeding the regulations, to avoid that its operation is negative to people or things. Once the damage has occurred, the intensity of the serious risk acts in line with a quasi-objectification, imposing on the person responsible the justification that, in the exercise of the activity, even with the pertinent administrative authorizations, he acted with all diligence within his reach and even extreme.

the measures, which could well lead in this case to a decision to reduce production or to control it properly in the face of a serious ecological catastrophe, because in these cases we can not speak of excesses in the forecast, but rather of «imperative needs».

4.7. Damages for defective goods or services: It is collected in the Lib. III of the Consolidated Text of the General Law for the Defense of Consumers and Users and other complementary laws (TRLGDCU approved by RDLeg 1/2007, of November 16, Arts. 128 to 149) dealing with establishing the rules of application for personal or material damages suffered by consumers caused by previously purchased products (eg, those derived from the explosion of butane cylinders, bottles, mobile phone devices -smartphones even- or intoxications due to the intake of certain food products) or by services provided by deficient way (such as an unfortunate electrical or gas installation or an elevator in poor condition that leads to a loss) excluding those damages caused by permanent breach or inaccurate fulfillment of a contractual relationship that does not result in damage to the person or the goods for which the legal response is good, the general rules of CL (especially, the contractual of Art. 1101 CC) or the specific ones foreseen for other specific areas (purchase and sale, lease and its variants). Hence the Art. 128 TRLGDCU establishes that *"Every injured party has the right to be compensated under the terms established in this Book for the damages caused by the goods or services..."*, noting that the actions for such damages do not affect *"...other rights that the injured may have to be compensated for damages, including moral damages, as a consequence of contractual liability, based on the lack of conformity of the goods or services or any other cause of non-compliance or defective performance of the contract, or liability extracontractual to that place"*.

The mandatory regime established by this TRLGDCU covers personal injuries, including death, and material damages, provided that they affect goods or services objectively destined for private use or consumption and, in that regard, have been used mainly by the injured party then those damages caused to goods that are intended for business use (such as industrial machinery, a commercial premises or a computer purchased for a professional office) are excluded, as well as those derived from nuclear accidents that will be governed by their specific regulations (Art. 129) being, on the other hand, the possible clauses of exemption or limitation of CL (Art. 130) being ineffective establishing the joint and several liability of those responsible for the same damage against the injured parties, without prejudice to the right of repetition that assists the one who has effectively responded against *"...the other responsible, according to their participation in the causation of the damage"* (Art. 132). The

responsibility established in this area by the TRLGDCU is not reduced *"...when the damage is caused jointly by a defect of the good or service and by the intervention of a third party. However, the responsible party who has paid the compensation may claim from the third party the part corresponding to his intervention in the production of the damage"* (Art. 133).

It is appropriate to distinguish, therefore, the CL regime established for damages caused by products of the other one foreseen in the case of damages due to the provision of defective services:

1º.- Regarding damages caused by PRODUCTS, the general principle is established in Art. 135 TRLGDCU pursuant to which *"The producers shall be liable for the damages caused by the defects of the products that they respectively manufacture or import"*, understanding for these purposes as a whole product *"...movable good, even when it is joined or incorporated to another movable or immovable property, as well as gas and electricity*" (Art. 136), while defective product will be that which lacks *"...the security that could legitimately be expected, taking into account all the circumstances and, especially, its presentation, the reasonably foreseeable use of the same and the moment of its putting into circulation"* (Art. 137).

The CL for damages derived from such defective products is the responsibility of the producer who, in reality, covers various types of subjects that are: a) Manufacturer or importer in the EU of a finished product; b) Manufacturer or importer in the EU of any element integrated in a finished product, and c) Manufacturer or importer in the EU of a raw material. In the event that the producer can not be identified, it is equated, for liability purposes, to the *"...supplier of the product, unless, within a period of 3 months, it indicates to the damaged or damaged the identity of the producer or who had supplied or facilitated said product to him. The same rule shall apply in the case of an imported product, if the product does not indicate the name of the importer, even if the name of the manufacturer is indicated"* (Art. 138). In any case, the party damaged by the defective product must prove *"...the defect, the damage and the causal link between the two"* so that the damages are repaired (Art. 139), so that as no mention is made of the fault considers that the CL is objective. However, Art. 140 TRLGDCU includes certain causes for exemption, including the so-called «development risks», so that no liability can be assessed when *"...the state of the scientific and technical knowledge existing at the time of circulation did not allow the existence of the defect"*, nevertheless, this reason is prevented from invoking the person responsible in the cases of *"...medicines, food or food products intended for human consumption"*.

The quantitative limitation of the CL of the producer for damages caused by defective products is included in Art. 141 TRLGDCU setting a limitation period of 3 years for the exercise of the action aimed at repairing the damage that is computed from the date on which the injured party suffered *"...either by defect of the product or by the damage that said defect caused, provided that the person responsible for said damage is known. The action for which the indemnity was paid against all the other persons responsible for the damage shall expire after one year, from the date of payment of the compensation"* (Art. 143.1). Finally, it should be noted that, according to Art. 145 TRLGDCU, the responsibility of the producer can be reduced or even suppressed, depending on the circumstances of the case, when the damage obeys *"...together with a defect in the product and the fault of the injured party or of a person from whom the latter must respond civilly"* (Which refers, therefore, to article 1903 CC).

2º.- With regard to damages derived from defective services, we return, in principle, to the general rule of liability for fault, although incorporating a modification of the burden of proof by providing Art. 147 TRLGDCU that the service providers respond to the damages caused to the consumers except when they accredit *"...that they have complied with the established requirements and requirements and the other care and diligences required by the nature of the service"*. The following precept establishes, instead, a singular regime of CL, stating that it is also liable for damages originated in the correct use of the services when by their very nature, or because they are so established by regulation, they necessarily include the guarantee of determined levels of efficacy or safety, under objective conditions of determination, and involve technical, professional or systematic quality controls, until reaching the consumer and user in due conditions being expressly subject to this special regime of CL the services *"...health, repair and maintenance of household appliances, elevators and motor vehicles, rehabilitation services and repair of housing, services review, installation or similar gas and electricity and those relating to means of transport"* and also those who *"... build or sell housing , in the framework of a business activity, for the d years caused by defects in the home that are not covered by a specific legal regime"* (Art. 149 TRLGDCU).

So far the main provisions of CL contained in the TRLGDCU regarding defective products or services although it should be noted that numerous times the Spanish Supreme Court has resisted applying it when deciding on a possible CL for damages arising from products or services defective (as it was doing with the previous Law 26/1984, of July 19, General for the Defense of Consumers and Users and Law 22/1994, of July 6, on Civil Liability for Damage Caused by Products Defective, both now included in the current TRLGDCU) opting, in such

cases, for the application of jurisprudential doctrine built around risk. Until the aforementioned Judgment nº 185/2016, of March 18, declares that Art. 147 TRLGDCU «...must be applied with caution, in the absence of established jurisprudential doctrine» (repeatedly denying its possible application to the action of health professionals to declare their possible civil liability because then it would become objective, an extreme that rejects)[36].

As an example, Sentence nº 1200/2008, of December 16, Civil, Section 1, Salas Carceller issued as a result of an explosion produced in a building through which several floors collapsed, several of its occupants were injured and appeared one of them died among the rubble. As a result of the accident, the widow sued the butane gas supplier, her insurer and the distribution company of the cylinders that opposed, alleging lack of proof regarding the necessary causal link between the damage and the existence of an imputable action. The Supreme Court, without even mentioning the legal texts concerning the consumer, declares that the probative claim of the alleged perpetrators contradicts jurisprudence that develops the theory of risk or quasi-objective liability because, precisely, this theory is based on the fact that the injured origin of the damage -in this case the explosion of gas- is fulfilled its evidentiary burden to derive to whoever created the risk the burden of proving that the harmful result is not a consequence of its performance, but of the interference of strange elements such as the own action of the victim or force majeure. As a result, this Judgment points out two aspects of liability for risk: «…the first, that can only go to imputation titles of responsibility based on criteria other than the subjective, with the subsequent consequence in the procedural order of the investment of the burden of the test, in cases where there is a dangerous activity that involves a considerably abnormal risk in relation to the average standards; and the second, that, in any case, whatever the title of attribution of responsibility, it is necessary that the necessary causality is met, according to criteria of adequacy or efficiency, which makes possible the attribution of the damage». Therefore, no violation of Art. 1902 CC.

Finally, other legal cases that can be framed in risk liability, such as, for example, occupational accidents (the social jurisdictional order being competent -see Supreme Court Judgment of January 15, 2008, Civil)[37] except when the injured worker files a joint claim with

[36] De las Heras, 2017, pp. 308-309. However, from the diction of the precept itself it is observed that this general regime of civil liability is not objective, but subjective but with reversal of the burden of proof.

[37] Establishing the article 4:202 PETL (titled «Enterprise Liability»): "*(1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has*

his employer and another company with which he has no employment relationship (Judgment of the Supreme Court of April 23, 2009, Civil); the so-called «patrimonial responsibility of the Administration»[38] (which is the CL of the Administration now regulated by Law 39/2015, of October 1, of the Common Administrative Procedure of the Public Administrations in relation to Law 40/2015, of October 1, of the Legal Regime of the Public Sector, being a responsibility of an objective, direct nature, ascribing its competence expressly to the jurisdictional contentious-administrative order) or the derivative of vices or constructive defects (Art. 1591 CC and Law 38/1999, of November 5, on Building Regulation).

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conformed to the required standard of conduct. (2) "Defect" is any deviation from standards that are reasonably to be expected from the enterprise or from its products or services".

[38] In this regard, Roca Guillamón, 2000, pp. 489-530. About the competent jurisdictional order can also be consulted De las Heras, 2006, pp. 205-242.

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