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Workplace Injuries and Tort Liability

Manuel Luque Parra
Facultad de Derecho
Universitat Pompeu Fabra

Carlos Gómez Ligüerre
Facultad de Derecho
Universitat Pompeu Fabra

Juan Antonio Ruiz García
Facultad de Derecho
Universitat Pompeu Fabra

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- ***More victims every year***

The figures speak for themselves: six workers die every working day in Spain.

> In 1999, 1,572 workers died in 1,671,004 occupational accidents in Spain. The numbers were substantially higher than those of 1988, when 1,491 workers died in 1,486,109 accidents in the workplace and those of 1997, with 1,454 workers killed in 1,320,161 accidents. (http://www.mtas.es/Estadisticas/BEL/ATE/ate1.html).
>
> This data leads us to conclude that in 1999 the daily average of workplace accidents in Spain was 4,578, with four deaths. But the figures are even more worrying if we base our calculations of daily deaths in work accidents not on 365 days but on the minimum yearly work calendar: 243 days. The average then rises to over six deaths per workday. If the calculation is made on the basis of the collective agreement (1,768 hours) we can state that in 1999 almost one worker died every working hour (1,572 deaths in 1,768 working hours). Spain almost triples the European Union average in fatal accidents (13.9 per 100,000, as opposed to 5.51 per 100,000. El País, 2.4.00, p. 30). We believe that all these figures are closely related to insecure employment, as Spain is also the country with the highest percentage of temporary work contracts in the European Union (32.9% versus the European average of 12.8%).

Workplace injuries make up a large part of the activities of the Spanish Supreme Court.

In the first Chamber, from 1996 to 1999, sixty workplace injury cases have been decided out of the 295 sentences passed on non-contractual civil liability during this period.

The ratio is obviously higher in the Fourth Chamber. In the period we are looking at, this Court resolved 39 work accident cases of the 113 appeals presented on employer liability due to non-compliance with safety measures.

- ***A de facto supposition and two legal systems***

Injuries suffered in an workplace accident are accounted for by various legal regulations:

a) Article 115 of the LGSS (Redrafted Text of the General Law on National Insurance, Real Decreto Legislativo (Royal Legislative Decree) 1/1994, of the 20th June) defines a workplace injury as *"any physical injury suffered by the worker during or as a result of work for another party"* and the employer for which the injured party works is, where appropriate, held responsible for these injuries.

b) Article 1902 Cc., on the other hand, states the obligation to pay compensation by the person who *"by action or omission, involving fault or negligence, causes tort to another"*.

Both these regulations are in principle applicable in cases of damages suffered in an employment relationship. But the fact that there are two legal approaches –occupational liability and civil liability for tort – leads to two problems.

Firstly, it is common in occupational accident suits for questions to be raised over the type of jurisdiction – civil or labor – able to hear the case. Secondly, once the appropriate jurisdiction has been decided, the plaintiffs and defendants respectively claim and deny the suitability of allowances and aid received by the worker as a result of the accident, with judges and courts stipulating the compensation.

- ***Jurisdictional problems***

1. Applicable legislation

The Spanish legislator has chosen not to uphold a single jurisdictional authority for hearing occupational accident liability cases. For workplace injuries, legislation procedures grant authority to civil and labor courts according to formal criteria – the type of relationship between the injurer and the victim – but they do not take into account the damage compensation systems.

Thus, the cases in which a worker sues a private employer for damages suffered in the course of the employment relationship often causes jurisdictional conflict between the labor and civil courts. This is the most serious practical problem and, of course, the most urgent. Today, plaintiffs and defendants do not have any guidelines for deciding before which court to sue or be sued.

Articles 9.2 and 22.2 of the Ley Orgánica del Poder Judicial 1/1985, 6th July, General Act on the Judiciary (henceforth LOPJ) respectively recognize the *vis attractiva* of civil courts and their authority to hear cases deriving from non-contractual obligations originating in Spain or abroad, if the injurer's and victim's usual place of abode is on Spanish territory.

Civil jurisdiction is therefore authorized to decide:

> "As well as its own matters, all those that are not attributed to another jurisdictional regime." (Art. 9.2 LOPJ).

> "(…) in matters relating to non-contractual obligations when the acts from which they derive have occurred on Spanish territory or the tort-feasor's and the victim's usual place of abode is in Spain" (Art. 22.2 LOPJ).

For their part, articles 9.5 and 25.1 LOPJ give labor Courts the authority to hear cases relating to *"National Insurance matters"* and *"rights and obligations deriving from an employment contract"*.

> "Labor Courts shall hear suits filed within the social division of Law, both for individual and collective conflicts, as well as claims relating to National Insurance or against the State when it is deemed to be responsible for labor legislation. (Art. 9.5 LOPJ).

> "In labor jurisdiction, the Spanish Courts shall be authorized:
> 1st. In matters relating to rights and obligations deriving from employment contracts (…)" (Art. 25.1 PGAJ).

Article 2.a) of the Ley de Procedimiento Laboral (Labor Procedure Law approved 2/1995, 7th April, henceforth LPL) reserves for labor Courts the hearing of suits between employers and employees that are the "*consequence of an employment contract*".

> Labor Courts shall hear litigious issues brought:
> a) Between employers and employees as a consequence of the employment contract (Art. 2 a) LPL).

Numerous labor regulations affirm the existence of civil liability in cases of violation of safety regulations in the workplace and prevention of occupational hazards.

Article 42 of Law 31/1995, of the 8th November, on Prevention of Occupational Hazards (Prevención de Riesgos Laborales), also imposes general prevention obligations and specific ones for certain sectors and stipulates that:

> *"Employers' violation of their obligations in terms of preventing occupational hazards shall give rise to administrative liability and if necessary, criminal and civil liability for the damages deriving from this violation."*

And according to article 127.3 LGSS:

> *"When the payment originates in acts involving a person's, including the employer's, criminal or civil liability, the payment shall be made, once the remaining conditions have been met, by the Social Security body for Occupational Hazards and Diseases, without prejudice to these liabilities. In these cases, the employee or his or her relatives may claim compensation from the persons criminally or civilly liable."*

Nevertheless, none of these regulations state which type of court, labor or civil, should rule on this kind of liability.

2. Case law from the Supreme Court

The debate in the First and Fourth Chambers of the Supreme Court on which jurisdiction holds authority has focused on the meaning of the term *"nature of the employment relationship"*. For the first Chamber, workplace injuries suffered by an employee lie outside the nature of this relationship. They are, then, identical to the damages that may be suffered by a person in any other circumstances and the case therefore corresponds to civil Courts. For the labor Chamber, on the other hand, the prevention and compensation of workplace injuries form part of the typical nature of any work relationship and thus fall under the jurisdiction of the labor Courts.

The First Chamber, in its authority to hear tort cases, gives a restrictive interpretation of the expression *"nature of the employment relationship"* and to avoid what is known as *"jurisdictional pilgrimage"*, without questioning its own authority, it decides cases in which employers are liable for injuries suffered by their employees, even in cases in which the rulings had been dismissible due to lack of jurisdiction.

> STS, 1ª, 13.7.1999 summarizes the doctrine of the First Chamber: on the 6th September 1991, Pelayo B., a faceworker in a mine, was crushed to death by the coal that came loose when a bag of firedamp exploded in the "El Sotón" shaft owned by the HUNOSA company in Entralgo (Asturias). His widow and children claimed 14 million pesetas in compensation from the company before a civil Court. The Trial Court partially allowed the claim. The Court of Appeals allowed the appeal by the defendant, declared that the civil jurisdiction did not have authority to judge the case and annulled the Civil Court's ruling. The plaintiffs appealed and the Supreme Court reversed. Civil jurisdiction had to declare its authority:
>
> "In spite of the fact that the Court of Appeal ruling is based on two previous rulings from the Court of Disputes, whose decisions are not a valid basis for creating case law, this ruling unduly applies articles 9 LOPJ and 2 LPL, taking into account that these precepts lead one to understand that the subject matter in order to attribute jurisdiction of labor courts refer to employment contract issues and others relating to collective disputes, National Insurance and mutual insurance companies; this does not apply to the case in question, in which damages were represented as a consequence of a work activity, which exceeds the specific sphere of the employment contract and gives one to understand that it should be heard by a civil court, due to its residual and extensive nature" (F. J. 2)

First Chamber judges have almost always ignored the decisions of the Court of Disputes which on several occasions has manifested itself in favor of labor court's authority to hear cases on workplace injuries and against civil jurisdiction's authority to decide cases of tort caused within the context of an employment relationship, Rulings of 23.12.1993 (Ar. 10126 and 10131), of 4.4.1994 (Ar. 3196) and of 10.6.1996 (Ar. 9676):

> "Compliance with legal duties relating to safety in the workplace are included in the nature of the employment relationship, the hearing of which corresponds to labor Courts."

According to this doctrine, labor Courts' authority is not only for workplace injury claims, but also civil liabilities envisaged by labor legislation in these cases.

In 1998, two rulings by the Civil Chamber of the Supreme Court (both with an opinion by Justice Luis Martínez-Calcerrada Gómez) accepted the rulings of the Court of Disputes and declared that civil courts did not have the authority to hear employer liability cases.

A) In the first, STS, 1ª, 10.2.1998, the Supreme Court declared its lack of authority and acknowledged the disparate criteria governing these matters over the last few years.

> A cleaner filed a lawsuit against her company, "Sociedad Anónima Alimentaria Aragonesa", for tortious liability in non-compliance with safety regulations in the workplace. The employee had suffered injuries not described in the ruling, when cleaning a conveyor belt. The labor courts had found the company guilty and the Industrial Relations Commission had fined it for violation of safety regulations. In a civil court, the first ruling partially allowed the claim and its decision was confirmed by the Court of Appeals. The defendant appealed again. The Supreme Court declared *ex officio* civil jurisdiction's lack of authority: labor laws had been infringed and liability should be

> occupational. The Supreme Court admitted that there is "an apparent discrepancy between the rulings of this Court, some of which claim authority to decide these suits (…) and others which take the opposite line and declare themselves without authority" and therefore "in the light of these diverse rulings on this controversial jurisdiction, it is necessary to reproduce what the Court of Jurisdictional Disputes has repeatedly resolved on the matter."

B) In the second, STS, 1ª, 20.3.1998, it defended the abstention of the civil jurisdiction in a compensation claim for the death of a construction worker.

> The widow and two daughters of the worker filed suit against the construction company for which their husband and father had worked (Construcciones Pichel Hermanos, SL) and against Granitos Soygar SA, the company that had contracted the work in the exercise of which the victim died. 10 million pesetas were claimed for the widow and 10 million for each of the daughters. The ruling of the trial court partially allowed the claim and sentenced "Granitos Soygar" to pay 10 million pesetas to each of the plaintiffs. The Provincial Court of Pontevedra dismissed the defendants' appeal and confirmed the decision. The sentenced company appealed claiming the exclusive fault of the victim: "if the employee died in a fall it was solely and exclusively due to the fact that he was not wearing the safety harness in the correct manner". The appellant also claimed that the compensation requested was "disproportionate, to say the least, as the plaintiff has already received the sum of 11,655,331 ptas." (1,750,000 ptas from the Mutua Asepeyo insurance firm, 676,845 ptas as special compensation raised for the beneficiary, and 9,228,486 ptas deposited in the National Insurance General Treasury as capital for the widow's pension and orphans' allowances). The First Chamber again questioned its authority over cases of damages caused by violation of safety regulations in the workplace. After citing the rulings of the Court of Disputes of 23.12.1993, 4.4.1994 and 10.6.1996, the First Chamber stated, in the 3rd "Fundamento Jurídico" of the ruling, "that the Court can only reiterate what is legally obvious in terms of liability: when a lawsuit is filed on the basis of an employer's non-compliance with appropriate measures of safety, control and vigilance, which can be demanded of him on the basis of the employment contract (...) and protection is sought both in contract and in tort , the unlawfulness determining the liability of the defendant, and which is present in each of these precepts, cannot be detached from employment contract law, and therefore the labor court's authority becomes unquestionable: for these reasons, without any further need to examine the appeal (…) it is appropriate to grant authority" to the labor courts.

However, later rulings by the First Chamber once again claim that it is the authority of civil jurisdiction to hear worker's lawsuits against their employers for injuries suffered in occupational accidents (as well as the above-mentioned Supreme Court Ruling, STS, 1ª, 13.7.1999, one may observe, among others, STS, 1ª, 17.2.1999 (worker died in fall from scaffolding without protective barrier while restoring building façade), 10.4.1999 (amputation of miner's left hand when cable he was fitting onto a launch suddenly tautened), 18.5.1999 (young fumigator electrocuted by high-tension cable while using a metal pole in a field of crops), or 1.10.1999, (worker crushed by falling plastic spools which he was loading into a truck).

For its part, the Fourth Chamber considers that it has exclusive authority over these cases. It is of the opinion that the determining factor of the tort arises within the context of the agreed conditions and as a normal development in the nature of the contract. Moreover, the references to civil liability in articles 123.3 and 127.3 GLSS do not mean that the authority for jurisdiction goes to the civil court, but that labor courts can decide on the

compensation for (civil) liability to be paid by the employer. *"In the sphere of labor law, because there is a duty of safety to be fulfilled by the employer, it is difficult to imagine cases in which the employer simultaneously violates the warranties implied in breach of contract and commits non-contractual unlawfulness, included in this work-related context"* (STS, 4ª, 10.12.1998, F.J. 4º, for the case of a fitter who died when the scaffolding on which he was working collapsed).

> STS, 4ª, 23.6.1998 (appeal to unify doctrine), decided a case in which three workers died when the charges they were handling exploded in a tunnel during the construction of the motorway in Extremadura. The Court considered that "when there is a tort potentially caused by occupational unlawfulness, taken to be the violation of a state or collective regulation or a law of private autonomy or custom, liability for it is no longer based on civil, but on labor law" (FJ 2º).

3. A possible solution

This disparity of case law criteria gives rise to legal uncertainty and prevents the formation of a single, stable jurisprudential doctrine on the liabilities deriving from workplace injuries. A single jurisdiction must hear and decide the claims for compensation of these injuries. The Court of Disputes has opted for the labor courts. This jurisdiction has in its favor its specialization in employment contracts and knowledge of National Insurance related issues. However, civil jurisdiction has traditionally been given the authority to decide tort liability cases and is maybe more accustomed to award damages than labor courts are.

> Moreover, compensation awarded by labor courts is usually scheduled. This is the case for compensation for unfair dismissal (art. 56.1 a ET), discharge of a contract by the employee as a result of serious non-fulfillment of employer's obligations (art. 50.1. c ET), or compensation for substantial modifications to working conditions that may affect the employee's dignity (art. 50.1 a ET), or for employee relocation (art. 40.1. ET). The exception to this rule is the process of protection of fundamental rights (arts. 175 to 182 LPL), which considers that one of the effects of declaring the infringement of a fundamental right is *"reparation of the consequences deriving from the act, including any appropriate compensation"* (art. 180.1 LPL). This compensation includes both physical and emotional harm (See STC 239/1991, of the 12th December).

The question to be answered is: on the basis of which criteria is the authority of one jurisdictional regime or another decided? If authority is attributed on the basis of the subject matter (reparation of a tort) it is the civil jurisdiction that should have the authority. If the criteria is the type of relationship joining a tortfeasor and a victim, it should be the labor jurisdiction.

The authors of this paper differ in their view of a possible solution:

a) One of us (Carlos Gómez) believes that a possible solution to this conflict of powers between jurisdictional regimes in matters of occupational accidents involves differentiating between the aspirations deriving from

i) the type of relationship joining a tortfeasor to a victim, and

ii) the claim for reparation of the injuries suffered.

The first would be heard by labor Courts and the second by civil Courts.

> Labor laws recognize public aid and payments to the victim of workplace injuries or his or her relatives. These payments, as we shall see, are based on the number of years worked, the type of accident and the seriousness of the injury. They are calculated sums of money that can be modified by a labor court. As well as the public aid system, labor regulations associate the obligation to compensate with the violation of legal or regulatory measures of safety and accident prevention.

Thus, labor courts would potentially hear cases on public aid and payments linked to the employment contract and on fines for the employer. Civil jurisdiction would then have exclusive authority to judge the employer's liability for the accidents suffered by his or her employees. Labor courts would hear the compliance with National Insurance regulations and civil courts would judge the behavior of the tortfeasor and the victim according to the standards of due care that can be demanded in their particular sphere of activity.

To reinforce this interpretation, we must note that the concept of workplace injuries used by labor courts (and therefore by National Insurance regulations), is wider than that which could be given to a person on the basis of civil law's criteria for allocating liability. An *in itinere* accident, common in labor case law, is a good example of this.

Labor law thus applies to the measures envisaged to mitigate the negative consequences of bodily injury, sick leave and potential disabilities or occupational sicknesses. It must, however, resort to civil rules of tort liability to ensure complete compensation of the harm, not subject to specific items or National Insurance contributions. We believe this is the only way of ensuring the victim's complete reparation. Civil compensation may be much more extensive than that pronounced by the labor courts because it takes into account the victim's situation before suffering the accident and, unlike labor law, allows for reparation of emotional harm and property damage. Regulations on prevention of occupational hazards do not completely cover the care that one can feasibly demand.

A labor court's ruling that recognizes aid for the employee and fines for the employer is thereby binding for the civil Court, but it can freely determine the sum required to give the victim complete compensation. This interpretation, based on the distinction between aid and compensation measures, can solve any potential incompatibility between what is paid through the National Insurance system and the liability of the negligent employer.

b) The other two (Manuel Luque and Juan Antonio Ruiz) believe that the fact that civil Courts "*are more used to calculating damage awards than labor Courts*" is not sufficient reason to deny its authority in this field, especially when a considerable percentage of cases heard refer to infringement of the employee's fundamental rights, in which effective reparation of damage is an inseparable part of the case and of the court's verdict.

In this way, the area of law specializing in rendering of services (employment relationship) should prevail over specialization in the claim (reparation of damages).

> Article 14.1 of the Law of Prevention of Occupational Hazards contractualizes the right of workers to proper protection in terms of health and safety at work and, consequently, the employer's duty to protect employees from risk.
>
> *"Workers have the right to proper protection in terms of health and safety in the workplace. This right presupposes the existence of a correlating duty on the part of the employer to protect employees from occupational hazards".*

We therefore share the position put forward above and taken by the Court of Disputes and the Fourth Chamber of the Supreme Court (STS, 1ª, 20.3.1998), i.e., giving labor Courts the authority to hear claims of employer liability for accidents suffered by employees.

- ***The various compensation mechanisms***

According to our legal system, the victim of workplace injuries or an occupational sickness is eligible to receive:

a) Public (workers' compensation) benefits calculated according to the years that the worker has been paying National Insurance, the average payment made over a specific period of time and the seriousness of the accident (articles 100 and ff. LGSS). These payments, or sums of money to be periodically paid to the worker, will be made by the National Insurance system or by the employer if it is proven that he or she did not fulfill his or her duties relating to National Insurance affiliation, registration and / or payments.

b) The surcharge referred to in art. 123 LGSS. If it is proven that the employer did not comply with safety regulations in the workplace, he or she will be obliged to make increased payments to the employee. This increase ("surcharge" in the words of the Law) will amount to 30 to 50% following the ruling by the Spanish Department of Employment. This is an administrative sanction imposed on the employer but it is the accident victim who shall receive it. The literature has pointed out the mixed public and private nature of this surcharge (see Manuel Luque Parra, 1999). It is decided by the public administration, it is not insurable, it is graduated according to the seriousness of the infringement of the rule of care and it operates in a similar way to a punitive damages system. (Punitive Damages)

c) "Voluntary improvements" agreed in the employment contract or in the collective agreement of the sector in which the accident victim worked. These are increases in the public payments agreed between employees and employers. To avoid the risk of potential company insolvency, Law 8 / 1995, of the 8th November, on Planning and Supervision of Private Insurance (Ordenación y Supervisión de los Seguros Privados) and its later modifications have forced these risks to be externalized,

either by underwriting insurance policies or by creating pension plans and funds before the 1st of January 2001.

d) Compensation decided on the basis of arts. 1902 and ff. Cc. and 109 and ff. CP if, as well as the occupational liability, civil liability is demanded of the employers.

Benefits (public or private), fines and compensation for civil liability all have a shared aim: compensation of damage following a workplace injury or occupational sickness. The employee in question or, if he or she died, the descendents, are recognized as being eligible for compensation from various sources – the employer or the Public Administration – the sum of which depends on what the Law, the contract or the Court's decision provides for. The main problem arising from all these different compensation mechanisms is their compatibility, in other words, if the employee:

a) Can receive all benefits deriving from the labor laws and those decided by civil or criminal Courts.

b) Must choose between one and the others.

c) Must subtract what has already been received for the injuries or sickness from the compensation decided by the judges and courts, be they civil, criminal or social.

The Law does not provide any criteria for resolving the issue and the judges of the First and Fourth Chambers interpret the relevant legal provisions very differently.

This analysis does not take into account the wages earned by the employee which, one assumes, are higher the greater the degree of danger in the work he or she carries out (this is normally manifested through *danger, toxicity or physical arduousness money).* Although the Spanish legal system does not take it into account, the higher wages of workers with more hazardous tasks act as compensation for future damages.

"Wages and worker's compensation serve as complementary compensation mechanisms, with wages providing ex ante risk compensation and worker's compensation providing ex post earnings replacement. Each of these wage components reduces workers quitting, and workers accept lower wages in response to higher worker's compensation benefits. This result reflects the trade-off workers are willing to make between different forms of risk compensation." (Moore / Viscusi, (1990), pp. 109-110)

1. Legislation / Civil, criminal and occupational liability in the legal texts

The Spanish legal system has no general rule that recognizes or prohibits the possibility of accumulating all the benefits and compensation that the worker may receive. Legislation restricts itself to certain specific cases, which, moreover, do not solve the problem.

Thus, article 127.3 LGSS states that when health services are required as a result of "*actions implying the criminal or civil liability of a person, including the employer, these services will be provided"* and "*the worker or his or her trustees can claim compensation from the parties criminally or civilly liable.*" And in relation to the benefits surcharge, article 123.3 LGSS provides that

"*the liability governing this article is independent of and compatible with those of any legal order, including criminal, that may derive from the infringement".*

These provisions envisage various liabilities (occupational, civil and criminal) for a single action. However, it is unclear whether what they allow is: a) to base a compensation claim on the civil or criminal liability of the employer in spite of the existence of special regulations on damage caused in the context of an employment relationship; b) to go before civil or criminal courts instead of labor courts; or c) to add to the compensation based on the application of the National Insurance system, full compensation based on the civil or criminal liability of the employer (see Luis Díez-Picazo, (1999), p. 175).

The doubts as to the compatibility between cases brought before labor Courts and those brought before civil or criminal Courts cause Spanish courts no particular problems. With very few exceptions, (Conflictos jurisdiccionales) the civil and administrative courts admit civil liability claims for workplace injuries or occupational sicknesses on which labor Courts have already ruled. If the cause of the damage suffered by the worker is an action specified as a crime or misdemeanor to the Criminal Court, they can always declare civil liability deriving from the employer's criminal offence. Nothing stops the worker from suing his employer in the civil, labor and, if relevant, criminal and administrative courts. This compatibility of proceedings generates frequent conflict among the jurisdictional divisions referred to in the first part of this paper.

The problems of incompatibility of the various types of liability arise when the worker who has received the benefits recognized by the Law, through the collective agreement or his employment contract, demands compensation for damages from his employer.

> The Spanish legal system has more cases of legal benefits for various liabilities for a single act. Unlike that which occurs in labor law, the relevant rule decides if the benefits can be added to the compensation that the civilly liable parties must pay.
>
> Thus, article 6.5 Law 32/1999, of the 8th October, on solidarity with victims of terrorism states that:
>
> *"Compensation awarded according to the provisions of this Law will be compatible with any pensions, aid, other compensation or indemnities that may have been received, or may be recognized in the future, under the aegis of the provisions contained in the legislation on Aid to Victims of Terrorism or other legal provisions."*
>
> A parallel rule, on the contrary, article 5 of Law 35/1995, of the 11th December, on aid and assistance to victims of violent crimes and crimes against sexual freedom highlights the incompatibility of the aid granted by this law with any other, public or private:
>
> *"1. Receipt of aid as regulated in this Law shall not be compatible with receipt of compensation for damages caused by crime as established by ruling (...) 2. Likewise, the aid covered by this Law shall be incompatible with the compensation of economic aid to which the beneficiary may have a right through a private insurance system, or through a benefit that may correspond to the temporary disability of the victim in the National Insurance system."*

2. Adding or subtracting. Decisions by the First and Fourth Chambers of the Supreme Court

The lack of clarity in the legal criteria has not been made up for by case law. The First and Fourth Chambers of the Supreme Court defend opposite positions when it comes to the possibility of accumulating any aid and compensation that the worker may receive. The view of the First Chamber is that employment benefits and damage compensation are two clearly distinct things and for this very reason are compatible and cumulative. The Fourth Chamber, on the other hand, sees the various mechanisms as different ways of repairing the same damage and are thus not cumulative.

a) Therefore, in cases in which the employer liable in tort for workplace injuries wishes to subtract from the compensation he owes the worker the sum received through public and private benefits, surcharges and voluntary additional benefits, the answer of First Chamber magistrates in the Supreme Court is unanimous: "compensation for workplace injuries is compatible […] with other compensation deriving from negligent or culpable acts by the employer that result in an action for tort" (STS, 1ª, 18.5.1999, FJ. 1ª).

> Thus, STS, 1ª, 11.12.1997: an employee of the TICSA company suffered an accident in the workplace because of which he declared total and permanent disability. The accident, a fall from a beam, occurred in facilities owned by the CEPSA company, in which the injured employee worked as a night watchman. In its appeal, CEPSA pleaded that the benefits received by the worker for permanent disability should be subtracted and it should be taken into account that the disability did not prevent the worker from being employed in other positions. The Supreme Court pronounced that "financial compensation (...) complies with the serious and irreversible physical consequences affecting the claimant and their repercussions on his way of life, not only on a personal level, in terms of attempting to compensate for the pain suffered, but also in the sphere of social and work life, in terms of the difficulties that he will obviously find when looking for a job that is compatible with his evidently much deteriorated physical condition, and consequently his diminished capacity for work". (F.J. 2). The defendants' appeal was overruled. The Supreme Court ruling confirmed the "Audiencia" ruling which ordered them to pay 22,091,000 ptas in compensation to the worker.

b) The Fourth Chamber has on several occasions declared the incompatibility (which for labor courts equals cumulation) of social benefits for occupational accidents with the employer's liability to pay compensation for infringement of the duty of care. The victim of workplace injuries can opt for one form of compensation or the other, but in no circumstances both at the same time. It is the same lawsuit and the worker can neither start two proceedings for the same case (one civil and the other before labor courts) nor receive benefits twice for the same harm.

> In the case decided by STS, 4ª, 17.2.1999, a locksmith who lost the sight of his left eye when a splinter shot off from the metal plate he was removing, claimed 10 million pesetas from the employer. The worker was receiving a National Insurance annuity of 2,344,740 ptas. The Social Court partially allowed the claim and ordered the employer to pay 2,353,470 ptas. The High Court of Justice of Madrid reversed. The claimant was no more fortunate in the appeal. "In order to determine all forms of damage compensation deriving from workplace injuries, one must separate or calculate benefits recognized on the basis of National Insurance protection, especially

> when determining the amount of compensation deriving from damage affecting the injured party's work or professional life." (F. J. 2nd).

3. Cumulation, deduction or subrogation

The problem with having a variety of compensation mechanisms is not much different to the problem of concurring private insurance policies and damage compensation. The National Insurance system acts as an insurance company both for workers, who will get payment of their salaries in case of disability or injury, and for employers, who are thus covered against the risk of insolvency due to compensation payments. The debate on this subject revolves around deciding if "the benefits brought by the victim's insurance systems may constitute rights that are separate from the compensation he may have a right to according to civil liability regulations" (Pablo Salvador Coderch, Recensión a "Derecho de daños" de Luis Díez-Picazo). It is the same debate as the one on *Collateral Benefits* in *Common Law* (Patricia Danzon, 1998) and on *Compensatio lucri cum damno* in continental law (Fernando Pantaleón, 1993).

The rules on compatibility of actions aim to ensure that the damage caused to the victim shall be repaired and that the victim shall not be enriched by the damage suffered. The intention is to avoid danger of under-compensation, which is an incentive to cause accidents, and the risk of over-compensation, which disincentivizes diligent conduct by the victim. Complete reparation is one of the objectives of the Law of Torts. Subsidizing negligent conduct is not.

> There is no easy solution to the problem, but for the rules of civil liability to work properly, a solution must be found. If risk is assigned inefficiently, the individual who is obliged by law to adopt damage prevention measures, for example, an employer, lacks any means of preventing the damage for which he is liable. If on the other hand the risk corresponds to the victim, in this case the worker, the employer will reduce investment in prevention, despite the sanctions provided for in the legal system.

When the victim is insured against potential damages, two rules can be applied: (Steven Shavell, (1987), pp. 235 and ff.)

a) The cumulation rule, according to which the victim shall receive the sum of the insurance policy and the compensation that the person responsible is ordered to pay.

b) The deduction rule, in which the victim can only get, in one trial, the difference, if there is one, between losses suffered and the sum received from insurance.

The first rule, on cumulation of monies, presupposes that in some cases the victim will receive a total sum higher than his losses. Deduction implies that the victim will not always have an incentive to claim compensation for damages that the person responsible should theoretically pay, and the threat of which is the best way to prevent future harm.

The solution to the problem of cumulation or deduction of monies received through general systems for compensating fixed amounts for damage deriving from workplace injuries or occupational sickness lies in allowing, through direct action or subrogation, that whoever has compensated the damage, the insurer (in this case, National Insurance) to sue the person responsible (the employer or a third party) for the monies paid to the victim.

In this way, the worker only receives one payment of the money owed him for damage reparation and the National Insurance system can sue the employer for the monies paid to the worker. This then meets the objectives of risk coverage and damage recovery (because the worker receives compensation) and deterrence of future risks (because the employer does not save money in compensation for damage caused in the course of business). (Collateral Source Rule)

> The solution has to recognize for the National Insurance system what article 43 of Law 50/1980, of the 8th October, on Insurance Contracts, recognizes for damage insurers:
>
> "The insurer, once compensation is paid, can exercise the rights and actions that, due to the accident, correspond to the insured party in relation to the persons responsible for it, up to the limit of the compensation."

This is recognized by the final paragraphs of article 127.3 LGSS, although only for third party liability (not employers) and for the cost of health services:

> *"Independently of the actions resorted to by workers or their executors, the National Health Service and, if relevant, the Mutual Insurance Societies for Occupational Accidents and Diseases of the National Insurance System, shall be entitled to sue the responsible third party (…) for the cost of health services received."* To exercise this right, the Insurance Firms and Mutual Societies *"shall have full right to be party to a suit in the criminal or civil proceedings taken in order to make the compensation effective, and to directly file the suit."*

Recognition of National Insurance's, or any of its dependent agencies', right to sue an employer for the monies paid to the worker would solve the problem of compensation accumulation (see Fernando Gómez Pomar, "Indemnización civil e indemnización laboral", Revista de Derecho Privado, 5, 1996).

The employer and National Insurance, then, act as mandatory insurers of future damages that may be suffered by the worker. The monies received are therefore assimilated into those of any future risk prevention insurance policy taken out by any citizen. (see Richard Posner, (1998), p. 219: "*[m]ost gratuitous benefits turn out to be ones for which the beneficiary has paid indirectly*.").

The worker would receive, when appropriate, the extra benefits with which the employment department can sanction the employer who breached occupational hazard prevention regulations. If, once the monies received from National Insurance and the surcharge have been added together, the worker considers that the damage has not been

repaired or wishes to claim for items not included in the benefits received, for example pain and suffering, and excluded from labor compensation, nothing stops him from suing the employer directly in a civil (or labor) court to claim for the difference.