

RESPONSABILIDAD PATRIMONIAL DE LAS ADMINISTRACIONES PÚBLICAS EN EL ÁMBITO EDUCATIVO

PATRIMONIAL RESPONSIBILITY OF THE PUBLIC ADMINISTRATION IN THE EDUCATIONAL FIELD

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Resumen

El artículo estudia la responsabilidad patrimonial en el ámbito educativo de los centros docentes de enseñanza no superior en un contexto donde las acciones de las instituciones educativas pueden tener un impacto directo en la vida de los distintos miembros de la comunidad educativa. La responsabilidad patrimonial garantiza que cualquier daño causado de manera indebida pueda ser resarcido, siendo este procedimiento una garantía para la ciudadanía. Se analizarán los diferentes presupuestos que se deben dar para imputar la responsabilidad a la Administración, teniendo en cuenta sentencias del Tribunal Supremo, Tribunal Constitucional y demás órganos judiciales, así como se expondrán diferentes propuestas de mejora para evitar estos procesos administrativos, los cuales suelen conllevar una detracción de recursos públicos

para afrontar estas responsabilidades mediante indemnizaciones, así como la contratación de diferentes pólizas con entidades aseguradoras y demás instrumentos de cobertura de riesgos.

Abstract

The article studies the patrimonial responsibility in the educational field of non-higher education educational centers in a context where the actions of educational institutions can have a direct impact on the lives of students, parents and teachers/non-teachers. Patrimonial liability guarantees that any damage caused unduly can be compensated, this procedure being a guarantee for citizens. The different assumptions that must be given to impute responsibility to the Administration will be analysed, taking into account judgments of the Supreme Court, Constitutional Court and other judicial organisms, as well as different proposals for improvement will be presented to avoid these administrative processes that entail a withdrawal of public resources to face these responsibilities through compensation.

Palabras clave: *Responsabilidad patrimonial, principio de causalidad, acción de regreso, Administración Pública, indemnización, antijuricidad.*

Keywords: *Patrimonial liability, principle of causality, return action, Public Administration, compensation, illegality.*

1. INTRODUCTION

The financial liability of the administration, specifically in education, is an extremely important issue within the framework of administrative law and public management. This article aims to analyse in detail the theoretical and practical aspects related to this liability, including its legal basis, the procedures for its enforcement, and relevant case law. On the other hand, in the educational context, financial liability can arise from multiple situations, such as accidents during school hours, bullying, negligence in the supervision of pupils, etc. Each case requires a detailed analysis by the Education Inspectorate in order to determine the demand for liability, the existence of the causal link and the quantification of the damages suffered.

The education administration, like any other public administration, is subject to the obligation to respond for the damages that its actions or omissions may cause to citizens. This obligation is part of what is known as patrimonial liability, which is strongly rooted in the principles of justice and equity (García de Enterría, 2008).

The aim of this article is to provide a comprehensive overview of these situations in the Education Inspection Services and in schools, referencing the basic regulations and case law in relation to each of the cases raised.

2. NORMATIVE REGULATION OF ASSET LIABILITY AND ITS CHARACTERISTICS

The financial liability of the Administration is a legal institution that nowadays enjoys constitutional status, reflected in articles 9.3 and 106.2 of the Constitution, the latter of which establishes that "individuals, under the terms established by law, shall be entitled to compensation for any injury they suffer to any of their

property and rights, except in cases of force majeure, provided that the injury is the result of the operation of public services".

The main assumptions that characterise the financial liability of the Administration have their current legal expression in sections 1 and 2 of article 32 and 1 of article 34 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector, which establishes that individuals have the right to be compensated by the corresponding Public Administrations for any injury they suffer in any of their assets and rights. On the other hand, the administrative procedure for making this financial claim is established in Law 39/2015, of 1 October, on the Common Administrative Procedure of the Public Administrations, establishing the particularities of this administrative procedure in various articles of this Law.

The characteristics of the current system of financial liability are:

a) Unitary: it applies to all Administrations.

b) General: covers all activity —by action or omission— deriving from the operation of public services, whether these are the responsibility of the public authorities or of private individuals who carry out public activities that the legal system considers to be of general interest.

c) Direct liability: the Administration is directly liable, without prejudice to a possible subsequent action for recovery against those who have been guilty of malice, negligence or gross negligence.

d) Objective¹: The idea of fault is disregarded, so that, in addition to causation being the essential pillar of the system, the damage must be the materialisation of a legally relevant risk created by the public service.

¹ See judgments of the Supreme Court of 14 May, 4 June, 2 July, 27 September, 7 November and 19 November 1994, 11 February 1995, 25 February 1995, 28 February and 1 April 1995. These rulings establish that it is irrelevant whether the administrative action has been normal or abnormal, and it

e) It tends towards full compensation.

3. CONSTITUENT ELEMENTS OF PECUNIARY LIABILITY

According to jurisprudential doctrine, the following requirements must be met in order to declare the existence of financial liability for damage caused to third parties:

- a) The effective reality of a damage that is economically assessable and individualised in relation to a person or group of persons.
- b) That the pecuniary damage or injury is a consequence of the normal or abnormal functioning of the public services in a direct, immediate and exclusive cause-effect relationship without extraneous interventions that alter the casual nexus.
- c) That force majeure has not occurred.
- d) The anti-juridical nature of the damage, in the sense that the person who suffers it does not have the legal duty to bear it, in accordance with the Law.
- e) The unlawful nature of the damage, in the sense that the person who suffers it does not have the legal duty to bear it, in accordance with the law. The imputability of the Administration for the harmful activity, i.e. the integration of the agent in the framework of the administrative organisation to which he belongs or the public ownership of the service or activity in whose scope the damage occurs.
- f) That one year has not elapsed from the time when the causative event occurred.

4. CAUSALITY RELATIONSHIP

is sufficient to declare it to have caused effective, economically assessable and individualised damage as a direct consequence of the administrative action.

In order for the administration's financial liability to exist, it is necessary to demonstrate the existence of a causal relationship between the administration's ²actions and the damage caused. This causal relationship implies that the damage must be a direct and clear consequence of the action or omission of the administration. This aspect is of vital importance, since even the regulations state that this causal link can be appealed in cassation before the Supreme Court, and the interested parties can use this extraordinary means of appeal (Judgments of 10 May, 18 October, 27 November and 4 December 1. 993, 14 May, 4 June, 2 July, 27 September, 7 November and 19 November 1994, 11, 23 and 25 February and 1 April 1995, 5 February 1996, 25 January 1997, 21 November 1998, 13 March and 24 May 1999 —appeal in cassation 1311/95, third legal basis—).

The system of non-contractual liability applicable to our Public Administrations has been described by case law and doctrine as objective in nature. This means that administrations are liable to individuals for the damage caused, regardless of whether there was an intention to cause damage (malice). The conduct of the perpetrator is not considered. This feature has been outlined by our jurisprudence stating that: "By stating that it is objective, it is intended to mean that no fault or illegality is required in the author of the damage, unlike the traditional subjective liability of civil law, since it is a liability that arises regardless of the degree of voluntariness and foresight of the agent, even when the original action is exercised legally, and hence the reference to the normal or abnormal functioning of public services" (Supreme Court Judgment of 26 September 1998).

The current legislation does not regulate the characteristic features of the causal relationship, although there is extensive case law on the subject, which has traditionally considered the defining features of this teleological link to be its

² With respect to the time limit for filing and prescription of the proceedings for pecuniary liability, see the STC of March 31, 2014, rec. 4867/2011 and STC of December 16, 2011, rec. 2599/2007.

direct nature, its immediacy and its exclusivity with respect to the damage giving rise to the claim. The objective nature of financial liability does not mean that the obligation to compensate arises whenever an injury is caused by the normal or abnormal functioning of public services, but rather that there must be an objective causal link between the injury and the functioning, resulting in an injury that is a consequence of the functioning of the services and without the negligent conduct of the injured party intervening in this cause-effect relationship (Supreme Court judgments of 19 January 1987 and 4 June 1994). However, this doctrinal tendency has been qualified and corrected, admitting also direct, indirect and concurrent forms of production that raise the possibility of a moderation of liability when other causes intervene, which must be taken into account at the time of setting the compensation (Supreme Court judgments of 27 October 2014 or 11 May 2015). The forms of production of the causal nexus should be highlighted.

- Direct causation: The damage is an immediate and direct consequence of the action or omission of the administration.
- Indirect causation: This may include cases where the damage is the consequence of a chain of events in which the action or omission of the administration has played a significant role.
- Concurrent causation. When the damage is a consequence of several administrations and/or interested parties in the procedure. This liability is shared between the various actors that caused the damage.

As is usual in the field of education, there are a multitude of factors in the facts susceptible to compensation, which can be affected by the behaviour of third parties, whether or not they are obliged to be related to the educational administrations: complementary services, extracurricular and complementary activities, organisations and companies that collaborate with the educational administrations, etc.

Currently, the Supreme Court's rulings tend to reflect the concurrence of third party interventions with the educational administration, not considering the reasoning that "there is a direct and exclusive causal link between administrative activity and the harmful result", which in the past was considered by our courts, to be in accordance with the law. As established in STS of 10 April 2003 (rec. 11492/1998), this reasoning is "old doctrine", admitting the possibility of concurrence of fault, i.e. percentages of liability of the Administration and third parties involved, which leads as a consequence to moderate the quantum of compensation payable by the Administration when in the production of the damaging result, the conduct of the victim or of a third party concur with facts, which, however, are not relevant enough to break the causal nexus between the Administration and the result, and which are not sufficiently relevant to break the causal nexus between the Administration and the victim and the third party.

4.1. Concurrent liability in cases of shared competences between the education administration and other administrations

Concurrent liability also occurs in cases of shared competences in the field of education. It is regulated in Article 33 of Law 40/2015 on the Legal Regime of the Public Sector. As a general rule, it imposes the obligation that when two or more administrations have competence over the same matter, they must coordinate and cooperate in order to avoid duplication and improve efficiency in the management of public resources. In the case of financial liabilities, the administrations involved are jointly and severally liable to the individual. In other cases of concurrence, the liability shall be established for each Administration in accordance with the criteria of competence, public interest protected and intensity of the intervention.

In the field of education, the State has the power to legislate in accordance with the conditions for obtaining, issuing and homologating academic and professional qualifications and basic rules for the development of the

fundamental right to education (article 149.1.30 of the Spanish Constitution). Regarding the legislative aspect, it is not possible to claim patrimonial liability according to the criterion of unlawfulness. However, in the case of non-university education in Ceuta and Melilla, it would be possible to initiate proceedings for patrimonial liability, given that it has competence for the legislative development and execution of education in these territories.

Whether the educational competences of local bodies are more relevant, given that local councils have educational competences as established in the fifteenth additional provision of Organic Law 2/2006 (LOE-LOMLOE) and Article 25 of the Law on the Bases of Local Regime. The educational competences of local councils can be summarised as follows:

- MAINTENANCE OF EDUCATIONAL INFRASTRUCTURES. It includes tasks of conservation, repair and maintenance of infant, primary and special education centres. It also includes cleaning, security and surveillance services. In this aspect, there is a great problem in defining the tasks of conservation, repair and maintenance, and there are numerous disputes between municipal and autonomous administrations.
- PARTICIPATE IN MONITORING COMPLIANCE WITH COMPULSORY SCHOOLING. This involves ensuring that all children in primary and secondary education attend school, promoting programmes to prevent truancy and detecting cases of non-attendance.
- MANAGEMENT OF EDUCATIONAL FACILITIES (LIBRARIES, SPORTS FACILITIES). The regional administrations should establish procedures for the use of educational centres by local and regional councils outside school hours for educational, cultural, sporting and other social activities.

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- PARTICIPATION IN EDUCATIONAL PLANNING. They usually transfer the educational needs of the municipality and pass them on to the regional authorities for consideration in resource planning (implementation of vocational training cycles, new units in centres, adult and artistic education, etc.), normally through the Municipal School Councils.
 - PROMOTION OF EXTRACURRICULAR AND COMPLEMENTARY ACTIVITIES
 - MANAGEMENT OF COMPLEMENTARY SERVICES. Some of these services (school transport, canteens, morning classes) may be managed or financed by the local councils. Some local councils manage financial aid to guarantee access to these services.
 - CREATION OF ARTISTIC EDUCATION CENTRES, ADULT EDUCATION CENTRES AND NURSERY SCHOOLS (0-3 YEARS).

Provincial Councils may also have educational competences in relation to the above as a supra-municipal body whose main function is to ensure the provision of the municipal competences established in the regulations. There are Provincial Councils that are in charge of educational centres (nursery schools, music schools), promotion of extracurricular and complementary activities

In all other cases, the problems are similar, although the problem is always to elucidate the percentage of responsibility of each Administration. For example, the maintenance and upkeep of primary schools is a municipal competence and any accident or damage in relation to this competence would be the responsibility of the local authority.

An important problem is absenteeism, which will be developed in a separate section on participation in the monitoring of compliance with compulsory

schooling, due to the numerous cases of patrimonial liability in the educational sphere.

It should be noted that these shared competences generate problems of administrative coordination, as there is legal uncertainty in the regulation of this distribution of competences (there is no unified protocol on absenteeism for the whole of Spain, lack of definition of justified/justified absence, it is not specified what number of absences imply action on the part of the Administration, etc.).

4.2. The return action

This action by the administration can be defined as the right of the education administration to recover from its public employees or responsible third parties the amounts it has had to pay out in compensation to individuals. It can be understood as a form of subrogation, where the administration assumes the rights of the injured party, in order to then claim from those who caused the damage.

In the current regulation, this action becomes prescriptive and obligatory as it is established that it must be demanded "ex officio in administrative proceedings from their authorities and other personnel in their service for the liability they may have incurred due to fraud, or serious fault or negligence, after investigation of the corresponding procedure" (article 36.2 of Law 40/2015).

This ex officio requirement was already contemplated in the previous Law 30/1992 on Common Administrative Procedure, as amended by Law 4/1999, of 19 January.

At present, the use of this action is almost testimonial in public employees, although it is often used in cases of concerted services with private entities and applicable, in the field of education, to concerted private centres. The investigation of these return action files encourages the individual responsibility of public employees, promoting the diligent fulfilment of their duties. On the other hand, it is a principle of good management of public resources, preventing

bad actions and negligence on the part of public employees/concessionaires from always falling back on public budgets, creating harm to citizens, who are the taxpayers who cover the expenses of public administrations through the payment of the corresponding taxes, fees and special contributions established in tax regulations.

Finally, the requirement of the return action does not prevent public employees from being held criminally liable in the exercise of their duties. There are some judgments in which public employees have been convicted of reckless homicide for breach of the duty *in vigilando* of the student body, as well as other possible offences that may occur in the public sphere: prevarication, bribery, false documentation, abandonment of duties, prohibited negotiations and activities and abuses in the exercise of their functions, etc. It is also compatible with disciplinary responsibility⁴ and the application of sanctions for minor, serious or very serious offences as defined in the corresponding civil service laws of each autonomous community.

5. INSURANCE CONTRACTS IN EDUCATION ADMINISTRATIONS

⁴ Although it is not the main subject of this article, in the case of public employees, the principle of "no bis in idem" would not apply, which prohibits the same act from being sanctioned more than once, allowing the administrative sanction to be applied together with the criminal sanction, if applicable. The "no bis in idem" principle has its exceptions, with the possibility of accumulating a penalty and an administrative sanction for the same act, if the subject is in a special relationship of subjection with the Administration.

That is, if such a relationship exists (civil servant, concessionaire, etc.), the Constitutional Court states that the *ius puniendi* exercised with the administrative sanction "is not the generic one of the State" (Constitutional Court Judgment 2/1987, p. 1) and this administrative sanction can be applied together with the criminal sanction precisely by virtue of the relationship existing between the administration and the sanctioned person. This argument has been used by the Constitutional Court itself to admit the duplicity of sanctions (criminal and disciplinary) in the case of prisoners, whom it considers to be affected by a special relationship of subjection to the prison administration. The SSTCs of 12 June 1990 and 10 December 1991 have qualified this doctrine by adding that a special relationship of subjection is not enough, but that, in addition, the sanctions must have a different basis.

The insurance contract in the field of education is a contractual agreement between education authorities and an insurance company. The purpose of this contract is to cover possible damages that may arise due to the liability of education authorities in relation to possible damages to third parties. The insurable covers can be grouped into:

- PERSONAL. Injuries or deaths that may occur to students, workers and visitors during school hours and complementary and extracurricular activities and complementary services.
- MATERIALS. Damage to property such as, for example, broken glasses, bicycles, motorbikes, computer equipment, mobile phones, etc.
- PUNITIVE. In some cases, this includes damage affecting the emotional and/or psychological integrity of those affected.

Many education administrations take out insurance contracts to cover certain liability risks, although only the risks set out in such policies and up to certain limits are covered⁵. The implementation of these insurances avoids judicial/administrative confrontations, since the injured party is compensated financially without delay with a quick and dynamic disbursement, which also provides a benefit to the Administration, since the process of financial compensation could be brought exclusively against the insurer (Lixmar Zoto Alvarado, J., 2012). As mentioned above, sometimes the administrative and/or judicial process of financial liability has to be carried out because the policies taken out do not cover all the risks derived from the activity of the education authorities and/or the indemnifiable limits are lower than the amounts claimed by

⁵ With regard to risk, article 8 of Law 50/1980 on Insurance Contracts establishes the essential elements of the contract, including: 'Nature of the risk covered, describing, in a clear and comprehensible manner, the guarantees and cover provided in the contract, as well as the exclusions and limitations that affect each of them, highlighted in typescript'.

the interested parties. In these cases, legal proceedings are brought against the education authorities and against the insurance companies as co-defendants⁶.

6. APPLICATION OF REAL CASES IN EDUCATION

In the field of education, it is important to highlight the obligation of "diligence" of the "good father of the family" that workers in the field of education are obliged by law, according to article 1903 of the Civil Code: "The persons or entities that are owners of an educational centre of non-higher education shall be liable for damages caused by their minor students during the periods of time in which they are under the control or supervision of the teaching staff of the centre, carrying out school or extracurricular and complementary activities. The liability referred to in this article shall cease when the persons mentioned therein prove that they have used all the diligence of a good parent to prevent the damage".

On the other hand, it should be pointed out that not only is patrimonial responsibility enforceable during the school period, but also for complementary and extracurricular activities and complementary services. Complementary and extracurricular activities are regulated in article 51 of Organic Law 8/1985 regulating the Right to Education, which will later be developed by Royal Decree 1694/1995, which regulates complementary activities, extracurricular activities and complementary services in state-subsidised centres. This regulation is national and refers to subsidised centres, although most of the autonomous communities have regulated these activities for all centres financed with public funds and, on the other hand, this regulation can be applied analogically when there is no regulation and definition to this effect applicable to public centres. By way of summary, the following can be defined.

⁶ This implies certain particularities in the judicial procedure, since both the educational administration and the insurance companies must be notified of the claim and enjoy the same rights and deadlines in the judicial procedure.

- COMPLEMENTARY SCHOOL ACTIVITIES. These are activities that are carried out by the centres as a complement to school activities. These activities may be of an occasional nature, and must be carried out during school hours, or of a permanent nature, and must be carried out outside school hours.
- EXTRACURRICULAR ACTIVITIES. These are those that take place between the morning and afternoon sessions of the school timetable, as well as those that take place before or after the aforementioned timetable.
- COMPLEMENTARY SERVICES. These are the canteen services, school transport, morning classes, school residences, etc.

This legal precept, in addition to establishing the corresponding responsibility towards the educational administration, establishes the duty of diligence that frames the prevention of harm to pupils, taking all necessary precautions to prevent accidents and dangerous situations and supervision during school, complementary and extracurricular activities. It should be noted in this regard, the obligation to approve these complementary and extracurricular activities with sufficient notice in the Annual General Programme, which is approved by the School Council, remembering that this is a collegiate body and that all members of this body are responsible for the decisions taken in it, according to article 17.6 of Law 40/2015 of the Public Sector Legal Regime: "When the members of the body vote against or abstain, they shall be exempt from liability which, where appropriate, may arise from the agreements".

Finally, the regulations also clarify that breaks and rest periods are also school periods, where all teaching and non-teaching staff have a duty of care and custody of pupils⁷. An example would be the case of a pupil who suffered very

⁷ STS of 4 June 1999, Civil Chamber, rec. 2957/1994, rapporteur Pedro González Poveda.

serious physical injuries at recess when he climbed down a wall at a school. The Supreme Court, in ruling 2815/2005 of 4 May 2005, condemned the Administration for *culpa in vigilando*, as there was a risk caused by the malfunctioning of the public educational service. It is worth noting the substantial compensation for this period (more than 90 million pesetas) due to the seriousness of the damages suffered "blindness in both eyes, tetraparesis and removal of the spleen, which are permanent in nature and which produce a degree of almost absolute disability of ninety percent, requiring assistance at all times from third parties".

Among the most common cases in the field of education, the following stand out:

6.1. Damage due to deficiencies in educational infrastructure, falls and accidents

In most cases of school accidents, compulsory school insurance comes into play as a social security benefit, although it is regulated by pre-constitutional legislation⁸. The requirement for access to benefits is to be under 28 years of age, Spanish or foreign⁹ with legal residence in Spain, be enrolled in the studies

⁸ Regulated in the Law of 17 July 1953 on the establishment of School Insurance in Spain, Decree 2078/1971, of 13 August, extending the scope of application of School Insurance to students following Vocational Training courses and those others which, in accordance with the provisions of the General Law on Education and Financing of Educational Reform, are to be integrated into Vocational Training courses and the Order of 11 August 1953, jointly issued by both Departments, approving the Statutes of the Mutualidad del Seguro Escolar (School Insurance Mutual Society).

⁹ In relation to non-national students, this coverage is extended to all nationals of all countries belonging to the European Union, as well as those integrated in the Agreement on the European Economic Area: Iceland, Liechtenstein and Norway (EC Regulation 307/1999). It is also extended to all resident foreign students under the same conditions as Spaniards, as established in Article 14.1 of Organic Law 4/2000: "Resident foreigners have the right to access Social Security benefits and services under the same conditions as Spaniards".

covered by the insurance and have paid the fee. The risks covered by Social Security are¹⁰:

- School accidents. Medical and pharmaceutical assistance, financial compensation for incapacity and burial expenses.
- Sickness. Medical assistance, pharmaceutical assistance and burial expenses. Includes general surgery, neuropsychiatry, obstetrics, pulmonary and bone tuberculosis. In certain cases, physiotherapy, chemotherapy, radiotherapy, cobalt therapy and maxillo-facial surgery may be provided.
- Family hardship. This benefit covers situations occurring in the student's home that prevent him/her from continuing studies, including doctoral studies. This can be the death of the mother or father, as well as the ruin or bankruptcy of the family.

The benefits of the civil service schemes of MUFACE, ISFAS and MUGEJU are treated similarly to those of the Social Security schemes, and their benefits are therefore considered incompatible with those that may be offered by the School Insurance. On the other hand, a usual case of patrimonial responsibility is that derived from damages suffered by pupils due to deficiencies in the infrastructures of educational centres, such as collapses, defective electrical installations, lack of safety measures, falls and accidents due to the poor state of the infrastructures.

An example of these situations would be falls and other accidents suffered by pupils due to the poor state of stairs, playground pavements, interior pavements, unevenness, etc. In these cases, the doctrine of the Supreme Court points to the concept of 'relevant risk'. This concept establishes that there must

¹⁰ Source www.seg-social.es.

be a significant irregularity in order to establish the causal link between the damage produced and the normal/abnormal functioning of the educational administration. Minimal irregularities in educational facilities are not a cause of financial liability. In this sense the judgment of the High Court of Justice of Galicia, 27 September 2013 (JUR 2013/310916): "a fall resulting from an obstacle of insignificant or visible dimensions entails a non-antijuridical damage, which must be borne by the person concerned from the very moment he or she participates in the public service of pavements or roadways, because it cannot be claimed that all pavements or roadways in an urban area are absolutely perfect in terms of maintenance and gradient, The damage caused as a consequence of the general risks of life inherent to human behaviour is the responsibility of the sufferer, who must bear the risks of a possible lack of attention or care when walking in places where there is a footpath...".

In this section, the possible patrimonial liability is highlighted in the effects derived from the possible non-compliance with the regulations on air conditioning in public facilities.

6.2. Negligent actions of educational/non-educational personnel.

Another frequent case is liability for irregular or negligent actions of educational staff, such as unattended bullying, incorrect application of disciplinary measures, or errors in academic assessment.

In this specific case, the jurisprudence of the Supreme Court indicates that the Administration will be exonerated, and in some cases the compensation will be reduced, in the case of negligence or fault on the part of the victim. In the case of pupils, the age of the pupils and their maturity to foresee the consequences of their actions will be taken into account. If the conduct of the pupils is negligent and this intervention is so intense that the damage would not have occurred without it, the administration cannot be required to compensate the damage

(Delgado Moral, 2018). The judgments of the Supreme Court of 25 April 6, 1999 and 25 April 2002 are worth mentioning

On the other hand, any kind of damage caused in the performance of educational activities due to alleged inactivity *in vigilando* of teaching/non-teaching staff is also not compensable. This liability *in vigilando* must be balanced with the other obligation *in educando* of the parents of the pupils, since the responsibility for education is shared and in the case of possible patrimonial liability there would be a concurrence of responsibilities¹¹. This responsibility of minors obeys risk criteria in no lesser proportion than the subjective criteria of culpability, so that it is not permissible to claim that the conduct of the minor, due to their young age and lack of maturity, cannot be classified as negligent, as liability arises from the guardian's own fault for omission of the duty of vigilance (STSS of 14 March 1978, 24 March 1979, 17 June 1980, 10 March 1983, 22 January 1991, 7 January 1992, 30 June 1995, 16 May 2000, 8 March 2006). There are facts that occur in the family environment that are not compensable by the Education Administration, even if they occur in the school environment: lack of administration of medication by the parents, lack of interest and negligence in the education of the children, etc. The proof of the circumstances that demonstrate the exclusive fault of the victim is sufficient to consider that the causal nexus has not been produced.

A case set out in the STS of 15 March 2005 (RJ 2005/2243), a minor (2 years old) dies in a special education centre as a result of a fire caused by a third party, another twelve-year-old pupil, who suffered from psychosis, with the consequent alteration and loss of contact with reality and who had already caused an attempted fire in the special education centre. In this case, the Supreme Court

¹¹ The doctrine of the Civil Division of the Supreme Court, in its ruling of 11 February 1993, establishes that "when several causes concur in the production of damage, the amount of liability must be adapted to the degree and nature of the culpability (ruling of 7 October 1988), so that if there is no exclusive fault of the victim and it is shared by the guilty party, the "quantum" must be distributed proportionally, with the moderation of liability being a discretionary power of the judge.

understands that there is a concurrence of faults between the Administration and the mother of this pupil in relation to the necessary supervision of the minor in its care.

We also highlight in this section the case of a student with a disability of 87%, who is doing the Work Centre Training (FCT) module¹² in a Society for the Disabled, in the Higher-Level Training Cycle in Administration and Finance. The student fell down the stairs at the workplace. The claimant alleged, on the one hand, poor organisation and management of the work experience and, on the other hand, poor supervision and coordination on the part of the Technical Educational Assistant. The Court, after analysing all the relevant evidence, concluded that there was no poor organisation, since after almost three months of "internships" such a fatal accident had not occurred, "no other incident having occurred previously". Regarding the lack of supervision, he points out that the plaintiff could have used an elevator to minimise the risk, not making use of it in any case to favour his personal autonomy, producing this accident without accrediting the necessary causal link and the damage produced. It should be noted that in this case the Court also takes into account as evidence all the documentation issued by the Guidance Department, in relation to establishing the obligations of the educational centre with respect to the student's disability¹³.

In relation to pupils with special educational needs, it is important to point out that it would be contrary to what is established in the jurisprudence of the Supreme Court, and therefore liable for compensation if damage or harm is caused to the public, the lack of attention *in vigilando* by the Education

¹² This vocational module has now been repealed as a dual vocational training model has been implemented.

¹³ In the case of possible financial liability for damages to students with special educational needs in non-university education outside of vocational training (Preschool, Elementary school, Compulsory Secondary Education), it is essential to comply with the provisions of the appropriate psycho-pedagogical assessments and/or schooling reports, as well as the corresponding individualised work plans for the students.

Administrations, when establishing "minimum ratios" when providing additional resources for these pupils. An example would be the provision of additional resources for teachers in the speciality of Therapeutic Pedagogy depending on the exceeding of minimum ratios of students with these educational needs, as well as different educational technical assistants and other specific resources (nursing staff, physiotherapists...). As has been pointed out, the allocation of these additional resources should be based on the characteristics and needs of the pupils, not on the basis of "minimum ratios".

Another quite common case, which is increasing in number every year, are errors in relation to student assessment. Every year, the number of complaints about marks in the appeal phase, in which the Education Inspection Service has to intervene, is increasing. And, on numerous occasions, the malfunctioning of the administration in relation to these processes is found to have occurred, it being relatively easy to demonstrate the causal relationship between the malfunctioning and the damage produced. Numerous rulings establish the objective damage of non-promotion of students due to these errors in assessment. As a general rule, when these assessment errors exist, administrative actions must be taken back to the moment when the nullity of the process occurred¹⁴, but in the case of non-university education, it is clear that this would be detrimental to the students, as they would have to repeat the academic year, with the corresponding easily objectifiable financial damage¹⁵. This fact is very

¹⁴ There is a great deal of jurisprudence to this effect, above all in procedures for claims in competitive examination processes, where the Courts of Litigation, when faced with proven errors in these selection processes, establish the retroactivity of actions up to the moment when the nullity was produced. For example, in a selection procedure of five tests, if the nullity is demonstrated in the third test, the courts consider the repetition of the process from this third test, never establishing the passing or passing of the selection process. This form of action is not appropriate in non-university education due to the ease of demonstrating the pecuniary damage suffered by the interested parties.

¹⁵ In various judgements, the claimants have accredited the damage suffered (not being in the student's class group), unfulfilled job offers in the case of vocational training students, lack of

clear in the case of students in the 2nd year of *Bachillerato* (Baccalaureate), who in some cases cannot take the university entrance exam, and it is always recommended in a "precautionary manner", in these claims, that students take the entrance exam in proceedings to claim their qualifications in order to avoid possible financial claims. An example would be the ruling of the High Court of Justice of Galicia, dated 16 December 2002. In this case, a student of the Higher Level Training Cycle in Automotive Industry completed this cycle in three academic years, due to an error in the qualification of one of the modules. The student has failed a module, for which reason they propose to repeat it. Subsequently, an appeal was accepted, which was upheld and the grade for the module was rectified, but the student felt that "he had lost an academic year". The student claims in the lawsuit the moral damage suffered and the loss of employment opportunities, and the Court rejects these claims for not demonstrating either of the two aspects claimed¹⁶.

Finally, an increasingly recurrent issue is bullying and the possible responsibilities arising from this problem. Most educational administrations have established protocols regarding these problems, so it is of the utmost importance that the provisions of these protocols are followed in order to avoid liability. The most extreme case is that of serious physical harm and even death as a result of self-harm. In such dramatic cases, the necessary weighing up of the responsibilities of both families and teaching/non-teaching professionals must be taken into account.

In these cases, deliberate behaviour on the part of a pupil to cause death or serious physical harm is not a sufficient cause to break the principle of causality

access to other education (Basic Vocational Training, university entrance exams, etc.) by means of medical reports.).

¹⁶ As stated above, the burden of proof of the causal link is always on the interested parties in the case of administrative liability proceedings, or on the plaintiffs in the case of contentious-administrative proceedings. If the student had provided evidence in relation to the causes set out above, his claim would surely have been upheld.

and exclude the education authorities from liability. We find ourselves once again in the concurrence of causes, a fact widely recognised by the Supreme Court, since in the case of extremely serious events there is never a single cause, but rather a multiplicity of factors that influence the incidents and events.

In the judgement of 23 February 1996, in this case of the Civil Division of the Supreme Court, the majority of the parents (90%) were held responsible for not informing the camp that their daughter was attending of the serious illnesses that affected her and the risk that physical exercise posed to her integrity. The minor died as a result of the physical activity, the Court stated: "As for the negligent or culpable conduct of the parents of the deceased minor, concurrent to the production of the harmful result, it must be taken into account that, as stated in the first instance judgement and accepted by the appellant when referring to the "silence of the parents", they did not provide clinical history or detailed and documentary information on the daughter's illness, which was required by the chronic and irreversible nature of the daughter's kidney disease, but did not even provide any information to those who urgently needed it in order to provide for any unfavourable contingency in the evolution of the disease".

In all these cases of harassment, potential suicides, and other related situations, families must communicate all important information regarding medical data, as well as ensure the mandatory adherence to prescribed treatments, which are crucial in addressing mental health issues among students (anxieties, OCD, bipolar disorders, depressions, post-traumatic stress disorders, etc.). It is also important to highlight the necessity of proper information transfer between educational stages among the professionals involved, for instance, during the transitions from Early Childhood to Primary, from Primary to Secondary Education, and from Secondary to High School¹⁷.

¹⁷ In this respect, it is important to note that the age of majority is established in the Civil Code at 18 years of age, so that both parents/guardians and schools are civilly responsible for these minors. In some schools, 'very lax' rules are established in relation to Baccalaureate students for access to

And as noted above, the "diligence of a good parent" is of vital importance when there are possible cases of harassment and risk of suicide. One example is the Supreme Court ruling of 14 February 2000, in which a school was condemned for damages suffered by a pupil who attempted suicide from a seventh floor, the court stating that not all measures had been established both *in vigilando* and for the safety of the infrastructures¹⁸.

6.3. Truancy

The liability of the administrations, in this case the regional and local administrations (concurrent liability), for truancy is limited to cases in which negligence or breach of duty on the part of these administrations can be proven, if it can be shown that they have not acted diligently to solve this problem. There are two situations of absenteeism:

- If the pupil does not attend school at the beginning of the school day, it is the parents/guardians who have the duty *in vigilando* and it is compulsory for the pupil to attend class. Any damages suffered and other responsibilities are assumed by the families.
- If the pupil attends the school and leaves before the end of the school day, it is the administration that may be liable for not fulfilling its obligations "as a good parent" (Díaz Madrera, 2007).

On the other hand, in the case of truancy, as this competence is shared, there is a great lack of coordination in its management, so that non-compliance

this educational stage, with access not being the fundamental variable but the age of majority of the student body.

¹⁸ This judgement states that windows should have been positioned in such a way that there were no openable elements below 1.10/1.20 metres, that the windows on the upper floors of the building in classrooms occupied by minors were not correctly positioned and protected, that they lacked safety elements, that they were easily accessible to pupils, etc. Establishing a deficiency in the infrastructures.

on the part of the administration is quite common. On the other hand, there is no unified protocol for action between the two administrations, and there is great disparity in the form of action depending on the locality where problems of absenteeism arise. Finally, there is also no precise definition of absenteeism for the different administrative procedures to come into operation, as there is no quantification of absenteeism for the different administrative actions to be carried out. In order to avoid financial liability, it is essential to:

- The daily register of pupils' absences and communication to the families by the teaching staff.
- Establish in the Rules of Organisation and Operation the procedures for the communication of student absences and their justification, as well as the mechanisms for coordination with the local Social Services, Local Police and/or the Minors' Prosecutor's Office.
- Establish some kind of action to prevent students from leaving the school/institute (locking the doors after a certain time, entry/exit cards, etc.).

Cases of absenteeism are particularly sensitive with regard to future responsibilities, as it is a time when there is no supervision either by families or the school and activities can be carried out during this time with serious consequences: dissemination of inappropriate or criminal content via social networks, fights, aggression, theft, consumption of toxic substances, etc.

6.4. Particular case in the dual training in work centres contemplated in vocational training courses

In workplace training, a professional module currently repealed, in 2018 it was made compulsory to register with the Social Security for all students taking the Workplace Training module (FCT), so that students are protected by this public insurance. However, this obligation to pay contributions did not materialise

until the entry into force of Royal Decree-Law 2/2023, of 16 March, which means that the obligation regulated in the Royal Decree-Law of 2018 has been repealed. Therefore, all students have the protective action of the General Social Security Scheme, although unemployment protection, Wage Guarantee Fund coverage and vocational training are excluded. In the case of unpaid internships, protection for temporary disability benefits derived from common contingencies will also be excluded.

In relation to the fulfilment of legal obligations, two cases can be distinguished:

- PAID TRAINING PLACEMENTS. The obligation corresponds to the entity or body paying for the training placements, which will assume the status of employer, for the purposes of registration, cancellation and other obligations.
- UNPAID TRAINING PLACEMENTS. The company/organisation is responsible for the obligations with regard to Social Security formalities, unless the collaboration agreement stipulates that these obligations correspond to the educational centre/training provider¹⁹.

At present, due to the implementation of a dual vocational training model, where during the academic year activities would be carried out in the workplaces and in the educational centres, it is more important to specify in the corresponding training plans of each student the days of training in the company. Although these tasks are usually seen as bureaucratic by the teaching staff, they are of considerable importance in terms of possible liabilities, social security and possible civil liability insurance contracted by the education authorities. This training plan must specify coordination mechanisms, the duration of training

¹⁹ As we have an integrated vocational training system, other types of entities can also carry out training activities: business associations, trade unions, public employment services of each autonomous community, etc.

periods in the company, coordinated decisions between those responsible (company and school tutors) and other aspects in relation to this training period with very singular characteristics.

Schools providing vocational training have to sign an agreement with companies/other organisations for students to carry out these training placements in workplaces and other organisations. The clauses of these agreements usually provide that any accident will be covered by school insurance, without prejudice to the various insurance policies that may be taken out by the education authorities to improve compensation, cover damage to third parties or civil liabilities.

Everything established in the corresponding collaboration agreement and in the training plan are of vital importance, and it is usually the courts of law that establish the causal relationship. In all legal proceedings, these documents (collaboration agreement and training plan) are usually requested as evidence to determine whether there is a causal link between the damage caused and the possible non-compliance with the provisions of these documents and the events that occurred. In all dual vocational training activities, machinery and other technical tools that can cause serious damage to the students are often used, but it is also established that the educational administration cannot "be understood as a universal insurer with respect to all possible damages or risks that the students may suffer regardless of the administrative action. Not even the fact that the administration has insurance cover to deal with possible circumstances that may affect pupils makes it a universal insurer of such risks"²⁰. By way of example, in the Judgment of the High Court of Justice of Galicia, Chamber for Litigation of 17 January 2008, a student of the intermediate level cycle of installation and furnishing (professional family of wood and furniture) during his training practices suffers cuts of a certain magnitude in several fingers, as he has to undergo

²⁰ STSJ of Galicia, Contentious, section 1, of 28 April 2021 (ECLI:ES: TSJGAL:2021:2628).

emergency surgery, due to the cut of a miter saw lacking homologation when cutting a skirting board on a building site. The claimant considers that the accident could have been avoided if the educational centre had been supervised, if it had acted with due diligence (by not appointing a tutor in the company who could not tutor the pupil to work outside the workplace) and if it had supervised the existence of approved machinery, with the mandatory safety elements required by law. The Court determined that the educational centre (the Administration) was not responsible for supervising the machines and tools to be used by the student. It also points out that all the obligations set out in the agreement and training programme are fulfilled, demonstrating that the claimant has sufficient and proven knowledge of occupational risk prevention in relation to the use of the machinery in question (miter saw), and does not require constant supervision. It therefore rejects the student's claim, on the principal ground of failure to prove the causal link).

Another similar case (Judgment of the High Court of Andalusia, Chamber for Litigation, dated 22 April 2024), is the case of a student of an Intermediate Level Training Cycle in Air Conditioning and Refrigeration Installations who suffers an accident with machinery, for which he has to undergo emergency surgery for the traumatic amputation of the distal phalanges of several fingers, as well as the subsequent physical rehabilitation treatment, therapy and psychological treatment. The student alleges lack of tutoring by the person in charge of the work, lack of training in personal or collective health and safety, failure to provide personal protective equipment (PPE) and that the machine did not have a detector or automatic stop device in the event that, due to inexperience or fatigue, an operator should gain access to the active parts of the machine. The court considers that none of the alleged omissions can be attributed to the educational administration, stressing that it is demonstrated that the students received training and information on occupational health and safety at the school (compulsory module of Occupational Training and Orientation) and that the training in the company was the responsibility of the company, not of the

administration (this is deduced from the signed Collaboration Agreement). Again, the importance of strict compliance with the collaboration agreement and the training plan is stressed. Nor is the absence of a detector or automatic stop device or the failure to provide PPE to students the responsibility of the education administration.

Finally, another very common case is 'itinere' accidents when travelling to the company where the traineeship is carried out. At present, these cases would be covered by Social Security and would be considered an occupational accident. An example would be the case of a student who was doing her internship in an architecture studio. On the way, she suffers a serious fall and has to undergo surgery and a rehabilitation process due to these injuries. In this case, the educational administration has taken out a civil liability and property insurance policy for damages to third parties derived from public services. This insurance company is a co-defendant in the legal proceedings, together with the educational administration. The Court established that there is no causal link to derive a patrimonial liability, not condemning the Administration and the insurer, but it did condemn another insurer, with which the Administration has contracted another insurance policy to cover the risk of accidents during the periods of Workplace Training (FCT). As has been pointed out, it was quite usual (before the compulsory registration with the Social Security) for the educational administrations to take out insurance to cover accidents and civil liability for students doing FCT in companies and other organisations.

7. COMPENSATION

It is regulated in Article 34 of Law 40/2015. For this right to compensation to arise, all the aforementioned requirements must be met (non-existence of force majeure, existence of a causal nexus, objectifiable...). It is established that it will be calculated in accordance with the valuation criteria established in tax legislation,

compulsory expropriation legislation and other applicable regulations. In cases of personal death, the valuation included in the scales of the current regulations on compulsory insurance and social security may be taken as a reference. All these applicable rules are not binding but are only indicative for the calculation of the compensation, leaving this assessment to the discretion of the Court, although in cases of material and physical damages and expenses incurred, there is greater objectivity in their assessment, and there is no major problem in their valuation. In the case of moral and psychological damages, there is greater difficulty in their estimation, as these are very important in educational administrations due to the casuistry of their administrative intervention: school bullying, self-harming behaviour, etc.

Regarding non-pecuniary and/or psychological damage, the First Chamber of the Supreme Court (Judgments of 31 May 2000, 22 February 2001 and 11 November 2003) has stated that the basic situation for compensable non-pecuniary damage to arise consists of psychological suffering or distress, including psychological or spiritual impact or suffering (Judgment of 23 July 1990); anxiety, anxiety or anguish (Judgment of 6 July 1990); anxiety, as a feeling of unease, heaviness, fear or foreboding of uncertainty (Judgment of 22 May 1995); anxiety disorder, emotional impact, consequent uncertainty (Judgment of 27 January 1998); or psychological distress or suffering (Judgment of 12 July 1999); or psychological suffering (Judgment of 12 July 1999).

As regards their valuation, it should be noted that, as the Supreme Court has pointed out (among others, Judgments of 28 February 1995 and 29 March 1999), moral and/or psychological damages escape by their nature any measurable objectivity, since they lack objective parameters or modules, so their quantification, which always has a subjective component, has to move within a reasoned weighing of the circumstances.

Finally, compensation is normally established as a single payment, although the Law provides for the option of periodic payments or compensation in kind, although there must always be consent on the part of the interested parties.

8. CONCLUSIONS

The liability of the education administration is a complex and highly relevant issue, involving a balance between the protection of citizens' rights and the need to ensure the efficient and safe functioning of education services. Legislation, doctrine and jurisprudence provide a solid framework for the enforcement of this liability, but it is necessary to continue to make progress in improving procedures and raising the awareness of educational staff to ensure adequate protection of the rights of all those involved, as well as the necessary budgetary stability in public spending, as these responsibilities can unbalance the management of public resources.

For this reason, and for the sake of better management of public resources and efficiency in the operation of services, it is proposed to modify the shared competences in the area of education with the Local Administrations, assigning exclusive competence to the Town Councils for the management of non-university educational centres for major works, extensions, repairs, conservation and maintenance, transferring the financing of this exclusive competence to the Local Entities through the corresponding budget items currently held by the autonomous administrations²¹. In connection with this competence, the exclusive competence for the management of non-university educational centres outside school hours would also be established for the integration of these facilities into the corresponding municipal services, and a comprehensive municipal library

²¹ See the example of Norway where municipalities have a lot of competences in relation to the education system.

service could be created, integrating all the libraries of the local educational centres, or the integrated management of sports facilities. At present, there is an under-utilisation of sports facilities in schools due to the lack of coordination between local and regional administrations, as well as numerous duplications and inefficiencies in the management of school libraries in each school. The integration of these facilities would allow for a more efficient and effective management of educational resources, as well as a reduction of the financial responsibilities in relation to these facilities. There are many cases where the lack of coordination between administrations causes a malfunctioning that can be objectively proven by means of a demonstrable causal link (numerous school accidents due to deficiencies in facilities, maintenance, etc.). The establishment of exclusive competences would avoid all these problems.

On the other hand, it is proposed to make it compulsory to take reimbursement action in cases of wilful misconduct or gross negligence on the part of public employees, leaving this administrative procedure for testimonial use, with the serious damage to the public coffers of not carrying out this action, being a tool to be used by public managers to improve the functioning of public centres and the educational service. This would allow for greater responsibility in the exercise of educational functions on the part of all teaching professionals.

Lastly, as a final reflection, in accordance with all the casuistry and problematic issues exposed, emphasis is placed on the need for professionals in the field of education to carry out all the administrative procedures established in the regulations. These activities are often seen as 'bureaucratic' by many teachers, but they are essential when it comes to establishing the corresponding responsibilities in the most serious cases: the need to specify in the Annual General Programmes the complementary and extracurricular activities to be carried out during the academic year, the implementation of bullying protocols in the necessary cases, the concrete elaboration of collaboration agreements and training plans in dual vocational training, the implementation of absenteeism

protocols and coordination between administrations, introduction of student absences and communication to families, use of schools outside school hours with other organisations with the corresponding authorisations and knowledge on the part of the educational administration, correct maintenance of school and sports facilities, establishment of protocols for the delivery/pick-up of minors, carrying out evaluation processes in accordance with the provisions of the teaching programmes, etc. All these actions are of vital importance to have them planned and documented in order to avoid the different administrative and judicial procedures of patrimonial responsibility.

In all administrative processes of patrimonial responsibility, the Inspection Services have to draw up reports and other documents to record the facts that have occurred, although the main action to improve the quality of the education system lies in the function of advising and supervising compliance with the regulations, since, as can be deduced from most of the problems described, the way to reduce these administrative processes is to comply with the established administrative processes and formalities.

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