



CIVIL LIABILITY IN THE FIELD OF FAMILY LAW IN EU, ESPECIALLY , CONCEALMENT OF PATERNITY

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Crossover of tort law and family law in *Civil law* versus *Common law*. EVOLUTION

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INTRODUCTION

Crossover **FAMILY LAW AND TORT LAW IN EUROPE**



A particularly attractive and evolving subject in constant evolution (intrafamily torts).

It is not only sociologically but also legally challenging (Rodríguez Pineau, G).

PREVIOUS IDEAS

1

EU FAMILY LAW

Family law is the **competence of EU countries**, and EU rules apply only in cross-border cases..

The principles of European family law (CEFL) are noteworthy, although these principles are still only recommendations..

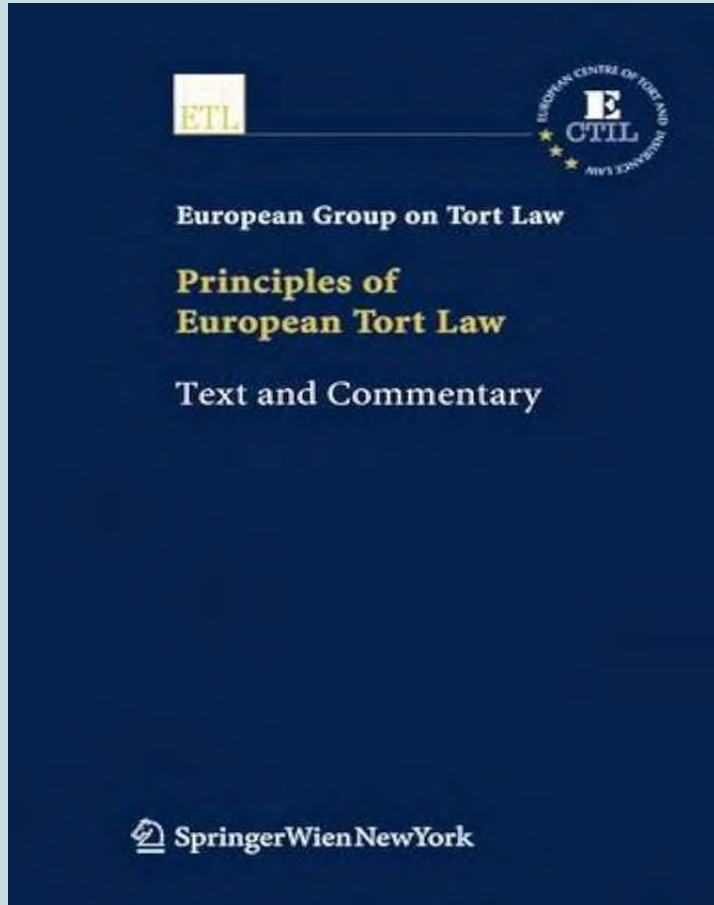
EU TORT LAW:

-There is no '***acquis communautaire***' on this issue, nor is there homogeneity in the legal response of the different countries.

-an area of law which **is under-theorised and in danger, therefore, of being incorrectly applied.**

-EU tort law is a sub-set of a broader category which may be termed 'European tort law'

However, **it should be borne in mind:**



"PETL are **worthy of attention** since they emerge for the approximation of the understanding of matters of civil liability in the various countries of Europe and **is the most important legal unification document in this area.**

The Principles of European Tort Law (PETL): The Impact of the PETL on National Legislation ? (Miquel Casals)



Austria:

Reform of law of damages, 2005

Romania & Slovakia: *New Civil codes (2011 & 2015)*

Spain:

Private draft for the reform of Spanish Civil Code by Association of Professors of Civil Law (2018): Tort Law

France:

some influence: 2017 Projet

Belgium:

2023 Belgian Proposition de Loi



The Principles of European Tort Law (PETL): The Impact of the PETL on CASE LAW – ? *(Miquel Casals)*

EUROPEAN COURT OF HUMAN RIGHTS (ECtHR): *(ratio decidendi)*:

-the norwegian case 2014: Oslo Ciy Court N.A v Norway **personal injury caused by parents'ill treatment of their children** (acquitted of a crime +duty to pay compensation: damages for non -pecuniary loss):

Liability is to be based on the positive obligation to protect the life and well-being of those who are under the control of third persons and...

*In particular, the parent's liability is based on their obligation to take care of their children as they **did not 'prevent the acts of violence carried out against the children in regard to whom had a duty of care'***

(consistent with PETL: 4: 103 (duty to protect other from damage)



The Principles of European Tort Law (PETL): The Impact of the PETL on CASE LAW – ? *(Miquel Casals)*

Jurisprudence of further EUROPEAN JURISDICTIONS

Lituania: 2015 Supreme Court (2 sentences): **pure economic loss requires intentional negligence (dolus)** for the judge obliged to compensate: **art. 2:102 PETL** (in my opinion, applicable to our case of concealment of paternity: pure -non material or moral damage). We will see later...

Italy, Poland, Czech Republic: related to compensation for non-pecuniary loss to relatives of seriously injured victims (art. 10:301(1))

The Netherlands: 2019 Supreme Court (art 3:105 PETL (Uncertain partial causation))



The Principles of European Tort Law (PETL): The Impact of the PETL on CASE LAW – ? (Miquel Casals)

Jurisprudence of further EUROPEAN JURISDICTIONS

*SPAIN: Have already **ACQUIRE THE CHARACTER OF AN INTERPRETATIVE SOURCE** (been cited either by our Supreme Court since 2007 at least once every year or by other Spanish courts):*

The most influential decision: Supreme Court 17.1.2007: criterion applicable to our topic: the criterion of the '**relationship of proximity or special reliance between those involved**' (art. 4:102): complementary criteria **to establish** or exclude fault (art. 1902 CC and 1104 CC) & Supreme Court 2019



- IN CONCLUSION: (Miquel Casals)

PETL: a panEuropean legal doctrine of considerable prestige and doctrinal weight, has been used by the Supreme Court to reinforce interpretations **in favour of victims,**

*The production **of an updated PETL 2.0 is a task that should be encouraged and supported***

PREVIOUS IDEAS

2

In an era in which **the expansion of liability** is a dominant trend in tort law, is the category, so to speak, of civil liability in family relationships **an exception?** **(principle of family immunity): today, there are 2 opposing views**



But, let us look at its evolution in both continental and common law.

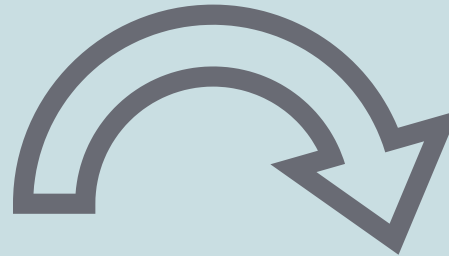
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CONSENSUS

In EU countries **the principle of family immunity has never implied immunity from criminal liability:** *duty to compensate arising from the offence arose from that offence).*

EX DELICTO CIVIL LIABILITY) with eventual *dolus*:
crimes of injury due to the transmission of a sexual disease, against sexual freedom or property of the spouses

Let us look at its **evolution** in both **continental and common law.**



2

Civil law y Common law

-**Civil Law**: Traditional refusal on the basis of an **'implicit principle of family indemnity'**, as opposed to the

-**Common Law** where it was **explicitly** enshrine (interspousal inmunity based on marital unity).

COMMON LAW

Married Women's Property Act 1870 & 1882): immunity from property damages disappears

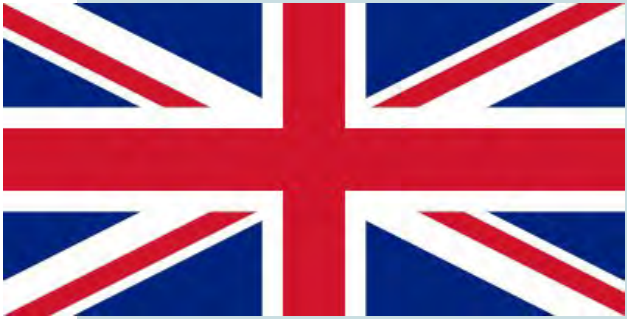
Law Reform Act 1962 (chapter 48, 1): immunity from personal injury between spouses disappears,

Exception: during marriage + no benefit derived: defence of harmonious marital relationship

Nuances related to the Concealment of paternity (recently arisen in the courts: P v B 2001: tort claim of DECEIT (dolus)

-consensus only in **unmarried couples**, and not in the marital sphere: it is possible to claim for compensation (encourage honesty)

-specific action for married couples: *'financial remedy proceedings'* (prior to divorce) + no obligation to disclose marital infidelity): FRB v DCA (2019)



COMMON LAW



WITHOUT MARRIAGE: tort of deceit could exist in the sphere of family relationships due to concealment of paternity

→ **EWHC 1246 3rd April 2007:**

AWARD DAMAGES for emotional injury (£ 7,500).

Refused patrimonial damages for maintenance paid to the child: reasons of public policy + *the claimant had derived much happiness from his relationship with what he considered to be his son, before he knew the truth.*

CONCLUSION:

There is no consensus about compensation for pecuniary damage

→ **High Court 17th october 2001:** AWARD damages **both patrimonial** (recovered child support payments of £30 000 (plus interest) made through the Child Support Agency over 7 years, and in damages **for the emotional hurt of** discovering that he was not a genetic father (£22 000)

COMMON LAW

Restatement (Second) of Torts in 1977§: Revise (Third): Rest. 2014



-Admits claims between spouses (especially custody issues).

-Courts rule: 'invalidity of clauses in insurance contracts' (no duty to indemnify: victim and tortfeasor from the same family)

COMMON LAW

NUANCES in relation to the Concealment of paternity:

NO CONSENSUS related to moral damage:

a) affirm: failure to inform husband of **outrageous** and not just insulting or offensive conduct (action for infliction of emotional distress)

Miller vs Miller 1998: the mother and her parents tricked the plaintiff into marrying her daughter when she was pregnant, and only after 15 years of marriage did he learn that he was not the father

b) deny: no autonomy between breach of duty of fidelity and concealment of paternity (Koestler vs Pollar, 1991)

CONSENSUS: denying pecuniary damages for the maintenance paid, as the payment was made under a valid and unreversed judgment, not admitting unjust enrichment. Even, some States, laws expressly prohibit compensation or repayment of maintenance paid by the mother, even in cases where paternity has been contested.



COMMON LAW



In **CANADA**(mix response):**one case appeared to pave the way** for future successful reimbursement claims, provided that **men act quickly on their suspicions of misattributed paternity** (Thompson v Thompson [2003]).



In **AUSTRALIA**, the Family Law Amendments Bill (june 2005) **allows men to reclaim money and property given through a court** order,

Moral damage: require a diagnosable mental injury, not mere distress.

Vindictory damage (fundamental rights: loss of dignity or autonomy: loss of choice...)

Contributory negligence: it no longer applies in the context of deceit



In **New Zeland: interesting:** Child support payments would not be regarded as damage (provision **for the refund in the Child Support Act 1991: undue payment...**

COMMON LAW

In conclusion, ...

In short, we are **faced with a question that is not closed in Anglo-American law:**

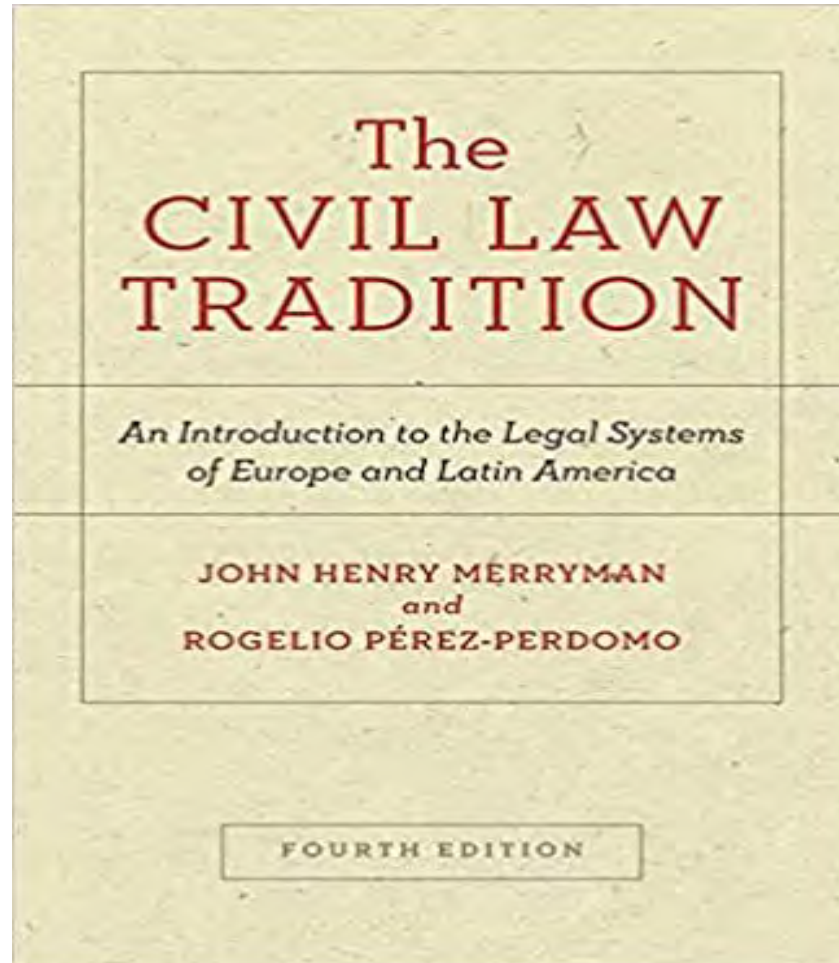
1) Allow this claim: natural development of Tort Law:

This, though, still leads to doubts as to which damages should be repaired, liability standards and limitation periods, so on...(adapt tort law to domestic context).

2) 'Public policy' reasons are regarded as significant enough to justify a bar on deceit claims in most circumstances: the plaintiff's action "offended public policy" and that **marriage is still a private domain.**

Even, modern doctrine has come to argue the legitimacy of the claim **in the right to 'the integrity of family life' (art. 8 ECHR)**

CODIFIED LAW



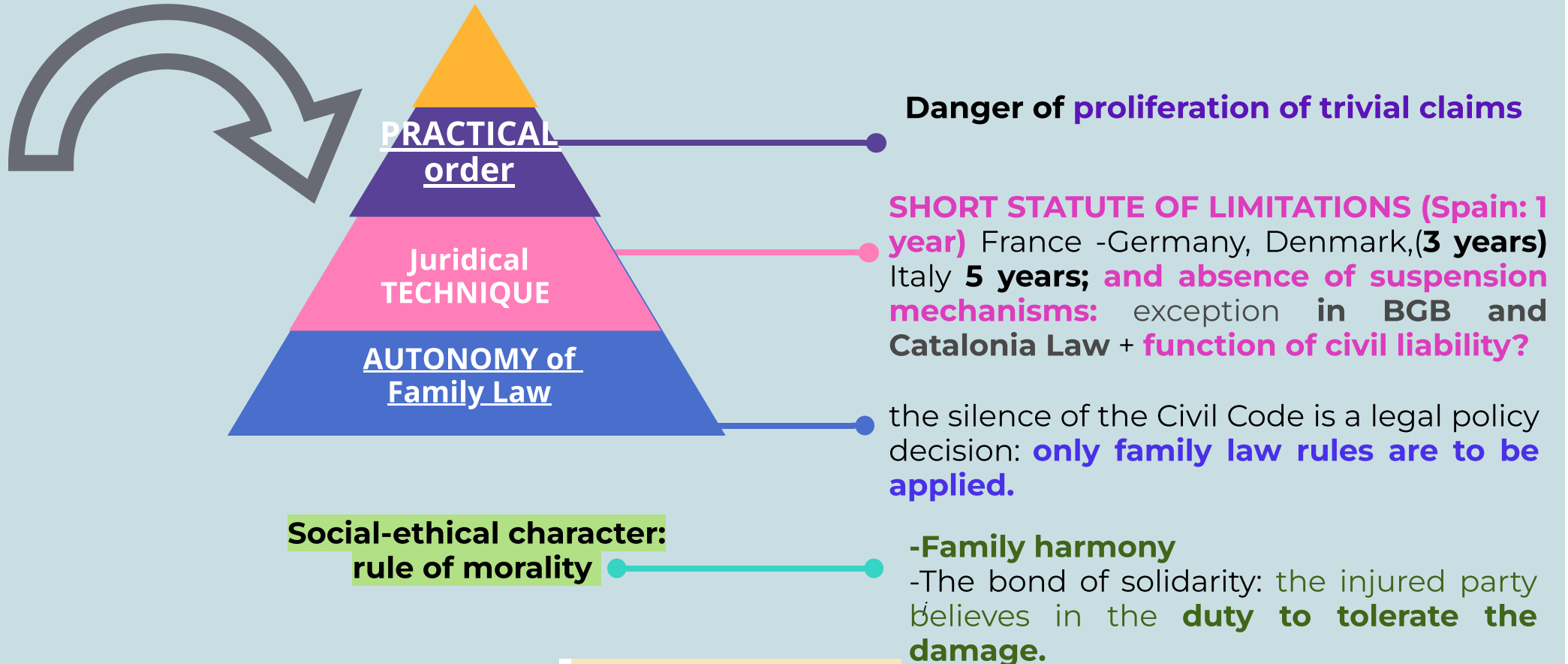
1) **FACTORS** that contributed to the principle of 'FAMILY INDEMNITY'

2) **TERMINOLOGICAL ACCURACY.** Differentiate: INJURY -DAMAGE

i

CODIFIED LAW

1) FACTORS that contributed to the implicit principle of 'FAMILY INDEMNITY'



EVOLUTION of family law: **from the patriarchal model to respect for the fundamental rights of the members of the family**

The investigation of the paternity of natural children was accepted in Canon Law, since the late Middle Ages, but was not included in the Civil Codes in order to preserve the tranquillity of family life

CODIFIED LAW

SOME ARGUMENTS AND COUNTER-ARGUMENTS



1

PRINCIPLE OF SPECIALITY AND AUTONOMY OF FAMILY LAW:

the family law in force at each historical moment is a closed system and regulates such relationships in a context of freedom and not under the threat of compensatory sanctions (the State's duty to respect the autonomy of the family)

Article VI-1:103 **Common Frame of Reference:** *civil liability rules 'do not apply in so far as their application would contradict the purpose of other private law rules'*

Even though **there are few precepts** that regulate such compensatory and non-compensatory patrimonial mechanisms **and MANY CURRENT PROBLEMS**

CODIFIED LAW -EXAMPLE: FAMILY LAW

SPANISH LAW (few articules)

COMPENSATORY RULES	MARRIAGE	Paternal-filial relationship: Administration of the father endangers the child's assets
During marriage	Art. 1390-1391 CC: damage to the community of property by individual management with malice aforethought. The only solution: extinction of the community of property. Problem: what if the spouse donates all his or her separate property, preventing the community of property from receiving income?	Art. 167: The judge may adopt any necessary measure
After the marital crisis	Art. 97: Compensatory pension.	Art. 168: rendering of accounts. Compensation for damages (DOLE or GROSS NEGLIGENCE)
	98 CC: compensation for nullity to the spouse in good faith.	



CODIFIED LAW

SOME ARGUMENTS AND COUNTER-ARGUMENTS

2

AVOIDING TRIVIAL DISPUTES: 'floodgates argument'

the unlawfulness of the damage is excluded when there is a 'cause of justification':

GENERAL RISK OF LIFE, so that this element excludes the possibility of suing for mere inconvenience, mere annoyance or displeasure, or for the normal development of social life: Principle: *'principio minimus praetor non curat'*

It would not be compensable, the non-fulfilment of the promise of marriage, or the marital conflict derived from the transsexuality of the other spouse, or even marital infidelity, and so on

2) TERMINOLOGICAL ACCURACY: differentiate

i) **INJURY**: of an '**interest of juridical relevance**' and/or subjective right *juridical data*

-to the PERSONAL SPHERE:

-physical integrity: corporal damage (it is not a *tertium genus*)

-others: moral integrity; honor; personal and family intimacy, image, son on.

-to the MATERIAL SPHERE

ii) **DAMAGE** (*préjudice*): **material data**

- Economic or patrimonial damage (cost emerging and loss of profits)

-Moral or non-economic damage

Article 2:101 PETL: '*compensable damage requires material or immaterial harm to a legally protected interest*'. **It is better to use two different terms (injury and damage) to refer to different realities.**

What if the pecuniary and moral damage does NOT derive from an injury neither personal (corporal or spiritual) nor material ? the so called: **'PURE DAMAGE'**

PATERNITY AND FILIATION

Objectives: At the end of the session, students will be able to:

1. Define Paternity and Filiation
2. Identify proofs of filiation
3. Compare legitimate and illegitimate child

- Filiation

Filiation refers to the legal and/or biological relationship between a parent and a child, encompassing both maternal and paternal connections. It establishes the

Like in the case of the CONCEALMENT OF PATERNITY?

Injury to the parental-filial legal bond: injury to the 'certainty of filiation and the maintenance of the legal paternal-filial bond upon the loss of it and, consequently, the disappearance or diminution of the right to relate to their alleged children'.

PURE DAMAGE: IS SUCH DAMAGE COMPENSABLE?

- **Consensus: those deriving from a crime + violation of fundamental rights**
- **Lack of consensus: the rest: PURE PATRIMONIAL and MORAL DAMAGES:**

Does the general clause of Art. 1902CC imply that all damage is compensable?: **non-typicality of the damage**

- **Pure economic loss:**

- **Emotional harm: admitted by the Courts in some cases: false positives for a disease, and the near miss (exposure to a risk that does not materialise: CONCORDIA CASE, -STS 8 April 2016!)**

- **CONCEALMENT OF PATERNITY?**

CODIFIED LAW

In conclusion, ...

1) PARADOXICALLY, related to the concealment of paternity:

The evolution of the socio-legal context itself, which has generally allowed the principle of immunity to be broken, **leads to the opposite effect, that is, the difficulty or limitation of such compensation**

-so as not to 'return to a framework of oppressive family relations from which modern family law had already freed us'

The so called: 'Demarcation function of tort law'

-because **is contrary to the welfare and best interests of the child?** ('digging up the dirt')

-because there is a 'mantle of privacy'...

-

CODIFIED LAW

2) ATYPICAL DAMAGE: OPEN CLAUSE? *not only subjective rights but interests worthy of protection would facilitate compensation for the (at least moral) damage resulting from the concealment of paternity*

SPAIN art. 1902 CC "**Whoever causes a damage** with negligence or deceit to a third party must compensate him/her"

FRANCE: art. 1240 CC "**Any act of man, which causes damage** to another, obliges the person by whose fault it was done to repair it"

BELGIUM: art. 6.5 CC "Everyone is **liable for the damage** they cause to others through their own fault".

On 2 February 2024 reform of Book 6 BGB (extra-contractual liability) **which will enter into force on 1 January 2025.**

ITALY: art. 2043 CC: "Any intentional or negligent act, which causes unjust damage to others obliges the person who committed the act to compensate for the damage".

- TYPICAL DAMAGE (more difficult): *only subjective rights*

GERMANY: German Law Section 823 Liability in damages

"A person who, intentionally or negligently, unlawfully **injures the life, body, health, freedom, property or another right** of another person is liable to make compensation to the other party ..."

:

3) Legal practice has to be systematic and at least minimally consistent. Where there are no positive rules applicable or where there are too few or contradictory ones, it is up to case law to recompose the system (if not, law loses its function of securing expectations and proving reliability in social relations: this is what happens to tort law within family relationships? only in cases where it is reasonable and *in accordance with common sense and morality (...)*. García Amado, JA, 2017)

FIRST PART



PANORAMIC VIEW:

Some controversial cases in Europe



FAMILY DAMAGES, IN PARENT-CHILD RELATIONSHIP

1. Lack of voluntary **recognition of paternity?**
2. Unlawful interference with **parent-child relationships?**

Special case in Spain: Civil liability of Public administration

1

REGARDING VOLUNTARY RECOGNITION



Acknowledgement
of Paternity



EMY A CORDANO
Attorney at Law

www.cor-law.com

CALL FOR A CASE REVIEW
801-804-5152

VOLUNTARY PATERNITY RECOGNITION (VPD)

Many couples who want to raise their child together, even if they are not dating, will go through a voluntary paternity process. The couple can sign a Declaration of Paternity to establish that both parents have rights and obligations regarding the child. You can find these forms by contacting:

The hospital or facility where the child was born

Local health departments

The Office of Vital Records and Statistics



Even if both parents sign the VPD, both can rescind the form (or change their mind) within 60 days of signing the document.

Parents can also change the child's last name on his or her birth certificate through the VPD process as long as the child is under the age of six.

If you want to get **child support** or you want to establish paternity for any other reason, having an experienced **divorce attorney Salt Lake City** to help can be an invaluable resource. Contact Emly A. Cordano, Attorney at Law by calling **801-804-5152** for a case review or further information.

FIRST SCENARIO

LIABILITY FOR LACK OF VOLUNTARY RECOGNITION, subsequently determined by other means? no case law



Can the child claim compensation for damage derived from the 'LOSS OF OPPORTUNITY' (work and study opportunities lost due to not having a better economic position? and for damaging his or her right to identity), not the moral damage due to lack of affection nor the patrimonial damage due to the duty to provide maintenance)?

In favor: basis: essentiality of parental-filial ties and child's right to Know (art. 7 and 8 CRC 1989: do not settle the issue: mother's and child's right?
No consensus: weight given to the mother's right in France (nuance today)
absolute priority recognized to the child's right in Switzerland

Against: its consequence **is already provided for in the family law regulations:** *by excluding from parental authority the parent who has been recognised with formal and real opposition (Spain, art. 111 CC). This is NOT the case in other legal systems in Europe (France, Italy....).*

SECOND SCENARIO

ACKNOWLEDGEMENT OUT OF COMPLACENCY (voluntarily not for convenience)

He could not challenge the acknowledgement, but **could he bring an action to challenge the paternity and that the child has a right to damages?**

. **IN FAVOUR (doctrine):** Spanish Supreme Court **4th July 2011:** the wording of art. 138 CC allows (arr. 140II CC):

doctrine of 'own acts' could not be invoked (questions of civil status of this nature are subject to unavailable public policy)

but he/she will not be able to demand the maintenance paid, and the child could bring an action for non-contractual liability for moral damages,..

. **AGAINST:** Spanish Supreme Court 10th Mai 2012



SECOND SCENARIO: FRANCE

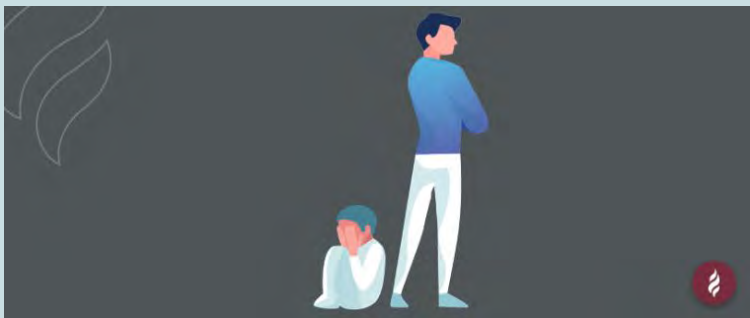


DUTY TO COMPENSATE:

1) the **FATHER** who makes an **acknowledgement of consent (reconnaissance mensongère)** and then contests it:

damages may be claimed at this stage. Either against the father who made the acknowledgement and who acted with full knowledge of the facts, or against the mother who concealed the truth.

2) And, consistently, the **MOTHER** who allows a paternal filiation to be legally established and then contests it.



CCA Nancy, 3e ch., 26.2.2007 (n°05/03455), **applying art. 1382 of the French CC**, condemned a mother **to compensate her 17-year-old daughter with 10,000 euros for having contested her paternal filiation**, thus preventing her sisters from sharing with her the inheritance that would have corresponded to her.

2

Unlawful interference with parent-child relationships



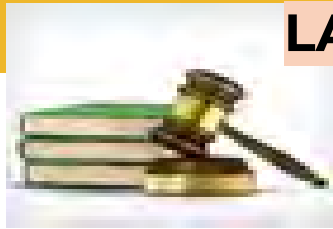
Parental responsibility - child custody and contact rights

Information on child custody and visiting rights across EU...

Europa



LANDMARK SENTENCE 30th June 1999



First recognition in Spain of certain and quantifiable non-pecuniary damage when one parent **obstructs the right of the other parent to have relations with the child and prevents the exercise of custody**.



The father (non biological) was judicially awarded custody of the child

The mother left for the USA after joining the Church of Scientology (The sentence could not be enforced in the USA)

The father claims for compensation: the mother of a minor was ordered to pay compensation for the non-pecuniary damage caused to the father for preventing him from exercising custody of a common child , and for hindering relations between the two. '



LANDMARK SENTENCE 30th June 1999

Fundament: 60.000 euros were awarded to the father **on the basis of art. 1902 CC and the right to respect for family life ex art. 8 ECHR** (atypical incorporation of the case law of the ECtHR)

Controversies:

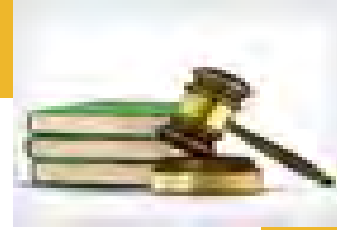
- **damage as continuous?** therefore the damage was not time-barred (*dies a quo* is when the definitive (final) damage occurs (the child turned 18 years old.)

-presumption of non-pecuniary damage (***ex in res ipsa***)

- **Is it more effective than other measures in most european countries:** changes in the custody of the minor, suspend the maintenance payment (harm the minor?) coercitive fines,

(serious offence of disobedience and crime of child abduction)

LANDMARK SENTENCE 30th June 1999



The novelty of this judgment:

we are not dealing with a case in which the parent who has custody prevents the exercise of the right of access by the non-custodial parent (more common case), **as it is the (non-biological) parent to whom custody was attributed who is claiming compensation**

It would also have been possible to have brought an action for moral damages on behalf of the minor (the father has custody and also the exercise of parental authority ?

This ruling is **to be commended:**

it takes into account **the silence or lack of sensitivity of the courts** towards the situation of separated or divorced men who pay their maintenance obligations on time and are prevented from interacting with their children.

OTHER CASES:



1) **Parental alienation syndrome:** the mere refusal of the child to see the parent does not exclude civil liability (sentence **ECtHR 13rd July 2000**).

2) Without obstruction, **the parent breaches the visiting arrangements: could the non-breaching parent sue for:**

- pecuniary damages (expenses for having to hire a babysitter?)

- and for non-pecuniary damage to the child (action on behalf of the child?)

CASE LAW EVOLUTION (SPAIN) PROVINCIAL COURTS

FIRST PHASE: non compensable: lack of legal provision in family law. No consensus in case law

CONSOLIDATED CURRENT STAGE: INDEMNIFICABLE DAMAGE:

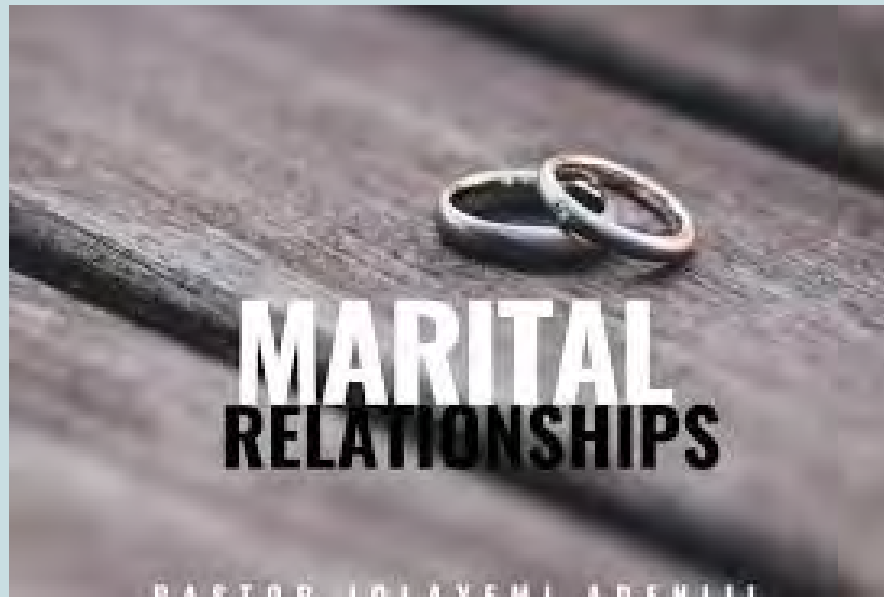
pioneering Province Court Madrid 21st June 2001:
SAP of Palencia 14th March 2016 which, ordered the mother to pay compensation of 15.000 euros (preventing the exercise of custody); **SAP Murcia 4th Junio 2015, son on....**

ITALY Italian courts have granted the right to compensation for moral damages in cases of infringement of custodial rights

(Tribunal di Roma, 13 June 2000 (200 1) Diritto Famiglie e persona, 209

SECOND PART

IN MARITAL RELATIONSHIP:



1. VIOLATION OF MARITAL DUTIES: is it a compensable damage? NO. CONSENSUS in most countries in Europe (some exception in France)

2) (WITH) CONCEALMENT OF PATERNITY?



1



FOR BREACH OF THE DUTY OF FIDELITY: CASE LAW in most European countries:

NEGATIVE RESPONSE: in most European countries (Spain, Italy, Netherlands, Germany, Cyprus, and others). **It is a duty of an ETHICAL-MORAL and NOT LEGAL nature. And for reasons of the evolution of family law (reforms of family law).**

Divorce and legal separation

Information on legal rules concerning...

Europa

Given that, in general, the legislator does not take account of the imputability of the conduct which is the cause of the marital breakdown in determining the 'compensatory measures' provided for by family law

1

FOR BREACH OF THE DUTY OF FIDELITY: CASE LAW in most European countries:

But, there are also, a lot of exceptions:

BELGIUM: The court can refuse the request for a maintenance payment **if the respondent proves that there was a serious fault on the part of the applicant that made it impossible to continue living together**

GREECE: Maintenance may be denied or restricted if the spouse who might be entitled to maintenance is to blame for the divorce

AUSTRIA: The spouse who was solely or predominantly at fault must pay the other spouse sufficient maintenance

POLAND, LITHUANIA, HUNGARY, ROMANIA, LATVIA : The spouse at fault in the divorce is not entitled to maintenance.

Divorce and legal separation

Information on legal rules concerning...

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1

FOR BREACH OF THE DUTY OF FIDELITY: CASE LAW in most European countries:



Furthermore, **there are even countries that expressly regulate the right to compensation**, compatible with alimony, if the divorce has particularly severe consequences for them and where the divorce is granted against the other spouse and the blame lies wholly with the latter

FRANCE

ROMANIAN

PORTUGAL

Divorce and legal separation

Information on legal rules concerning...

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FRENCH LAW



Permitted under French law: art. 266 Code compatible with 1240 (civil liability).

The breach of these duties may give rise in some cases (considering the factors of **seriousness, repetition** and **consequences deriving from it**: public repercussion, leaving home, its repetition, or even bigamy, **when they show a serious disregard for the welfare of the other**), to an unlawful damage if the extremes that are linked to civil liability are proven, **THUS BEING ABLE TO DISSOCIATE THE MORAL DAMAGE FROM THE REPROACH OF FIDELITY.**

ROMANIAN LAW



SPECIAL CASE IN ROMANIA: A spouse applying for a maintenance allowance may also request compensation. Where **the divorce has been granted due to the exclusive fault of the defendant spouse, the plaintiff spouse may receive compensation.**

FOR BREACH OF THE DUTY OF FIDELITY: CASE LAW in most European countries:

PORTUGAL: Article 1792 of the Portuguese Civil Code (as amended in 2008), according to which the award of damages ensuing from the divorce action is governed by the general rules of tort.



"1. The spouse who sustains the damage has a right to reparation for the damage inflicted by the other spouse in the general terms of civil liability before ordinary courts. 2. The spouse who filed for divorce on the basis of Article 1781, letter b) must pay non-patrimonial damages inflicted to the other spouse, due to the dissolution of marriage.

Alteration of the mental faculties of the other spouse, when it has lasted for more than one year and, due to its seriousness, jeopardises the possibility of living together;

Moving towards a patrimonialisation of family law:

The compromise position: damages resulting from infidelity can only be compensated when other rights of the person outside the marriage are affected, i.e. when fundamental rights are violated, because the damage is legally relevant / The necessary adaptation of the legal rules on civil liability to the specific area of family **law must be analysed on a case-by-case basis.**

In conclusion, ...

Furthermore (oppsing wiw): the duty of fidelity (true and proper obligation) does not imply a duty to love the other in all circumstances and until the end of time, but rather to adopt reasonable measures to ensure that no harm is done, (when divorce is an accessible and quick alternative in most of the european countries

fidelity: in democratic societies: broader concept?

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2

FOR CONCEALMENT OF PATERNITY

Increase in claims of concealment of true paternity **has its sociological parallel at present:**

A study in the United Kingdom: **1 in 50 fathers support a child that is not theirs**, which is equivalent to 2% of men who believe they are fathers.

A sensitive (media-sensitive) issue, on which it is considered important that **there should be a unified approach**



National Announcement

PATERNITY FRAUD SURVEY

YOU ARE NOT THE FATHER!

Have you been a victim of paternity fraud?

Were you surprised by a DNA test that ruled you out as a father?

Do you pay child support for a child that was proven not to be yours?

Take the survey
<https://www.surveymonkey.com/r/PaternityFraud>

Contact: Dr. Squires
Email: SquiresS@LincolnU.EDU

Some european countries

Germany: German courts **grant this right with some nuances..:**

*The BGH held that the law of tort does not permit the plaintiff to sue his ex-wife for economic loss but it also clarified that **the special torts rule of 826 BGB might be applied if further aggravating factors were present.** Thus, the fact that a wife concealed her infidelity from her husband did not amount to an immoral wrong in the sense of § 826 BGB; however, there might be a right to claim if the wife conceived a child under adultery and **gave a false statement** in order to dispel her husband's doubts about his paternity.*

Art: 826 BGB: "A person who, in a manner offending common decency, intentionally inflicts damage on another person is liable to the other person to provide compensation for the damage.

*The German Bundesgerichtshof's IV senate) decision of 19 **December 1989 (1990)** Neues Juristische Wochenschrift, 706*

SPANISH CASE

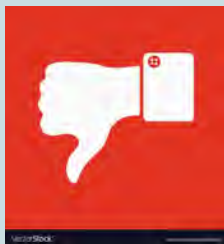


Absolute refusal of the Supreme Court: non-pecuniary and pecuniary damage for concealment of paternity : Sentences Supremo Tribunal:

13rd November 2018 (marriage): **plenary judgement (cause jurisprudence:** as it is a sensitive matter that requires unity of judgement:

- Autonomy of family law
- Non-autonomy between the breach of the duty of fidelity and the concealment of paternity.

23rd February 2024 (unmarried partners)



1

FACTUAL EVENT (2018):

From the marriage of Mr. Marino to Ms. Juliana, **three children** were born in 1992, 1994 and 1997.

In 2009 the divorce was decreed with the relevant measures. After a filiation process, in which it was declared that Mr. Marino was not the father of the child he had been considering to be his son, Raúl, Mr. Marino filed a lawsuit against his former wife to claim: 35,304.37 euros (pensions and expenses) and 70,000 euros for non-pecuniary damage.

He was awarded pecuniary damage for pensions and non-pecuniary damage (15,000 euros) by the Provincial Court. The **Supreme Court upheld the appeal and DENIED ALL INDEMNIFICATION.**



ARGUMENTS & COUNTER-ARGUMENTS:

- AUTONOMY OF FAMILY LAW (legal policy decision)

a) **FRANCE: autonomy of family law does not prevent the 'complementarity of actions':**

-the elimination of the duty of fidelity (212 CC) was debated (reform of the Civil Code on same-sex marriage April 2013):



this precept did not undergo any reform, and that French doctrine affirms that sexuality constitutes a marital duty with a double positive and negative dimension, and that such a breach is a cause for guilty divorce from which damages would be awarded (by the particularly serious consequences of divorce ex Article 266 of the Civil Code

-Furthermore, it makes them compatible with other damages not included in this provision on the basis of Art. 1240 Code (they are compatible).

b) the legislator **could have prohibited such a regulation if he was so concerned with limiting state interference in family matters**

ARGUMENTS & COUNTER-ARGUMENTS:

- INFLATION OF LAWSUITS and ATTACK ON FAMILY HARMONY:

Does it make sense after the family law reforms?

-NON AUTONOMY OF THE DUTY OF FIDELITY AND CONCEALMENT OF PATERNITY:

It does not hold...(the protected interests are different:).

And **when there is an unmarried couple**, what if the husband is informed?



CONCLUSION SUPREME TRIBUNAL 2018 (compromise position)

It is not denied that conduct such as this is likely to cause damage. What is denied is **that this damage can be compensated through the exercise of civil liability actions on the basis of an undoubtedly complex morality trial with undoubtedly negative consequences for the family group**'.

'this solution **does not leave the general system of civil liability provided for in article 1902 of the Civil Code without application**, nor, of course, does it leave without sanction the damage generated by **other types of conduct typical of the criminal sphere and of fundamental rights**.

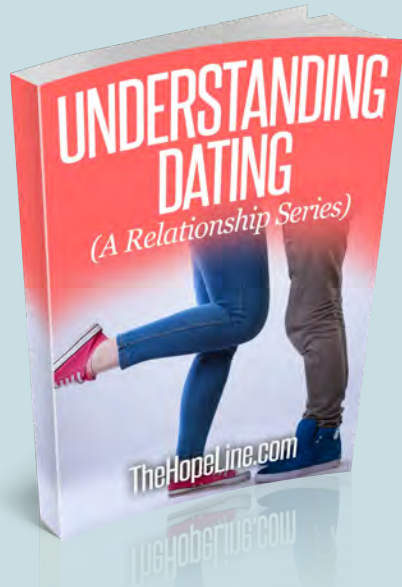
Even stating that the STS of 2018 (plenary) causes jurisprudence, in accordance with the system of sources (codified system) jurisprudence is not a source of Law, as no matter how much the Supreme Court pretends to formulate its interpretation of the rule with abstraction, it cannot be separated from the concrete factual situation in which this interpretation has been maintained;

Case law or precedent has practical relevance because of its authority and exemplary force, but not because of its binding force

THE PROBLEM IS NOT YET RESOLVED

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024: (unmarried partner)



On 6 March 2010, Diego and María **Consuelo entered into a canonical marriage.**

Previously, the couple, who had agreed to maintain a dating relationship 'in chastity', after having a few drinks, had a single sexual intercourse **on the last weekend of October 2009**

On 2 August 2010, MC had a daughter, Carla, who was registered in the Civil Registry as Diego's daughter in wedlock.

On 11 June 2011, Fabio (María Consuelo's work colleague, with whom she was in a relationship) **carried out a paternity test which showed that Carla was his daughter**, of which Diego was aware 28th January 2013

On 13 January 2014, **María Consuelo filed for divorce proceedings.**

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024:

The lawsuit giving rise to the present proceedings was filed by Diego on **28 January 2014** against **MaríaConsuelo and Fabio**

For the non-pecuniary damage caused:

-**loss of the paternal-subsidiary relationship** with his daughter: €157,700.

-for having been **humiliated** and injured in his honour and dignity, having suffered intrusion into his family and his privacy. Damage to **his own image**: €20,000.

For pecuniary damage:

-Compensation **for unjust enrichment** (sums paid for the care of the minor, since her birth and prior to those fixed in the judgment of separation: €35,066.66.

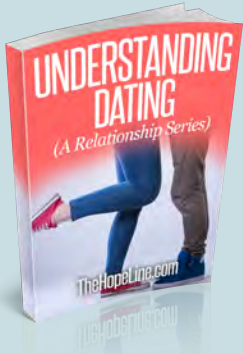
-**Other damages**: -biological paternity test: €350+

- for the amounts paid to the professionals (process of contesting filiation brought by the biological father of the minor):

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024: (unmarried partner): First instance judgement: refused compensation (no dolus)

Provincial Court: upholds in part the claim:



i) the jurisprudential doctrine is not applicable to this case **since the relationship maintained by the defendant with the biological father of the child was prior to marriage.**

ii) **there is no legal regulation of the dating relationship**, so that if one partner engages in conduct that causes harm to the other, causally related, he or she must be compensated (1902 CC);

iii) the defendant's malice is ruled out (it cannot be concluded that María Consuelo knew from the first moment...), but her actions must **be classified as negligent**, as she did not act with the diligence that the case required, given the circumstances, (...) **so she must necessarily have had doubts about the paternity** and did not tell Diego; also because, in 2011, once she had certain knowledge that Diego was not the father, she did not tell him.

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024: (unmarried partner):

There can be no difference in the solution reached on the basis of whether or not there is a marriage (..) , if what is really sought (and recognised, as the judgment under appeal does) is compensation for the emotional distress and non-material damage caused by the plaintiff being deprived 'of the presence or cohabitation' with the child (**interest in bringing up one's own children and not being exposed to their deprivation**)

Different: compensation for the damages suffered as a result of the husband having entered into a marriage, later declared null and void, in the mistaken belief that the child the wife was expecting was his (he was compensated..) 98 CC

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024: (unmarried partner): ARGUMENTS

General clause means that any damage can be compensated if it is worthy of protection. As a consequence, all competing interests must be assessed(...).

DE FACTO RELATIONSHIP

a relationship between two people
who live together as a couple but are
not legally married.

- is it the general interest in the stability of family relations?
no, divorce had already been sought
- is it the woman's right to privacy, autonomy and her dignity that prevents her from reporting doubts about her paternity in this particular case?

This duty to inform a doubt is not absolute in view of the circumstances: open relationships admitted in the couple, the risk of causing a family break-up .. the protection of the child's interests; a joint desire to form a family regardless of the biological veracity,...

- arguments *obiter dictum* (not applicable to the case)

2

SENTENCE SUPREME COURT 23rd FEBRUARY 2024: (unmarried partner):

MY OPINION:

In this particular case:

it is not that tort law does not apply to family law (or only applies in criminal cases), **but rather that a prerequisite for the compensation obligation to arise was lacking: the causation relationship**, according to the theory of civil liability

It is true that in this case it seems to be a case of concurrency of negligence of the victim with causal incidence (as he must have had knowledge of the concealment). **Therefore, in this case should have been applied 'a reduction of compensation by the ex spouse'**

DE FACTO RELATIONSHIP

a relationship between two people who live together as a couple but are not legally married.

What do PETL tell us?



4:103 PETL:

'the duty to protect others from harm', not only when it is established by law, **but also if there is a special relationship between the parties**, or if the seriousness of harm on the one hand and the ease of avoiding it on the other hand indicate the existence of the duty to protect and also who acts creates and controls the dangerous situation.



SPECIFIC ANALYSIS:

I) COMPENSATION FOR NON-PECUNIARY (MORAL) DAMAGE IN THE CONCEALMENT OF PATERNITY: ART. 1902 CC: PREREQUISITES:

II) COMPENSATION FOR PECUNIARY DAMAGE:

- Art. 1902 CC?**
- Collection of what is undue?**
- Unjust enrichment?**

ANALYSIS OF THE ELEMENTS:

Action/omission - Unlawfulness - subjective criterion of imputation-
causation relationship-damage



SUBJECTIVE CRITERION OF IMPUTATION: fraud, gross negligence or mere negligence?

1º) **FRAUD or gross negligence: principle of solidarity and ethics:** (relaxation of the standards of care in privacy and arts. 168 and 1390 CC and art. 4:102 PETL or European Principles of Tort Law



Case law that apply fraud: examples:

-Provincial Court Valencia 2nd Nov 2004 (**long time elapsed of concealment**). It must be proven that the mother had 'full knowledge and total certainty' of the husband's lack of paternity.

Ms. A. R. and Mr. F. L. knew from the outset that the children (3) were not Mr. V.'s children, despite which they allowed them to be registered in the Civil Register as their children

-or for **plotting strategies** (SAP of León of January 30, 2009), Valencia 13 nov 2014. the fraudulent conduct of the wife in deceiving the husband about the origin of the child's pregnancy, making him believe that it was the result of in vitro fertilisation,

SUBJECTIVE CRITERION OF IMPUTATION: fraud, gross negligence or mere negligence?



GERMANY: intentional infliction of damage contra *bonos mores*.

the husband has been **deceived about his paternity by having made false statements to dispel his doubts about his paternity or by threats or manipulation to prevent** the husband from being able to determine the filiation of the child or to prevent him from contesting it;

But according to German **jurisprudence there would be no malice or immoral behaviour if the unfaithful spouse remains silent about his or her conduct**, since there is no duty on the spouses to make their adultery known to the other spouse.



Adapting tort law to family law principles

THE CRITERION OF FRAUD AND GROSS NEGLIGENCE COULD BE ADMITTED IN FAMILY RELATIONSHIPS: basis:

- Principle of **solidarity**,

- **relaxation of the standard of care in intimacy**

- the normative unification is only for the compensation obligation (in the technical sense: quantum, prescription), but not for civil liability (reflection of the primary legal duty not to harm another), **so article 1104 CC (medium diligence) would not have to be applied by analogy** (and most European countries do not have an article on non-contractual fault).

Most of the countries in **continental law legal systems admit forms of 'domestic privilege'**, as is reflected in German law in §277 BGB Standard of care in one's own affairs

SUBJECTIVE CRITERION OF IMPUTATION: DOLUS AS the existence of a concealment or deception as to the biological parentage of the child



The Principles take into account the generalised characteristics of certain groups in order to assess the diligence required of a person,

It is true that they only recognise it for minors and persons with disabilities **(Art. 4: 102 (2))**, but I consider that it could be fair to apply it to people living together in a family environment, since it is generalised that in the family environment people adopt a relaxed behaviour and each cohabitant accepts the others with their faults and qualities.



2) **FAULT OR NEGLIGENCE** due to the **violation of due diligence (medium)**: analogous application of art. 1104 CC, but taking into account the **circumstances of the social time** in which it is applied:

the **ease of biological evidence in the 21st century** to prevent the husband from continuing to be considered a father due to the legal presumption of paternity under arts. 116 CC) and the principles of **loyalty** and **honesty** in the event of not being married..

Case law: Provincial Court of Barcelona of 16/01/2007: (social time and personal circumstances)

*“if after **17 years she had not been able to get pregnant** (...) she should have suspected and adopted the measure tending to its true determination..”*

And the joint claim against the BIOLOGICAL FATHER for said moral damages?

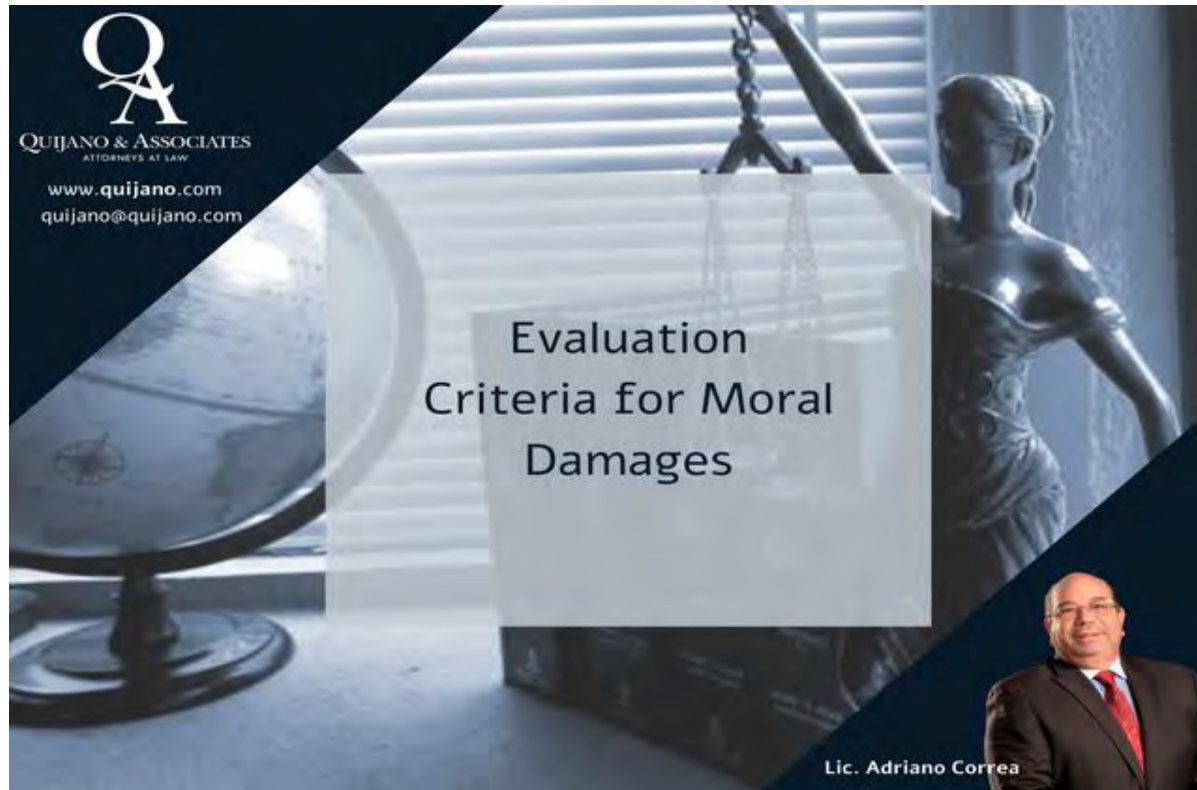
Difficult proof of negligence: SSAP of Madrid of 05/24/2019 and of Madrid of 10/26/2012:



“the defendant, lacking possession of status, outside the family circle **and a stranger** HAS NO OBLIGATION TO BREAK INTO A LEGALLY CONSTITUTED FAMILY (...) RAISING A CLAIM FOR FILIATION, nor to undergo paternity tests behind the back of the actor that could suppose an intrusion into his privacy... THE AFFECTIVE AND LEGAL SECURITY OF THE CHILDREN MUST BE PROTECTED.

BIOLOGICAL TRUTH AND LEGAL AND AFFECTIVE SECURITY (both protected and of equal hierarchy ex art. 39 CE)

2) MORAL DAMAGE FOR CONCEALMENT OF PATERNITY



Differentiate:

Injury to a legitimate interest:

-interest in "the certainty of filiation" by the breakdown of the parent-child relationship following the finality of the filiation judgment, to which the compensable damages would be connected" **(marks the *dies a quo* of the prescription action according with Spanish Supreme Court)** -

interest in bringing up one's own children and not being exposed to their deprivation

-the right to freedom by deprivation of the decision on his unknown filiation? injury due to the knowledge of his non-paternity.

DIFFERENT from the interest in maintaining the marriage and respect for its rules.

Moral damage compensable: pain, frustration, suffering, sadness or anxiety :

-For the **loss of affection and alteration of the relationship:** the deep pain and emotional emptiness, the frustration of the existing family life project'.

a) **PRESUMPTION** as damage *in re ipsa*?

Should it be valued as the loss of a loved one? (Scale damage? No)
Extreme and intolerable pain.

b) Problem of **QUANTIFICATION:** factors that are taken into account by case law (*age of the minor, time of cohabitation; 'the possibility of continuing to maintain an affective relationship in the future; and the existence or not of a cohabitation relationship until the formal declaration of non-paternity, and the damage caused to the victim's life projec?*

- **For the psycho-physical damage due to knowing that he is not the biological father?** not to grant him autonomy, but take it into account in the previous quantification (against STS of June 18, 2012)



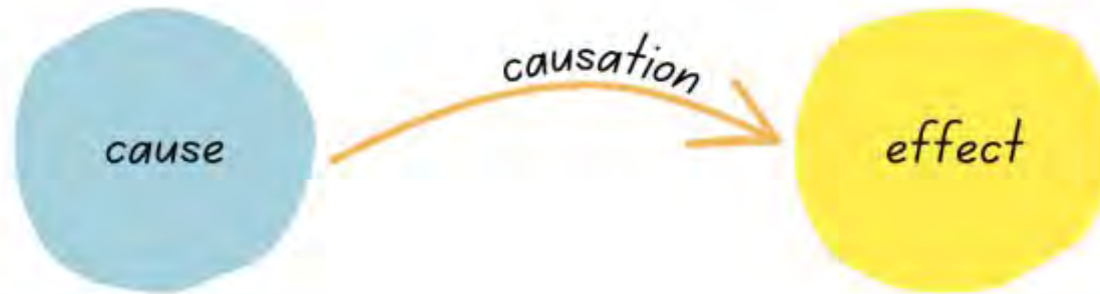
Consolidated case law: **at the time when the judgment challenging paternity becomes final or when the husband has 'absolute certainty of his non-paternity'** (SAP of Gerona of 10/04/2018 the son did communicate this to him)

We are facing **PERMANENT and not continued damage:** start from the time he had actual Knowledge of it and was able to measure its significances (final filiation judgment)

Would you admit the non-prescription due to the appearance of subsequent damages?

CAUSTION RELATIONSHIP

There's a causal relationship between 2 phenomena when one directly causes the other.



PROBLEMS OF concurrence of negligence/ exclusion due to force majeure or fortuitous event (knowledge by the father of his lack of paternity): Sentence Supreme Court 23 rd February 2024

CAUSTION RELATIONSHIP

There's a causal relationship between 2 phenomena when one directly causes the other.



Even, the causal link can be broken:

-force majeure event: sentence Provincial Court Coruña 8 th November 2010, which exonerated the mother from civil liability for the fact that the daughter, being of age, did not want to submit to the biological test to determine the true paternity, especially due to the degree of deterioration in the affective relations she had with her father

-the victim's conduct has a causal effect: for example, on the basis of the plaintiff's knowledge of the child's lack of paternity: sentence Castellón 10th February 2009 in which this knowledge was based on the fact that the spouse had informed the plaintiff of the doubts in this respect, as the conception had occurred during a marital crisis with subsequent reconciliation, and the former had avoided the paternity test.



PATRIMONIAL DAMAGE?

-for MAINTENANCE

-OTHERS:

cost of medicines and treatments for damage to physical health;
procedural costs of divorce and of contesting paternity or of professionals;, son on



NEGATIVE RESPONSE (SPANISH SUPREME TRIBUNAL). ARGUMENTS:



Of non -recovery of food :

-Traditional theory due to the consumable nature of food.

-Best interest of the minor.

-The conditions for collecting what is undue payment are not met: *it is a payment made on the basis of a legal obligation'.*

Consequences to the public order? such a solution would encourage parents who have reasons to doubt their paternity to stop paying the maintenance ordered by a court judgment?

DISSENTIG VOTES

1) Thesis in favor of collecting what is undue (1895 et seq. CC): 5 years: Advantages

- Declaratory scope **ex tunc**: maintenance paid **after the judgment of separation**, not accepting as returnable the amounts paid during the marriage, since both spouses have to contribute to the support of the matrimonial expenses
- The **solvent's error** as to the undue nature **is presumed**
- possibility of suing the **biological parent if he is known**
- the request is not for 'return of maintenance', but rather for the return of the amounts paid in maintenance

2) Thesis in favor of the civil liability (1 year): overcomes disadvantages of previous thesis:

- one requirement of undue payment are not met and
- the action should also extend to other sums paid for education, clothing and housing, and both prior to the matrimonial breakdown and at a later point in time

STS 4/24/2015: **widely disseminated in social and legal media**: Marriage that, after 18 years, separated (2003) and divorced (2005): the woman convinced her husband to undergo a painful and expensive fertility treatment and then have the extramarital relations that led to the birth of the daughter

ALTERNATIVE THESIS

UNJUST ENRICHMENT (WITHOUT CAUSE), autonomous from the collection of the undue, for the return of alimony from the separation or divorce judgment (not during the marriage, both must contribute to the marital burdens: 1318 and 1362. 2. 1 CC, even if it is only one).

France: Ordinance No. 2016-131, 2016, ar. 1301-5 CC refers to 'unjust enrichment' the actions that do not exactly respond to the conditions of the cuasicontracts.

German experience... (later)

And, CIVIL LIABITLIY: Other expenses following the contested judgment:

It overcomes the difficulties of the previous titles of legitimation:

- Civil liability is a posteriori + alimony was due.
- FAULT is not necessary
- the enrichment is returned (not the total damage) and it is not the result of an illicit act.



- PROBLEMS:

1) **Is the mother's right to privacy violated? And the minor's right to his/her identity?**

2) **There is no active legitimacy (paternity claim)** of the putative father to exercise the action against the true parent (since only the one who has the status of father is obliged to pay maintenance).



Experience in German law! (Ref: BGB 1998, and draft ref 2016): identification for the sole purpose of requesting compensation and limitation to two years of retroactivity. Against German Constitutional Court (against fundamental right of the mother). **WHAT IF IT IS KNOWN?**

3) Is it consistent, **when the father himself requests moral damages** for termination of the parent-child relationship?

-And against the MOTHER?: difficulty: proof that she has consumed the pensions for her own benefit and not for the minor? (Miguel Casals)

Natural Obligations

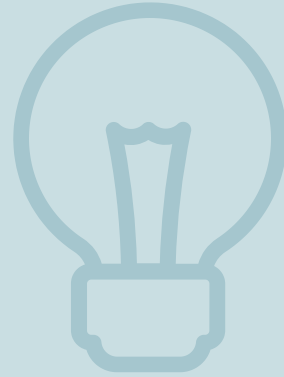
Arts. 1423-1430, *New Civil Code*

UNREPEATABILITY OF WHAT WAS PAID IN FULFILMENT OF A NATURAL OBLIGATION?

if the father had doubts about his paternity in a case of concealment, the unrepeatability of what was paid could be argued on the basis of having fulfilled this natural obligation for ethical-moral reasons ex Article 1901 CC.




THIRD PART



FINAL CONCLUSIONS

Crossover Tort Law and Family Law



The unanimous doctrinal and jurisprudential assessment that **interference in the exercise of custody** by one of the parents was the **starting point** for the recognition of civil liability in the family conflict both in Common Law and Codified Law).

Brebbia, 1997, 47'

"final goal of Law which is justice, (...) and imposes equity as a moderating factor of the whole system, to obtain its concretion in the particular case; without which, the positive norms would constitute mere aspirations (...)'.

Parliamentary Debates (Civil Code, 1889):

"non-contractual civil liability was created with a potential for development or flexibility to adapt to new and ever-present human needs"



In cases of damage in family relationships, and specifically for **concealment of paternity**, the Courts have the duty to decide in accordance with the rules of civil liability, which is the legal institution designed to compensate for damage due to the violation of any legitimate interest, and **in equity**, which will lead them to deny (*real risk of violence for telling the truth; action is exercised in an opportunistic manner*). or admit compensation (dolus or deciet).



The tendency towards individualism and the search for *commutative justice between the one who causes harm and the one who has suffered* mean **that civil liability can be applied to family law issues with due coordination**, in terms of its application, **with the speciality of family law rules**

(Rodríguez Guitián)

Transition from an old model of the family to a modern model: equality of the couple; protection: no family prerogatives

the family and life in it constitute a vital space in which people can pursue and achieve their greatest possible spiritual and material fulfilment, and the paternal bond that biological filiation generates is a factor of enormous emotional depth;

the knowledge that one is not the progenitor of a child after having had it as such for years must generate a state of mind that is unquestionably harmful to the psychological health of the person who suffers from it.

This is a **legal judgement** and in no way a **judgement on the morality of the spouse**.

**THANK YOU
SO MUCH
FOR YOUR ATTENTION**

[in](#) [🐦](#) [f](#)

