

# **Mexican Law and Personal Injury Cases: *An Increasingly Prominent Area for U.S. Legal Practitioners and Judges***

JORGE A. VARGAS\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	476
A.	<i>Mexico: A Paradise for Tourists</i> .....	481
1.	<i>The Grandeur of Indigenous Ancient Civilizations, Colonial Art and Pristine Environmental Places</i> .....	481
2.	<i>An Increasing Flow of International Tourists and Investments</i> .....	482
B.	<i>And for Tortious Injuries and Deaths</i> .....	483
C.	<i>Content of This Article</i> .....	484

---

\* Professor of Law, University of San Diego School of Law (USD). LL.B, *summa cum laude*, (*Licenciado en Derecho*), School of Law, National Autonomous University of Mexico (UNAM), Mexico City; LL.M. and J.S.D. candidate, Yale Law School. Founder and Director of the Mexico-United States Law Institute, USD, 1983-1987. Guest Lecturer on Mexican Law at New York University School of Law, International Global Program (1999) and Visiting Professor at Stanford Law School (1994). Fulbright Border Lectureship Fellow (1998) and Fellow at the Center for U.S.-Mexican Studies, UCSD (La Jolla, 2000). Professor Vargas was a member of the Mexico City Bar Association and served as Legal Counsel to various agencies of the Government of Mexico from 1972 to 1982. The author thanks Daniel B. Rodriguez, former Dean and Professor of Law at USD for the 2005 Summer Research Award granted for the research and writing of this work. The author expresses his sincere thanks to Angela Dominguez (USD Class of 2008), Janette Glaser (USD Class of 2008), and Jerry Gonzales (USD Class of 2008) for their excellent research assistance during the preparation of this article. Mrs. Magali Garcia, the author's assistant prepared the charts on Mexican population figures taken from the INEGI site. The author verifies the accuracy of the Spanish language cites and all of the English translations. Since 1994, Prof. Vargas has maintained a web site on Mexican law at <http://www.mexlaw.com>.

II.	MEXICO'S EXTRA-CONTRACTUAL LIABILITY IN CIVIL LAW .....	485
A.	<i>Types of Civil Liability Under Mexican Civil Law</i> .....	485
1.	<i>Contractual Liability</i> .....	485
2.	<i>Objective Liability</i> .....	489
a.	<i>Legal Definitions</i> .....	489
3.	<i>Objective Liability</i> .....	490
a.	<i>Car Accidents</i> .....	492
b.	<i>No Products' Liability Legislation in Mexico</i> .....	494
c.	<i>Extra-contractual Liability (Mexican Torts)</i> .....	496
B.	<i>Mexico's Two Fundamental Principles in Civil Liability</i> .....	498
C.	<i>Personal Injury Cases and Mexican Attorneys</i> .....	501
1.	<i>Cultural and Professional Aspects</i> .....	502
2.	<i>Economic Reasons</i> .....	503
3.	<i>Legal Reasons</i> .....	503
4.	<i>Professional Reasons</i> .....	504
III.	APPLICATION OF MEXICAN LAW TO TORT LAW CASES.....	504
A.	<i>The Territoriality Principle</i> .....	505
B.	<i>The Principle of Lex Loci Delicti</i> .....	505
C.	<i>Joint Application of the Local Civil Code and the Federal Labor Act</i> .....	506
1.	<i>Civil Law Issues</i> .....	508
a.	<i>Damages and Losses</i> .....	508
b.	<i>Moral Damages</i> .....	509
c.	<i>Statute of Limitations</i> .....	512
2.	<i>The Federal Labor Act</i> .....	512
a.	<i>Four Types of Labor Disabilities</i> .....	512
IV.	SIX HYPOTHETICALS ON PERSONAL INJURY AND WRONGFUL DEATH CASES.....	515
V.	CONCLUSION .....	520

## I. INTRODUCTION

In 2005, some 20 million American tourists visited Mexico.<sup>1</sup> During relatively brief stays (averaging seven days), a considerable number (probably in the hundreds<sup>2</sup>), were victims of tortious acts ranging from slip and fall incidents involving temporary sprained ankles and broken bones to severe injuries resulting in permanent paralysis and wrongful death. For a number of reasons explained below,<sup>3</sup> the overwhelming majority of these tort law cases ended up in American courts.

---

1. SECRETARÍA DE TURISMO, EL TURISMO EN MÉXICO 2005, 216 (2006) [hereinafter SECTUR].

2. In response to a specific inquiry to Mexico's Secretariat of Tourism (Sectur) regarding the number of American tourists who suffered injuries or died during their brief visit to Mexico, the Sectur indicated that "it does not generate any information or statistics of this kind." E-mail from Director de Verificación, SECTUR, to Jorge A. Vargas, Professor of Law, University of San Diego School of Law (Aug. 28, 2006) (on file with author).

3. See *infra* Part I.C.

According to the data collected by the U.S. Department of State, between 2002-2005 a total of 595 American tourists died in Mexico. Most deaths resulted from vehicle accidents (254), followed by homicide (107), drownings (89), suicides (43), drug-related incidents (24), air crashes (11), natural disasters (6), maritime incidents (5), and other miscellaneous accidents (56). Most accident events took place in Baja California (114), followed by Quintana Roo (78), Jalisco (58), Sonora (53), Baja California Sur (40), Chihuahua (37), Nuevo Leon (26), Tamaulipas (24), and Michoacan (21).<sup>4</sup>

From the perspective of American law, the exercise of jurisdiction over this increasing number of Mexican cases poses intriguing and challenging questions for American judges and magistrates and, to a lesser extent, to American legal practitioners.

Since all of the incidents occurred in Mexico, would it not be more convenient for the courts in Mexico to adjudicate these cases pursuant to Mexican law, especially when one considers that the Republic of Mexico strictly adheres to the traditional *lex loci delicti* principle?<sup>5</sup> Further, if these cases are to be resolved by American courts, what should be the law governing these cases, American law or Mexican law? Since tort law cases are seldom filed in Mexico, and the number of judicial resolutions rendered by Mexican courts are few and relatively unimportant, is there a sufficient corpus of Mexican jurisprudence that may be tapped into by American judges to ascertain the rules of Mexican law that govern a case

---

4. U.S. DEPARTMENT OF STATE, U.S. CITIZEN DEATHS FROM NON-NATURAL CAUSES BY FOREIGN COUNTRY, [http://travel.state.gov/family/family\\_issues/death/death\\_2572.html](http://travel.state.gov/family/family_issues/death/death_2572.html) (last visited Mar. 4, 2007).

This report is updated every six months and includes records for the last three years. The Department cannot legally determine whether a person was injured as a result of a tortious act while vacationing in Mexico. We do not have statistics of how many Americans have filed a lawsuit in Mexico as a result of death or injuries inflicted while in Mexico.

Letter from the U.S. Department of State, Office of American Citizens Services and Crisis Management, to Jorge A. Vargas, Professor of Law, University of San Diego School of Law (Sept. 13, 2006) (on file with author).

5. Under this principle, the law of the place where the tortious incident occurred is the law that governs the case. This principle was in place in the United States some decades back, however, it has been abandoned in California and Texas (and in the overwhelming majority of U.S. states). In contrast, the *lex loci delicti comisii* principle has been applied in Mexico since the very first Civil Code for the Federal District and the Territory of Baja California was promulgated on December 8, 1870, which continues to be in force today throughout the Republic of Mexico. See JORGE A. VARGAS, *The New Federal Civil Code of Mexico*, in THE FEDERAL CIVIL CODE OF MEXICO (Bilingual Edition) XXVII (West 2005).

pending before an American trial judge or an appellate justice? Considering that American courts resolve a far larger number of personal injury cases governed by Mexican as compared to the nominal amount of cases decided in Mexico by Mexican courts, is there a risk that this rapidly growing number of American precedents based on the application and interpretation of Mexican law by American judges may somewhat depart from “the other” Mexican law, that is reflected in the applicable civil codes and other pertinent statutes of that country?

The purpose of this article is not to answer these questions but to provide a roadmap for American judges, magistrates and legal practitioners in order to lead them through the rather simplistic legal path of the fundamentals of Mexican tort law, technically referred throughout the Republic of Mexico as “extra-contractual civil liability.” Therefore, by relying on a number of hypothetical cases, this article describes and discusses the *modus operandi* that a Mexican judge would adopt in applying the provisions of Mexican law to personal injury and wrongful death cases if they were to be resolved in a Mexican Court.

Today, throughout the Republic of Mexico, civil judges at the state and federal level are legally empowered to decide personal injury and wrongful death cases by applying the pertinent provisions of the Civil Code of the state in which the tortious act occurred in accordance with the traditional *Lex loci delicti comisii* rule. Invariably, the civil code of the state in question (known in Mexico as the “local” or state code<sup>6</sup>), or the Federal Civil Code<sup>7</sup> in federal cases, predicates that the eventual economic indemnification to be awarded to the victim must be calculated as if the victim were a Mexican laborer who suffered a labor accident or death in the work place. Accordingly, the applicable civil code mandates that said indemnification is to be calculated in accordance with the

---

6. *Código local* or *Código del Estado*. Mexico, as a federal republic, is composed by thirty-one states and one Federal District. The states are: Aguascalientes, Baja California, Baja California Sur, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Vera Cruz, Yucatán and Zacatecas. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], art. 43, 5 de Febrero de 1917 (Mex.) [hereinafter Const. 1917]. Each of these states, and the Federal District (*i.e.*, Mexico City), has its own “local” code. For federal matters, the country applies a Federal Civil Code which, for decades, has served as “the model” for the state codes. Most of the state codes virtually reproduce *verbatim* the language of the Federal Civil Code.

7. Articles 1910-1934 of Mexico’s Federal Civil Code (*Código Civil Federal*) are the only articles that regulate “Extra-contractual liability cases” (Mexican tort law) under Mexican law. VARGAS, *The New Federal Civil Code of Mexico*, in THE FEDERAL CIVIL CODE OF MEXICO, *supra* note 5, arts. 1910-1934. These articles are reproduced *in toto* by the overwhelming majority of the thirty-one state codes and by the Civil Code of the Federal District.

technical rules established by Mexico's Federal Labor Act (*Ley Federal del Trabajo*).<sup>8</sup>

This statute operates in Mexico as a "workers' compensation statute" awarding economic compensation based on the severity of the resulting injuries (or death), which are categorized into four specific types of disabilities (either total or partial, temporary or permanent). As part of this "legal package," the federal/state legislature also mandates that the economic indemnification in civil liability cases must be calculated by taking into account the minimum wage in the state at the time when the tortious act occurred. In general, each disability is compensated by a specified number of days, *i.e.*, an amount equivalent to wages for 1,095 days if the risk results in "total permanent disability," as prescribed by Article 495 of the Federal Labor Act.

In turn, the applicable civil code mandates that, for civil liability cases, the amount of the minimum wage be quadrupled (in most states) and then multiplied for the number of days that corresponds to the specific type of disability. Depending on the individual case, additional "damages and losses" consisting of the expenses resulting from hospitalization, medical and surgical services, medication and curative materials, rehabilitation, funeral costs, etc., would have to be added to the legislatively established economic indemnification. In essence, this is the *modus operandi* that Mexican judges strictly adhere to when deciding personal injury and wrongful death cases anywhere in Mexico.

The application of Mexican law is described below, in the appropriate sections, by using the following hypothetical cases:

1. *CASE A: Anastasia Ashley, an Alaskan accountant drowned in Acapulco, in the State of Guerrero, while swimming in marine waters of the Pacific Ocean under federal jurisdiction, in front of the beach-front hotel where Anastasia was staying.*
2. *CASE B: Bobby and Berenice Barrett decided to go to Bahía Ballenas, in Baja California Sur, for their honeymoon. While riding in a hotel bus to go to the whale breeding lagoons a few miles away from their hotel, the bus experienced a mechanical failure and went*

---

8. See Ley Federal del Trabajo [L.F.T.] [Federal Labor Law], *as amended*, Diario Oficial de la Federación [D.O.], Title IX, arts. 477-480, 487, 491-493, 495-497, 500-502, 1 de Agosto de 1971 (Mex.) [hereinafter FLA]. See also FLA, art. 513.

*off the highway, going down a canyon and crashing against a rock barrier. Bobby died and Berenice broke a leg.*

3. *CASE C: Christopher Colbert took a charter plane from Cleveland to Can Cun, Quintana Roo. After checking in at "Condos Can Cun" and being welcomed to his suite, later that evening he went for a swim at the condos' swimming pool where Sunday's "Reguetón" dancing competition was in full swing. After dancing for a while, Christopher decided to dive into the pool without noticing that the pool was very shallow. As a result of his dive, Christopher ended up with a couple of broken vertebrae and became paralyzed.*
4. *CASE D: Dan and Dorothy Dandrige, geology professors from the University of Denver, were excited to go to a time-share in the City of Durango, in the state of Durango, to study the geology of nearby iron deposits found at Cerro del Mercado. While having breakfast at their time-share kitchen, the boiler exploded. Dorothy suffered serious injuries in her face and hands, and Dan lost the use of both arms.*
5. *CASE E: Edward Elliot, an electrical engineer, was sent by his company from Eugene, Oregon, to Ensenada, Baja California, to supervise the construction of an electrical power plant. With two other Mexican engineers and a Mexican pilot, Edward boarded a helicopter to travel to the construction site a few miles away. During the flight the helicopter crashed. There were no survivors.*
6. *CASE F: Frederick Forbes was a marketing manager sent by his company to design and direct a training program for the largest marketing company in Mexico City. Affected by his intense working program and the high altitude of Mexico City, Frederick suddenly fainted suffering from a serious increase in high blood pressure. The medical doctor at the private clinic where Frederick was sent to be treated, felt Frederick needed a triple bypass heart surgery. Frederick died in the operating room.<sup>9</sup>*

---

9. All of these cases are purely hypothetical and were formulated to address the different kinds of tortious cases according to the labor incapacities and disabilities

*A. Mexico: A Paradise for Tourists**1. The Grandeur of Indigenous Ancient Civilizations, Colonial Art and Pristine Environmental Places*

Geographically, Mexico is perceived by most Americans as many “Mexicos.” It offers the unparalleled beauty of the Caribbean Sea’s turquoise-blue water and white-sand beaches;<sup>10</sup> the magnificence of ancient civilizations such as the Aztecs,<sup>11</sup> the Mayans,<sup>12</sup> or the Toltecs, whose archeological sites are admired in the Western hemisphere;<sup>13</sup> and the beauty of the colonial architecture of tranquil cities like Guanajuato, Querétaro or Zacatecas, all recently declared as World Heritage Sites by UNESCO.

Other tourists prefer the silence of the desert and the majestic beauty of the Copper Canyon (*Barranca del Cobre*, in the northern state of Chihuahua), a natural park that spans more than 372 miles in length and 155 miles in width that rivals the Grand Canyon; the richness of pristine environmental places abundant in endemic flora and fauna like the La Venta Park in Tabasco, the Sumidero Canyon and the Agua Azul waterfalls in Chiapas, or the Gulf of California with 244 islands, 695 vascular plant species and 891 types of fish species, ninety of them endemic. A recent report by UNESCO declared that this Gulf contains 39% of the world’s total number of marine mammals and one third of the world marine cetacean’s species.<sup>14</sup>

---

enumerated by the Federal Labor Act. Any similarity to personal injury and wrongful death cases filed in U.S. courts is unintentional and purely coincidental.

10. Mexico has 8,000 miles of beautiful beaches along the Pacific Ocean, the Gulf of California, the Gulf of Mexico and the Caribbean. This is more coastline than any other Latin American country. Cities like Acapulco, Ixtapa, Zihuatanejo (all of them in Guerrero); Puerto Vallarta (Jalisco); Puerto Escondido and Huatulco (Oaxaca); and Can Cún, Isla Mujeres and Cozumel (Quintana Roo), are well-known resorts attracting millions of international tourists every year.

11. See generally THE AZTEC EMPIRE (2000).

12. See generally ALBERTO RUZ, EL PUEBLO MAYA (1981).

13. In addition to its numerous archeological sites like Teotihuacan, Xochicalco, El Tajin, Mitla, Palenque, Chichen Itza, Uxmal, Tulum, Edzna, Calakmul, etc., today Mexico’s population includes 56 different ethnic groups, more than any other country in this hemisphere.

14. Twenty-four New Sites Added to World Heritage List, 50 THE WORLD HERITAGE NEWSLETTER (Aug.-Oct. 2005), [http://whc.unesco.org/documents/publi\\_news\\_50\\_en.pdf](http://whc.unesco.org/documents/publi_news_50_en.pdf). With the recent addition of the Gulf of California as a World Heritage Site, Mexico enjoys the distinction of being the only country in the Americas with the most places (25 registered in UNESCO’s World Heritage List).

## 2. *An Increasing Flow of International Tourists and Investments*

But Mexico does not only possess awe-inspiring sites. For decades, this country has been recognized for the richness of its history and the depth and variety of its culture, as manifested in its art, its music and literature, and its varied and exquisite cuisine. Therefore, it is no surprise that a growing number of international tourists—most of them Americans—visit Mexico every year.

According to the latest report produced by Mexico's Secretary of Tourism (*Sectur*), in 2004 Mexico received 20.6 million international tourists, 10.5% more than those registered in the preceding year.<sup>15</sup> This affluence of international visitors allowed Mexico to position itself today as the eighth most visited country in the world, and the second most visited in this hemisphere, after the United States.<sup>16</sup> From January to June, 2005, Mexico received 11.3 million international tourists, formed by 6.8 million "Inland tourists" (*Turistas de Internación*) and 4.5 million "Border tourists" (*Turistas fronterizos*). In addition, during the same period, 40 million tourists (*Excursionistas*) entered the country, out of which 36.5 million visited border towns and 3.5 million visited Mexico on a cruise ship.<sup>17</sup>

In 2004, the economic benefits Mexico received from international tourists amounted to \$10.7 billion dollars, representing a 14.9% increase from 2003. From January to June, 2005, Mexico received \$6.9 billion dollars, divided into \$5.1 billion from international tourists and \$1.2 billion from cruise ship visits. In 2004, the average expenses per international tourist was estimated to be \$698.20 dollars per day.<sup>18</sup>

And from January 2001 to June 2005, private investments in the tourism sector amounted to \$9.1 billion dollars, surpassing the total anticipated by the administration of President Vicente Fox Quesada, which expected to receive this amount at the end of his presidential term in December of 2006.<sup>19</sup>

---

15. SECRETARÍA DE TURISMO, MEXICO—TOURISM: WHERE WE STAND, WHERE WE ARE HEADING (Oct. 2006), [http://www.sectur.gob.mx/PDF/Where\\_we\\_stand.zip](http://www.sectur.gob.mx/PDF/Where_we_stand.zip) (out of the 20.6 million "international tourists," over 80%, or over 16 million were American tourists).

16. SECTUR, *supra* note 1, at 215. According to the World Tourism Organization (WTO), the first ten countries receiving the largest number of international tourists in 2004 were: 1) France; 2) Spain; 3) USA; 4) People's Rep. of China; 5) Italy; 6) United Kingdom; 7) Hong Kong; 8) Mexico; 9) Germany; and 10) Austria. WTO. *World's Top Tourism Destinations 2004, 3 WTO World Tourism Barometer 4-5 (June 2005)*.

17. *Id.*

18. Average expenses of "Inland tourists" in Mexico (*Gasto medio de los Turistas de Internación a México, 2000-2004*). SECTUR, *supra* note 1, at 196.

19. SECRETARÍA DE TURISMO, *Rebasa Turismo Meta Sexenal de Inversiones Privadas; Acumula 9,104.3 MDD* [Private Investment in Tourism Surpasses Six-Year



According to Sectur, by July 31, 2006, Mexico was estimated to receive in excess of \$12 billion dollars by the end of the Fox administration.<sup>20</sup> This report indicates that:

[I]nterest in Mexico's famous beaches remains high, with the sun and beach segment outpacing all other tourism products by garnering 48% of private investment. Three coastal states also ranked in the top three in amount of private investment received: Guerrero State (\$2.63 billion); Quintana Roo State (\$2.47 billion) and Nayarit State (\$92.5 million) captured almost 52% of the total amount invested in 2001 and 2006.<sup>21</sup>

Today, the income generated by tourism—which totals \$15 billion dollars—ranks third only after oil and the remittances from Mexican abroad.<sup>22</sup>

### *B. And for Tortious Injuries and Deaths*

The following chart, indicates deaths of American citizens while visiting Mexico between 2002 and 2005. It was prepared based on the data collected by the U.S. Department of State.<sup>23</sup>

DEATHS OF AMERICAN CITIZENS IN MEXICO	
TYPES OF DEATHS	NUMBER OF DEATHS
Vehicle Accident	254
Homicide	107
Drowning	89
Other	56
Suicide	43
Drug Related	24
Air Accident	11
Natural Disaster	6
Maritime	5
<b>Total</b>	<b>595</b>

Goal; It Accumulates \$9.1 Billion Dollars] [http://www.sectur.gob.mx/wb2/sectur/sect\\_Boletin\\_092\\_Rebasa\\_turismo\\_meta\\_sexenal\\_de\\_in](http://www.sectur.gob.mx/wb2/sectur/sect_Boletin_092_Rebasa_turismo_meta_sexenal_de_in) (last visited March 4, 2007).

20. Burson Marsteller, *Private Investment in Mexico's Tourism Sector Booming*, PR9.NET, July 31, 2006, <http://www.pr9.net/pdf/4186july.pdf>.

21. *Id.*

22. *Id.* Today, the United States contributes close to 70% of the total foreign investment in Mexico; other investor countries include the U.K. (6%), Germany (4%), France, Spain and Switzerland combined (3.5%). See Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1341 (2004).

23. Data taken from the web site: U.S. Department of State [http://travel.state.gov/family/family\\_issues/death/death\\_2572.html](http://travel.state.gov/family/family_issues/death/death_2572.html) (last visited on Sept. 25, 2006).

### C. Content of This Article

If the Mexican legal system is generally perceived as an “alien legal environment” by an American judge or a legal practitioner,<sup>24</sup> Mexico’s tort law system may be characterized as one of the most obscure corners of that foreign legal system. Possibly no other area of Mexican law can be as arcane or as contrastingly different from U.S. law than Mexico’s “extra-contractual civil liability.”<sup>25</sup> Therefore, this article simply attempts to provide an introduction to the basic rules and principles that govern the major legal aspects of “extra-contractual civil liability”<sup>26</sup> in Mexico.

This article is formed by four parts. *Part Two* discusses the notion of “Extra-contractual liability” under Mexican Civil law, similar to U.S. tort law. *Part Three* enunciates the major Mexican law components that govern civil liability and the resulting obligation to compensate victims for death or injuries arising out of tortious acts, combining legal notions taken from the Civil Code of the place where the tortious act occurred with those enunciated by the Federal Labor Act. Special attention is given to Mexico’s traditional principles of “Limited Territoriality” and *Lex loci delicti*, to the civil notions of “damages and losses” and to the four types of legal disabilities recognized by the labor law of that country pursuant to the Federal Labor Act. Mexico does not have punitive damages, exemplary damages, loss of consortium or damages for pain and suffering. However, a comment on Mexico’s “Moral damages,” their legal meaning, scope and application is included in this part.

*Part Four* consists of six hypothetical cases addressing different fact patterns resulting in serious to fatal injuries in different Mexican states (including the Federal District, *i.e.*, Mexico City). These cases will provide the reader with different factual scenarios that may illuminate the way Mexican courts would approach and decide different types of tort law cases under Mexican law. The Mexican law notions of extra-contractual liability, “objective liability” (similar to the U.S. notion of strict liability), products’ liability and medical malpractice are presented and discussed in these cases. *Part Five* offers some preliminary conclusion for going forward.

---

24. See generally JORGE A. VARGAS, *Tort Law in Mexico*, in 2 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 214-15 (1998).

25. See STEPHEN ZAMORA ET AL., MEXICAN LAW 520 (2004).

26. It should be mentioned that the expression “tort law,” simply does not exist in Mexico.

## II. MEXICO'S EXTRA-CONTRACTUAL LIABILITY IN CIVIL LAW

### *A. Types of Civil Liability Under Mexican Civil Law*

Under Mexican Civil Law, there are three types<sup>27</sup> of civil liability: (i) contractual; (ii) "objective" (similar to the U.S. notion of strict liability); and, (iii) "extra-contractual" liability arising out of illicit acts (similar to U.S. tort law).

Civil liability is governed by the principles prescribed by the applicable Civil Code: either the local code of the state where the tortious act occurred or by the Federal Civil Code in federal matters.<sup>28</sup> However, since the Articles of the Federal Civil Code (including those relative to "extra-contractual liability," found in Articles 1910-1934) were the first enacted in that country and later served as a "model" for all of Mexico's state codes, from a substantive viewpoint the language of the Federal Civil Code and that found in each and every state code is one and the same.

Therefore, it may be said that from the point of view of a U.S. judge or legal practitioner, the provisions contained in the Federal Civil Code represent the "common law" that governs tort law cases (technically, extra-contractual liability cases) in that country.

### *1. Contractual Liability*

Mexico is a civil law country whose legal system is based upon the Romano-Germanic tradition and highly influenced by the Napoleonic Code.<sup>29</sup> Accordingly, its codes play a primary role in defining the relative legal rights and obligations of parties. As legislative enactments, codes are

---

27. Pursuant to Article 1458 of Mexico's Civil Code of 1884, civil liability was divided only into two categories: contractual and extra-contractual. See Manuel Borja Soriano, *TEORÍA GENERAL DE LAS OBLIGACIONES [General Theory of Obligations]* 352 (1984).

28. The Federal Civil Code (*Código Civil Federal*) is the first and oldest that was formulated in Mexico. The Civil Code was enacted in 1870, later substituted by the 1884 and the 1928 Codes, as well as by the current Code which was recently enacted on May 29, 2000. Since 1870, the local civil codes of the Mexican states that composed the Republic of Mexico literally reproduced the language of the Federal Civil Code; a legal custom that virtually continues to be in force until today. For a historical evolution of the civil codes in Mexico. See VARGAS, *The New Federal Civil Code of Mexico*, in *THE FEDERAL CIVIL CODE OF MEXICO*, *supra* note 5, at XIX-XLVII. For practical reasons, articles cited in this work refer to the Federal Civil Code unless otherwise stated.

29. See JOHN H. MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND ASIA* 5-6 (1994). See also ZAMORA ET AL., *supra* note 25, at 1-42.

unitary works that integrate all norms in a given branch of Mexican law in a systematic, comprehensive, organized and logical manner.<sup>30</sup> Mexico has distinct codes to regulate civil matters, penal matters, commerce, tax matters, civil procedure and criminal procedure at the federal and state levels.

Pursuant to Mexico's Federal Constitution of 1917, which was inspired by the Constitution of the United States, its government is structured according to a federal system, democratic and republican.<sup>31</sup> Thus, the federal government and each of the thirty-one states<sup>32</sup> and the Federal District, possess separate sets of codes. For the most part, state codes closely parallel both the form and language of the federal codes.

Mexico does not adhere to the principle of *stare decisis*. Therefore, Mexican judges give attention to the principles, norms and rules enunciated by legislative enactments, in particular codes and statutory materials, rather than adhering to judicial precedents.<sup>33</sup> It is not uncommon for Mexican judges to rely on the authority of opinions or legal theories advanced in doctrine or academic works authored by renowned Mexican or foreign specialists in a given area of the law. In recent years, it has become more common, especially at the appellate level, to see Mexican magistrates and Supreme Court justices cite a *Jurisprudencia* or an *Ejecutoria* to buttress some of their legal arguments.<sup>34</sup> Mexico also does not have a jury system.

Among Mexican codes, none is more central than the Civil Code. The *Código Civil Federal* (Federal Civil Code) governs throughout the country in federal civil matters. Each state's civil code governs civil law matters, which arise within the state and are not of a federal nature. Mexican civil codes cover all matters in the civil legal realm, including the civil status of individuals, family law, assets, property, succession and inheritance, contracts and other forms of civil obligations.

---

30. See 1 NUEVO DICCIONARIO JURÍDICO MEXICANO [*New Mexican Legal Dictionary*] 488-89 (1998).

31. Const. 1917, arts. 39-40.

32. Article 43 of the 1917 Mexican Federal Constitution enumerates each of the thirty-one states. Const. 1917, art. 43. The federal government is divided into three major branches: the Legislative, the Executive and the Judicial. Const. 1917, art. 49.

33. The only exception to this assertion is *Jurisprudencia* (Jurisprudence), as produced by Mexico's Supreme Court or by the Circuit Collegiate Courts pursuant to Articles 192-193 of the Federal *Amparo* Act. In general, the term of art *Jurisprudencia* applies to certain decisions rendered by either of these federal courts that, because of their content and mode of formulation, become legally binding to lower courts. See Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos [L.A.] [Federal *Amparo* Act], as amended, arts. 192-93, Diario Oficial de la Federación [D.O.], 10 de Enero de 1936 (Mex.) [hereinafter Federal *Amparo* Act].

34. Undoubtedly, the use of computers and the availability of electronic data banks where *Jurisprudencias*, *ejecutorias* and *tesis aisladas* can be easily consulted by judges and attorneys alike has made this practice more widespread and common.

Mexican civil codes do not provide for a series of torts like those found in common law jurisdictions in the United States. Rather, rules concerning civil liability between private parties are set forth in the portion of the civil codes titled: "Obligations" (*De las Obligaciones*). The law of obligations encompasses not only what a U.S. lawyer would understand to be tort theories but also contract and quasi-contract theories of legal duty. The articles of any Civil Code that pertain to extra-contractual liability are found in Book Four, devoted to "Obligations," Chapter V, titled: Liabilities from Illicit Acts (*De las Obligaciones que Nacen de los Actos Ilícitos*).<sup>35</sup>

Whereas in the United States tort law cases are quite common and represent a lucrative and honorable professional practice, this is not the case in Mexico. The provisions found in the Civil Code of Mexico (at the federal and state levels) regarding extra-contractual liability—the technical legal name given in Mexico to tort law—are not only sparse but also simplistic.

In essence, the Mexican provisions are a copy of the skeletal principles on this matter enunciated for the first time by the *Napoleonic Code* of 1804. It is evident that the group of eminent French jurists who formulated this brilliant and systematic *civil corpus* did not think much about the already popular common law institution of tort law in England at that time. Thus, it was through the language of the Civil Code of Spain (taken directly from the Napoleonic Code of 1804<sup>36</sup>) that Mexico adopted the skeletal provisions formulated by France (and other countries) in this legal area. The legal principles established then are the principles that continue to be in force today in the Republic of Mexico, at the dawn of the XXI century.<sup>37</sup>

Despite the remarkable progress of industry, science and technology on a global scale, and the considerable increase in the standard of living of the Mexican population over the last century, the legal principles that control personal bodily injuries and wrongful deaths in that country have been kept in isolation and virtually untouched in a legal time capsule that

---

35. VARGAS, *The New Federal Civil Code of Mexico*, in THE FEDERAL CIVIL CODE OF MEXICO, *supra* note 5, at 603, 637.

36. See generally RODOLFO BATIZA, *Las Fuentes de la Codificación Civil en la Evolución Jurídica de México*, in MEMORIA DEL III CONGRESO DE HISTORIA DEL DERECHO MEXICANO (1983) 13-16 (1998); See also OSCAR CRUZ BARNEY, HISTORIA DEL DERECHO EN MÉXICO 562-70 (1999); VARGAS, *supra* note 28, at XXV-XXIX.

37. See also ZAMORA ET AL., *supra* note 25, at 520-21.

is today legally obsolete and completely out of sync with Mexico's economic and industrial realities.

Indeed, the area of extra-contractual liability in Mexico is long overdue for a thorough and systematic overhaul and modernization.<sup>38</sup> It is a new and fertile area that may be expanded and enriched with the detailed rules and technical legal standards developed by the prolific and creative solutions and principles developed, for example, by U.S. tort law or by modern legislation adopted by certain European Union countries, such as Germany.<sup>39</sup>

Since the extra-contractual liability principles contained in the Civil Code of Mexico are scant, skeletal and simplistic; since the resulting economic indemnification for the victim of a tortious act is outdated and less than frugal; and since the rendering of justice in that country continues to leave much to be desired, it is not surprising to find out that the practice of tort law in Mexico is simply non-existent.<sup>40</sup>

Under Mexican Civil Law, "an agreement is an accord between two or more persons in order to create, transfer, modify or extinguish obligations,"<sup>41</sup> and a "contract" is an agreement "that creates or transfers obligations and rights."<sup>42</sup> Therefore, when one of the contracting parties is obligated to perform and fails to do so, or does not perform as required by the agreement, that party "shall be liable for the resulting damages and losses,"<sup>43</sup> as dictated by the contract and the applicable provisions of the code. This is the most common type of contractual liability under Mexican law.<sup>44</sup>

A decision rendered by Mexico's Second Circuit Collegiate Court in 1991 contrasted the differences between contractual liability and objective liability in these terms:

---

38. See Laura Trigueros Gaisman, *La Responsabilidad Civil en el Derecho Internacional Privado*, ACADEMIA MEXICANA DE DERECHO INTERNACIONAL PRIVADO Y COMPARADO (Oct. 24-26 1996).

39. See generally GERT BRÜGGEMEIER, COMMON PRINCIPLES OF TORT LAW 1-262 (2004); J. SPIER UNIFICATION OF TORT LAW: LIABILITY FOR DAMAGE CAUSED BY OTHERS (2003).

40. For a discussion of this matter, see *infra* Part II.B.

41. Código Civil Federal [C.C.F.] [Federal Civil Code], as amended, Diario Oficial de la Federación [D.O.], art. 1792, 1 de Abril de 1970 (Mex.) [hereinafter FCC].

42. *Id.* art. 1793.

43. For an explanation on the legal meaning of "Damages and losses," defined in Articles 2108-2110, FCC, see *infra* Part II.C.

44. One of the longest and most detailed sections of the Civil Code is "Book Four," which addresses obligations in general and contracts in particular, including a section on non-compliance with obligations. See generally FCC, *supra* note 41, arts. 2104-2118.

Both the civil [contractual] and the objective liability constitute sources of obligations . . . through which an individual who causes a damage is obliged to repair it. There are notable differences between them: civil [contractual] requires a conduct on the part of the one responsible party for the damage, considered to be an illicit act; in the second one, the damage is originated when hazardous things are being used in a licit manner. The damage takes place without any involvement of the individual responsible for said damage.<sup>45</sup>

## 2. *Objective Liability*

In essence, the Mexican civil notion of “Objective liability” parallels the U.S. notion of strict liability. Article 1913 of the Federal Civil Code defines “objective liability” in these terms:

If a person employs mechanisms, instruments, equipment or substances which are inherently dangerous, because of the speed they develop, their explosive nature or inflammable characteristics, or by the intensity of the electric current, or similar causes, he/she is liable for the damages or injuries they cause even though he/she is using them licitly, unless he can prove that the damage was caused by the fault or inexcusable negligence of the victim.<sup>46</sup>

“Objective liability” under Mexican law operates as a legal protection to an individual who uses or handles, in a reasonable manner, mechanisms or substances that are “inherently dangerous” and the individual in question is anyway inflicted with a resulting injury or death. Accordingly, the “objective liability” derives from the “inherently dangerous nature” of said mechanisms or substances, even cases where these materials and substances do not have any defects or irregularities in their structure or composition.

### a. *Legal Definitions*

A leading Mexican Civil Law specialist, Dr. Ernesto Gutiérrez y González, defines objective liability as “the duty imposed by the law to the owner of inherently hazardous objects or mechanisms to compensate for a patrimonial loss caused by these objects or mechanisms, even when said owner did not act in an illicit manner.”<sup>47</sup> A similar definition reads:

---

45. *Semanario Judicial de la Federación*, Octava Época, tomo VII, Enero de 1991, Tesis A./J. 21/1991 Página 437 (Mex.) (by unanimous votes).

46. FCC, *supra* note 41, art. 1913.

47. See ERNESTO GUTIÉRREZ & GONZÁLEZ, 2 DERECHO DE LAS OBLIGACIONES 796 (1999). Interestingly, this author claims that the Drafting Commission that formulated the Mexican Civil Code of 1870 was a pioneer in creating the notion of “created risk,” as included in Article 1595 of one Code. *Id.* at 802.

Objective liability [is incurred] if the damages arise out of a licit, juridical, or culpable behavior, which consists in utilizing a hazardous object that creates the risk of producing damages. Said liability is based on the risk and therefore is named as “objective liability” because it derives from an external element such as the created risk. Therefore, under our positive law, civil liability emanates from two sources: an illicit act and the created risk.<sup>48</sup>

### 3. Objective Liability

According to Mexico’s Supreme Court, “to award an economic indemnification resulting from the damage produced by the use of hazardous instruments, neither the existence of a criminal offense nor the conduct of a civil illicit act is required. What must be proved is that the damage exists and the corresponding causal relationship.”<sup>49</sup> According to the Supreme Court, the elements present in objective liability cases are:

- i. The use of a hazardous instrument;
- ii. The causing of damage;
- iii. A causal relationship between them; and
- iv. That there is no inexcusable negligence of the victim.<sup>50</sup>

In the following decision, the Second Collegiate Court of the Sixth Circuit established the differences between objective liability and the civil liability resulting from a criminal offense. The pertinent part reads:

Objective liability [established by Article 1402 of the Civil Code of the State of Guanajuato] is based on the hazardous nature of things, which normally cause a damage. In other words, those things are inherently dangerous so their mere use is the assumption taken by the law to attribute the resulting liability. The Article in question enunciates the objective theory of the risk and not the subjective theory of the fault of the agent. For this reason, the objective liability exists even though the damage had been caused by an Act of God<sup>51</sup> or by *force majeure*, independently of the fault of the agent or even [in the case] of an acquittal rendered in a criminal proceeding.<sup>52</sup>

---

48. See MANUEL BEJARANO SÁNCHEZ, OBLIGACIONES CIVILES 192 (1999) (asserting that “Mexico’s objective liability as a result of the created risk was inspired by the Civil Codes of Switzerland and Russia”).

49. *Semanario Judicial de la Federación*, Sexta Época, tomo XL, Octubre de 1960, Tesis A./J. 21/1960 Página 168 (Mex.) (by unanimity of four votes) (isolated thesis).

50. *Id.*

51. For definitions of an Act of God and *force majeure* by Mexico’s Supreme Court, see *Semanario Judicial de la Federación*, Sexta Época, tomo XXVII, Septiembre de 1959, Tesis A./J. 21/1959 Página 29 (Mex.) (isolated thesis); *Semanario Judicial de la Federación*, Sexta Época, tomo XXII, Abril de 1959, Tesis A./J. 21/1959 Página 27 (Mex.) (isolated thesis).

52. TRANSPORTES URBANOS Y SUBURBANOS AVALOS DE GUANAJUATO, *Semanario Judicial de la Federación*, Novena Época, tomo II, Diciembre de 1995, Tesis A./J. 21/1995 Página 568 (Mex.) (by unanimity of votes); see *Semanario Judicial de la Federación*, Octava Época, tomo XIV, Julio de 1994, Tesis A./J. 21/1994 Página 784 (Mex.) (isolated Thesis).



The Code prescribes that when damages are caused without the use of machinery or equipment, and without fault or negligence of either party for the damages, each party shall bear their own loss, without a right for indemnity from the other.<sup>53</sup>

The following rulings from Mexico's Supreme Court and Federal Circuit Collegiate Courts may contribute to understanding the notion of objective liability under Mexican law:

*Objective liability. The Defendant must prove that the damage was produced by the Victim's Inexcusable Conduct.* In Article 1913 of the Civil Code for the Federal District, the legislature incorporated the theory of objective liability or created risk, which lacks the concept of fault in the conduct of the agent that triggers the fact or incurs in an illicit omission. It simply suffices that a person makes use of inherently hazardous mechanisms, instruments or substances. . . to become obligated to repair any damaged caused, even when not acting illicitly. [Said person] may be relieved of paying for the damages if he/she can prove that [said damages] resulted from the fault or the inexcusable negligence of the victim.

From a different angle, in a lawsuit for damages and losses, the burden of proof is upon the victim regarding the existence of the damage and the use of hazardous mechanisms by the defendant; in turn, the defendant must oppose the necessary defenses and demonstrate that the damage resulted from the fault of inexcusable negligence of the victim.<sup>54</sup>

*Contractual Civil Liability and Extra-contractual, Differences between them.*

(a) In the contractual liability, the author of the damage and the victim have created by their own will (*i.e.*, in the contract they entered into) the possibility of damage; in the extra-contractual, this possibility has not been created by the parties. (b) These parties, in the first type of liability, are legally tied prior to the fact that generated the resulting liability; in the extra-contractual, the legal tie emerges by the execution of the injurious acts and at the precise moment when these acts take place. (c) In addition, in the contractual liability there is a precise obligation to perform a specific act and the non-compliance of this act originates the liability, whereas in the extra-contractual liability, there is no predetermined obligation.<sup>55</sup>

It would seem that, under Mexican law, objective liability as a cause of action in a personal injury case would always be decided in favor of the plaintiff/consumer, unless the defendant can prove in court that "the damage was caused by the fault or inexcusable negligence of the victim." The burden of proof rests flatly on the defendant's shoulders.

53. FCC, *supra* note 41, art. 1914.

54. Semanario Judicial de la Federación, Novena Época, tomo XIV, Septiembre de 2001, Tesis A./J. 21/2001 Página 1359 (Mex.) (isolated thesis).

55. Semanario Judicial de la Federación, Quinta Época, tomo LXVIII, Mayo de 1941, Tesis A./J. 21/1941 Página 1695 (Mex.) (isolated thesis).

In contrast, strict liability in the United States generally applies to product liability cases in which a seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety.<sup>56</sup> In other words, the product sold was "defective and/or hazardous" and "unduly threatened the consumer's personal safety." The burden of proof in this case would be on the plaintiff to prove that the product was defective and unduly threatened the consumer's safety. In this regard, a 1994 ruling by a Circuit Collegiate Court stated:

To be exempted from the application of Article 1913 of the Civil Code, the concurrent presence of these two elements is required: (a) That the defendant proves that there was fault or inexcusable negligence on the part of the victim; and (b) That there is a causal relationship between that fault or inexcusable negligence and the damage caused.<sup>57</sup>

Exploring the historical background of this notion, scholars in Mexico opine that the civil notion of "objective liability" is based upon the concept of "created risk" (*Riesgo creado*) developed by Saleilles and Josserand at the end of the XIX century. These French jurists expanded the notion of civil liability applying it not only to cases when damages were caused as a consequence of fault or imprudence but also to all cases when the author of the damage was acting in a licit manner. Civil liability was thus based upon the causing of damage and lead to the notion of "objective liability" (*Responsabilidad objetiva*) based upon a material fact that caused the damage, independently of any subjective element such as fault, *i.e.*, an illicit act.<sup>58</sup>

Another exception to the application of objective liability is found in Article 2111 of the Federal Civil Code which prescribes that no one shall be held liable "for a fortuitous event, unless caused or contributed to by him, or expressly assumed or imposed by law."<sup>59</sup>

#### a. Car Accidents

Under Mexican law, a car—or any other internal combustion engine vehicle—is considered to be an "inherently dangerous" mechanism, as prescribed by Article 1913 of the Federal Civil Code.

The same legal characterization applies to, say, a train, a helicopter or an airplane, or any other type of vehicle or apparatus that employs

---

56. See BLACK'S LAW DICTIONARY 1275 (5th ed., 1979) (strict liability).

57. Semanario Judicial de la Federación, Octava Época, tomo XIII, Abril de 1994, Tesis A./J. 21/1994 Página 432 (Mex.) (isolated thesis).

58. 4 NUEVO DICCIONARIO JURÍDICO MEXICANO 3367-68 (1998).

59. FCC, *supra* note 41, art. 2111. The placement of the notion of objective liability, as enunciated in Art. 1913, under the subheading of Chapter V: *Liabilities from Illicit Acts*, has been criticized because this liability is de-void of any subjective component.

“mechanisms, instruments, equipment or substances” which are *inherently dangerous* because “of the speed they develop, their explosive nature or inflammable characteristics,” or “by the intensity of the electric current, or similar causes.” It should be evident that the opening paragraph of Article 1913 of said Code clearly goes beyond car and vehicles and becomes a very broad enunciation that embraces technical and industrial equipment and machinery, complex mechanisms, equipment that is put into operation by means of natural gas, gasoline, diesel, petrol, electricity, etc.

In principle, the operation of any of these vehicles, machinery, equipment or substances is likely to trigger the automatic application of objective liability when said operation results in “damages or injuries” that are caused to property or inflicted upon a victim. For the objective liability to attach, it does not matter if the person driving the vehicle, operating the machinery or handling the hazardous substance was acting in a licit manner. Pursuant to Article 1913 of the Federal Civil Code, the individual in question “is liable for the [resulting] damages or injuries,” unless that individual can prove that “the damage was caused by the fault or inexcusable negligence of the victim.” Thus, proving before a competent court of law the victim’s fault or contributory negligence is the only way to escape civil liability.

In Mexico, according to the elements of objective liability enunciated by the Supreme Court, in a lawsuit for civil liability resulting from a vehicle accident, the plaintiff needs to prove (a) that the defendant was driving the vehicle; (b) the damages and injuries caused; (c) a causal relationship between (a) and (b); and, (d) that there was no fault or inexcusable negligence of the victim.<sup>60</sup>

In three separate precedents cited by Mexico’s Supreme Court regarding objective liability, Mexico’s highest tribunal has reiterated that “[w]hat must be proved is that the damage exists and the corresponding causal relationship.”<sup>61</sup> Regarding a case where the victim was not the consumer that entered into a contract with the electricity company, but a third party, the Court declared that with respect to the risks and damages produced by electrical energy,

---

60. See *supra* note 51.

61. See *supra* note 49.

there is always the presumption that this kind of energy is always actively present in causing damage and this attaches the liability to the [company] that [commercially] exploits it, so that the only way to avoid this liability is to prove that the cause of the accident is the inexcusable fault of the victim, or an act of God. Therefore, if the victim dies due to the discharge of electrical energy, the law imposes a defined and objective liability upon the defendant, the Electricity Company.<sup>62</sup>

Finally, in a case involving the handling of a hazardous substance, the Court wrote:

It is not necessary to establish the liability of the Appellant to examine the fault in which it may have incurred, it suffices that the risk created through the sales of a hazardous substance [*i.e.*, natural gas] materialized as a result of the damage to the plaintiff to trigger the civil liability.<sup>63</sup>

Regarding a case involving a passenger transportation company, the Supreme Court of Mexico wrote:

Extra-contractual liability, arising out of the use of hazardous instruments, is independent of the existence of a contract. A transportation company is liable for the damage caused by the vehicles used to provide its services both with respect to passengers and to mere pedestrians. It would be contrary to equity that said liability would be subject to different rules, from the simple fact that in one case there was a contract but not in the other one. . . . When a transportation company is sued for the damage caused to one of its passengers in a [vehicle] accident, the existence of two separate causes of action cannot be considered and the victim cannot choose between them because the obligation of the transportation company does not derive from a contract, but from the law, and for that reason there is only a single extra-contractual cause of action.<sup>64</sup>

#### *b. No Products' Liability Legislation in Mexico*

Mexico is still in a developmental process in the areas of products' liability and consumer protection from legal, industrial and economic perspectives.

For example, Mexico's Federal Consumer Protection Act (*Ley Federal de Protección al Consumidor*) was originally enacted in 1975, inspired by a number of consumer protection statutes already in place in the United States.<sup>65</sup> The system introduced by this Act protects consumers via a non-confrontational two-tier mediation-arbitration process rather than relying on civil litigation before judicial courts. It should be noted that the overwhelming majority of cases involve domestic electrical

---

62. OBJECTIVE LIABILITY, *Semanario Judicial de la Federación*, Quinta Época, tomo CXXXIX, Julio de 1956, Tesis A./J. 21/1956 Página 187 (Mex.) (isolated thesis).

63. OBJECTIVE LIABILITY, *Semanario Judicial de la Federación*, Sexta Época, tomo XXXIV, Abril de 1960, Tesis A./J. 21/1960 Página 144 (Mex.) (by unanimity of four votes).

64. SÁNCHEZ, *supra* note 48, at 193.

65. See Jorge A. Vargas, *An Overview of Consumer Transactions in Mexico: Substantive and Procedural Aspects*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 345 (1989).

appliances and TV sets although other areas, such as acquisition of real estate, rendering of hotel services are gradually being incorporated.

Most cases are resolved when the store where the defective domestic appliance was bought replaces the item at no cost or when the parties reach a mediated settlement. Even though this Act allows the consumer to file a civil complaint before a judicial court, very few cases end up following this longer, more technical and costly route.

From a technological and industrial angle, although an increasing number of products, machinery and equipment are being manufactured in Mexico every year, the overwhelming majority of them continue to be based on foreign industrial processes, technologies and patents, especially those from the United States which is, by far, the largest foreign investor.<sup>66</sup> Major items, such as airplanes, automobiles, trucks, pick-ups, ships, vessels, railroads, etc. continue to be manufactured in developed countries, such as the United States, Japan, Germany, France, the United Kingdom, Sweden, etc. Most of these items are imported into Mexico from abroad. This may explain the absence of products' liability legislation in Mexico.

Consequently, and in contrast with the United States, no cases are litigated in Mexico involving defective parts or improper manufacturing processes, not to mention defective design of automobiles, aircraft, vessels, etc.<sup>67</sup> Most cases in these categories tend to be litigated in the United States by American law firms with Mexican clients who suffered personal injuries in Mexico resulting from car, airplane or helicopter incidents. Technical and engineering questions pertaining to the design of machinery such as automobiles, airplanes, helicopters are in the hands of foreign companies protected by intellectual property law and who outside the jurisdiction of a Mexican court. Furthermore, even if this technical or engineering information would end up in the hands of a Mexican plaintiff, it is highly unlikely that Mexico would have the technical or industrial expertise to

---

66. At least since the end of WWII, the United States investment in Mexico represents some 70% of all direct foreign investment (DFI). Other investors are the U.K. (6%), Germany (4%), France, Spain and Switzerland combined (3.5%), Netherlands and Japan combined (2%), etc. See Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1341 (2004).

67. For an informative article explaining to a Mexican legal audience the problems arising out of products' liability in the United States, see Friederick K. Juenguer, *Derecho Conflictual Americano en Materia de Responsabilidad Por el Producto*, NOVENO SEMINARIO DE DERECHO INTERNACIONAL PRIVADO (Oct. 16-19, 1985).

validly prove to a Mexican court (that is generally unfamiliar with this kind of evidence), that the industrial design in question was defective.

Finally, from an economic perspective, the reader should be aware that today most Mexicans do not own a house or a car, and the majority of them do not have a steady, remunerative job. So, consumer protection and product liability are areas that have not yet been incorporated into Mexico's legal system nor have these areas reached the Mexican court system.

With the increasing industrial and economic progress taking place in Mexico, especially over the last few decades, it is to be anticipated that in the future product liability and consumer protection are likely to become relatively new and important litigation arenas for private practitioners from Mexico and the United States.

### c. *Extra-contractual Liability (Mexican Torts)*

Book Four of the Federal Civil Code, titled: *Obligations*, includes a brief section (Chapter V), devoted to "Liabilities from Illicit Acts." This chapter—composed of 26 Articles—contains the civil rules used by Mexican courts for resolving all kinds of personal bodily injuries and wrongful death cases. For an American legal practitioner, the simplistic and scanty rules found in said Chapter V constitute Mexico's tort law system.<sup>68</sup>

Accordingly, since Mexico does not adhere to the principle of *stare decisis*, when a Mexican civil judge is confronted with a cause of action involving an "extra-contractual civil liability" case, the judge will basically have to direct his/her attention *only* to the specific Articles of Chapter V of the applicable Civil Code (*i.e.*, Articles 1910-1934, Federal Civil Code) to make a substantive determination.

Based on the evidence submitted to the court, the judge will have the required discretion to make a ruling as to:

- (a) the seriousness of the injury or resulting death;
- (b) the presence or absence of contributory negligence on the part of the victim (*i.e.*, fault or inexcusable negligence of the victim);
- (c) the amount of damages and losses (including medical and surgical expenses, hospitalization, medicine, rehabilitation, etc.);
- (d) the amount of the economic indemnification mandated by the law and the beneficiaries of this indemnification; and
- (e) the awarding of moral damages, if any.

---

68. See FCC, *supra* note 41, arts. 1910-1934 (Chapter V of the FCC is comprised of Articles 1910-1934).

Although this may be surprising to an American judge or a legal practitioner, the Mexican legal system—unlike its counterpart in this country—is completely devoid of any technical standards, rules or principles that would provide any legal or judicial guidance to Mexican judges in “extra-contractual liability” cases. Occasionally, a Mexican magistrate may cite the opinion of a well-renowned legal expert in Mexico or in a foreign country to support their arguments or opinions. From a legislative viewpoint, neither the Federal Congress nor any of the State legislatures has ever enacted any legislation detailing or expanding any legal issues pertaining to “extra-contractual civil liability.”

When one compares Mexican tort law with its U.S. counterpart, looking into the fundamental nature of both systems, some conclusions become evident. Apart from the common element of all torts that is equally shared by the United States and Mexico, that “someone has sustained a loss or harm as the result of some act or failure to act by another,”<sup>69</sup> there are no similarities. It has been asserted that tort law is “the last bastion of the common law.”<sup>70</sup> In other words, U.S. tort law has remained “without a code and largely unaffected by statute.”

In comparison, the Mexican tort law is totally codified, as prescribed by the applicable civil code. American tort law “evolved *a posteriori*, inductively, from particular cases,”<sup>71</sup> thus resulting in a surprising number of diverse and independent torts. The Mexican side, in contrast, was formulated *a priori*, as it was produced by the minds of the jurists who wrote in most abstract terms that original chapter of the Napoleonic Civil Code of 1804, from which the rules applicable to “extra-contractual civil liability” were derived for all countries within the civil legal tradition, including Mexico.

As a result of these deep and striking differences, the American side of tort law is full of numerous detailed rules and technical standards whereas Mexican extra-contractual liability is entirely devoid of any rules or technical standards.<sup>72</sup> In conclusion, whereas the U.S. tort law is

---

69. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (5th ed. 1984).

70. *Id.*

71. *Id.* (emphasis added).

72. In Mexico, for example, there is no notion of due care; no strict liability for manufacturing defects; no negligence liability for design and warning defects; no pharmaceutical liability law; no defective product legislation; no modern strict liability product of industrialization; no contributory or comparative negligence; no enterprise liability; no proximate cause; no compensatory damages; no pain and suffering; no

alive, dynamic and vibrant, the Mexican side is skeletal, stale and stereotyped.

### *B. Mexico's Two Fundamental Principles in Civil Liability*

Article 1910 is fundamental to extra-contractual civil liability because it establishes the controlling principles in this type of cases. The Article reads:

Whoever, by acting illicitly or against the good customs, causes damage to another shall be obligated to compensate him/her, unless he/she can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim.

This Article lays down two fundamental principles: *first*, a person or a company who commits a tortious act (*i.e.*, causes harm or damage) is legally obligated to compensate the victim; and, *second*, contributory negligence operates as a total bar to any recovery.

The economic indemnification to be given to the victim (or to the spouse, descendants or ascendants, in cases of death) is determined by the joint application of two different statutes: first, the Civil Code of the state where the tortious act occurred (*lex loci delicti* rule). Without exception, the Code remits to the Federal Labor Act, which is the second statute. This Act is applied in order to supplement the provisions of the Code to calculate the indemnification to be given to the victim. One may say that the Civil Code legally assimilates the tortious act with the legal situation of a worker who is injured at the work place. In Mexico, the Federal Labor Act operates as a worker's compensation statute.

Accordingly, relying on this legal fiction, the victim of a tortious act in Mexico is indemnified with the specific compensation provided by the Federal Labor Act to an injured laborer, categorized by this Act as one of four "working disabilities,"<sup>73</sup> depending upon the severity of the resulting injuries or death.

In sum, a person who is injured as a result of a tortious act is compensated in Mexico in the same manner as a worker who is injured while working in the workplace. This is prescribed, for example, by Article 1915 of the Federal Civil Code which reads:

---

punitive damages; no windfall effect; no class actions; and no explicit official public policy on technical and industrial development affecting "extra-contractual civil liability" cases derived from railroads, commercial airplanes, public transportation, private vehicles, etc.

73. See FLA, *supra* note 8, arts. 477-480 (pursuant to the Federal Labor Act, the "working disabilities" are: 1) Temporary disability; 2) Permanent partial disability; 3) Permanent total disability; and 4) Death).



Damages shall consist, at the election of the injured party, either in the restoration of the damaged item to its previous condition when this is possible or in the payment of the damages and loss.

If an injury is caused to individuals and causes death or disability (either total or partial, temporary or permanent), the amount due for reparations shall be determined by the provisions of the Federal Labor Act. In order to calculate the indemnity due, the highest minimum daily wage in force in the region shall be multiplied by four, and shall be extended for the number of days during which the victim suffers from each of the incapacities set forth in the Federal Labor Act. In the event of the victim's death, the indemnity shall be paid to his/her heirs.

If the injured party is a wage-earner, the indemnification cannot be assigned or transferred, and it shall preferably be paid in one lump sum, except as agreed between the parties.<sup>74</sup>

The provisions of the Civil Code do not detail the different types of injuries that may result from a tortious act, nor the specific amounts of the corresponding economic compensation since in Mexico these legal matters are regulated in detail and in an exclusive manner by the Federal Labor Act. Therefore, the Mexican legislature opted for a practical solution: it prescribed in the 1928 Civil Code that the amount due for reparations in tortious acts is to be determined by the provisions of the Federal Labor Act. It is a kind of domestic *renvoi* from the applicable Civil Code to the provisions of the Federal Labor Act. This system continues to be in force today.

There are other matters that may require further clarification. For example, the name "extra-contractual liability" simply indicates that this kind of civil liability does not derive from a contract but from acts that happen in the physical and legal world "outside" of the volition process of two or more contracting parties.

Unlike the United States, where the use of precedents in tort law cases has generated a number of relatively precise technical standards governing the multitude of tort law cases, thus distinguishing and separating them, in Mexico (and in other civil law countries) the establishment of technical legal standards is left to the will (or lack of it) of the legislature. The end result is that in Mexico there are no legal standards in the area of "extra-contractual" liability today because the Mexican legislature has not legislated (neither at the state nor at the federal level) to such a degree of detail in this area.

---

74. FCC, *supra* note 41, art. 1915.

Practically, this means that the determination of whether the damage or injuries of a tortious act were the “result of the fault or inexcusable negligence of the victim,” is a question left entirely to the discretion of the judge. Furthermore, it would be futile to look in any civil code for the legal definition of “fault,” “negligence,” or “inexcusable negligence”<sup>75</sup> because the code (or any other statute) simply does not provide a definition.

However, the following rulings of Mexico’s Supreme Court provide some clarification regarding the notions of fault and inexcusable negligence, as well as good customs, used by the Congress of the Union in the language of Article 1910 of the Federal Civil Code. The rulings read:

Civil Liability. Inexcusable Negligence of the Victim. The existence of fault or inexcusable negligence must be appreciated by the judge according to the circumstances of the specific case.<sup>76</sup>

Good customs. Good customs constitute a concept which authors seek to define in a precise manner. They have reached the conclusion: anything that hurts morality is contrary to good customs, and jurisprudence has slowly considered that there is a criterion of morality in society and that the social environment is the source of good customs. Therefore, it is necessary to give a precise definition of good customs because no legislature is going to do this but leave it to the wisdom of the courts.<sup>77</sup>

Although Mexico does not adhere to the Anglo-Saxon principle of *stare decisis*, as applied today in the United States and other common law countries, certain decisions rendered by Mexico’s highest federal courts, *i.e.*, Mexico’s Supreme Court and Circuit Collegiate Courts, carry some precedential value for lower courts, as mandated by the Federal *Amparo* Act.<sup>78</sup> Thus, the federal decisions known as *Jurisprudencias* are legally binding on lower courts, and *Ejecutorias* or *Tesis* only carry “persuasive” value to lower courts.<sup>79</sup> Accordingly, in compliance with the *Amparo* Act,

---

75. In a decision rendered by the Second Collegiate Court regarding objective liability, this court incidentally referred to these key legal notions in the following manner: “. . . unless the victim acted with fault or inexcusable negligence, namely: *lacking the duty of providing care which according to the circumstances was one of the obligations he/she had to complied with.*” TRANSPORTES URBANOS Y SUBURBANOS DE AVALOS DE GUANAJUATO, *Semanario Judicial de la Federación*, Novena Época, Diciembre de 1995, Tesis A./J. 2/1995, Página 568 (Mex.) (isolated thesis) (emphasis added).

76. RESPONSABILIDAD CIVIL. CULPA O NEGLIGENCIA INEXCUSABLE, *Semanario Judicial de la Federación*, Séptima Época, Julio de 1973, Tesis A./J. 2/1973, Página 51 (Mex.) (emphasis added).

77. BUENAS COSTUMBRES, *Semanario Judicial de la Federación*, Quinta Época, Octubre de 1954, Tesis A./J. 225/1954, Página 581 (Mex.) (emphasis and translation added by author).

78. See Federal Amparo Act, *supra* note 33, arts. 192-197B.

79. The *Jurisprudencia* established by the Supreme Court is legally binding to: (1) the Supreme Court Chambers (*Salas*) when rendered by the Supreme Court plenary (*en banc*); (2) Unitary Courts and Circuit Collegiate Courts; (3) District Courts; (4) Military Courts; (5) State judicial courts and those in the Federal District; (6) Administrative

Mexican courts formally adhere to the substantive content of *Jurisprudencias* and pay an adequate degree of deference to *Ejecutorias* and *Tesis*, when rendering their rulings and decisions.<sup>80</sup>

### C. *Personal Injury Cases and Mexican Attorneys*

Most legal practitioners in the United States would be surprised to find out that personal injury cases are treated with disdain by Mexican attorneys. Some of them are of the opinion that these cases are not a reputable legal practice for an honorable Mexican lawyer.

From the Mexican lawyers' viewpoint, many of these professionals—especially those working for prestigious law firms in large cities like Mexico, Monterrey or Guadalajara—would be proud to publicize that their law firm has never taken any personal injury cases. Major law firms in Mexico—like their counterparts in the United States—have a specialized and profitable practice in areas such as corporate and tax, commercial matters, family law, etc. More recently, new areas have emerged, including international business transactions, environmental law, and criminal law cases involving extradition requests from the United States. Successful extra-contractual liability cases filed in Mexican courts result in most instances in such meager economic indemnification for the victim (or their spouse, children, ascendants), that they instantly become uninteresting for major law firms from an economic viewpoint.<sup>81</sup>

In sum, the prevailing idea is that personal injury cases are *not* for Mexican attorneys (at least in today's Mexico). This idea seems to be anchored on four different rationales: cultural, because of the Mexican tradition of settling disputes out of court; economic, because of the low ratio for indemnification due to the worker's compensation statute; legal,

---

Tribunals; and, (7) Labor Boards, local and federal. Federal Amparo Act, *supra* note 33, art. 192. For the legal effects of *Jurisprudencias* rendered by Circuit Collegiate Courts, see Federal Amparo Act, *supra* note 33, art. 193.

80. For definitions of *Jurisprudencias*, *Ejecutorias* and *Tesis*, see JORGE A. VARGAS, MEXICAN LEGAL DICTIONARY AND DESK REFERENCE 299-300 (2003).

81. This lack of interest would change immediately if an equally prestigious U.S. law firm would retain the services of Mexican counsel from a Mexican firm to serve as a consultant, or more commonly, as an expert witness in a lawsuit filed in the United States to defend the interest of a major corporation with first-class hotels operating in Mexico (and in other tourist-oriented countries). Bilingual Mexican attorneys with graduate degrees from U.S. law schools have found a new area of professional practice in the United States by providing these expert services in tort law (as well as in other Mexican law areas).

no punitive damages; and professional, as the simple nature of the process discourages attorneys.<sup>82</sup>

### *1. Cultural and Professional Aspects*

During the early 20th century, Mexican custom among wealthy landlords and merchants dictated that if one of them suffered a tortious act in a restaurant or store, for example, the owner of the place would immediately offer to provide that important person whatever medical services would be necessary to treat him/her at no cost. This seemingly generous offer derived from the fact that the victim in question belonged to a high social class in Mexico, likely to be endowed with high education, economic affluence and political connections. As a matter of fact, in those days (and even today), this is what the owner of such a commercial establishment was supposed to do in order to continue to keep the victim (as well as their family and the members of that powerful class) as part of the regular clientele, and continue to use that person's favors and political influence when needed.

In those days, it would have been denigrating for the victim (or for their family) to have to file a lawsuit in a Mexican court to receive the required medical attention, if the owner of the establishment would not voluntarily offer such attention.

Needless to say, members of lower social classes would never aspire to receive such treatment. And with respect to people of very modest means, or indigenous people, they would have never even dreamed of visiting such commercial establishments, let alone of receiving such special and generous treatment. Likewise, they would never dream of filing a law suit against any of the wealthy and politically powerful people in town.

Mexican culture tends to induce Mexican contending parties to reach an out of court settlement—considered to be more civilized and amicable—instead of the litigious and confrontational avenue practiced regularly in the United States. The constitutional right “to have a day in court” to settle a dispute—common in American culture—does not have a valid counterpart in Mexico yet. Whereas most Americans firmly believe that American courts were established in the United States to administer justice to the people, Mexicans continue to embrace the old idea that money influences any important ruling rendered by a Mexican court.<sup>83</sup>

---

82. See generally JORGE A. VARGAS, *Torts in Mexican Law*, in 2 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS, *supra* note 24, at 209-39.

83. In the early 20th century, Luis Cabrera, a leading practicing attorney and political philosopher whose ideas influenced Mexico's revolution of 1910 used to say: “In Mexico, civil law applies to wealthy people and criminal law to poor people.”

## 2. *Economic Reasons*

Today, the economic indemnification to be awarded to the victim of a tortious act in Mexico continues to be quite low. For example, the victim's indemnification in the large cities for an individual who dies as a consequence of a tortious act may be around \$17,880 dollars, including funeral expenses. It can be much less in smaller cities and rural towns.

This estimate is based on the highest minimum wage in the Republic of Mexico, which is \$6 dollars (per eight hours of labor) in places like Mexico City or Tijuana, B.C. The calculation would be as follows: the minimum wage equivalent to \$6 dollars, multiplied by 730 days pursuant to Article 502 of the Federal Labor Act (in the case of the victim's death), and then multiplied by four, as mandated by Article 1915 of the Federal Civil Code, plus a two month salary based compensation on the same minimum wage, according to Art. 500 of said Federal Labor Act.<sup>84</sup>

Evidently, there is an significant difference between the indemnification claimed under the tort law system in the United States and that of Mexico. This is a major factor for Americans injured in Mexico to file a tort lawsuit in the United States rather than Mexico.

## 3. *Legal Reasons*

Under Mexican law, there are no punitive damages, damages for pain and suffering, or for loss of consortium. For an American, these would be important reasons to file a lawsuit in the United States *and not* in Mexico. However, Article 1916 of the Federal Civil Code provides for moral damages under certain circumstances.<sup>85</sup>

Unlike the United States (and other countries within the civil legal tradition like France, Germany, Spain, Italy and Switzerland), Mexico has maintained a mostly traditional and schematic legal regime applicable to extra-contractual liability that has not required the formulation of technical legal standards, the imposition of more sophisticated legal approaches or the establishment of different types of damages, as adopted decades ago by the American legal system and even by other civil law countries in Europe. This Mexican legal regime has been preserved intact as it was

---

84. For an explanation on how to calculate the amount of this indemnification, see FLA, *supra* note 8, arts. 500-502; see also FCC, *supra* note 41, art. 1915.

85. See *infra* Part II.C.

originally formulated by the Commission of eminent jurists that produced the 1928 Civil Code (which in essence is a copy of the 1884 Code).<sup>86</sup>

Given the fact that extra-contractual liability regime mainly regulates cases affecting international tourists, in particular American tourists; that Mexican tourists seldom use this type of liability to recover indemnifications for tortious acts; and that the Mexican hotel and tourism industry appear to be relatively comfortable with the civil legal regime in place (given the very modest indemnifications awarded under Mexican law and the fact that American tourists, knowing these realities, take their tort law cases back to the United States instead of using Mexican courts), it is highly unlikely to see any changes in the area of extra-contractual liability in the near future.

#### 4. Professional Reasons

Mexican legal practitioners share the opinion that given the simplicity of the current legal regime in place governing extra-contractual liability and the very low economic indemnifications mandated by Mexican law, there is hardly a need for professional intervention of an attorney. This type of service would seem to be better suited for the services of an American type of "paralegal" even though Mexico does not have this kind of semi-professional.<sup>87</sup>

### III. APPLICATION OF MEXICAN LAW TO TORT LAW CASES

A number of reasons may explain why American tourists, when injured in Mexico as a result of a tortious act, choose to take their case back to the United States instead of filing the corresponding lawsuit in Mexico. These reasons may include the following:

An American tourist in that situation probably contacted a Mexican lawyer who informed the tourist of the very low economic indemnification to be received even if they prevails in the lawsuit. Most likely, the Mexican attorney also mentioned that any contributory negligence on the part of the tourist (*i.e.*, the victim and potential plaintiff) constitutes a total bar to any recovery under Mexican law. Possibly the tourist, days or weeks after the incident, may attempt to start recollecting whether he drank only one "Margarita" cocktail or half a dozen of them. Or maybe the tourist—who

---

86. See VARGAS, *The New Federal Civil Code of Mexico*, in THE FEDERAL CIVIL CODE OF MEXICO, *supra* note 5, at XIX-XLVII.

87. Accordingly, it may be a practical idea to consider that for personal injury cases, as well as for many other administrative tasks in the areas of real estate, trade, customs, environmental law, immigration, family law, tax, etc., Mexico may consider the introduction of a paralegal career in the future.

crashed his car into a wall in a colonial Mexican town—may start remembering that the Mexican police, in the accident report, wrote down that he had been speeding and driving under the influence of alcohol, and that the police found a half-empty bottle of tequila in the back seat of the car. These considerations can all be important grounds for filing the case in an American court.

If the case is filed in a Mexican court, the American tourist—as a plaintiff—will have to hire a Mexican attorney to submit the case to the court. This would not be a very attractive proposition for a tourist as they are in a foreign country with a foreign language, and in a completely unfamiliar legal system. Additionally, there are the stories that occasionally appear in American newspapers about the probity and inefficiency of the Mexican police and of the administration of justice in that country.

Sometimes the resulting injuries to an American tourist are so egregious, that the victim (or their family) immediately decides to file the case in the United States. The facts that the travel arrangements were made in the United States, by an American travel agency that strongly recommended an American hotel in Mexico and an American air carrier transported the American tourist there, clearly contribute to that decision.

#### *A. The Territoriality Principle*

Any acts that take place within the Republic of Mexico, including tortious acts, are subject to the applicability of Mexican law pursuant to the “Territoriality Principle,” enunciated by Article 12 of the Federal Civil Code in these terms:

Mexican laws apply to all persons within the Republic, as well as to acts and events which take place within its territory or under its jurisdiction, including those persons who submit themselves thereto, unless the law provides for the application of foreign law, or it is otherwise prescribed by treaties and conventions to which Mexico is a signatory party.<sup>88</sup>

#### *B. The Principle of Lex Loci Delicti*

The Federal Civil Code applies only to federal matters. It would apply, for example, to tortious acts taking place on a Mexican federal highway (as opposed to a state or local highway under the control of the given state) or in a railroad accident, since both of them are under the exclusive control and jurisdiction of the federal government. The railroad

---

88. FCC, *supra* note 41, art. 12.

system and the Mexican toll-highways (*Carreteras de cuota*) are under the control of the Secretariat of Communications and Transports (SCT), a federal agency.

However, it should be emphasized that most tortious acts fall under the jurisdiction of individual states, pursuant to the Principle of *Locus Regit Actum*. In essence, this principle prescribes that “the law of the place [where the tortious act occurred] governs the act.” Therefore, if the tortious act took place, say, in Acapulco, Guerrero, the Civil Code of the State of Guerrero controls the case; if in Can Cún, the code of Quintana Roo; if in Puerto Vallarta, the code of Jalisco, etc.

### *C. Joint Application of the Local Civil Code and the Federal Labor Act*

Mexico is a country with a 105 million inhabitants who live in thirty-one states<sup>89</sup> and one Federal District (*i.e.*, Mexico, D.F.); this District serves as the venue of the federal powers (similar to the District of Columbia), pursuant to Articles 43 and 44 of Mexico’s Federal Constitution of 1917. Although each of these individual states has its own, local Civil Code enacted by a state legislature, all of them (including the Federal District) are a virtual copy of the Federal Civil Code both in substance and format.

Within each state, the respective local civil code regulates all substantive legal questions, such as births, deaths, marriages, divorces, adoptions, successions and inheritance, wills, property, easements, mortgages, as well as contracts and civil liability, including extra-contractual liability. Legally, this means that the legal principles, the system to calculate the economic indemnification based on the Federal Labor Act and other substantive rules of extra-contractual liability clearly enunciated by the Federal Civil Code in Articles 1910 through 1934), are duplicated in every states’ civil code (including the Federal District). Whereas the overwhelming majority of states have reproduced *verbatim* the language (and sometimes even the numbers of the Articles) of the Federal Civil Code, a few have introduced minor or insignificant changes. Therefore, the provisions of this Federal Code serve as the *federal common law* throughout the Republic of Mexico, in the area of extra-contractual liability.

Unlike the United States, tort law in Mexico has remained in a state of relative dormancy during the majority of the 20th century. However, more and more personal injury cases are beginning to be filed in Mexican courts by Mexican nationals.

---

89. See *supra* note 6 for the list of the Mexican states.



This recent development may be attributed principally to the gradual but steady development of consumer protection awareness in that Mexico since the enactment of the corresponding legislation in the mid-70s,<sup>90</sup> an increase in the acquisitive power of the Mexican population,<sup>91</sup> and the fast and sustained growth of Mexico's tourism industry over the last decade (1996-2006).

Other significant factors include the geographical proximity of Mexico to the United States;<sup>92</sup> the fact that the overwhelming majority of international tourists visiting that country are U.S. citizens, well-known for their litigious oriented preferences; and the important fact that the United States, as the largest foreign investor in Mexico,<sup>93</sup> maintains close corporate links with many first class, international luxury hotels in Mexico which are highly favored by economically affluent American tourists.

The dual (civil/labor) legal regime in Mexico applies to personal injury cases confining the applicable provisions of (i) the local civil code with those of (ii) the Federal Labor Act (which determine the economic indemnification due to a worker injured at the work place depending upon the severity of the resulting injuries).

This dual regime was adopted by the Mexican legislature as a practical regime using the provisions already in place in the Mexican legislation, *i.e.*, the pertinent civil code and the Federal Labor Act, without having to add to the civil code technically detailed compensation provisions (which would have been perceived as out of place because under Mexican law they are already included in the Federal Labor Act) to compensate victims in personal injury cases, thus assimilating cases in a civil context to those happening in a labor context.

As stated earlier, under Mexican law, all personal injury cases in the civil arena are treated as if the victim was a worker who had been injured at the workplace, thus subject to the application of the economic indemnification rules mandated by the Federal Labor Act. This dual legal regime derives from Article 1915 of the Federal Civil Code which reads:

---

90. See VARGAS, *supra* note 28 and the accompanying text.

91. See Jorge A. Vargas, *An Introductory Lesson to Mexican Law: From Constitutions and Codes to Legal Culture and NAFTA*, 41 SAN DIEGO L. REV. 1337, 1362 (2004).

92. See *id.* at 1339-40.

93. Today, the United States contributes close to 70% of the total foreign investment in Mexico; other investor countries include the U.K. (6%), Germany (4%), France, Spain and Switzerland combined (3.5%). *Id.* at 1340.

Damages shall consist, at the election of the injured party, either in the restoration of the damaged item to its previous condition when this is possible or in the payment of the damages and loss.

If the injury caused to individuals causes death or disability (either total or partial, temporary or permanent), the amount due for reparations shall be determined by the provisions of the Federal Labor Act. In order to calculate the indemnity due, the highest minimum daily wage in force in the region shall be multiplied by four (4), and shall extend for the number of days during which the victim suffers from each of the incapacities set forth in the Federal Labor Act. In the event of the victim's death, the indemnity shall be paid to his/her heirs.

If the injured party is a wage-earner, the indemnification cannot be assigned or transferred, and it shall preferably be paid in one lump sum, except as agreed between the parties.<sup>94</sup>

Also, one must keep in mind that *all* of the Civil Codes in the Republic of Mexico used to calculate said economic indemnification, mandate that the minimum wage be first multiplied several times (usually four times) and then need a multiplier for the number of days prescribed by the pertinent Article of the Federal Labor Act, depending on the kind of disability inflicted to the victim. In this regard, the Federal Civil Code reads:

In order to calculate the indemnity due, *the highest minimum wage in force in the region shall be multiplied by four, and shall extend for the number of days during which the victim suffers from each of the incapacities set forth in the Federal Labor Act.* In the event of the victim's death, the indemnity shall be paid to his/her heirs (emphasis added).<sup>95</sup>

## 1. Civil Law Issues

### a. Damages and Losses

Civil law predicates that the victim of an illicit act causing injury or death has the right to receive, at the election of the injured party, either (a) "the restoration of the damaged item to its previous condition," or (b) "the payment of the damages and losses," as mandated by the first paragraph of Article 1915 of the Federal Civil Code. Articles 2108 and 2109 of the Federal Civil Code define these terms.<sup>96</sup>

---

94. FCC, *supra* note 41, art. 1915.

95. *Id.*

96. *Id.* *Damages* are the loss or decrease of assets suffered as a result of the failure to comply with an obligation. FCC, *supra* note 41, art. 2108. *Losses* are the deprivation of lawful gains that would have resulted had there been compliance with an obligation. FCC, *supra* note 41, art. 2109. In addition, the Code prescribes that damages and losses *must be a direct and immediate consequence* of the failure to comply with the obligation, whether they have already occurred or will necessarily occur. FCC, *supra* note 41, art. 2110.

*b. Moral Damages*

Article 1916 of the Federal Civil Code defines “moral damage” in these terms:

*For moral damage it is understood the injuries inflicted upon a persons' feelings, affections, beliefs, decorum, honor, reputation, privacy, image and physical appearance, or how that person is perceived in the opinion of others. Moral damages shall be presumed when a person's freedom or his/her physical or psychological integrity is illegitimately injured or diminished.*

*If an illicit act or omission causes moral damage, the person responsible shall be liable to pay a monetary indemnification, independent of any other liability for material damages by virtue of a contract or extra-contractually. He/she shall also be liable for moral damages resulting from strict liability, pursuant to Article 1913, including the state and its public servants as provided by Articles 1927 and 1928 of this Code.*

The cause of action for moral damage cannot be transferred to third parties and can only be passed to the victim's heirs if the victim had filed it when he/she was alive.

*The amount of the indemnification shall be determined by the judge taking into account the injured person's rights, the degree of liability, the economic situation of the responsible, and that of the victim, as well as the other circumstances of the case.<sup>97</sup>*

Traditionally, Mexico's Civil Law does not provide reparation or compensation for any non-material, non-physical damage. However, this situation changed in 1982 when the Civil Code for the Federal District was amended to include the relatively novel notion of *daño moral*, or moral damage. Mexican civil law specialists are beginning to examine this notion more closely in order to determine its precise legal meaning and scope, since Mexican courts have now decided numerous cases involving moral damages and, thus, have gradually produced more current jurisprudence.<sup>98</sup>

Only four *Jurisprudencias* on moral damages have been produced by Mexico's Supreme Court between the amendment to the Civil Code for the Federal District in 1982 and December of 2003. These *Jurisprudencias* stated:

---

97. *Id.* art. 1916 (emphasis added).

98. For a detailed legal analysis of the legal meaning, scope and application of moral damages recently decided by courts in Mexico, see generally Jorge A. Vargas, *Moral Damages under the Civil Law of Mexico: Are These Damages Equivalent to U.S. Punitive Damages?* 35 U. MIAMI INTER-AM. L. REV. 183-282 (2004).

- Two elements are required to generate the obligation to repair the moral damage: first, it must be proven that the damage took place; and second, said damage must be the consequence of an illicit act.<sup>99</sup>
- [I]f...the reparation of the damage is to be demanded by the Public Prosecutor determining its amount based on the evidence submitted to the trial, it is evident that [the accused] cannot be condemned to pay said reparation when no proof was submitted to demonstrate the existence of moral damage as a result of the illicit act [in a criminal proceeding].<sup>100</sup>
- Whereas moral damage is that suffered by a person as a consequence of a damaging act [inflicted upon] his or her docorum, prestige, honor, good reputation or in his or her social image. In sum, upon his or her personality rights. Therefore, for an indemnification claim to be filed in any of these cases, the corresponding judgment must enunciate the specific type of damage inflicted and how these were proved. And with respect to moral damage, the judgment must specify in what manner the victim's personality rights were injured as a consequence of the criminal offense (*Delito*).<sup>101</sup>
- Therefore, if a hospital provides inadequate medical attention to a patient, causing him/her a permanent incapacity, it is clear that apart from the material damage, the patient in question has suffered a psychological injury which translates into a moral damage that affects his or her sentiments and affections. In this case, the hospital must repair the damage caused [to the patient] as provided by the law, independently from the corresponding indemnification for the material damage.<sup>102</sup>
- [W]hen a complaint is filed for the reparation of a moral damage resulting from contractual or extra-contractual liability, the illicit act of the defendant and the damage which directly resulted must be fully proved.<sup>103</sup>

The notion of “moral reparation” appeared for the first time in Mexico’s legislative history in the Civil Code for the Federal District in 1928. “Although the term ‘moral reparation’ may not fit exactly the current meaning of the more novel notion of ‘moral damages,’ as this term was

---

99. DAÑO MORAL. REQUISITOS NECESARIOS PARA QUE PROCEDA SU REPARACION, *Semanario Judicial de la Federación y su Gaceta*, Octava Época, tomo XV, Enero de 1995, Tesis J/39, Página 65 (Mex.).

100. DAÑO MORAL EN EL PROCESO PENAL. DEBE ESTAR ACREDITADO PARA QUE PROCEDA LA CONDENA (LEGISLACIÓN DEL ESTADO DE PUEBLA), *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XI, Febrero de 2000, Tesis J/2, Página 926 (Mex.).

101. DAÑO MORAL E INDEMNIZACIÓN CON MOTIVO DE HOMICIDIO O LESIONES, PRESUPUESTOS QUE SE DEBEN ACTUALIZAR PARA QUE PROCEDA EL PAGO COMO RESULTADO DE ESTOS DELITOS (LEGISLACIÓN DEL ESTADO DE PUEBLA), *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XII, Diciembre de 2000, Tesis J/8, Página 1199 (Mex.).

102. DAÑO MORAL, DERECHO A LA REPARACIÓN DEL. SE DA EN FAVOR DE UNA PERSONA, COMO CONSECUENCIA DE UNA INADECUADA ATENCIÓN MÉDICA PRESTADA POR UN CENTRO HOSPITALARIO QUE VULNERE O MENOSCABLE SU INTEGRIDAD FÍSICA O PSÍQUICA, *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XVI, Noviembre de 2002, Tesis J/39, Página 1034 (Mex.).

103. See Vargas, *supra* note 98, at 256.

introduced in that Code by a 1982 amendment, Mexican specialists are of the opinion that the 1928 term definitely constitutes a legal antecedent to the modern notion of 'moral damages.'"<sup>104</sup>

At the time when that Code was promulgated in 1928, "moral reparation" applied in two different legal contexts: first in cases of breach of a betrothal agreement as an economic indemnification to be paid by the offering party to the innocent party as a "moral reparation" for the personal, familial and social inconveniences generated by the breach. This economic reparation was to be paid to the innocent party for the "pain and suffering" inflicted on that party's honor and reputation. Second, the term moral reparation also applied to civil liability cases arising out of illicit acts. In this second connotation, the author of a tortious act is statutorily mandated to pay a monetary indemnification, independent of the material damages and losses, as an *equitable moral reparation*. "It corresponds to the Judge, at his or her discretion, whether or not to grant in favor of the victim (or of his or her family upon the death of the victim), the 'equitable' indemnification in question."<sup>105</sup>

It should be underlined that, in both cases, the use of "moral reparation" constitutes a legal remedy that operates as an "equitable complement" to the "legal indemnification" statutorily imposed by the applicable provision of the Civil Code. "Whereas the material damages suffered by the victim are to be *statutorily compensated* by the economic indemnification calculated in Mexico on the basis of 'damages' and 'losses' clearly enunciated by the Code, the moral reparation constitutes an *equitable indemnification* to compensate for the non-economic injuries inflicted on the victim."<sup>106</sup>

Therefore, based on the historical legal background of this notion, and the recent *Jurisprudencias* and *Ejecutorias* rendered by Mexico's Supreme Court after the 1982 Civil Code amendment it is clear that moral damages under the Civil Law of Mexico<sup>107</sup> are not equivalent to the U.S. punitive damages.<sup>108</sup>

104. *Id.* at 265.

105. *Id.* at 266.

106. *Id.*

107. See Vargas, *supra* note 98, at 271-75 (*Appendix Two* contains a comparison of moral damages in all the Civil Codes of Mexico including the Federal District); see Vargas, *supra* note 98, at 277-81 (*Appendix Four* contains a complete list of the decisions rendered on moral damages by Mexico's Supreme Court in recent years).

108. Recently, the Legislative Assembly of the Federal District (*Asamblea Legislativa del Gobierno del Distrito Federal*) enacted a "Civil Liability Act of the Federal District for the Protection of the Rights to Privacy, Honor and Self-Image" (*Official Gazette of the Federal District* of May 19, 2006). This new Act endeavors to protect some of the

### *c. Statute of Limitations*

The Federal Civil Code prescribes that the statute of limitations for any cause of action involving extra-contractual civil liability (including moral damages) is two years, counted from the date when the damage occurred.<sup>109</sup> In general, most of the civil codes of the states, including that of the Federal District, adhere to this rule.<sup>110</sup>

### *2. The Federal Labor Act*

This federal statute, enacted in 1970 and amended many times,<sup>111</sup> governs all matters pertaining to workers and labor law, both substantive and procedural, including individual and collective labor contracts, workers' unions, working days, vacations, wages, employers' and workers' obligations, as well as collective labor relations, strikes, labor courts and their procedure, local and federal conciliation and arbitration boards, etc. Title IX of this Act is devoted to Work-Related Risks (Articles 472-513) and includes a Table of Occupational Illnesses and a Valuation of Permanent Disability Table (Articles 514-515). Thus, from a practical viewpoint, the Federal Labor Act may be considered to be Mexico's Labor Code (*Código Federal del Trabajo*), from both substantive and procedural viewpoint.<sup>112</sup>

#### *a. Four Types of Labor Disabilities*

Article 477 of the Federal Labor Act recognizes four types of labor disabilities: (a) Temporary; (b) Partial permanent; (c) total permanent; and, (d) death.<sup>113</sup>

---

"Personality Rights" recognized at the international level and to provide a civil reparation when these rights have been breached or violated as a result of the "abuse of the right of information and the freedom of expression," guaranteed by Mexico's Federal Constitution of 1917. *Ley De Responsabilidad Civil Para La Proteccion Del Derecho A La Vida Privada, El Honor Y La Propia Imagen En El Distrito Federal*, 19 de Mayo de 2006 (Mex.).

109. FCC, *supra* note 41, art. 1934.

110. *See supra* Part II.C.3.

111. *See generally* FLA, *supra* note 8.

112. *See* LINDA ESCANDÓN OJEDA & MARINA L.C. BOTTONE, *Labor Law in Mexico*, in 1 MEXICAN LAW TREATISE 151-89 (1998).

113. *See* FLA, *supra* note 8, art. 477. Under the Federal Labor Act, *Temporary disability* is the loss of faculties or abilities, thus making it partially or totally impossible for a worker to perform a job for a period of time. FLA, *supra* note 8, art. 478. *Partial permanent disability* is a decrease of a worker's faculties or abilities to work. FLA, *supra* note 8, art. 479. And *Total permanent disability* is the complete loss of faculties or abilities, thus making it impossible for a worker to perform any work for the rest of his life. FLA, *supra* note 8, art. 480.

In extra-contractual liability cases occurring in Mexico, a Mexican doctor determines the type of disability after conducting a medical examination of the victim. Once the disability is determined, the Federal Labor Act prescribes the kind of economic indemnification to be given to the victim based upon the severity of the injuries and/or death.

The Federal Labor Act (FLA) prescribes that employees [or victims of a tortious act in the civil context] who suffer a work-related risk shall have the right to medical and surgical assistance, rehabilitation, hospitalization; medications and curative materials; and the indemnity specified in Title IX: *Work-Related Risks*.<sup>114</sup>

In addition, this Act provides that if the risk results in *temporary disability*, the worker shall be paid lost wages in full for the period he is unable to work. This payment shall begin from the first day of disability.<sup>115</sup> If the risk results in *partial permanent disability*, the worker shall be paid the percentage specified in the disability evaluation table of the amount that would have to be paid if the disability had been a total permanent disability. The appropriate percentage between the maximum and the minimum levels shall be calculated, taking into account the age of the worker, the severity of his disability, and the likelihood that he will be able to undertake compensated work similar in nature to his own occupation and position. Whether the employer has concerned himself with the worker's occupational reeducation is also considered.<sup>116</sup>

If the *partial disability* consists of absolute loss of the worker's faculties or abilities to perform his job, [the Labor Board] may increase his compensation up to the amount for total permanent disability, considering the importance of the job and whether the worker is able to perform a similar job that is capable of producing similar income.<sup>117</sup> And if the risk results in *total permanent disability*, the compensation shall consist of an amount equivalent to wages for 1,095 days.<sup>118</sup>

If the risk results in the worker's death,<sup>119</sup> the Federal Labor Act prescribes that the compensation shall consist of: (a) Two months' wage for

---

114. *Id.* art. 487.

115. *Id.* art. 491.

116. *Id.* art. 492.

117. *Id.* art. 493.

118. *Id.* art. 495.

119. *Id.* art. 500.

funeral expenses; and, (b) Payment of the amount specified in Article 502.<sup>120</sup>

Pursuant to the Federal Labor Act, the following persons shall have the right to receive compensation in cases of death:

- (1) *The widow, or the widower* who has been economically dependent on his working wife and has a disability of 50% or more; minor children under the age of sixteen; and children over fifteen who have a disability of 50% or more;
- (2) *Ascendants* shall share with the persons mentioned in the preceding section, unless they were not economically dependent on the worker;
- (3) If there is no surviving spouse, *the person with whom the worker live as if they were married during the five years immediately preceding his death, or with whom he had children,*<sup>121</sup> shall share with the persons mentioned in the two preceding sections;
- (4) If there is no surviving spouse, child or ascendant, *persons who were economically dependent on the worker* shall share, according to each one's degree of economic dependence, with the person who satisfies the requirement of the preceding section; and
- (5) The Mexican Social Security Institute (IMSS), in the absence of all persons mentioned in the preceding section.<sup>122</sup>

Several of the preceding Articles of the Federal Labor Act refer to "lost wages" or "days of wages." This is due to the fact that throughout the Republic of Mexico the government, through the National Commission for Minimum Wages (*Comisión Nacional de los Salarios Mínimos*)<sup>123</sup>—formed by representatives of the government, employers and workers—every year establishes the three minimum wages that apply to each of the three geographical areas<sup>124</sup> into which that country is officially divided.

---

120. *Id.* ( In the event of the worker's death, the persons mentioned in the preceding article shall receive an indemnity in an amount equal to 730 days of wages, without deduction of the indemnity received by the worker while on temporary disability.) *Id.* art. 502.

121. In Mexico, this kind of "common-law wife" or "common law-spouse," known as "Concubines" (*Concubinas* or *concubinos*), is a rather common practice throughout the Republic of Mexico. The rights of concubines are statutorily created by the applicable Civil Code where the couple resides in certain states, and may result in benefits to the surviving concubine and children for inheritance, social security, medical treatment, retirement funds and housing benefits. See Jorge A. Vargas, *Concubines under Mexican Law: With a Comparative Overview of Canada, France, Germany, England and Spain*, 12 SW. J.L. & TRADE AM. 45, 45-45-96 (2005); Jorge A. Vargas, *Family Law in Mexico: A Detailed Look into Marriage and Divorce*, 9 SW. J. L. & TRADE AM. 5-88 (2002-2003).

122. FLA, *supra* note 8, art. 501 (emphasis added).

123. For the composition and functions of this Commission, see FLA, *supra* note 8, arts. 551-574.

124. *Area "A"* includes Mexico City, Baja California, Baja California Sur, Sonora, Tamaulipas, Veracruz and the State of Mexico; *Area "B,"* Jalisco, Nuevo Leon and certain municipalities in Sonora, Tamaulipas and Veracruz; and *Area "C"* the remaining States in the Republic of Mexico. In each of the three geographical areas, the National Commission for Minimum Wages establishes higher salaries than the "general minimum wage" for 86 different categories of occupations ranging from masons, cooks, truck drivers, nurse's assistant, elementary school teacher in a private school, mechanic, plumber,



In general, the minimum wages for the following calendar year are published in the Federal Official Gazette (*D.O.*) in late December every year. Therefore, in order to calculate the respective economic indemnification due to the victim of a tortious act it is indispensable to know (i) the minimum wage in force in the specific year and (ii) in the geographical area where the tortious act occurred. During 2006, the “general minimum wage” (*Salario mínimo general*) in Mexico City and Tijuana (Area “A,” the highest in that country) was 48.67 pesos.<sup>125</sup>

#### IV. SIX HYPOTHETICAL ON PERSONAL INJURY AND WRONGFUL DEATH CASES

1) *CASE A: Anastasia Ashley, an Alaska accountant drowned in Acapulco, in the State of Guerrero, while swimming in marine waters of the Pacific Ocean under federal jurisdiction, in front of the beach-front hotel where Anastasia was staying.*

Pursuant to Mexico’s Federal Constitution of 1917, the beach and the adjacent coastal waters are under the exclusive jurisdiction of Mexico’s federal government.<sup>126</sup> Therefore, according to the “Territoriality” and the *Lex loci delicti* principles, federal law controls this case and the Federal Civil Code should govern the case (instead of the Civil Code of the State of Guerrero).

As prescribed by Articles 1910 and 1915 of the Federal Civil Code, the minimum wage in the State of Guerrero, where Acapulco is located,

---

journalist and social worker. See SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL, Comisión Nacional De Los Salarios Mínimos, <http://www.conasami.gob.mx/Archivos/TABLA%20DE%20SALARIOS%20M%C3%8DNIMOS%20PROFESIONALES/2007.pdf>.

125. The “general minimum wage” in Area “A” in September of 2006 was 48.67 pesos. One US dollar would be equivalent to 10.968 pesos (or one peso = \$0.125). SECRETARÍA DEL TRABAJO Y PREVISIÓN SOCIAL, Comisión Nacional De Los Salarios Mínimos, <http://www.conasami.gob.mx/Archivos/TABLA%20DE%20SALARIOS%20M%C3%8DNIMOS%20PROFESIONALES/2006.pdf>.

126. See Const. 1917, art. 27. The beach is included within Mexico’s “Federal Maritime Land Zone” (*Zona Federal Marítimo Terrestre*) under the strict control and exclusive jurisdiction of the federal government. Pursuant to the same article, the adjacent ocean waters—since they are technically defined as “maritime internal waters” (*Aguas marítimas interiores*) are under the direct ownership of the Nation and subject to federal jurisdiction and governed by Mexico’s Federal Oceans Act (*Ley Federal del Mar*). See Jorge A. Vargas, *Mexico’s Legal Regime Over Its Marine Space: A Proposal for the Delimitation of the Continental Shelf in the Deepest Part of the Gulf of Mexico*, 26 U. MIAMI INTER AM. L. REV. 189, 189-242 (1994-95).

multiplied by four and then by 730 days wages, as mandated by Article 502 of the Federal Labor Act, would produce the amount due as the economic indemnification provided by Mexican law. The fact that Ms. Ashley's salary in Alaska was \$37,000 per year has no relevance for Mexican law purposes. In compliance with Article 500 of the Federal Labor Act, a two-month wage calculated on the basis of the Mexican minimum wage in Acapulco when the incident occurred, should be added for funeral expenses. Ashley's spouse, children and ascendants (if economically dependent on the victim) have cause of action under Mexican law to seek economic compensation for the infliction of non-patrimonial, "moral damages," pursuant to Article 1916, FCC.

2) *CASE B: Bobby and Berenice Barrett decided to go to Bahía Ballenas, in Baja California Sur, for their honeymoon. While riding in a hotel bus to go to the whale breeding lagoons a few miles away from their hotel, the bus experienced a mechanical failure and went off the highway, going down a canyon and crashing against a rock barrier. Bobby died and Berenice broke a leg.*

This case is governed by the Civil Code of the State of Baja California Sur where the vehicle accident occurred based upon the principles of Territoriality and *lex loci delicti*. The Mexican hotel should be liable for Bobby's death and Berenice's injuries given the deficient mechanical condition of the bus, indicative of the hotel's negligence. Under Mexican law, as prescribed by the Civil Code of the State of Baja California Sur, "the managers and owners of commercial establishments shall be liable for the damages and injuries caused by their workers or employees . . . in the performance of their duties."<sup>127</sup>

Bobby's economic indemnification should be calculated using the minimum wage of Baja California Sur, as mandated by Articles 500 and 502 the Federal Labor Act. Since Berenice suffered a "temporary disability" according to Article 478, FLA that impeded her work for three months, she had to be paid lost wages in full for the three-month period, as provided by Article 491, FLA. In addition, she received medical and surgical assistance, hospitalization, medication and curative materials, rehabilitation and the use of a prosthetic device for two months, based on Article 487, FLA, as duly proven to the Mexican court. Under Mexican law, Berenice also has a cause of action to seek an equitable economic compensation for "moral damages."

---

127. FCC, *supra* note 41, art. 1924.

- 3) *CASE C: Christopher Colbert took a charter plane from Cleveland to Can Cun, Quintana Roo, where he checked in at "Condos Can Cun" and later that evening walked down by the condos' swimming pool where Sunday's "Reguetón" dancing competition was in full swing. After dancing for a while, Christopher decided to dive into the pool without noticing that the pool was very shallow. As a result of his dive, Christopher ended up with a couple of broken vertebrae and became paraplegic.*

Because of a special provision found in the local code, Christopher's case may be governed either by the Federal Civil Code or by the local Civil Code of the State of Quintana Roo. The local Civil Code prescribes that "[t]he effects of legal transactions entered into abroad that should be executed in the territory of the State, shall be governed by federal laws."<sup>128</sup>

The Federal Civil Code would apply to this case, for example, if Christopher made his travel arrangements with a Cleveland travel agency (instead of directly contacting "Condos Can Cún in Quintana Roo). In this case, if the incident results in "total permanent disability," such as is the case with a quadriplegic person, the compensation shall be calculated by multiplying the minimum wage of the State of Quintana Roo by four and then by 1,095 days, as prescribed by Article 495, FLA. In addition, Christopher should be indemnified for medical and surgical assistance, rehabilitation, etc., pursuant to Article 487, FLA. Christopher, as well as his spouse, children and ascendants (if economically dependent from the victim) have a cause of action to seek "moral damages."<sup>129</sup>

Otherwise, the case is to be governed by the Civil Code of Quintana Roo, whose provisions closely follow those of the Federal Civil Code and the Federal Labor Act, including an "equitable indemnification" for "moral damage."<sup>130</sup> Depending upon the circumstances, "Condos Can Cún" may attempt to escape liability by alleging that Christopher's permanent injuries resulted from his "fault or inexcusable negligence." However, it should be noted that in this regard, the Civil Code of Quintana Roo

---

128. Código Civil Para el Estado de Quintana Roo [C.C.Q.] [Civil Code of the State of Quintana Roo], art. 15, Periódico Oficial del Estado de Quintana Roo [P.O.], 12 de Enero de 1984 (Mex.) [hereinafter Civil Code of the State of Quintana Roo].

129. *Id.* arts. 131-135.

130. *Id.* arts. 15, 87-134.

departs from the rule that any contributory negligence on the part of the victim results in a total bar to any recovery.<sup>131</sup>

4) *CASE D: Dan and Dorothy Dandrige, geology professors from the University of Denver, were excited to go to a time-share in the City of Durango, in the state of Durango, to study the geology of nearby iron deposits found at Cerro del Mercado. While having breakfast at their time-share kitchen, the boiler exploded. Dorothy suffered serious injuries in her face and hands, and Dan lost the use of both arms.*

Under Mexican law, the explosion of a boiler is one of the most common cases of “objective liability,” given the inherently hazardous nature of boilers. Accordingly, the owner of the timeshare would be liable under the Civil Code of the State of Durango. Dorothy’s injuries would have to be characterized by a medical doctor as a “temporary disability,” as prescribed by the Federal Labor Act, to then proceed to calculate her economic indemnification based on the number of days she was unable to work (Art. 491, FLA), in addition to the payment of damages and losses, including medical and surgical assistance, etc., as mandated by Art. 487, FLA.

Given the fact that Dorothy’s injuries caused disfigurement in her face and hands, she has a valid cause of action to seek economic compensation for her non-material “moral damage,” as prescribed by the local code of Durango.<sup>132</sup>

Regarding Dan’s injuries, having lost both arms results in a “total permanent disability,” according to Art. 480, FLA. The corresponding damages and losses derived from medical and surgical assistance, hospitalization, medication, etc. one established by Art. 487, FLA. The mandated economic indemnification is to be calculated pursuant to Art. 495, FLA, that prescribes an amount equivalent to 1,095 days, multiplied by four per the statutory mandate found in the Civil Code of the State of Durango.<sup>133</sup> Given Dan’s physical situation, he has a valid cause of action to claim an economic compensation for “moral damage.”<sup>134</sup>

---

131. *Id.* art. 87.

132. Código Civil del Estado de Durango [C.C.D.] [Civil Code of the State of Durango], art. 1797, Periódico Oficial del Gobierno del Estado de Durango [P.D.], 4 de Julio de 1982 (Mex.) [hereinafter Civil Code of the State of Durango].

133. *See* C.C.D. art. 1799.

134. *Id.*

5) *CASE E: Edward Elliot, an electrical engineer, was sent by his company from Eugene, Oregon, to Ensenada, Baja California, to supervise the construction of an electrical power plant. With two other Mexican engineers and a Mexican pilot, Edward boarded a helicopter to travel to the construction site a few miles away. During the flight the helicopter crashed. There were no survivors.*

Under Mexican law, cases involving injuries or death resulting from a civil aviation incident occurring within the Republic of Mexico are governed *not* by the Federal Civil Code (or any other local code) but by a special federal statute: the Civil Aviation Act (*Ley de Aviación Civil*)<sup>135</sup> and its Regulations. Basically, this Act adheres to what is prescribed by Art. 1915 of the Federal Civil Code and by the Federal Labor Act, with a few minor differences.

6) *CASE F: Frederick Forbes was a marketing manager sent by his company to design and direct a training program for the largest marketing company in Mexico City. Affected by his intense working program and the high altitude of Mexico City, Frederick suddenly fainted suffering from a serious increase in high blood pressure. The medical doctor at the private clinic where Frederick was sent to be treated, felt Frederick needed a triple bypass heart operation. Frederick died in the operating room.*

Unlike in the United States, medical malpractice lawsuits are still rather uncommon in Mexico although their number is beginning to gradually increase over the last few years. From a civil liability viewpoint, these cases are controlled by the traditional *lex loci delicti* rule.

Recently, victims (or heirs) of medical malpractice have begun to explore an informal, alternative avenue, non-confrontational and non-judicial, which is medical arbitration. This alternative is being promoted by the Mexican Council of Medical Arbitration.<sup>136</sup> This Council asserts that

---

135. *Ley de Aviación Civil, as amended*, Diario Oficial de la Federación [D.O.] 12 de mayo de 1995 (Mex.).

136. This Mexican Council of Medical Arbitration provides detailed information on this alternative avenue to resolve medical malpractice cases. See generally CONAMED, MODELO MEXICANA DE ARBITRAJE MÉDICO 10-45, [www.conamed.gob.mx](http://www.conamed.gob.mx).

“alternative methods of solution of conflicts generally are more efficient than the traditional judicial means,” guaranteed by Article 17 of Mexico’s Federal Constitution.<sup>137</sup> The Council considers medical arbitration more efficient than the traditional judicial means because the parties may design *ad hoc* proceedings suited for the nature of the controversy. The arbiter tends to be an expert in the medical area in question and intervenes either to resolve the conflict through arbitration by means of an award (*Laudo*) or inducing the parties to reach an agreement which would resolve the problem.

The Code of Civil Procedure for the Federal District (*Código de Procedimientos Civiles para el Distrito Federal*) allows contending parties to resolve their differences through arbitration. Interested parties enter either into a special *Compromise* (*Compromiso*) consisting of a public document produced by a Notary Public or by means of a special judicial agreement detailing the appointment of the arbiter and all questions pertaining to the arbitration proceedings.<sup>138</sup> The Mexican Council has prepared a “model compromise” that may be used in the proceedings conducted under the aegis of the Council.<sup>139</sup>

## V. CONCLUSION

The simplistic and scanty provisions on tort law found today in the Mexican civil codes, at the federal and state levels, have not been incorporated into the social and legal realities of Mexico or into its legal system. Historically, while those provisions can be clearly traced back to the *Code Napoleon* of 1804 or to the first Mexican Civil Code of 1884, they have remained in the pages of the codes as archaic legal relics that have seldom found their way into the litigiousness characteristic of the civil courts of any country. Since the rules and principles of Mexico’s extra-contractual civil liability have been carefully kept as museum pieces, with little or no connection to the social and economic transformations that have taken place—and continue to take place—in the social and economic life of that country, those rules and principles have become dry, inflexible and stale.

Mexican nationals and their legal system have lost a great deal by failing to apply and develop a modern and up to date tort law system. It

---

137. See Const. 1917, art. 17 (Any person has the right to be administered justice by tribunals that shall be expeditious in rendering it in the periods and terms established by the laws, rendering their resolutions in a prompt, complete and impartial manner. Their service shall be free of cost. Consequently, judicial costs are prohibited.)

138. See VARGAS, *The New Federal Civil Code of Mexico*, in THE FEDERAL CIVIL CODE OF MEXICO, *supra* note 5, at arts. 609-636.

139. See *supra* note 136.

is necessary to infuse life and reality into the content of the rules and principles governing tort law in that country. For a Mexican tort law system to be modern and fair, the substantive legal principles governing extra-contractual liability must be in close symmetry to the socio-economic realities of Mexico.

Accordingly, the old Mexican principles of territoriality and *lex loci delicti* are crying for a complete and thorough overhaul. It would be interesting to see in Mexico the emergence of new rules, principles and doctrines that may consider, for example, the factual application of foreign law by Mexican courts and the recognition by Mexican courts of a valid jurisdiction by foreign courts. But above all, it is long overdue to see that the economic indemnifications awarded to the victims of tortious acts in that country are truly fair and just instead of simply being economically nominal or symbolic.

No legal overhauls and no modernization of the old civil rules and principles of extra-contractual liability are ever to take effect in Mexico until there are new and progressive laws and regulations; better educated Mexicans familiar with their rights and obligations; responsible and consumer-oriented companies; goods and services of a higher quality and, above all, an honest, efficient and fair administration of the justice system.

