CHILDREN AS TORTFEASORS UNDER SPANISH LAW

Miquel Martín-Casals, Jordi Ribot and Josep Solé Feliu

I. Liability of the Child

A. Liability for Wrongful Acts

1. Is there a fixed minimum age for children to be liable?

Spanish tort law, unlike criminal law – see art. 19 Código Penal (Spanish Penal Code 1995, CP)¹ – has not established an age limit below which a person should be excluded from liability regardless of his or her actual mental capacities and abilities.

Moreover, being underage is not in itself a ground for exoneration.² The prevailing opinion stresses that the general clause of art. 1902 Código Civil (Spanish Civil Code, CC) does not contain any limit based on the age of the tortfeasor.³ Mainly for economic reasons, however, plaintiffs usually only address their claims towards the parents or the legal guardians of children.⁴

¹ “Minors under eighteen shall not be liable according to this Code. When a minor commits a criminal act he or she shall be deemed liable according to the provisions of the Act concerning the criminal liability of the minor” (“Los menores de dieciocho años no serán responsables criminalmente con arreglo a este Código. Cuando un menor de dicha edad cometa un hecho delictivo podrá ser responsable con arreglo a lo dispuesto en la Ley que regule la responsabilidad penal del menor”). This Act is the Organic Act on Criminal Liability of Minors (Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, LORPM) (BOE no. 11, 12.1.2000), which came into force on 13 January 2001. Art. 1.1 LORPM provides that the Act is applicable to criminal and civil liability arising from crimes or misdemeanours of persons under 18 years of age but over 14 years of age.

² See nevertheless L. Díez-Picazo/A. Gullón, Sistema de Derecho civil vol. I (2001), 229, who deny that minors can be held liable in tort. L.F. Reglero in: Tratado de Responsabilidad Civil (2002), 192, contends that, although the Spanish Civil Code has no direct rules regarding tortious capacity of minors, incapacity results indirectly from the rules that subject certain persons to liability for the acts of persons with no tortious capacity such as children. Implicitly, in a similar sense, also M. Yzquierdo Tolsada, Sistema de responsabilidad civil, contractual y extracontractual (2001), 230–231. However, the prevailing legal opinion is that art. 1903.2 CC – which makes parents liable for the tortious acts of their children – has consequences for the parents, but leaves the issue of the underage liability unaffected.

³ See E. Gómez Calle, La responsabilidad civil de los padres (1992), 27.

⁴ E. Gómez Calle (supra fn. 3), 190.
Therefore, the Supreme Court has had few occasions on which to consider the issue of direct liability of minors.\footnote{In these cases the Supreme Court has usually held them liable together with their parents. See Sentencia del Tribunal Supremo (Supreme Court Decisions, STS) 24.5.1947 ([1947] Repertorio de Jurisprudencia Aranzadi (RJ), 631 and 631bis); 15.2.1975 (RJ 1975\566) and 10.4.1988 (RJ 1988\3116). See also STS 22.1.1991 (RJ 1991\304; commented by S. Díaz Alabart in Poder Judicial 1991, no. 23, 135–140); 22.9.1992 (RJ 1992\7014); 30.12.1992 (RJ 1992\5547) and 12.4.1994 ([1994] Jurisprudencia Civil, 334). See C. López Sánchez, La Responsabilidad civil del menor (2001), 260 et seq.}

2. Is there a specific window within the life of a child during which the liability of the child depends on its capacity to act reasonably or any similar standard?\footnote{M. Navarro Michel, La responsabilidad civil de los padres por los hechos de sus hijos (1998), 112.}

3 Since a fixed minimum age for children to be liable does not exist (see supra nos. 1 and 2) any case of damage caused by a minor will have to be dealt with by first applying the rule that requires the tortfeasor – at least within fault liability – to have capacity to commit a culpable act.\footnote{M. Navarro Michel (supra fn. 6), 112; F. Rivero in: J.L. Lacruz et alii, Elementos de Derecho Civil, II, Derecho de Obligaciones (1999), 467; F. Pantaleón (supra fn. 7), 453.}

\footnote{In the Spanish legal scholarship S. Díaz Alabart, Comentario a la sentencia de 15 de diciembre de 1994, [1994] 38 CCJC, 639, ventures to talk about the age of 10 years as a limit “under which one could consider that incapacity exists and if we move to an age above, for instance 12, it is clear that he has capacity”. Nevertheless, clearly against this yardstick, STS 12.6.1997 (RJ 1997\5423) considers that a 12-year-old child has no capacity. More recently, C. López Sánchez (supra fn. 5), 169 et seq. seems to suggest the limit of 7 years. Nevertheless, the same author recognises that case law has not set up a specific threshold and that several decisions have considered that minors 10 or 12 years old have no tortious capacity.}

4 The capacity to commit a culpable act requires the tortfeasor to possess the general aptitude to understand and to want, which depends on him or her having enough maturity of judgement to understand what damaging others means,\footnote{F. Pantaleón Prieto, Comentario a la sentencia de 10 de marzo de 1983, [1983] 2 Cuadernos Civitas de Jurisprudencia Civil (CCJC), 452.} assessed according to his or her intellectual conditions. Insofar as he or she has the tortious capacity so defined, the child may be held liable for his or her wrongful act.\footnote{In the Spanish legal scholarship S. Díaz Alabart, Comentario a la sentencia de 15 de diciembre de 1994, [1994] 38 CCJC, 639, ventures to talk about the age of 10 years as a limit “under which one could consider that incapacity exists and if we move to an age above, for instance 12, it is clear that he has capacity”. Nevertheless, clearly against this yardstick, STS 12.6.1997 (RJ 1997\5423) considers that a 12-year-old child has no capacity. More recently, C. López Sánchez (supra fn. 5), 169 et seq. seems to suggest the limit of 7 years. Nevertheless, the same author recognises that case law has not set up a specific threshold and that several decisions have considered that minors 10 or 12 years old have no tortious capacity.}

5 In the same way that, as pointed out, there are no legal rules establishing an age limit under which children cannot be considered capable of committing a culpable act, there is no legal age limit after which it can be presumed that a minor has tortious capacity.\footnote{Among the decisions of the Supreme Court, it is possible to find judgments that consider that not only 4-year-old children (STS 8.11.1995 (RJ 1005\8636)) but also 8-year-old children (Sentencias del Tribunal Supremo, SSTS 17.9.1998 (RJ 1998\6544); 16.5.2000 (RJ 2000, 3930)) cannot be held liable in tort for lack of tortious capacity. By contrast, courts usually consider that 14-year-old children have tortious capacity, as for instance the Sentencia Audiencia Provincial (Provincial Court decision, SAP) Madrid 11.2.2002 (JUR 2002\113980), which held that in the case at stake, the 14-year-old child “had enough discretion to know the results and effects that could arise from his act”.} Case law has also eschewed general declarations on this topic and has proceeded on a case-by-case basis.\footnote{Among the decisions of the Supreme Court, it is possible to find judgments that consider that not only 4-year-old children (STS 8.11.1995 (RJ 1005\8636)) but also 8-year-old children (Sentencias del Tribunal Supremo, SSTS 17.9.1998 (RJ 1998\6544); 16.5.2000 (RJ 2000, 3930)) cannot be held liable in tort for lack of tortious capacity. By contrast, courts usually consider that 14-year-old children have tortious capacity, as for instance the Sentencia Audiencia Provincial (Provincial Court decision, SAP) Madrid 11.2.2002 (JUR 2002\113980), which held that in the case at stake, the 14-year-old child “had enough discretion to know the results and effects that could arise from his act”.}