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DAMAGE CLAIMS BETWEEN FAMILY MEMBERS IN SPANISH CASE LAW



GIUFFRÈ EDITORE

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Damage claims between family members in Spanish case law

Il diritto spagnolo, rispetto al diritto italiano, si trova ancora in una fase evolutiva iniziale in tema di azioni di responsabilità civile fra membri della stessa famiglia. È altrettanto vero, però, che i tribunali territoriali, poco a poco, hanno intrapreso a pronunciare sentenze che esplicitamente ammettono questo tipo di responsabilità e il medesimo Tribunale Supremo spagnolo, in qualche occasione, ha riconosciuto ipotesi di responsabilità civile all'interno della famiglia, sia pure con alcune cautele. La riflessione prosegue rimarcando l'importanza di una indagine che si soffermi ad analizzare in dettaglio i casi giurisprudenziali più significativi in questa materia, in modo da evidenziare le regole giuridiche e i criteri di risoluzione dei conflitti applicati dalla giurisprudenza.

In relation to damage claims between family members, it could be considered that Spanish Law is not quite as evolved as Italian Law. Nevertheless, numerous Spanish appeal courts are gradually allowing the procedure of such a claim. In addition, the Spanish Supreme Court has also admitted them too, on occasions. However, this has not been without certain reservations. Finally, I would like to emphasize that the analysis of Spanish case law may be useful and interesting for the purpose of carrying out further research on this matter.

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1. - Introduction.

The Spanish Civil Code (SCC) does not expressly regulate claims of damage between family members. Notwithstanding this statement, the SCC contemplates some absolutely exceptional cases. One such example is the pension in divorce or separation, which operates under art. 97 SCC and occurs as a result of economic imbalance caused by marital breakdown. It is the civil responsibility of the parents in question to compensate for the loss or damage of a child's asset under their administration, due to either fraud or gross negligence under art. 168 SCC. In addition to this, the court can remove parental authority in cases of breach of duty which had been imposed by parental authority under art. 170 CC. Such a decision would allow a child to disinherit their parents under arts. 854.1 and 855.2 SCC¹. Traditionally in tort law, the family sphere was excluded, with the only exception to the general criterion of this rule being when damage was caused as a result of an offence.

In 1999, Sr. D. Alfonso Barcala y Trillo-Figueroa of the Spanish Supreme Court passed two judgments on this matter, which are the decisions of the 22nd and 30th of July 1999². The judgments in question dealt with a breach of conjugal duties, in which the plaintiffs claimed compensation from their spouses after the breakdown of their marriage, claiming moral (non-material) and material damages on the grounds that the children of their

¹ A. RODRIGUEZ GUTIÁN, *Responsabilidad civil en el Derecho de familia: Especial referencia al ámbito de las relaciones paterno-filiales*, Navarra, 2009, 19-21.

Most notable legal doctrine in this matter: A. RODRIGUEZ GUTIÁN, *Responsabilidad civil*, cit., M.A. NOVALES ALQUÉZAR, *Las obligaciones personales del matrimonio en el Derecho comparado*, Madrid, 2009. A.M. ROMERO COLOMA, *Reclamaciones e indemnizaciones entre familiares en el marco de la responsabilidad civil*, Barcelona, 2009; M. MARTÍN-CASALS-J. RIBOT, *Daños en el Derecho de familia: un paso adelante, dos atrás, ADC*, tomo LXIV, 2011, fasc. II, 504-561.

² Spanish Supreme Court (STS-SSC) Judgment of 22nd July 1999. Reporting judge: Sr. D. Alfonso Barcala y Trillo-Figueroa RJ 1999/5721.

Spanish Supreme Court (STS-SSC) Judgment of 30th July 1999. Reporting judge: Sr. D. Alfonso Barcala y Trillo-Figueroa RJ 1999/5726.

wives were not their biological children. In this case, a relevant circumstance was that both fathers had been paying maintenance before and after the divorce. Consequently, the court decided on both occasions that the breach of conjugal duties did not allow claims for compensation to succeed, on the basis that «any disturbance of matrimonial life would give rise to liability for damages» (July 30th 1999). The latter ruling states that: «the breach of the marital obligations contained in arts. 67 and 69 of the Spanish Civil Code deserves an ethical and social reproach», which leads us to think that the Supreme Court excluded the possibility of a legal reproach. There is another argument in support of the view of these decisions; the preservation of family peace. In this sense, it has been said that immunity protects family peace and on the contrary admitting claims between family members decreases family harmony.

In this regard, Rodríguez Guitián ³ said that the principle of family harmony cannot exclude the possibility of any action or claim related to damages caused within the family. Guitián believes that certain conducts of family members deserve a legal sanction, and that it is not appropriate to establish a paternalistic criterion in order to rule family relationships. Why should the members of a family not legally protect their relations? However, this author affirms that the principle of family harmony is useful in order to limit the cases which could deserve compensation in this context.

Fifteen years ago Professor Roca i Trias wrote that these decisions maintained the traditional vision that excluded compensation for damages between family members, but she underlined that such a legal structure may soon collapse ⁴. The effect of these two rulings on the Spanish doctrine is worth noting. It could be said that they were the detonators of a renewed interest in the study of this type of claim ⁵.

³ A. RODRIGUEZ GUITIÁN, *Responsabilidad civil*, cit., 87-88.

⁴ E. ROCA I TRIAS, *La responsabilidad civil en el Derecho de familia. Venturas y desventuras de cónyuges, padres e hijos en el mundo de la responsabilidad civil*, in J.A. MORENO MARTINEZ, *Perfiles de la responsabilidad civil en el nuevo milenio*, Madrid, 2000, 533.

⁵ J. FERRER I RIBA, *Relaciones familiares y límites del derecho de daños*, in *InDret*, 04/2001, October 2001, 14 (1-21). The complete text is available on www.indret.com/es/?ed=20, and E. ROCA I TRIAS, *La responsabilidad civil*, 2000, 537-554.

2. - Why was the family sphere traditionally excluded from tort law?

The family sphere was originally excluded from tort law due to the standard of morality that prevents a lawsuit from being filed between family members⁶. Also, in the family sphere, several ties of solidarity exist which imposes a duty of altruism, tolerance and forbearance between family members. These ties prevent them from litigating each other to claim for compensation of damages. The exceptions to this occur when damages are covered by insurance, in cases of matrimonial crisis and when the damage is caused by an offence.

Another reason the family sphere is excluded is due to the patriarchal family model⁷. The “pater familias” was a legislator (a judge) and was responsible for damages that the family members could cause to third parties. It is also worth noting the reasons why the Spanish Supreme Court has followed the traditional immunity from damages between family members. It is a principle implicitly established by the Spanish Civil Code and it requires exclusive application of family law norms to solve conflicts between families. Furthermore, they follow the traditional immunity because of the danger of the proliferation (explosion) of trivial complaints and the increase in family conflicts⁸.

One notable exception, however, is in the field of private insurance, where these types of claims are normal when damages are covered by an insurance policy. Equally, in the case of criminal offences this exception also applies⁹.

Nevertheless the process of the emancipation of the person and the growing individualism in Western society have determined that this immunity is to be increasingly questioned¹⁰. Today a family interest cannot prevail over the individual interest of the members of the family when a funda-

⁶ The same argument that has been suggested in Italy by S. PATTI, *Famiglia e responsabilità civile*, Milano, 1984, 67.

⁷ See in this respect, L. DIEZ-PICAZO, *Familia y Derecho*, Madrid, 1984, 74-75; and the prologue of the book of E. ROCA I TRIAS, *Familia y Cambio Social* (De la “casa” a la persona”), in *Cuadernos Cívitas*, 1999, 22.

⁸ A. RODRIGUEZ GUTIÁN, *Responsabilidad civil*, cit., 33-116

⁹ J. FERRER I RIBA, *Relaciones familiares*, cit., 3.

¹⁰ M.C. REGAN JR., *Alone together (Law and the meanings of marriage)*, Oxford, 1999, 15-22.

mental right is affected ¹¹. In fact the law protects the family because this institution is considered as a suitable and natural channel to develop the rights of the individuals ¹². Within this new context the autonomy of will is being empowered and therefore, the traditional inhibition of the liability of family members is undermined ¹³.

3. - Provincial courts decisions.

In accordance with this new insight into family relations, and after said judgments on the 22nd and 30th July 1999 by the Spanish Supreme Court, some provincial courts have set aside the traditional criterion and have assumed the new role given to the family relations by this modern way to understand the family ¹⁴.

For instance, the *judgments on the 2nd November 2004* ¹⁵ and *5th September 2007* ¹⁶ (*the Provincial Court of Valencia*) and those dated on the *16th January*

¹¹ E. ROCA I TRIAS has written in *Familia y cambio*, cit., 75-76, that today every member of a family has to be considered in first place as a person. This means that he cannot be constrained to sacrifice his fundamental rights to the interest of the family or the other members of the family. A. RODRIGUEZ GUTIÁN, in *Responsabilidad civil*, cit., 69, adds that the Spanish Constitution does not put the family in a prevailing situation.

¹² J.M. TORRES PEREA, *El interés del menor y derecho de familia. Una perspectiva multidisciplinar*, Madrid, 2009, 31-41.

¹³ Likewise, the Common Law has evolved considerably over the past century. From a defined original position based on the interspousal immunity as a consequence of the so called "marital unity" what it was considered an exception to the general rules of torts in order to protect the "domestic relations", has been reached the current position which does not admit this class of immunity, especially after the Law reform Husband and Wife Act of 1962. However, now has the judge a great deal of discretion in order to admit these types of claims to avoid trivial complaints. N. LOWE-G. DOUGLAS, *Bromley's Family Law*, 9^a ed. Butterworths, London-Edinburgh-Dublin, 1998, 63-64.

¹⁴ It should be pointed out the delayed start of doctrinal debate regarding this issue in Spain. In Italy, the possibility of claims between family members has been discussed and debated since the 1950's. It should be remembered the famous ruling of the Court of Piacenza of 31st July 1950, which declared the right of a son to receive compensation from his father for the transmission of syphilis in the moment of his conception (FI, 1951, I, 987-991).

¹⁵ Judgment of the Appeals Court of Valencia (Sentencia de la Audiencia Provincial de Valencia) 11 November 2004. Reporting judge: Sra. María del Carmen Escrig Orenga (AC/2004/1994).

¹⁶ Judgment of the Appeals Court of Valencia (Sentencia de la Audiencia Provincial de Valencia) 5 September 2007. Reporting Judge: Sra. Pilar Cerdán Villalba (JUR 2007/340366).

2007¹⁷ (the Provincial Court of Barcelona) and the 2nd January 2007¹⁸ (the Provincial Court of León), show that the Courts are willing to award damages for non-material loss (moral damages). In the decisions of the Courts of Valencia and León, it was held that the wives in question had knowingly withheld information from their husbands and did not inform them that they were not the biological parents of the children. The Courts held that infidelity does not produce legal consequences, and that the liability stems from hiding information. In addition, it should be noted that the decision of the Provincial Court of Valencia (2nd November 2004) declared the mother and biological father *jointly and severally liable*, due to the fact he was the accomplice of the wife. The judgment ordered compensation to be paid for moral damages, but not for the material ones¹⁹. In contrast, a German case established that these kind of duties are the spouses' sole responsibility, and it is not possible to demand any liability for damages to third parties (*Ehestörer*).

With regard to the decision of 5th September 2007 of the Provincial Court of Valencia, Professor Díez-Picazo²⁰ affirms that in these cases the reason for the claim is not certain. It could be infidelity, the hiding of the truth or the fact that the husband had to discover the truth at a later date. He admits that this situation could cause the husband to suffer with severe depression, but he believes that such damage is unlikely to be compensated, because from his point of view is not possible to apply the rules of torts to the marital relations. In his opinion the only applicable regulation is the one which rules the marriage.

There are other judgments held on the previous doctrine. For example the

¹⁷ Judgment of the Appeals Court of Barcelona (Sentencia de la Audiencia Provincial de Barcelona) 16 January 2007. Reporting Judge: Sra. María Dolores Viñas Maestre (JUR/2007/323682).

¹⁸ Sentencia de la Audiencia Provincial de León de 2 de enero de 2007. Reporting Judge: D Alberto Francisco Álvarez Rodríguez (JUR 2007/59972).

¹⁹ M.T. MARÍN GARCÍA DE LEONARDO, *Séparación y divorcio sin causa. Situación de los daños personales*, in *RDPat.* N.16, 2006, 157, affirms that in these cases there are two types of different liabilities. One, the moral and material damages which suffer the husband; the other, damages caused to the son who ignores his biological information and believes that the husband of his mother is his father.

²⁰ L. DIEZ-PICAZO, *El escándalo del daño moral*, in *Thomson Civitas*, 2008, 46.

decision of the Provincial Court of Cádiz (3rd April 2008 ²¹) ordered the ex-wife, who had hidden the true paternity, to compensate her ex-husband for damages. Another example is the decision of the Provincial Court of Murcia (18th November 2009 ²²) in which the court ordered the ex-wife to compensate for moral and material damages. In this case, the ruling was that the *starting date for counting the one-year period to exercise the action* for non-contractual damages, was not the day in which the ex-husband discovered he was not the biological father, but *the date in which the judgment that had recognised the paternal denial action as being final and definitive*. On the other hand, the decision of the Province Court of Barcelona (31st October 2008 ²³) dismissed the action brought about by the ex-husband. The grounds for the ruling was that it could not be proved that the ex-wife had acted with intent or deception, it was considered that she had only known the facts following the biological test.

Farnós Amorós considers that these judgments, especially the ruling of the Provincial Court of Valencia 2nd November 2004, were made to compensate partly as a result of the existence of previous infidelity, which may be incorrect. On the other hand, she adds that the option to compensate moral damages could cover an alibi to avoid justifying the amount of the compensation. Finally, she maintains that the rule of law requires that in these types of claims, based on the fact that the wife had hidden the real paternity of her child, the compensation and the scope of such claims should only reach the repayment of the alimony. Moreover she affirms that compensation could be admitted as a consequence of an unjust enrichment applying the rules of the law of torts ²⁴.

²¹ Judgment of the Appeals Court of Cádiz. (Sentencia de la Audiencia Provincial de Cádiz) 3 April 2008. Reporting judge: Sr. D Antonio Marín Fernández. (JUR/2008/234675).

²² Judgment of the Appeals Court of Murcia (Sentencia de la Audiencia Provincial de Murcia) 18 November 2009. Reporting Judge: D José Manuel Nicolás Manzanares (AC 2010/60).

²³ Judgment of the Appeals Court of Barcelona (Sentencia de la Audiencia Provincial de Barcelona) 31 October 2008. Reporting Judge: D Francisco Javier Pereda Gámez. (AC 2009/93).

²⁴ E. FARNÓS AMORÓS, *El precio de ocultar la paternidad*, in *Indret*, 2/2005, 279, May 2005, 11. It can be viewed online at www.indret.com/pdf/279_es.pdf.

4. - Judgments of the Spanish supreme court (SSC) on this matter in recent years.

One could also look at the judgments of the Spanish Supreme Court (SSC) on this matter in recent years. SSC Judgment of (30th June 2009²⁵) ordered damages, however the SSC Judgment (14th July 2010²⁶) and SSC Judgment of (18th June 2012²⁷) did not go to the heart of the matter because it maintained that the legal action regarding this matter had been time-barred.

4.1. - Judgment of the Spanish Supreme Court of 30th June 2009.

A massive SSC judgment on this matter occurred on the 30th June 2009. The facts are as follows: Don Paulino and Doña Remedios were partners living together. They had a son in 1982, with Paulino being recognised as his legal father. In 1991 the mother became a member of the Church of Scientology, and on 23rd August of that year she moved with her 9-year son from Spain to Florida. Soon after, custody was awarded to the father by a Spanish Court. He then moved to Florida in order to implement the Spanish ruling there. After two years of judicial disputes, and having spent all his available economic resources, he returned to Spain without any real progress. When the son turned 18, he declared that he did not want to see Paulino and that he did not recognise him as his father. Paulino alleged that his son had suffered “*parental alienation*” and sued Remedios and the Church of Scientology, requesting compensation for all moral damage caused by the loss of his son. Paulino brought proceedings in tort claiming for 210.354 euros.

The lower Spanish Court (First Instance Court) dismissed the action brought by Paulino on the grounds that the legal action regarding this matter had been time-barred. He filed an appeal to the Provincial Court of

²⁵ Spanish Supreme Court Judgment (STS-SCC) 30 June 2009. Reporting Judge: Sra. Encarnación Roca Trías. (RJ 2009/5490).

²⁶ Spanish Supreme Court Judgment (STS-SCC) 14 July 2010. Reporting Judge: Sr. Francisco Marín Castán. (RJ 2010/5152).

²⁷ Spanish Supreme Court Judgment (STS-SCC) 18 June 2012. Reporting Judge: Sr. José Antonio Seijas Quintana (RJ 2012/6849).

Madrid, which affirmed the ruling of the lower court. Then, Paulino appealed to the Spanish Supreme Court, who upheld the appeal and held the plaintiff had the right to claim. The SSC ordered Remedios to pay 60.000 euros compensation for moral damages, but acquitted the co-defendant, the Church of Scientology. The principle established here was that the non-contractual action had not been time-barred because it was a case of ongoing damage. The *starting date for counting the one-year period to exercise the action* for non-contractual damages was the day in which the son turned 18. This was because until that date the mother had continued preventing the father from seeing his son ²⁸.

Nevertheless, most Spanish scholars believe that in relation to the judgment of the Spanish Supreme Court of the 30th June 2009 it could be possible to claim for criminal liability. Therefore, a case of civil liability could derive from the offence ²⁹. They added that in other rulings the Spanish Supreme Court does not admit to this kind of liability because the evolution of family law is against this type of sanction. In fact, the amendment of the Spanish Civil Code in 2005 means that today, either spouse is free to break the marriage link and claim for divorce ³⁰. It is indeed, no longer necessary to base a party's request on a concrete cause or reason. Consequently, the interest to continue the marriage or to fulfill the rules of marriage has been affected by the new family model. Therefore, if the new family law does not penalise the spouse for such marital breaches (infidel-

²⁸ Additionally, it could be of interest to refer to the growing number of cases in which the Spanish Courts decide to compensate the biological parents for the loss of their child. I mean the cases in which the parent has been awarded parental responsibility and custody of the child by a court decision, it is impossible to execute such a ruling. I refer to the cases when the State separates the child as dependent and gives him to a foster family and afterwards a judge revokes the said decision. However having lived with the foster family for a substantial period of time the judge may rule that it is in the best interest of the child to keep him with this second family. To cite but one example I refer to the order of the Province Court of Seville of 30th December 2005 (Sixth Chamber) Reporting Judge: Ruperto Molina Vázquez. I highly recommend you read this article: "Indemnización por la privación indebida de la compañía de los hijos", by M.Á. ROIG DAVISON, in *InDret*, 2/2006, 333, 1-12. It is available at www.indret.com/pdf/333_es.pdf.

²⁹ C. GONZÁLEZ BEILFUSS-M. NAVARRO MICHEL, *Sustracción internacional de menores y responsabilidad civil*, in *RJC* 109, 2010, 805-831, (footnote 62) 821 and following.

³⁰ Art. 86 of the Spanish Civil Code establishes that divorce will be finalised when the requisites required in article 81 are met. The circumstances occur upon the petition of just one of the spouses, once three months have lapsed from the celebration of the marriage. The Spanish law does not establish any other requirements.

ity is no longer a cause to ask for divorce), is it logic to penalise this conduct through tort law?

If fact, outstanding scholars like Salvador and Ruiz hold that as marriage is currently understood as a link founded and maintained on a voluntary basis, the spousal duties are therefore not enforceable. This idea can be considered as the most prominent legal principle governing marital relationships³¹.

Martin-Casals and Ribot³² affirmed that the above-mentioned decisions of the Appeal Courts are wrong when they distinguish between wives acting in good faith and wives acting in bad faith. It is said, that when the spouse decides to hide the real biological paternity, the “legal father” can sue for compensation, but when she does not know the biological reality, he should not be entitled to do so. In fact, this argument is considered to be artificial. In any case, the claim for damages would be based on the infidelity of the spouse, and as it has been said, the modern family law does not permit compensating for infidelity. In this respect, in a year as early as 2001 Ferrer wrote: «the admission of compensation for damages on account of adultery or breach of other duties that spouses owe each other [...] distorts that legal principle, which has earned a high level of consensus among judges and scholars, and reintroduces, through the back door, a fault-based system of separation or divorce, increasing the strain in marriage crises»³³. It is not coherent to reintroduce into the matrimonial proceeding the proof and analysis of trivial facts that time ago, were sidelined.

4.2. - The decisions of the Spanish Supreme Court of 14th July 2010 and 18th June 2012.

These two rulings do not go to the heart of the matter, because it was

³¹ P. SALVADOR CODERCH-J.A. RUIZ GARCÍA, (2000b), *Comentari a l'art. 1 del Codi de família*, in J. EGEA FERNÁNDEZ-J. FERRER RIBA (directo da), *Comentaris al Codi de família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua*, Madrid, 43-66, P.63.

³² M. MARTIN CASALS-J. RIBOT IGUALADA, *Daños en Derecho de familia*, cit., 503-561; 557-558.

³³ J. FERRER I RIBA, *Relaciones familiares*, cit., 1-21; 14. This article is available at www.indret.com/pdf/065_es.pdf.

maintained that the legal action regarding this matter had been time-barred.

A second important judgment occurred on the 14th July 2010. On the 29th June 1973, the plaintiff and the defendant got married and they had a daughter, Beatriz, in 1984. They separated in 2001. In 2003 the ex-wife brought a paternity denial action, and *the Court declared that Beatriz was not the daughter of the plaintiff*. Soon after the husband filed for divorce against his wife, he also filed for custody of his other son and demanding the withdrawal of Beatriz's pension and maintenance. In 2004, the ex-husband demanded the withdrawal of his wife's economic imbalance pension, who had began a relationship with another partner. In 2005 the ex-husband sued his ex-wife claiming non-contractual damages for different reasons. The first of these reasons was moral damage, due to the loss of the daughter. The second was moral damage due to psychological scars caused by the divorce and to the prejudice to his reputation and honor due to the infidelity. The third claim was for material damage and the claim of unjustified enrichment, due to the fact he had fed a person he thought was his daughter.

The First Instance Court dismissed the action brought by the plaintiff on the grounds that the one-year non-contractual action had been time-barred (*art. 1902 Spanish Civil Code*). The plaintiff filed an appeal alleging that it was a case of on-going damage, that it had began in 2001 (moment of the separation) and would have continued until 2005. In addition it was said the time in which the plaintiff gained knowledge he suffered long-term medical effects and consequences of the damage suffered by the ex-husband, as a medical certificate of 2005 proved. Also, in 2006, the Provincial Court of Cáceres affirmed that in spite of the fact that it was a case of on-going damage the action had been time-barred. The Plaintiff appealed, and the Supreme Court dismissed the action that he had brought. Contrary to the former SSC judgment, this time the Supreme Court upheld that it was not a case of on-going damage (*daño continuado*), but a case of lasting harm (*daño duradero o permanente*), which had been produced at a particular time and had ended in the moment of the marital separation. The SSC said that in this case the starting date of the one-year period to exercise the non-contractual action was the moment in which

the Plaintiff should reasonably have become aware of the damage and could calculate and foresee its consequences. Therefore, it was decided that the action had been time-barred.

Scholar Rodriguez Guitián ³⁴ considers that this lawsuit was wrongly argued. Her reasoning is that the Plaintiff had claimed compensation for moral damages due to the psychological scars caused by the divorce and to the prejudice to his reputation and honor due to the infidelity. She also argues that the lawsuit ought to have been based on compensation for damage caused by the discovery of the real paternity of the child. The date of notification of judgment declaring the real paternity was 27th March 2003, and the Plaintiff filed the lawsuit in 2005. Consequently the one-year period action had been time-barred.

In conclusion, it appears that the SSC Judgment does not go to the heart of the matter, because it maintains that the legal action regarding this matter had been time-barred. Therefore, this decision does not refer to what the necessary requirements are to admit liability in the familiar sphere.

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Finally, the SSC Judgment of 18th June 2012 concluded that a case of infidelity and hiding of the real paternity of a child did not go to the heart of the matter, because it was maintained that the legal action regarding this matter had been time-barred. In this case, the plaintiff did not claim compensation of damages for infidelity, but for damage caused by the discovery of the real paternity of the two daughters of his ex-wife, that he thought were his biological daughters. However, the SSC considered that the starting date for counting the one-year period to exercise the non-contractual liability action to claim compensation for moral damages was not the date of notification of judgment declaring the real paternity. The Court upheld that in order to establish the “*dies a quo*”, it was necessary to take into account the moment in which the ex-wife sued for divorce against her husband and (as a result of the deception and infidelity) moved with the girls into the apartment of the biological father. This is what caused the severe depression. Consequently the SSC affirmed that the date for counting the one-year period was the date of the medical certifi-

³⁴ A. RODRIGUEZ GUITIÁN, Lecture at the UNIA Univesity (Málaga) on 27th of January 2014.

cate, which informed people of the severe depression suffered by the ex-husband. This date was the 16th October 2006, and the date in which the Plaintiff filed the lawsuit was 18th December 2007. Therefore, the SSC upheld that the legal action had been time-barred.

5. - Conclusion.

Indrawing conclusions regarding this topic of law, it seems apt to assume that The Spanish Supreme Court has affirmed that infidelity is not compensable. It also seems that what may be compensable is the moral damage caused by the loss of a child. This occurs especially in cases of parental alienation, due to the actions of the mother who has continued preventing the father from seeing his child. The SSC did not get to the heart of the matter in the other cases, because it maintained that the legal action regarding this matter had been time-barred (loss of a child when the husband discovered that he is not the real biological father). Furthermore, the Spanish Supreme Court upheld that these claims between family members are cases of non-contractual liability and that the decisions in 2010 and 2012 take restrictive views with regards the calculation of the limitation period to bring the non-contractual action for damages.

Regarding Spanish Scholars, some part of Spanish legal doctrine sharply criticises the decision of the SSC from the 30th June 2009. Other scholars consider that the compensation for damages on the grounds of breaching conjugal duties cannot mean the recuperation of the concept “divorce-sanction”. Consequently, it would only be possible for compensation in the case of a breach of fundamental rights³⁵. However, there is another doctrine which justifies the award of compensation to the pain caused by the loss of a loved one (caused for instance by parental alienation or the finding that the plaintiff is not the real biological father). From this perspective, the infidelity could give rise to claims for damage in some special

³⁵ L. LÓPEZ DE LA CRUZ, *El resarcimiento del daño moral ocasionado por el incumplimiento de los deberes conyugales*, in *InDret*, 4/2010, 35. This text is available at www.indret.com/pdf/783_es.pdf.

cases, depending on the reiteration, deception and consequences, especially when the real paternity is consciously hidden³⁶.

Nevertheless, most Spanish scholars agree that infidelity should not lead to compensation for damages. Some authors, such as Martin-Casals and Ribot go even further by denying compensation in case of malicious concealment of the true paternity. As already stated, they believe that in any case, the claim for damages would be based on the infidelity of the spouse, and as modern family law does not accept compensation for the infidelity, discovering the truth shall not give rise to any compensation³⁷. However in spite of the new conception of the social reality impeding these types of claims between family members based on infidelity, and the fact that the State is evolving to a more neutral position in respect of families, so as to not to interfere in the marital life, I think it is likely that this view would change with respect to cases where one of the spouses had acted purposely in bad faith³⁸. In this case the reason to sue is not the infidelity, but the fact to have deliberately hidden the real paternity of the child. Immunity for tortious acts should not be admissible. Nevertheless, the rule of law demands the approach to be very rigorous when admitting these complaints, which should be limited and treated as exceptional cases³⁹.

In conclusion, there is no longer a general immunity in this matter.

³⁶ M.d.P. ALVAREZ OLALLA, *Prescripción de la acción ejercitada por el marido contra su ex mujer por daños sufridos al determinarse judicialmente la filiación extramatrimonial de una hija, previamente inscrita como matrimonial*, in *Aranzadi Civil*, 9/2010, (BIB 2010/2878), 5. M.L. ATIENZA NAVARRO, goes ever further in *La responsabilidad civil de los padres por las enfermedades o malformaciones con que nacen sus hijos en el ámbito de la procreación natural*, in J.R. VERDA BEAMONTE, *La responsabilidad civil en el ámbito de las relaciones familiares*, Navarra, 2012, 47-74. Sometimes, it has been considered that the children would be entitled to sue their parents for compensation in case of lack of love, but most of the Spanish literature refuse such an option, for example: A. RODRIGUEZ GUTIÁN, *Responsabilidad civil*, cit., 156. A.M. ROMERO COLOMA, *Reclamaciones e indemnizaciones*, cit., 2451, consider that only in case of strong moral pain could be possible to compensate the lack of affection.

M.A. NOVALES ALQUÉZAR, *Las obligaciones personales del matrimonio*, cit., 211 try to objectify the marital liability and propone to adopt a scale of damages to be compensate (baremo de daños).

³⁷ M. MARTIN CASALS-J. RIBOT IGUALADA, *Daños en Derecho de familia*, cit., 557-558.

³⁸ The opinion of A. RODRIGUEZ GUTIÁN, *Responsabilidad civil*, cit., 173. She believes that in order to be liable the mother has to act intentionally or gross negligently. This means that she deliberately lies about the real paternity of her son or daughter, or she is silent whilst withholding suspicion that her husband is not the biological father.

³⁹ E. FARNÓS AMORÓS, (*El precio de ocultar la paternidad*, cit., 11) believes that it ought to be reduced the admissibility of such claims to the repayment of alimony.

Nevertheless this does not imply that each claim between family members will be successful. The modern concept of family and the respect to the right of each spouse to decide freely his divorce or separation determines that the possibilities to claim for compensation are rather limited. Moreover, I would argue that we are currently in a period of obsession with the biological nature of the parenthood. The affection for a father can be independent of the blood-bond, for example in the case of an adoptive parent. Therefore, the circumstances of each case should be very carefully inspected by the judge and what should not be appropriate is to identify these cases with the death of a son.

Furthermore, it is said that the relationships of coexistence and interaction among relatives require a level of relaxation, distraction and well-being that are totally incompatible with the demand for a high degree of due diligence ⁴⁰. In other words, family members have the right to live in a certain relaxed manner, and it is blatantly obvious that such a fact protects them from being sued on the grounds of having acted with a lack of a certain level of diligence ⁴¹. Ferrer i Riba has declared that, for example, Courts should be prevented from having the option to punish parents for occasionally lack of attention ⁴².

⁴⁰ A. WACKE, *Münchener Kommentar zur BGB* (§§1353, 1359, Band 7, Familienrecht I, Beck, München, 2000, 273.

⁴¹ This was the view taken by the Spanish Supreme Court in the decision of 17 of July of 2007. Reporting Judge: Francisco Marín Castán (RJ 2007\4895). In this case the Province Court of Valencia had issued a judgment dated 6th April 2000, reporting judge: Vicente Ortega Llorca (JUR 2000\155734), in favour of the party who brought the action. Consequently, the defendant, an insurance company, was ordered to pay damages to the plaintiff (25.800 euros). The facts were as following: María de los Milagros was invited by his friends Jesús María and Araceli to visit their apartment. Just as she entered the apartment, she decided on her own to go through a dark passage where she tripped over a wheeled toy and twisted her knee badly, resulting in her being severely injured. The insurance company appealed this decision, and the Spanish Supreme Court overturned the Province Court's ruling. In essence it held that the conduct of the plaintiff revealed the trust and confidence that the hosts had shown in her, and she in the hosts. Therefore, the Supreme Court decided that in this case the hosts could not be required to have a high level of diligence, stating that: «Not all situations entailing risk deserve compensation, especially when it comes within normal people's behavior in the family context».

In such cases the *culpa leve* is exonerated, therefore the tortfeasor is only responsible for fraud, willful misconduct and gross negligence.

⁴² J. FERRER I RIBA, *Relaciones familiares y límites de Derecho de Daños*, in A. CABANILLAS SÁNCHEZ (coordinated by), *Estudios Jurídicos en Homenaje al Profesor Luis Díez-Picazo*, tomo II, Madrid, 2003, 1849.