A NEGLIGENCE ACTION IN MEXICO: AN INTRODUCTION TO THE APPLICATION OF MEXICAN LAW IN THE UNITED STATES

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Resumen

La cercania geográfica, ecónomica y cultural entre los Estados Unidos y Mexico también implica un creciente numero de litigios de tipo transnacional en los cuales tribunales de ambos paises aplican normas juridícas correspondientes al país vecino. El derecho de la responsabilidad extracontractual y en especial el de los actos y hechos ilicitos es uno de los mas aplicables, sobre todo por el creciente turismo binacional. El presente artículo examina en detalle la aplicación del derecho Mexicano en torno a actos ilicitos por un tribunal norteamericano. Partiendo de una situación hipotética, los autores discuten los diversos contextos para la aplicación del derecho mexicano: el contexto mas amplio o "remedial", en el cual debe determinarse la accionabilidad de la demanda en el derecho Mexicano, el contexto mas limitado, en el cual solo deben aplicarse normas aisladas, y el contexto "segmentado" o intermedio. Este último es el contexto de aplicación mas frecuente. Tras examinar los tres contextos, los autores llegan a la conclusión que el accidente en cuestión es solo accionable en parte. La restricción se debe en gran parte a que el concepto del deber hacia la victima de actos ilicitos o contra las buenas costumbres está intimamente

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relacionado con el concepto de propiedad. Además, las excepciones de caso fortuito, fuerza mayor y negligencia inexcusable de la víctima son mucho mas poderosas en el derecho Mexicano que en el derecho norteamericano. Los autores concluyen recomendando medidas judiciales para incrementar la certidumbre y la equidad en la adjudicación de accidentes turisticos ocurridos en Mexico pero litigados en los Estados Unidos.

I. INTRODUCTION

Transnational litigation is an inevitable byproduct of the increasingly strong familial, economic and cultural ties between the United States and Mexico. A large number of the lawsuits filed in the United States involve negligent acts committed in Mexico against United States nationals visiting[1] or residing in Mexico. Some of the these lawsuits involve injuries caused by defendants' use of what Mexican law refers to as "dangerous machines or instrumentalities." In Mexican law, the use of these machines or instrumentalities gives rise to "strict" or "objective" liability, a category which includes vehicular accidents. Other lawsuits involve ordinary "subjective" or "fault" type of negligence by providers of goods and services. These providers are often sued in the United States because they have either their principal place of business in, or other significant contacts with, a United States jurisdiction. In many of these negligence lawsuits, United States courts have applied Mexican law.[2] An earlier article by one of the authors dealt with the application of Mexican "objective"

1. For a description of the growth of tourism in Mexico, see BANAMEX S.A. DE C.V., TOURISM IN MEXICO: AN INVESTMENT OPPORTUNITY 7 (1986). Mexico's tourism sector has registered a 7.1% annual growth rate between 1960 and 1985. *Id.* at 5. For a description of tourism in the state of Sonora, see GOBEIRNO DEL ESTADO DE SONORA, SISTEMA INTEGRAL DE DESAROLLO TURISTICO HERMOSILLO (1986). There are very few legal commentators on Mexican tourism law, among them are J.O. TORO, LEGISLACION Y ORGANIZACION TURISTICA MEXICANA (3d ed. 1988); ANALISIS DE LA LEY FEDERAL DE MEXICO TURISMO, SECRETARIA DE TURISMO (1987); E.P. BONNIN, TRATADO ELEMENTAL DE DERECHO TURISTICO (1978).

2. *See, e.g.*, Hernandez v. Aeronaves de Mexico, S.A., 583 F. Supp. 331 (N.D. Cal. 1984); Smith v. General Motors Corp., 382 F. Supp. 766 (N.D. Tex. 1974); Daily v. Transitron Electronic Corp., 475 F.2d 12 (5th Cir. 1973); Victor v. Sperry, 163 Cal. 2d 518, 329 P.2d 728 (1958); Walters v. Westin Hotel, CA No. 84-5307 (E.D. Mich. Nov. 20, 1986). *But cf.* Wendelken v. Superior Court of Pima County, 137 Ariz. 455, 671 P.2d 896 (1983).

strict liability law by a court in the United States.[3] The present article deals with the application of Mexican "subjective" negligence law as it relates to the provision of tourist, and especially, lodging services in Mexico.

To facilitate the description of Mexican law, the authors have developed a sequence of events based in part on the facts of a recent case litigated before a United States District Court.[4] In 1986, Walt and Moira, United States citizens and residents of Tucson, Arizona decided to vacation in a highly regarded hotel in Ixtapa, Guerrero, Mexico, Hospitalario S.A. (Hospitalario). This hotel was run by Hospitality, Inc. of Tucson, Arizona, a highly regarded United States hotel chain. When Walt and Moira arrived in Ixtapa and checked into Hospitalario, they were asked to sign a "guest release." This document, written in English and Spanish, provided: "By signing this document, the guest releases the hotel from any and all liability for injuries which guests might suffer while engaged in recreational activities in the hotel or on the adjoining beach." Walt and Moira signed the release. They also received a booklet listing the addresses and telephone numbers of the Department of Tourism in Guerrero and Mexico City in case they needed to register a complaint or suggestion concerning the hotel.

The day following their arrival in Ixtapa, Walt and Moira rented snorkeling equipment from Hospitalario and went snorkeling in the ocean in front of the hotel. Hospitalario had placed a twelve inch by twelve inch wooden sign, written in Spanish and English, near the beach gate used by most hotel swimmers. The sign read: "Ocean Can Be Dangerous, Be Careful, Swim at Own Risk." Moira entered the surf in roughly the center of the cove. When she was approximately ten feet from the shoreline, she noticed her face mask did not fit, and filled up with water as she snorkeled. As she was trying to clear the mask, a series of large waves struck her, threw her to the sandy bottom and rendered her unconscious.

Walt went to Moira's rescue. The hotel's lifeguard was not in sight and Walt remained unassisted in his rescue until he brought Moira to Hospitalario's infirmary, approximately 100 meters from the beach area. When Moira regained consciousness, she was unable to move her legs. Upon Walt and Moira's return to Tucson, Moira was diagnosed as a permanent paraplegic. The Tucson physician also determined that the resuscitation administered by the lifeguard at the

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3. Kozolchyk, *Mexican Law of Damages for Automobile Accidents: Damage or Restitution?*, 1 ARIZ. J. INT'L & COMP. L. 189 (1982) [hereinafter Kozolchyk, *Damages*].

4. *Walters* CA No. 84-5307 (E.D. Mich. Nov. 20, 1986) (Martin Ziontz was one of the attorneys in this case. Boris Kozolchyk was an expert witness on Mexican law).

infirmary was improper and may have contributed to Moira's condition. Walt and Moira then met with their attorney in Tucson to consider filing suit against Hospitality, Inc.

United States lawyers faced with litigation for personal injuries suffered in Mexico must pay special attention not only to choice of forum but also to choice of law issues. Prominent among these are: (1) Which substantive law will be applied, United States or Mexican?; (2) If Mexican substantive law is applied, what does it encompass? Will Mexican federal law suffice if the accident took place in federal property such as federal highways or "maritime zones," or are Mexican state or local versions of substantive law equally relevant, and if so, which state law should apply?; (3) With respect to a "codified" system of laws such as Mexico's, is the restatement of Mexican codal, statutory and administrative law provisions enough, or should court and doctrinal interpretation also be alleged and proven?; (4) What is the precise ranking of the various sources of law, such as constitutions, codes, statutes, administrative regulations, court decisions, doctrinal comments and so forth?; (5) Once all applicable sources have been identified and ranked, how does the litigant establish the appropriate Mexican counterpart to United States litigational concepts such as "cause of action," "proximate cause," "contributory or comparative negligence," "assumption of the risk," "act of God," "punitive damages," and so on?; (6) How can one effect the application of a Mexican standard of diligence in the United States if such a standard differs from that which prevails in the jurisdiction in question?

This article will assume the choice of Mexican law and will address the issues related to its application in the hope of helping adjudicators, practitioners, and students of comparative law make the best use of the surprisingly little legal information available.[5]

II. APPLICATION OF MEXICAN LAW

A. Mexican Law as "Law": Remedial Context, Individual Rule and Segmented Law Analysis

Courts in the United States face serious problems when they attempt to locate and prove the relevant foreign law. To begin with, the parties do not always make clear what they mean by foreign law. At times,

5. *See* Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L & COMP. L. J. 235 (1986); B. CARL, DOING BUSINESS IN MEXICO 28-1 (S. Lefler ed. 1980); Butte, *Strict Liability in Mexico*, 18 AM J. COMP. L. 805 (1970).

what they mean by foreign law is a narrowly drawn rule in a code or statute.[6] Often, however, the parties refer to foreign law as an entire legal system, or as a set of rules, principles or doctrines, extracted from the foreign legal system.[7] In the end, what is meant by foreign law is predetermined by the issue before the court. If the issue were one of standing or right to sue under foreign law, the term foreign law would have to include a remedial context or a description of the actual operation of the foreign remedial system. Sources of law and their ranking, methods of pleading, proof and decision making would have to be included in the description. Thus, if faced with the defense of Walt and Moira's lack of standing or right to sue in Mexico for Hospitalario's negligence, the Arizona court would need to determine, first of all, what was meant by the appropriate suit and cause of action allegedly unavailable to the plaintiffs under foreign law. Since this determination would require an examination of Mexico's substantive and procedural law, the court's foreign law incursion would be more exhaustive and contextual than if the question had been whether a foreign law required a given formality for a contract or will. The remedial context analysis, incidentally, does not violate the traditional choice of law axiom that enjoins the foral court's application of foreign procedural law in its own proceedings.[8] The foreign procedural law proven to the local court is not intended for local application but merely as a datum to help determine the existence of a foreign law remedy.

By contrast with the remedial context analysis, the discrete or individual rule approach requires comparatively little research and minimal context analysis. For example, the determination of the meaning of the foreign law rule that governs the formality of a marriage, a will or a contract requires only a credible tender of normative information. The risk in this approach is that the court is left free to construe foreign law as it sees it. And as stated in a United States Court of Appeals decision,[9] "[t]he Court's construction... might be guided by logic and reasoning underlying similar rules of common law."[10]

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6. *See, e.g.*, First National City Bank v. Compania de Aguaceros S.A., 398 F.2d 779 (5th Cir. 1968) (discussing individual rules of Panama's civil and commercial codes regardless of their remedial context).

7. *See, e.g.*, Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930) (discussing the remedial context of various provisions in the French civil and commercial codes).

8. For one of the earliest statements on the applicability of foral procedural law, see Pritchard v. Norton, 106 U.S. 124 (1882).

9. Daniel Lumber Co., J.W. v. Empresas Hondurenas, S.A., 215 F.2d 465 (5th Cir. 1954).

10. *Id.* at 470.

Somewhere between the remedial context and the discrete or individual rule analysis lies what, for lack of a better term, will be described as the "segmented law" analysis. This is an analysis of the foreign law rules, concepts and principles of interpretation selected by the litigants and their experts on the basis of what the foreign court of appropriate jurisdiction would have selected. Implicit in this analysis are the assumptions that the selected foreign law is consistent with the law and public policy of the forum and that the United States court, applying its own procedural rules and using its own legal and lay language, is equipped to apply the proven foreign law to the facts in the controversy. The magnitude of the foreign law incursion inherent in the segmented law analysis depends upon the direction of the litigation. If the litigation proceeds in the direction of remedial issues, the incursion will be much more extensive than it would be were it directed toward the meaning and scope of application of individual foreign law rules.

As is readily apparent, the segmented law analysis is less comprehensive and realistic in its portrayal of foreign law than is the remedial context analysis. Serious comparative lawyers, legal anthropologists and sociologists may well regard it as artificial and unrepresentative. In the final analysis, the assumption that foreign law will fit snugly within the substantive, procedural and attitudinal parameters of the local courtroom is fictional. Yet, given the constraints that weigh upon adjudication, the segmented law analysis seems the only practical approach. Not only would a generalized requirement of exhaustive proof of the foreign remedial context be too costly and time consuming, but most courts in the United States, and for that matter elsewhere, lack the equipment to handle such a requirement on a routine basis.[11] It is therefore important to educate local courts on the basic contextual facts of Mexico's legal system. This understanding should reduce the need for proof of purely introductory and irrelevant Mexican legal institutions during the actual trial.

11. Law libraries are but one example of the inadequacy of resources. Very few law libraries in the United States and elsewhere have the books and reference librarians necessary to assist courts in the task of researching foreign law. Very few countries have a legal research center such as the Max Planck Institute whose function is to report to governmental bodies, including courts, on various aspects of foreign law. For information on the Max Planck Institute's reporting on foreign law functions, see Riegert, *The Max Planck Association's Institute for Research and Advanced Training in Foreign Law*, 25 J. LEGAL EDUC. 312 (1973).

B. Remedial Context Analysis

1. Sources of Negligence Law

As a federal nation, Mexico has a dual set of constitutions, codes, statutes, administrative regulations and courts.[12] Although strongly influenced by the United States Constitution,[13] the Federal or Political Constitution of the Republic of Mexico of 1917 [hereinafter Mexican Constitution][14] is a much more detailed and statutory like document than its United States model. For example, article 27 of the Mexican Constitution lists in several pages of minute detail the national ownership of lands and waters, including a reference to the waters in which Moira's accident occurred.[15] Since Mexico's Constitution takes precedence over state constitutions in federal matters, such as the determination of federal property and the legal status of visitors or tourists,[16] this Constitution will govern Walt and Moira's right to sue and the application of federal or state law to their negligence claim.

Mexico's law of negligence is also governed by the federal and state constitutions. These constitutions delegate legislative powers to the federal and state legislatures.[17] The federal and state legislatures, in turn, enacted codes, such as the Federal Civil Code (CCDF) or the Civil Code of Guerrero (CCG) that, depending upon the place of occurrence of the accident, will govern most of the issues in the negligence claim adjudication.[18]

Moira's, Walt's and Hospitalario's rights and duties may, additionally, be governed by federal or state statutory and

12. *See generally* S. BAYITCH & J.L. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES 1-9 (1968) (describing Mexico's legal system); K. REDDEN, 1 MODERN LEGAL SYSTEMS CYCLOPEDIA 93-95 (1984) (describing Mexico's legal system). *See also* Revilla, *A Selected Bibliography on Mexican Real Property Law,* 12 ARIZ. L. REV. 374 (1970).

13. F. TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO 15 (1972).

14. MEXICO CONST.

15. MEXICO CONST. art. 27.

16. MEXICO CONST. arts. 40, 115-122.

17. *See* MEXICO CONST. art. 71 (federal delegation of legislative power).

18. *See* CODIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] (Federal Civil Code) 13 (Edicion Conmemorativa, P. Cruz & G. Leyva 1982) for a reference to the delegation of powers by Mexico's Federal Congress to President Plutarco E. Calles, regarding the enactment of the C.C.D.F.). *See also* the Civil Code of the State of Guerrero's constitutional promulgation in CODIGO CIVIL PARA EL ESTADO LIBRE Y SOBRANO DE GUERRERO [C.C.G.] 10 (Cajica 1977).

administrative law, such as the Federal or State Law of Tourism,[19] and by the Federal Consumer Protection Law.[20]

In accordance with a civil law tradition inherited from Spain and France, Mexican courts attribute primary and preponderant weight to the text of constitutional, codal or statutory provisions. Mexico's judiciary also attributes considerable weight to administrative regulations, especially those in the form of legislatively authorized executive decrees.[21] This ranking is the result of the historical preeminence of the executive branch in Mexico's formula of government, at both the federal and state levels. Thus, unlike what is customary in United States litigational research, Mexican litigants and courts will not look up court interpretation of a given legislative provision before they look up the constitution, code, statute or regulation in question. The first research step for Mexican litigants and courts is to look up legislative and administrative law sources. Depending upon the nature of the text involved, the next research step may involve either a doctrinal or judicial source. If the text is perplexing, because of the importation of a totally exotic institution (such as the *"reporto"* transaction into Mexico's law of negotiable instruments),[22] the researcher will turn for immediate clarification to the works of leading national and foreign commentators (also referred to as *doctrina).* Furthermore, when courts and litigators need factual illustrations of the application of legislative or administrative law concepts, they will turn to commentators. In our case, the litigants would use this method to define terms such as "fortuitous event," "force majeur," "good faith," "good customs," and so on. The commentators' opinions, although not listed as official sources of law by codal or statutory law, frequently persuade courts' opinions.

If the problem before the court were litigated enough so that the generality or vagueness of the legislative rule acquired a specific, Supreme Court-determined meaning, lower courts would look up and cite the Supreme Court precedents. Examples of such formulations are found in the Supreme Court's decisions on contributory negligence, diligence and good faith.[23] Similarly, litigants and courts will regularly

19. *See* J.O. TORO, *supra* note 1; SECRETARÍA DE TURISMO, *supra* note 1; E.P. BONNIN, *supra* note 1.

20. *See* Ley Federal de Proteccion al Consumidor (Federal Consumer Protection Law of 1975) (Porrúa 1981) [hereinafter F.C.P.L.].

21. *See* S. BAYITCH & J.L. SIQUEIROS, *supra* note 12, at 17.

22. *See* CODIGO DE COMERCIO (Commercial Code) art. 259, at 392 (Porrúa 1962) (on the law of negotiable instruments and credit transactions).

23. *See infra* section II(D)(2).

invoke Mexico's Supreme Court's constitutional due process principles in connection with Mexico's *"Amparo"* type of appeal.[24] The *Amparo* is a *sui generis* appeal because it combines purely constitutional and public law doctrines on the denial of constitutional rights (as normally alleged in actions seeking to impugn the unconstitutionality of statutory or administrative law), with private law grounds of judicial error in the interpretation of substantive, procedural and evidentiary law. Presently, Mexico's Supreme Court has delegated upon Collegiate Circuit Courts the final decision on "private law" type of *Amparos,* and retained the right to decide purely constitutional and public law types of *Amparos.*[25]

To be officially binding, and not merely persuasively authoritative, the decisions made by the Mexican Supreme Court or by the Collegiate Circuit Courts must reiterate the same rule five consecutive times (without interruption or reversal).[26]

The decisions of the Supreme Court of Mexico are compiled in an official reporter known as the *Semanario Judicial de la Federacion* [hereinafter *Semanario*], in separate volumes which correspond to the terms, or epochs (*epocas*) of the Court.[27] Mexico's Supreme Court decisions are also compiled and indexed in *Jurisprudencia de la Suprema Corte,* an unofficial reporter published by *Editorial Mayo* in separate volumes which correspond to the judicial term and branch of the Supreme Court.[28]

Mexican reported decisions assume that the reader is familiar with the facts. Thus, they discuss the applicable law exhaustively but refer to facts only occasionally and in oblique fashion. When Mexico's Supreme Court decisions are quoted by the Supreme Court itself, or by lower federal and state courts, what is quoted is what Anglo-American lawyers refer to as *dicta.* The quoted passages do not isolate

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24. Grant, *Judicial Control of Legislation,* 3 AM. J. COMP. L. 186 (1954); R. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT 6-9 (1971); Headrick, Book Review, 17 AM. J. COMP. L. 120 (1969) (review of L. CABRERA, EL PODER JUDICIAL FEDERAL MEXICANO Y EL CONSTITUYENTE DE 1917 (1968)).

25. Cervantes Ahumada, *Mexican Living Law: An Insider's View,* 5 ARIZ. J. INT'L & COMP. L. 152 (1988).

26. Article 192 of the Amparo Law that regulates articles 103 and 107 of Mexico's Federal Constitution requires that binding Supreme Court decisions be approved by at least fourteen justices if the decision of the Court is *en banc,* or by four justices if it is a decision by one of the Court's chambers. *See* M. ACOSTA ROMERO & G. D. GONGORA PIMENTEL, LEY DE AMPARO 688 (Porrúa 1983).

27. For a reference to the Semanario, see Kozolchyk, *Damages, supra* note 3, at 195.

28. *Id.*

the "ultimate" fact or facts that gave rise to the controversy and legal issues in question. Such an isolation would make the quoted passage the case's "holding." The quoted passages are abstractly written, with minimal references to ultimate facts and only transcribe legal rules or principles of interpretation.

2. Standing or Right to Sue

Let us assume that a major issue in Walt and Moira's suit was their right to sue under Mexican law. Typically, an objection to standing would prosper only where the right to sue is organically linked to a foreign legal institution, as is the case of a shareholder's derivative action and the law of the place of incorporation. If the corporation in question were Mexican and did all of its business, including the selling of its shares, in Mexico, investors and shareholders should reasonably expect Mexican law to govern their right to sue the corporation. Accordingly, an Arizona court would be justified in searching for the link between a shareholder's right to sue corporate directors in Arizona and Mexican law. Such is not the case with Moira and Walt's negligence suit. Their right to compensation for an alleged negligent act in Mexico is unrelated to the place of Hospitalario's incorporation. Walt and Moira's right is "transitory" or "moveable"[29] because it arises from injuries suffered by them as a result of negligence allegedly committed by a transnational business entity. Furthermore, the alleged negligence was not related to Hospitalario's use of its Mexican real property.[30] If Mexico were to deprive Walt and Moira of their right to sue, it would not be because of the location of the corporation but because of a constitutional impediment placed upon foreigners. But such is not the case with Mexico's Constitution, as it affords Walt and Moira the same right to sue afforded to Mexican citizens. Mexico's Constitution grants the enjoyment of constitutional guarantees to any "individual" (*individuo*),[31] an expression as broad as it sounds, and thus, inclusive of citizens, residents and tourists. Accordingly, the tourists' standing or right to sue remains unobjected in the decisions reported in the *Semanario*, and doctrinal commentary lists tourists among the parties entitled to Mexico's constitutional guarantees.[32]

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29. *See* Safir v. Compagnie Generale Transatlantique, 241 F. Supp. 501 (E.D.N.Y. 1965) (defining transitory tort action).
30. *See infra* section II(c)(1)(a).
31. *See* MEXICO CONST. art. 1.
32. *See* J.O. TORO, *supra* note 1, at 41.

3. Actionability of a U.S. "Type" of Negligence

Does an allegation that Hospitalario failed to warn Moira against the dangerous waves and that it also failed to hire proficient lifeguards suffice to state a cause of action under Mexican law?

Legislators, including judicial decision makers, do not draft the rules, concepts and principles of interpretation that constitute a jurisdiction's remedial law *urbi et orbi*, for all men, everywhere and at all times. Remedial rules are invariably part of a specific procedural context, whether it be the 17th century English forms of action, or the 20th century United States code pleading. This is true especially when the action is based upon a general or proverbial rule, such as Article 1910 of the CCDF and of the CCG:

> The person who, acting illegally or against good customs causes harm to another, is obligated to remedy the harm, unless it is shown that the harm was the result of fault or inexcusable negligence of the victim.[33]

The procedural context of this provision, however, is one of openness of pleading, liberality of evidence and considerable discretion of the trier of fact. As will be discussed shortly, an illegality may arise from a violation of a public order statutory or administrative provision as it may from a violation of "good customs." A finding on good customs, by its very nature, requires a flexible approach to the admissibility of evidence, the method of proof, and discretion of the trier of fact. In theory, good customs could be proven by as many evidentiary devices as may be concocted by a fertile imagination, from the interpretation of theological or religious injunctions on bad behavior to anthropological, sociological or psychological expert testimony on prevailing attitudes.[34] Such a broad spectrum of proof presupposes that the trier of fact has the legal training necessary to exercise sound discretion. If the trier of fact is a professional judge, as he is in Mexico, he will try, at least ostensibly, to rely not on his own knowledge and experience but on that of witnesses, particularly expert witnesses.

If the trier of fact is a lay juror, as is often the case in the United States, he will rely upon what he personally saw and heard in the courtroom and on his own experience with prototypical good customs.

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33. C.C.D.F., *supra* note 18, art. 1910; C.C.G., *supra* note 18, art. 1910.
34. *See infra* section II(C)(2)(b).

In other words, for findings on "good customs," a juror relies much more on his own views and sources than does a judge who, after all, is supposed to abide by the admonition to litigants *da mihi factum, dabo tibi ius* (Give me the facts and I will give you the law).[35] Walt and Moira's allegations of negligence, therefore, would be actionable under Mexican law.

Hospitalario could still be expected to argue that Mexican standards of care under article 1910 of the CCDF and CCG differ from those applied by courts in the United States. Consequently, Hospitalario would argue that unless those standards are specified in the complaint, the complaint would lack either definiteness or consistency with Mexican law, and should thus be dismissed.

Mexico's pleading rules require that a complaint and an answer be filed with the court of appropriate jurisdiction. The Mexican complaint and answer are generally more prolix than their United States counterparts. A Mexican litigator prefers to narrate exhaustively and list comprehensively the supportive grounds of law, rather than to circumscribe his complaint to the rigidities of a given cause of action.

Contrary to Hospitalario's argument, a Mexican plaintiff may allege any and all possible combinations of facts and remain undeterred by a motion to dismiss for failure to define or to state a prescribed cause of action. Mexico's Supreme Court has upheld state court interpretations of the respective codes of civil procedure which allow allegations of facts that do not specify standards of care or characterize the cause or causes of action. As stated by Mexico's Supreme Court:

> It is not absolutely essential that the complaint contain a characterization of the facts in order to indicate the cause of action being claimed, it is enough that from the factual narrative the judge can establish which remedy is sought, examining such facts from every possible viewpoint, and it is even possible that an action be granted even though based upon grounds different than those set forth by the plaintiff.[36]

An additional significant difference between the Mexican and Anglo-American remedial systems lies in what each understands as factual pleadings. From an Anglo-American pleader's vantage point, a Mexican pleader's facts are often indistinguishable from legal

35. For an invocation of this principle by Mexico's Supreme Court, see CODIGO FEDERAL DE PROCEDIMIENTOS (C.F.P.C.) (Federal Code of Civil Procedure) 441 (G.D. Gongora Pimentel & M. Acosta 1986) (citing 1956 (Supp.) Semanario 5th 228).

36. Judgment of Oct. 11, 1951, Amparo directo [A.D.] 6161/50, Mexico, 110 Semanario Judicial de la Federación [Semanario] 5th (1), 366, 370 (Sánchez Mignel) and extract thereof in C.F.P.C., *supra* note 35, at 440.

conclusions. Since allegations of facts in Mexico are not addressed to potential jurors, but to professionally trained judges and clerks, a pleader frequently denies the existence of a physically or objectively verifiable fact, if that fact is rendered irrelevant by a legal argument. For example, an answer may deny the "existence" of a contract whose documentation is acknowledged in the same pleading as genuine. The denial of the contract's existence is supported by the argument that whatever contract was entered into was null and void and therefore "legally," and for all litigational purposes, non-existent. It is important to note that his denial will not adopt the form of a plea of confession and avoidance ("yes, my client entered into a contract, but..."). The denial will be of a "fact", to wit, "no contract exists." *Mutatis mutandis*, defendant's lawyer in a negligence action may deny such physically demonstrable facts as the occurrence of conduct which was allegedly below the required standard of care if such conduct was beyond the scope of defendant's employee's employment. Being invalid, such conduct was legally and litigationally non-existent.

Such arguments, incidentally, permeate the subsurface of Mexican judicial decisions and thereby render them nearly incomprehensible to readers who assume the distinction between objectively verifiable facts and legal arguments or conclusions. Hospitalario's argument that the plaintiffs failed to specify the required standard of conduct will not result in a dismissal of the complaint under Mexican law. This result is also supported by the nature of admissible evidence in Mexico, and by the powers of evaluation vested in the Mexican judge and in his clerk, a silent but highly influential assistant.

4. Evidentiary Rules and the Mexican Bench Trial

The Mexican judge determines with the broadest discretion the admissibility and weight of evidence. As a trier of fact, he can rely on the testimony of any person, whether this person be a party to the lawsuit or a third party. The only restriction is that the evidence be recognized by law, i.e., documentary, confessional, expert witness testimony and so on.[37] Broad admissibility of evidence and grant of judicial discretion do not go hand and hand with the policy behind Anglo-American strict evidentiary rules such as hearsay. Hearsay, prior acts, authentication, and best evidence rules are intended to provide the trier of fact with factual reliability and to protect him against

37. *See, e.g.*, C.F.P.C., *supra* note 35, art. 79, at 301.

manipulations of the evidence by professional litigators.[38] Broad standards of admissibility and discretion presuppose the trier of fact's alertness and skill at determining the credibility of the various sources.

Unlike the United States, whose constitution guarantees the right to trial by jury, Mexico requires that civil cases, such as negligence actions, be tried before judges. The judge and his clerk are the finders of fact and law. Requests for the admission of evidence and the submission of evidence are predominantly in writing. Parties submit interrogatories and names of witnesses to the court. In return, the witnesses, including expert witnesses, submit written answers or reports. Cross-examination, while theoretically possible, is practically insignificant.

Given the prolixity of pleadings and of written proof, and given the accumulation of filings, the judge relies on his clerk for summaries and suggestions on findings of fact and law. The Mexican judge also relies extensively on his own deductions or inferences, called "presumptive evidence," in some Mexican procedural codes.[39] Unhampered by the requirements of adversary procedure, the judge can obtain his "presumptive evidence" from anything and anyone, including *ex parte* meetings with counsel. Mexican attorneys enjoy lawful, *ex parte* access to both judges and clerks at any time prior to judgment.[40] Defendant's counsel need not be present while plaintiff's counsel meets with the judge or clerk and informally argues the merit of his complaint, and vice versa.

This seemingly unrestricted judicial determination of facts does not result in exhaustive and sequential findings of fact. On the contrary, as discussed earlier, Mexican judicial decisions, reflecting the nature of the pleadings, are an inseparable mixture of facts and law. Thus, Mexican judicial findings rarely produce formulations of generalizable standards of care.

In conclusion, Hospitalario's argument that Walt and Moira could not sue on a United States type negligence action in Mexico is unsupported by an analysis of Mexico's remedial context. Equally unsupported is Hospitalario's assertion that the complaint would be dismissed unless Walt and Moira can allege and prove the violation of a specific standard of care required by Mexican law.

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38. *See generally* J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (J.H. Chadbourn rev. 1976).

39. C.F.P.C., *supra* note 35, at 381.

40. Cervantes Ahumada, *supra* note 25.

C. Segmented Law Analysis

1. Which Civil Code Should Be Applied, the CCG or CCDF?

As indicated earlier, the basic substantive legal rules on an action for negligence or "extra-contractual" liability in Mexican law are found either in the federal or state civil code. The Supreme Court of Mexico has stated in five consecutive decisions[41] that even where an automobile accident has taken place on a federal highway, if the parties to the lawsuit are private, and the federal highway was not damaged, the applicable law will be that of the state in which the road is located.[42]

Mexico's Supreme Court adoption of the *lex loci delicti* for automobile accidents finds ample support in statutory and doctrinal sources.[43] Yet, as Bayitch and Siqueiros point out, the choice of the law of the *locus delicti* does not, by itself, determine whether this law is the law of the place where the accident occurred. The *locus delicti* may mean the law of the place (the infirmary) where one possible tortfeasor (the lifeguard) committed the tort of negligence, or it could mean the place where he failed to act (Hospitalario's oceanfront), or the place where the actionable injury actually occurred (either in the infirmary or in the ocean). In our case, this choice could have significant consequences because, as will be discussed shortly, if the *locus delicti* is federal property, application of the CCDF could provide a more substantial recovery than application of the CCG.[44]

The United States landmark decision of *Seguros, S.A., Compania Mexicana v. Bostrom*[45] alluded to a choice of law problem that may well arise in a Mexican court when the judge attempts to determine the applicable code. According to the United States Fifth Circuit Court of Appeals, if the complained of act and the injury occurred in different places, the *lex loci delicti* would be the place where the injury was actually suffered, rather than the place where the last event necessary to make an actor liable for the alleged wrong occurred.[46] Accordingly, if the negligence were deemed to have occurred in Hospitalario's infirmary and the infirmary were located in the State of Guerrero,

41. Kozolchyk, *Damages*, supra note 3, at 194.
42. *Id.*
43. S. BAYITCH & J.L. SIQUEIROS, *supra* note 12, at 147.
44. *See infra* section II(C)(2).
45. 347 F.2d 168 (5th Cir. 1965).
46. *Id.* at 174-75.

Guerrero law, meaning the CCG, would be applicable. More difficult questions arise, however, if negligent acts took place both in an ocean area ten feet from the high-tide line and in Hospitalario's infirmary, assumed to be on Guerrero property.

On the one hand, the ocean area just described could be characterized as property of the Mexican nation and as part of the "public domain" in accordance with article 27 of the Mexican Constitution and Mexico's Law of National Property.[47] Yet, Mexico's Supreme Court decisions on federal-highway automobile accidents have stated that if the litigation involved private parties, and no federal property was damaged or affected, the law of the contiguous state should apply.[48] This precedent could be applied by analogy to another federal property such as the maritime zone. As of this writing, this question does not appear to have been answered authoritatively by Mexican courts.[49]

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47. The ownership of the lands and waters found within the nation's territorial limits belongs, in principle, to the nation, which has the right to transfer ownership of the same to individual or legal entities, thereby constituting private property. *See* MEXICO CONST. art. 27, ¶ 1. The Constitution also states that "waters of the territorial sea, to the extent and in the terms established in international law, are the property of the Nation, as are internal marine waters...." MEXICO CONST. art. 27, ¶ 5. Article 132 in relevant part provides: "real property earmarked by the Government of the Union for public service or *common use* will be subject to the jurisdiction of the federal branches of authority, in the terms established in the law to be enacted by the Congress of the Union ...." MEXICO CONST. art. 132. Pursuant to Constitutional authority, Mexico's federal congress enacted the General Law of National Property, Diario Oficial [D.O.] (Jan. 8, 1982). Article 1, section IV of this law listed as "public domain" property "the ocean floor of the territorial sea and the floor of the internal marine waters." *Id.* art. 1, § IV. Article 49 of this law defines the federal maritime shore zone as a "strip of 20 meters wide of solid land surface, passable and contiguous to said beaches," and beaches are defined as "those parts of land which by virtue of the tide are covered by water and successively exposed, from the limits of the maximum ebb tide to the limits of the maximum annual flood tide." *Id.* art. 49. Article 2 of this law deems such property (beaches and the maritime shore zone) as public domain properties. *Id.* art. 2.

48. Kozolchyk, *Damages, supra* note 3, at 194.

49. A search of the various indexes of the Semanario failed to reveal any judicial determination of this issue. Only one decision was found with some bearing on the present issues. In Soledad Sanchez de Cuevas y Coagraviadas, Judgment of Apr. 23, 1968, A.D. 40/67, Mexico, 6 (Pleno) Semanario 7th 131, a Cuernavaca hotel, the Hotel Casino de la Selva, was sued because of the discharge of sewage and other effluent which damaged a neighbor's property. Based upon the text of the CCDF's article 1932 and the Civil Code of Morelia's art. 2042, the Supreme Court held that Morelia, and not Mexico City (where the hotel was incorporated), was the proper venue, and that its civil article 2042 and the CCDF's article 1932 were jointly applicable. *Id.* The Supreme Court found the tort so closely related to the real property, that it was "inherent to the thing, inseparable from it, and thus akin to an action *in rem*." *Id.*

2. Negligence under the CCG and the CCDF

a. The illegality of Hospitalario's failure to effectively warn Moira

While the formula of damages, especially moral damages, could differ under the CCDF and CCG,[50] article 1910 (of both codes) relies on the same definition of negligence: an "illegal" act or an act against good customs that causes harm to another, unless the harm was caused by the inexcusable fault or negligence of the victim.[51] M. Borja Soriano, one of Mexico's most influential tort law authorities, attributes the inspiration for the relevant wording of article 1910 to the German Civil Code of 1900 and the Swiss Code of Obligations of 1911.[52] An examination of the relevant provisions in these codes, however, does not provide assistance in determining the exact meaning or scope of article 1910's "illegal" act.[53]

Lic. Jose L. Siqueiros, a co-author of S. BAYITCH & J.L. SIQUEIROS, *supra* note 12, and a recognized authority on Mexico's conflicts of laws, expressed the following opinion: the application of the CCDF where negligence occurred in federal property, such as the maritime zone, is supported by the CCDF's own article 1 reference to "federal territories in matters of an ordinary nature, and in the entire Republic in matters of a federal nature." It is also supported by case law that applies federal law to accidents in federal means of transportation such as airplanes, buses and trains. Yet, if the injury was actually perpetrated on state land or property, the weight of authority is inclined toward the application of state law. Ultimately then, it would be a question of determining the exact location of the infirmary, and of the nature of the injury and negligence in each situs. Lic. Siqueiros was equally unaware of any decisional choice of law determination on this issue. Telephone interview with Lic. Jose L. Siqueiros by Boris Kozolchyk (November 6, 1987).

50. *See infra* notes 123-139 and accompanying text.

51. *See supra* note 33 and accompanying text.

52. M. BORJA SORIANO, TEORIA GENERAL DE LAS OBLIGACIONES 355 (Porrúa 1982). Borja Soriano also mentions the Soviet Civil Code but in connection with wording inapplicable to the definition in question. *Id.*

53. Article 823 of the German Civil Code states:

> A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.

THE GERMAN CIVIL CODE (bk. 2) §823, at 134 (I.S. Forrester, S.L. Goren, and H.M. Ilgen, trans. 1975).

Article 41 of the Swiss Civil Code of Obligations states:

> Every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation. Every person who, *contra bonos mores,* wilfully causes damage to another is also liable for compensation.

THE SWISS FEDERAL CODE OF OBLIGATIONS art. 41, at 8 (S.L. Goren trans. 1987).

As apparent in the above transcription, articles 823 of the German Civil Code and 41 of the Swiss Code of Obligations refer to unlawful acts including intentional as well as negligent acts and also to acts contrary to good customs but do not provide a working definition.

The CCDF and CCG article 1910 reference to violation of "good customs" could be regarded as redundant. For if illegality includes any act contrary to law (broadly defined) then illegality would include acts against good customs. Whereas, if illegality means only the violation of imperative or mandatory statutes, regulations or decisions that embody Mexico's "public order" or policy, then the violation of good customs becomes a discrete, actionable illegality. Mexico's Supreme Court seems to have adopted the narrower and non-redundant version of illegality in an often cited decision:

> ... An illegal act is that act which is contrary to or in violation *of public order laws* or against good customs. (... *leyes de orden público o contra las buenas costumbres*)(emphasis added).[54]

The first question is, then, whether Hospitalario's failure to post unquestionably visible warnings about the dangerous surf violated a "public order law." Had Mexico's Supreme Court stated that the illegality could arise from the violation of general principles of the law of negligence, an analogical search for duties of care in Mexico's entire body of statutory law could be undertaken. Since the definition is categorical and narrow, a determination of article 1910 illegality must involve conduct proscribed or described as unlawful by public order statutes.

The tourism statute in effect at the time of the accident was the Federal Law of Tourism of 1984 (FLT).[55] This law is said by express legislative declaration to be of "public interest" (*interes publico).* And while one may distinguish between public interest and public order statutes and may regard the former as less imperative, the term public interest is sufficiently strong to qualify its violation as an illegal act. The question remains, however, whether Hospitalario violated any specific standards of care on warning set forth in the FLT.

The FLT's predecessor statute stated that enterprises providing tourist services "are obligated to look after the interests and security of the tourists" and to "watch over the interests and safety of tourists."[56] The text presently in force omitted the language in the preceding quote.[57] The omission, however, does not mean that the duty

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54. Judgment of Jan. 7, 1966, A.D. 4712/64, Mexico, [1966] 103 (3a Sala) Semanario 6th 11 (Jesus Leal Garza y Coagraviada).

55. *See* J.O. TORO, *supra* note 1, at 87, 191-207 (background on the enactment of the law and the regulation itself).

56. *See* Ley Federal de Turismo (Federal Law of Tourism of 1980) art. 75, ¶ XIII, at 22 (Publicaciones Administrativas y Contables 1982).

57. *See* J.O. TORO, *supra* note 1, at 100 (text of FLT, art. 71 which lists the obligations of the suppliers of tourist services).

"to look after" the interests and security of the tourists has disappeared. It is present in diluted fashion in the FLT regulations on hotel rankings based upon the quality of their services.[58] In other words, a hotel's right to charge for its services is dependent upon factors such as its "conditions of security and hygiene" (*Condiciones de Seguridad e Higiene*).[59] Conceivably, a hotel such as Hospitalario, which advertised the high ranking ("grand tourism") it had received from the Department of Tourism was guilty of tortious, if not criminal, misrepresentation if it did not fulfill the conditions of "security and hygiene" required of that category.

As consumers of Hospitalario's goods and services, Walt and Moira may also have a cause of action against Hospitalario for misleading advertising and breach of warranty of service based upon Mexico's Consumer Protection Law (FCPL).[60] Unlike the FLT, the FCPL is labeled a "public order" statute. Yet, as is the case with the FLT, neither the FCPL nor its regulation defines hotel services, or lists obligations of safety connected therewith, nor warrants the conclusion that hotels near beaches have the duty to warn guests effectively about ocean dangers.[61] The consumer protection duties imposed upon hotels is both contractual and tortious or extra-contractual. Actionability is predicated upon proof of breach of contractual obligations.[62] In addition, article 55 of the FCPL sets forth the tortious liability of providers of goods or services for

> their own acts that attempt against the rights of consumers, as well as for the acts of their collaborators, subordinates, guards or auxiliary personnel that render services in their establishments, even though no labor employment relation exists, aside from the personal liability by the party that committed the infraction.[63]

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58. *See* J.O. TORO, *supra* note 1, at 194 (text of art. 14 of the Secretary of Tourism's Regulations for the Hospitality Industry).

59. *Id.*

60. *See* F.C.P.L., *supra* note 20, arts. 52, 53, at p. 25.

61. The FCPL makes the following rules applicable to hotels for the protection of consumers: it requires a public and clear display of the rates charged for services (article 42); it prohibits a double or two-tiered set of prices for the same service, one for the public in general and one for speculative intermediaries (article 43); it prohibits the use of discriminatory practices (article 44); it creates a duty to issue invoices (article 45); it requires strict fulfillment of terms of their contracts or reservations with consumers (article 52); it prohibits the performance of "direct acts" *(acciones directas)* that affect the public's liberty, security or personal integrity (article 54); and provides that acts by the hotels that affect the consumers' rights will give rise to tort (responsabilidad civil) and administrative actions (article 55). F.C.P.L., *supra* note 20.

62. *See* F.C.P.L., *supra* note 20, arts. 52, 53.

63. *Id.* art. 55.

Neither the FLT regulation's reference to a duty of care for the guest's security or safety, nor the FCPL's duty of abstention from acts that "attempt against the rights of consumers," necessarily encompasses Hospitalario's duty to effectively warn Moira. Since the method of statutory interpretation that prevails in Mexican courts is quite literal[64] "security" (*seguridad*) in the FLT will, in all likelihood, be interpreted narrowly to mean safety from crimes, such as assault, rape or thievery. Moreover, even if security were to encompass safety from accidental hazards it is not likely that the FCPL, the CCDF or the CCG will be interpreted as holding Hospitalario's failure to effectively warn Moira as an actionable illegality. Nor is it likely that the FLT or the FCPL will be interpreted as requiring a personal warning to each guest. Aside from Moira's possible contributory negligence or assumption of the risk, there is the question of the scope of Hospitalario's duty of warning, as part of its duty of care.

Since Mexican statutory, decisional and doctrinal sources are silent on the illegality of Hospitalario's failure to give effective warning, the authors submitted this issue to three distinguished Mexican lawyers in the states of Sonora and Sinaloa, states whose tourist trade is also very large. The interviewees were: Lic. Francisco Acuna Griego, a former Chief Justice of the Supreme Court of Sonora and present private practitioner in Hermosillo, Sonora; Lic. Eduardo Estrella, a practicing lawyer in Ciudad Obregon, Sonora, a former president of the Sonora Bar Association, and Lt. Governor of the State of Sonora; and Lic. Octavio Rivera Farber, a former president of the Notarial Bar of Mazatlan and a professor of torts at the University of Mazatlan.[65] Lic. Estrella and Rivera Farber doubted the actionability of such a duty of care under Mexican law either because of property law considerations, absence of a legislative basis for the cause of action, or both. The property law considerations were prompted by the ownership of the location of the accident. Since the Organic Law of the Federal Public Administration granted possession and administration

64. *See* Kozolchyk, *Fairness in Anglo and Latin American Commercial Law*, 2 B.C. INT'L & COMP. L. REV. 219, 244 (1979) [hereinafter Kozolchyk, *Fairness*].

65. Two other distinguished Mexican attorneys testified on very similar issues in Walters v. Westin Hotel, CA No. 84-5307 (E.D. Mich. Nov. 20, 1986), Lic. Teofilo Berdeja of the Bufete Berdeja, for the plaintiff, and Lic. Luis R. de Velasco of the Bufete Sepulveda, for the defendant. Lic. Berdeja, in a short affidavit, testified that Hospitalario's failure to warn a hotel guest of potentially hazardous conditions was violative of good customs. Lic. Velasco, in an exhaustive affidavit, testified that it neither violated Mexican law nor good customs.

of the nation's beaches to the Ministry of Urban Development and Ecology, the duty to warn swimmers and to watch for their safety belonged with this Ministry and not with Hospitalario. While this result could be unfair to victims, the absence of a specific statutory or administrative law source could not be remedied by courts; it required a legislative or administrative remedy. Chief Justice Franciso Acuna Griego did not think that Hospitalario's lack of ownership or control would necessarily prevent an action on negligence. After all, non-owners such as users, usufructuaries or franchisees had a duty of diligence for their misuse of someone else's property. The question, however, was who was owed the duty of care. Acuna Griego was not aware of a statutory or decisional rule that imposed the duty to effectively warn Moira upon Hospitalario. In the absence of such a rule, he agreed with Estrella and Rivera Farber that such a duty did not exist. A Mexican Supreme Court decision echoes this view.

In a 1978 decision,[66] the Supreme Court stated that a finding of illegality (*obrar ilicitamente*) in accordance with article 1768 of the Michoacan Civil Code (which contains similar language to that of article 1910 of the CCDF and CCG) requires "that something forbidden by the law be done, or that what the law requires to be done not be done, thereby causing damage...."[67] Significantly, when Justice Acuna Griego was asked whether the duty of vigilance existed with respect to swimmers in a swimming pool located within the hotel premises, he stated that possibly such a duty of care existed based upon the duty toward customers *in one's own establishment.*[68]

The above qualification by Justice Acuna Griego highlights the difficulty of severing Mexican law's link between ownership and control of one's premises and the duty to warn invitees about dangers outside the boundaries of one's property in Mexican law. The property-duty connection appears in provisions such as articles 1925 and 1932 of the CCDF and CCG which reflect both pre-industrial and incipient-industrial attitudes.[69] Article 1925 implicitly equates the

66. Judgment of Mar. 8, 1978, A.D. 239/76, Mexico, [1978] 109-114 (4a parte) Semanario 7th 145 (Manuel Quiroz Macia y otra).

67. *Id.*

68. See *infra* note 69 and accompanying text.

69. Article 1925 of the CCDF and article 1925 of the CCG state that homeowners or owners of hotels or lodging houses are liable for the damages caused by their servants in the discharge of their duties. *See* C.C.D.F., *supra* note 18, art. 1925; C.C.G., *supra* note 18, art. 1925. Articles 1932 of the CCDF and the CCG, in relevant part state: "Owners shall also be liable for damages caused: by the weight or motion of machines, by agglomerations of materials or animals noxious to health, or by any cause that unlawfully damages." *See* C.C.D.F., *supra* note 18, art. 1932; C.C.G., *supra* note 18, art. 1932.

liability of hotel owners with that of homeowners, and article 1932 lists various industrial activities and makes property owners liable for "any cause that unlawfully damages."[70]

The property-duty connection, however, also reflects a pre-commercial paternalism where duties were owed by the *bonus paterfamilias* to the members of the household, and not to strangers. Strangers were owed no greater private law duties than those for which they had expressly and formally contracted.[71] *Mutatis mutandis*, a business invitee's "extra-contractual" causes of action, beyond those to which he is entitled to within the host's premises, are very few and dependant upon a statutory or administrative grant.

In contrast to the scarcity of private law, marketplace-inspired protection of strangers, ample protection is provided to strangers by Mexican criminal law. Mexican criminal law protects the stranger as well as the non-stranger victim of negligent acts. Article 8 of the Penal Code for the Federal District and Territories (and for the nation on federal crimes)[72] contains this protection:

> Crimes may be:
>
> I. Intentional, and
>
> II. Non Intentional or Imprudent.
>
> Imprudence is understood as a failure to foresee, (and as) negligence, lack of skill, failure of reflection or of care that causes harm equal to that caused by an intentional crime.[73]

This equation between tort and crime, based upon the intensity of the suffered harm, explains why much of tort law in Mexico continues to be a branch of public and especially criminal law.[74] Moreover, courts will be reticent to "enact" new torts because such enactment would be inconsistent with the public law protection against *ex post facto crimes*.[75] Simply stated, torts, which could easily be prosecutable

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70. C.C.D.F., *supra* note 18, arts. 1925, 1932; C.C.G., *supra* note 18, arts. 1925, 1932.

71. Kozolchyk, *Fairness*, *supra* note 64, at 264.

72. *See* LEGISLACION PENAL MEXICANA [L.P.M.] art. 8 (Andrade 8th ed. 1978). *See also* CODIGO PENAL ANOTADO [C.P.A.] (Annotated Penal Code) 39 (R. Carranca y Trujillo 1962).

73. *See* L.P.M., *supra* note 72, art. 8; C.P.A., *supra* note 72, at 39.

74. *See* Kozolchyk, *Damages*, *supra* note 3, at 211-12.

75. In addition to constitutional provisions, the protection mentioned in the principal text is usually found in civil law countries in the classic criminal law adage, *nulla poena sine previa lege penale* (the punishment for a crime not found in the criminal statutes at the time of its alleged commission is null).

as crimes, will not be legislated from the bench. In sum, the preceding opinions are consistent with the policy of narrow interpretation of article 1910 illegality.

b. *Good customs and the failure to warn*

Article 1910's alternate basis for Walt and Moira's action on negligence is a violation of "good customs." As indicated earlier,[76] the inclusion of good customs as an alternative basis of liability to illegality was inspired by article 41 of the Swiss Civil Code.[77] Mexico's Supreme Court has not shed much light on the meaning of good customs. An often cited 1970 decision was only able to peel off one of its many possible layers of meaning:

> Good customs are not those that necessarily adhere to scientific and technical standards but rather standards which form a general and social morality of a human group at a determined place and time....[78]

As intuited by the Supreme Court, the addition of the adjective "good" to the word "customs" moralizes it and directs the inquiry away from a mere restatement of what a given group does. To be a good custom it must be not only factual behavior but moral behavior. Yet, the Supreme Court does not indicate whose behavior must be taken into account. Is it only the morality of grand tourism or five star hotel owners? Or, is it the morality of all hotel owners of the region or country? Or, is it perhaps the morality of the guests that ordinarily stay at hotels such as Hospitalario's? Or, is it that of guests and hotel owners, considered as a "community" or "group"? And, if so, what is the relationship of this community's morality with the morality of the much larger community of renowned hospitable and caring Mexican hosts?

The lack of answers to the these questions in Mexican judicial and doctrinal sources requires a brief review of Professor Von Tuhr's survey of early twentieth century German decisions.[79] Professor Von

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76. *See supra* notes 51-53 and accompanying text.

77. *See supra* note 53 for the text of article 41 of the Swiss Code.

78. Judgment of Nov. 13, 1975, A.D. 1982/70, Mexico, [1975] 83 (7a parte) Semanario 7th 15 (Ingenio Zapoapita, S.A.).

79. A. VON TUHR, 1-3 DERECHO CIVIL, TEORÍA GENERAL DEL DERECHO CIVIL ALEMAN [hereinafter VON TUHR]. When dealing with the German Civil Code, Mexican courts and commentators also frequently use L. ENNECCERUS, T. KIPP and M. WOLF, TRATADO DE DERECHO CIVIL ALEMAN (Spanish trans. C. Melon Infante 1955). Von Tuhr, however, has remained more popular because of the succinctness and clarity of his style.

Tuhr's multivolume treatise on civil law is one of the most influential among Mexican civil law teachers and commentators in issues involving the German Civil Code, and German decisional law.[80] German decisions are helpful in the application of article 1910 because German Civil Code (BGB) articles 138, 242 and 826[81] were among the model provisions used by the draftsmen of the CCDF. Von Tuhr reports agreement among some of the draftsmen of the German Civil Code and early commentators on the view that the morality of good customs must take into account social and professional diversities.[82] Nevertheless, the morality of a restricted group (a group like the grand tourism hotel owners) could not be controlling unless it imposed duties higher than those of average societal morality. If the small or restricted group morality required higher duties than the average, as was the case with the duties of loyalty and confidentiality required from lawyers toward their clients, or from physicians toward their patients, the higher duties would be enforced as good customs. If they did not require higher duties, or accepted lower duties, as was the case with agreements forbidding competition among physicians and dentists, they would not qualify as good customs.[83] Good customs, therefore, had a minimum or threshold average morality in early twentieth century German law. This morality's turn of the century flavor suggested its extraction from an outwardly upright, Bismarckian *Recht ist Recht* type of bourgeoisie. Accordingly, it was against good customs: to smuggle goods into a foreign country and thereby violate foreign customs laws;[84] to publish false information in order to profit from the stock exchange price fluctuations;[85] to form joint ventures or partnerships connected with the exploitation of prostitution;[86] to promise, while still

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80. *See supra* note 79.

81. Article 138 of the German Civil Code states in relevant part:

> A legal transaction is void whereby a person exploiting the need, carelessness or inexperience of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which exceed the value of the performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance.

THE GERMAN CIVIL CODE, *supra* note 53 (Bk. 1) § 138(2), at 21.

Article 242 states: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." *Id.* (Bk. 2) §242, at 41. For a translation of article 823 see *supra* note 53.

82. Von Tuhr, *supra* note 79, vol. 2, at 29.

83. *Id.* at 29 n.15.

84. *Id.* at 30 n.22.

85. *Id.* at 30 n.23.

86. *Id.*

married, a certain *inter vivos* or *mortis causa* reward to one's mistress;[87] to promise tips to employees;[88] to promise a certain sum in order to obtain a spouse's consent to a divorce, and to facilitate or procure insurance against fines for violation of the law or good customs.[89] Nevertheless, it was not against good customs to sell a house in which prostitution was practiced, even though the seller knew that the buyer intended to carry on the business of prostitution.[90] Shorn of its legalistic rhetoric, then, the distinction drawn by German courts between good and bad customs in the house of prostitution cases was prompted by appearances: if the sale appeared to be a sale of a house, it was not against good customs even though the house was a house of prostitution; but if the sale referred to and involved the prostitution business then it was against good customs.

Based upon the German doctrinal and court criteria described by Von Tuhr, the Mexican judge would have to establish whether there was any professional (grand tourism) version of good customs on the duty of effective warning. He would further have to establish how that group's morality stacked up against the average morality of larger state and federal communities. Representatives of each community would have to answer questions such as:

1) Should Hospitalario have posted a sign or signs in the spot most visible to the largest number of swimmers, or should the signs have been placed in spots visible to every possible swimmer?
2) Should Hospitalario's employees have warned Walt and Moira that the surf was inappropriate for snorkeling because of large waves and strong undertow?
3) Should Hospitalario have lifeguards on duty who, at all swimming times, watched out for dangerous surf conditions and did everything possible to prevent swimmers like Walt and Moira from going in at dangerous times?
4) Should the Hospitalario employee who rented Moira's snorkeling equipment to Moira have taken additional measure to verify that her face mask fit properly?
5) Should Hospitalario's lifeguard have discovered Moira's distress earlier and come to her rescue while she was in the water?

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

Let us assume that other grand tourism or five star hotel owners or managers in the area or region testified that it was not against their good customs to post signs in spots only generally visible.[91] Let us also assume that these owners and managers testified that they had no duty to warn each guest about the dangers of the surf, nor to post lifeguards to do everything possible to prevent guests from going into the ocean at dangerous times, nor to assure the proper fit of the rented snorkeling mask, nor to have discovered Moira's distress and come to her rescue at an earlier time.[92] The German decisional law surveyed by Von Tuhr requires proof that such a version of good customs does not conflict with average morality.

Proof of this threshold good customs presents serious difficulties to litigants and judges alike. As indicated earlier, such proof could come from theological to sociological or anthropological sources. Given the wide range of good customs characterizations that will inevitably flow from these different sources, the Mexican judge, influenced by the prevailing stranger standard of fairness will not hesitate to infer his own "presumptive" evidence. As will be recalled, where negligent acts are concerned, this standard holds that one owes good customs primarily to those allowed to use one's property, whether gratuitously or onerously. Thus, while good customs may require that upon a guest's registration or upon his walking to the beach, the guest be warned of surf conditions, good customs do not require the most effective warning in a beach area that does not belong to Hospitalario but to the national government. In addition, this version of good customs does not require placing permanent "activistic" lifeguards charged with preventing guests from going into a dangerous looking ocean. The judge may take into account that a lifeguard was hired and that he was supposed to be present near the place where the accident took place. Since the duty of effective warning is so narrowly circumscribed by law and good customs, the lifeguard's absence from the beach area is not as relevant for the duty of effective warning as it is for the duty of proper emergency assistance, as will be discussed shortly.

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91. One of the authors asked two hotel managers in Guerrero and two in Sinaloa about the duty of most effective warning. While one Guerrero hotel manager stated that it would be against good customs not to have a permanent lifeguard on duty, especially during heavy surf conditions, he felt that, on the whole, Hospitalario had not violated good customs. The other three managers unqualifiedly stated that Hospitalario had not violated good customs. Telephone interview by Boris Kozolchyk (Mar. 7, 1987).

92. *Id.*

The judge is likely to find that good customs require ascertaining that the rented mask fit properly. Yet, he will regard this duty as inherent in a contractual relationship and, as such, requiring only Hospitalario's return of the rental charge. Alternatively, he may decide that the rental violated consumer protection provisions of the FCPL.[93] Yet such a finding would only entitle plaintiffs to the contractual remedies set forth in this enactment.[94]

Having found that good customs do not necessarily require posting the most effective warnings on the beach (activistic lifeguards included), the Mexican judge will find that only if the lifeguard had been in a position to be of assistance to Moira will his untimely and improper assistance be a violation of good customs.[95] The Mexican judge is likely to conclude, therefore, that neither an average, prototypical morality, nor a higher, archetypal morality (such as that of a "good grand tourism hotel owner") brands Hospitalario's failure to provide the most effective warning a violation of good customs.

D. Hospitalario's Defenses Under the CCDF and CCG

A segmented analysis of Mexican law must take into account Hospitalario's defenses of *force majeur*, fortuitous event, contributory negligence and assumption of the risk. The Anglo-American tort law notion of proximate cause has its counterpart in CCDF and CCG article 2110: "Damages must be the immediate and direct consequence of the failure to comply with an obligation."[96] When events or acts by persons other than the defendant contribute to the plaintiff's injuries, Mexican law seems to allocate liability based on the foreseeability of the harm.[97] Thus, the requirements of proximate cause set forth in article 2110 are qualified by the exculpatory language of article 2111:

> No one is obligated with regard to a fortuitous event except when he has caused it or contributed thereto, or when he has expressly accepted such liability or when the law imposes it.[98]

And, as will be discussed shortly, defendant's exculpation is predicated upon what non statutory authorities regard as foreseeable.

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93. *See supra* note 20.
94. *Id.*
95. *See infra* notes 115-116 and accompanying text, discussing article 340 of the Penal Code and the good samaritan rule in Mexican law.
96. C.C.D.F., *supra* note 18, art. 2110.
97. *See* Kozolchyk, *Damages*, *supra* note 3, at 200-202.
98. C.C.D.F., *supra* note 18, art. 2111.

Yet, from an Anglo-American law viewpoint, the fact that Mexican law foreseeability is usually unaccompanied by determinations of reasonableness renders this foreseeability a different concept.

1. *Force Majeur* and Fortuitous Events

Mexican courts and commentators often use the terms *force majeur (fuerza mayor)* and fortuitous or unforeseeable event (*acto fortuito*) interchangeably.[99] For example, Prof. Gutierrez y Gonzalez defines both fortuitous event and *force majeur* as "a future event which is beyond the power of a party to avoid, because it is unforeseeable or, if foreseeable, unavoidable."[100] In turn, Gutierrez y Gonzalez defines an unforeseeable event as an event "that impedes the carrying out of an obligation or legal duty (and whose presence) cannot be determined or conjectured by signals or indications that foreshadow its proximity or arrival."[101]

The references to "signals or indications" in Gutierrez y Gonzalez's and *force majeur* in Mexican law. If no physical or objective signal foreshadows the arrival of the act or event, the question of what is the most reasonable behavior to cope with the likelihood of its arrival is not particularly relevant since the act or event is still deemed unforeseeable. This connotation makes the defenses of fortuitous event and *force majeur* more powerful in Mexican law than in Anglo-American law, because certain acts or events will be categorized, *a priori*, as unforeseeable.

In United States law, the doctrine of *force majeur* is raised as a defense only when a supervening act, whether natural or man-made, alters or supersedes a defendant's ability to perform his obligations, contractual or otherwise.[102] Allegations involving unforeseeability are usually accompanied by references to reasonableness.[103] And, in light of the foreseeability of the harm, an allegation of an unforeseeable

99. *See* Kozolchyk, *Damages*, *supra* note 3, at 201.

100. E. GUTIERREZ Y GONZALES, DERECHO DE LAS OBLIGACIONES 489 (5th ed. 1976).

101. *Id.*

102. *See* Annotation, *Gas and Oil Lease Force Majeure Provisions: Construction and Effect*, 46 A.L.R. 4TH 976, 981 (1986) ("force majeure thus falls within the larger rubric of impossibility of performance; however, it is broader than 'Act of God'").

103. *See, e.g.*, First Wyoming Bank v. Cabinet Craft Distributors, Inc., 624 P.2d 227 (Wyo. 1981).

emergency requires proof of reasonable behavior.[104] Such evidence is not necessarily required by Mexican courts. A Mexican judge, as a trier of fact and law, may treat the supervening act or event as *per se* fortuitous, or as a *force majeur*. One such case involved a drought in the State of Coahuila that caused the loss of more than 60% of plaintiff's cattle. The Supreme Court held that the defendant, lessee of the land and cattle, was not obligated to return the cattle to his lessor if this lessee could prove the fortuitous event of drought. The lessee proved this by introducing documents in the public record referring to the Coahuilan drought; no proof was required on the drought's reasonable foreseeability or on defendant's mitigation of damages.[105] *Pari passu*, Mexico's Supreme Court regarded the fact that a stationary vessel was dragged by "winds, hurricanes and impetuous currents" as a *force majeur*; the victims themselves were required to absorb the damages.[106] Hence, a Mexican court could easily regard the suddenness and strength of the waves and undertoe in Moira's case as *per se* fortuitous or as a *force majeur*.

2. Contributory Negligence, Waiver and Release and Assumption of the Risk.

The language of article 1910 suggests that contributory negligence operates as an absolute bar to recovery under Mexican law: the defendant is liable for remedying the harm he caused "unless it is due to the fault or inexcusable negligence of the victim."[107] Mexico's Supreme Court accordingly held that the plaintiff's inexcusable negligence frees the defendant from liability:

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104. *See, e.g.*, Newton v. Davis Transport and Rentals, Inc., 312 So. 2d 200 (Fla. Dist. Ct. App. 1975); Hatlee v. Owego-Appalachin School District, 100 Misc. 2d 1103, 420 N.Y.S.2d 448 (1979); Iraweek v. Larkin, 708 S.W.2d 942 (Tex. Ct. App. 1986).

105. Judgment of July 4, 1960, A.D. 2433/59, Mexico, 1960 Boletín de Información Judicial [Bol. Info. Jud.] 408, Tesis 8119 (Miguel V. Villarreal).

106. *See* Judgment of Sept. 9, 1957, A.D. 2787/56, Mexico, 3 (3a Sala) Semanario 6th 105 (Petróleos Mexicanos) (citing article 1914 of the CCDF). Article 1914 of the CCDF states: "When without the use of mechanisms, instruments, etc., referred to in the preceding article, and without the fault or negligence of any of the parties, damage is produced, each of the parties shall support it without right to indemnity." THE MEXICAN CIVIL CODE art. 1914, at 349 (M. Gordon trans. 1980). *See also* C.C.D.F., *supra* note 18, art. 1914 (Spanish). The translation of this provision in Gordon is somewhat misleading, however, in its use of the term indemnity for the Spanish "indemnificacion". Indemnity may refer to a letter of indemnity, bond or other insurance type of obligation. Such a method of being made whole is not precluded by article 1914; only the compensation in a strict liability action is precluded.

107. *See supra* note 33 and accompanying text.

> Once it was proven that the victim of the accident (plaintiff) was drunk at the time the accident occurred, the person who drove the car as well as the car's owner could not have incurred the liability set forth in article 1913 of the CCFD, as this was the result of inexcusable negligence of the victim (a negligence) which frees (defendants) from any responsibility.[108]

While some Mexican scholars have advocated the adoption of a comparative fault system for civil torts, the Mexican Supreme Court has not yet adopted this standard in five consecutive decisions.[109] The insertion of the word "inexcusable" preceding the word negligence in article 1910, however, allows a judicial finding of excusable negligence, and thereby allows plaintiff's recovery where he was excusably negligent.

Whether Moira's snorkeling despite the beach sign is inexcusable or excusable negligence is not clear. This determination may well depend upon the findings on Hospitalario's violation of good customs. If the testimony of similarly situated hotel owners or managers is that guests are expected to enter the ocean despite the posted warnings, and that because of such behavior, good customs require the employment of lifeguards, Moira's snorkeling will not likely be regarded as inexcusable.

On the other hand, the release signed by Walt and Moira when they registered in Hospitalario's hotel can be regarded as both an additional indication of Moira's assumption of the risk of dangerous surf and as a valid waiver of Walt and Moira's personal injury claims against Hospitalario. Mexican commentators agree that the waiver and release, signed by Walt and Moira, is a legitimate exercise of the parties freedom of contract.[110] The waiver and release would only violate Mexican law if they exempted Hospitalario for liability for intentional harm (*dolo*).[111] Nevertheless, Walt and Moira may attempt to annul

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108. *See* Kozolchyk, *Damages, supra* note 3, at 199 n.22.

109. For the Supreme Court's reliance on comparative negligence considerations, see Judgment of May -, 1968, A.D. 6452/67, Mexico, 136 (4a parte) Semanario 6th 125. *But see* C.P.A., *supra* note 72, at 39 (citing Mexican Supreme Court decision that the principle of contributory negligence has no application in criminal negligence actions).

110. For the finest comparative study in print on the Mexican law of contractual waivers and releases of liability, see Rivera Farber, *Analisis Respecto a la Validez de las Clausulas de Irresponsabilidad Contractual en Derecho Mexicano*, ASOCIACIÓN NACIONAL DEL NOTARIADO MEXICANO, A.C. 8, 12, 31 (1988). *See also* Kozolchyk, *Fairness, supra* note 64, at 251-256; Kozolchyk, *Commercialization of Civil Law and Civilization of Commercial Law*, 40 LA. L. REV. 3, 13-16 (1979).

111. *See supra* note 110.

this waiver by alleging its violation of article 17 of the CCDF and CCG, an article which protects contracting parties whose "notorious inexperience" has been exploited by the other party who thereby obtains an "excessive profit... evidently disproportionate to the obligations assumed by him."[112] Walt and Moira's allegation would be buttressed by article 31 of the regulations of the FLT, which require that hotels obtain an insurance policy against damages suffered by injured guests (tourists) either in their property or persons.[113] Walt and Moira would argue that Hospitalario's procurement of the waiver and release without disclosing the liability coverage by a mandatory insurance policy was an exploitation of their ignorance. They would also argue that the failure to disclose the mandatory policy was designed either to avoid Hospitalario's liability in excess of policy coverage or to keep Hospitalario's rate low at the guests' expense. A review of article 17 inspired Supreme Court decisions, however, reveals the Supreme Court's unwillingness to apply this provision except in the most egregious instances of contractual weakness and exploitation.[114] Consequently, Moira's contributory negligence, and Walter and Moira's waiver and release and assumption of the risk loom large as defenses against Walt and Moira's action on negligence under Mexican law.

a. The illegality and violation of good customs of Hospitalario's improper medical assistance

Hospitalario's failure to render proper medical assistance in its infirmary by failing to hire or train someone capable of administering sound emergency procedures is an illegal act under Mexican law. The most significant "public order" statute violated by Hospitalario's failure is Article 340 of the Penal Code for the Federal District (also in effect in the entire Republic for federal crimes):

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112. Article 17 of the CCDF states:
When any person, taking advantage of the supreme ignorance, notorious inexperience, or extreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligations assumed by him, the victim has the right to demand the rescission of the contract, and if this is impossible, an equitable reduction of his obligation. The right granted in this article expires after one year.
C.C.D.F., *supra* note 18, art. 17.

113. *See* J.O. TORO, *supra* note 1, at 197.

114. *See* Kozolchyk, *Fairness*, *supra* note 64, at 227-233.

> If someone finds... an injured person or a person threatened by any danger, the applicable penalty for failure to immediately notify the authorities, or for failure to provide *the necessary help* when it can be given without personal risk, is one to two months of prison or fine of ten to fifty pesos.[115]

An authoritative code commentary indicates that article 340 applies both to criminal negligence and to intentional harm (*dolo*).[116] And, unlike private law contributory negligence, negligence by the victim of criminal negligence does not bar his criminal action.[117]

The fact that the Penal Code found it necessary to punish the failure to provide proper medical assistance underscores the seriousness with which Mexican law regards Hospitalario's duty as a host and as a good samaritan. Therefore, assuming that Hospitalario's lifeguard's acts are found to be a negligent administration of emergency assistance, Hospitalario will be deemed to have committed an illegal act. Article 1925 of the CCDF and of the CCG provides that "householders or owners of hotels or lodging houses are liable for the damages caused by their servants in the discharge of their duties."[118] Similarly, article 1932, as previously mentioned,[119] imposes upon owners of buildings liability for damages caused "... by the weight or motion of machines, by agglomeration of materials or animals noxious to health, or *by any cause of unlawful damage.*"[120] Mexico's Supreme Court has applied this article to find negligence where a building owner built too narrow a stairway, which caused a tenant to fall and lose his life.[121] Given the catch-all clause of article 1932, this article will be applied analogically to other illegal acts that result in injury. Once Walt and Moira establish the illegality of improper assistance under the Penal Code, the remaining issue is factual: was the assistance rendered by the lifeguard truly improper, and was it in the terms of article 2110 of the CCDF and CCG,[122] the "direct and immediate cause" of the plaintiff's injuries?

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115. *See* C.P.A., *supra* note 72, at art. 340.

116. *See* C.P.A., *supra* note 72, at art. 340. For the text of article 8 see *supra* note 73 and accompanying text.

117. C.P.A., *supra* note 72, at 39.

118. *See supra* note 69 and accompanying text.

119. *Id.*

120. *Id.*

121. Judgment of Oct. 20, 1960, A.D. 4607/59, Mexico, 1960 Bol. Info. Jud. 739, Tesis 8450 (Manuela Garcia).

122. *See supra* note 96 and accompanying text.

E. Regular and Moral or Punitive Damages[123]

Assuming that the injury and the negligence that was its proximate or "direct and immediate" cause took place in the infirmary and that it was located in the State of Guerrero, articles 1915 and 1916 set forth the damages owed to Walt and Moira.

Article 1915 states in relevant part:

> The reparation of the harm shall consist in the restoration of the status that prevailed prior to the perpetration of the damage and when that were not possible, by payment of damages.
>
> I- When the harm is caused to persons and produces death, total permanent, partial permanent, total temporary or partial temporary disability, the degree of the reparation will be determined by the quotas set forth by the Federal Law of Labor, in accordance with the victim's circumstances and taking as a basis the income or salary of the victim.
>
> II- When the income or salary exceeds 25 pesos per day, only this amount will be taken into account in determining the compensation.
>
> III- If the victim does not preceive an income or salary, or such an income or salary cannot be established, payment will take into account the minimum salary.[124]

Article 1916 states:

> Aside from damages, the judge may award to the victim of an illicit act, or to the victim's family if the victim dies, an equitable compensation as moral damages that will be paid by the party responsible for the illegality. This compensation shall not exceed one third of the total amount of liability for the illegal act.[125]

Article 495 of the Federal Law of Labor referred to by Article 1915 states:

> If the accident caused the worker a total permanent disability, the compensation shall consist of an amount equal to one thousand ninety-five days of salary.[126]

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123. *See infra* note 128 (use of the term punitive as closest equivalent of moral damages).

124. C.C.D.F., *supra* note 18, art. 1915. Despite numerous attempts to ascertain whether the 25 peso-per-day limit has been modified or enlarged, it has not been possible to obtain this information.

125. C.C.D.F., *supra* note 18, art. 1916.

126. Ley Federal de Trabajo (Federal Labor Law) [L.F.T.] art. 495 (Avadvade).

The above measure of damages, far from generous when enacted, is absurdly unfair after numerous serious devaluations of the Mexican peso. Sections I and II of article 1915 would provide Moira the total sum of 27,375.00 Mexican pesos, or roughly ten United States dollars. Sections I and III would provide roughly 10,000,000 Mexican Pesos, which at the current rate of exchange would amount to approximately $4000.00. Clearly an addition of one-third this sum by way of "moral" damages will not significantly improve Moira's dismal recovery.

If the CCDF were deemed applicable, the amount recovered may be larger because of the broad discretion vested in the judge by article 1916. In accordance with this article, the judge can take into account "injured rights, the degree of (defendant's) responsibility, the economic situation of the responsible party and of the victim, as well as all other circumstances of the case" in awarding moral damages.[127] No longer is the judge bound by one-third of the total recovery or any other cap. As long as caused by defendant's illegal conduct, the limit is up to the judge.[128] Nevertheless, recovery under article 1916 of the CCG and 1916 of the CCDF has been largely confined to libel and slander actions, and it has yet to provide the additional open-ended measure of damages that could render Mexican tort judgments more equitable.[129] Contemporary decisions attempting to increase the size of the aggregate wage or income based recovery do so by awarding

127. *See* C.C.D.F., *supra* note 18, art. 1916; C.C.G., *supra* note 18, art. 1916.

128. The preceding version of CCDF article 1916 capped the moral damages at one third of the total recovery, as article 1916 of the CCG continues to do. On December 31, 1982 the present "uncapped" recovery version of C.C.D.F. article 1916 (and C.C.G. article 1916) was enacted. *See* D.O. (Dec. 31, 1982); BARRERA GRAF, REFORMAS LEGISLATIVAS 55-62 (1983). For the civil law roots of moral damages in Mexican law, see Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT'L & COMP. L.J. 235 (1988) [hereinafter Friedler]. Friedler's 1986 reliance on the pre-1982 text of article 1916, however, is outdated, as this text was amended in 1982. *Id.* at 254. In addition, Friedler states that "moral damages recovery has nothing to do with the common law notion of punitive damages.... Moral damages recovery is not awarded for the purpose of punishing the wrongdoer.... The purpose of moral damages recovery in civil law tort actions is to compensate the victim." *Id.* at 263. Friedler's understanding of exemplary damages is at odds with that of one of the authors and case law which views exemplary damages as either compensatory or punitive. *See* Brause v. Brause, 190 Iowa 329, 342, 177 N.W.2d 65, 70 (1920); Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881, 884, 885 (1983) ("'exemplary' damages are those 'award(ed) to the plaintiff over and above what will barely compensate him for his property loss.... (They are) *intended to solace the plaintiff... or else to punish* the defendant and... or make an example of him'" (quoting BLACK'S LAW DICTIONARY 352 (5th ed. 1979))) (emphasis added). *See* also Kozolchyk, *Damages*, *supra* note 3, at 206.

129. For the legislative history of the confinement of moral damages largely to libel and slander actions, see Duarte y Norona, *El Daño Moral*, 52 BOLETÍN MEXICANO DE DERECHO COMPARADO 625 (Enero-Abril, 1985).

items such as medical expenses, or doubling the wage or earnings base, when the defendant proves that he practiced two or more professions or lost special skills.[130]

III. CONCLUSIONS AND RECOMMENDATIONS

A. *Certainty and a Pre-Trial Foreign Law Hearing*

The preceding remedial and segmented analysis reveals serious problems with the certainty and fairness of applicable Mexican law. It is certain that Walt and Moira can bring tortious, administrative and criminal actions under Mexican law. It is also true that facially these actions do not differ much from those available in the United States. Walt and Moira can sue directly as injured parties, or they can request that the Department of Tourism or the Office of the Attorney for the Protection of Consumers, bring the appropriate administrative or criminal actions. Yet, if they were to sue on negligence, it is uncertain that they could succeed when relying solely on Hospitalario's failure to provide an effective warning. The failure to provide an effective warning is not actionable because Hospitalario does not seem to owe this duty to Walt and Moira, and even if it owed this duty, the defenses of fortuitous event, contributory negligence, assumption of the risk and waiver and release could bar their recovery.

The differences between foral and Mexican law, therefore, are sharp when the action of negligence is examined under the remedial and segmented law microscope. It is true that a duty of care is a duty of care in both jurisdictions, that a fortuitous event is still a member of the Act of God family in Guerrero, and that contributory negligence and waiver and release require similar elements in both jurisdictions. Yet, somehow they do not mean the same thing: The scope of the duty of care in Mexican law is severely limited by the perimeter of

130. On the award of medical expenses in addition to the aggregate salary compensation, see Judgment of July 11, 1966, A.D. 8091/61, Mexico, [1966] 109 (4a parte) Semanario 6th 89 (Linea de Camiones Mexico-Cuautla-Matamoros-Oaxaca y Anexas "Flecha Roja," S.C.); Judgment of July 11, 1966, A.D. 8096/61, Mexico, [1966] 109 (4a parte) Semanario 6th 78 (Celso Espinosa Pacheco). For a case of multiple indemnity due to proof of several partial permanent incapacities, disabling plaintiff for *any kind of employment* as well as for her profession as pianist, see Judgment of Sept. 4, 1963, A.D. 6782/961/2a, Mexico, 1963 (3a sala) Informe Suprema Corte 28 (Flor de Maria Conde Camacho). For a California court application of the $2 per day cap, at a time when the peso was roughly at 12.50 pesos per one U.S. dollar, see Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958). For subsequent developments in California law, including the break from the traditional *lex loci delicti* rule, see E.F. SCOLES & P. HAY, CONFLICT OF LAWS 574 (1982).

the hotel property; the scope of fortuitous event is broadened by the absence or minimal presence of reasonableness; the scope of contributory negligence and assumption of the risk is broadened by the absence or minimal presence of defendant's duty to warn effectively; and the scope of waiver and release is broadened by Mexico's judicial unwillingness to apply the CCDF and CCG prohibition of unconscionable or overreaching conduct to cases other than of egregious poverty and ignorance.

Most of the above foreign law "facts" will remain unknown to a court in the United States that requires nothing more than the English translation of isolated Mexican statutory rules. In fact, these foreign law facts will remain unknown even by a court that hears expert testimony on a remedial questions such as, "is there an action for negligence for failure to effectively warn hotel guests about a dangerous surf and undertow?" For as with United States law, the expert would need to inquire about the location of the accident, the location of the signs, the presence of a waiver and release, etc. And if these questions came up during the actual trial and were not addressed in the expert's affidavit (assuming that he submitted such an affidavit), the expert would require leave to research the various issues.

The fallacy in the assumption that the foreign law applicable to varying facts can be instantly capsulized by the foreign law expert on the stand is a major contributor to uncertainty in the proof and application of foreign law. Another fundamental contribution to uncertainty is the local court's own indirection. Understandably, a court untrained in the law of a foreign jurisdiction will not be able to manage the evidentiary and briefing functions of foreign law advocacy as well as it manages the advocacy of local law. For this reason, courts will be greatly aided in their choice of law analysis by a pre-trial foreign law hearing. In such a hearing the judge and the parties would engage in oral examination of experts in Mexican law and receive documentary evidence of the relevant law to be applied. This hearing should be conducted well before the trial itself in order to develop an outline of the case, including the questions to be decided by the judge and by the jury. The court would then enter an order setting forth the specific legal standards to be applied at the time of trial. This order would provide the parties more meaningful discovery, because it will encourage a full appreciation of the effect of Mexican law on the future trial. It would also help prevent eleventh hour rulings that render major portions of a party's case moot, and would help explore the possibility of unbriefed remedies. For example, assume that

one of the Mexican law facts that the Court deemed most important for the determination of damages was the legal nature of the hotel owners' mandatory personal injury insurance policy. The order following the foreign law hearing should provide the necessary data for shaping a contractual (insurance supported) remedy whose measure of damages may be considerably fairer than that offered by Mexican tort law.

Fair Recovery

The unfairness of the measure of damages provided by the CCG has not been corrected by the application of the amendments of the CCDF. Moral or punitive damages recovery under the CCDF is not the equitable corrective that Mexican and foreign tort victims had hoped it would be. Mexican judges have failed to use the discretion given to them by CCDF articles 1916 and 1916 bis is to award reasonable compensation in negligence actions. This failure may have been influenced by a legislative purpose seemingly concerned only with damages resulting from actions on libel and slander. Or, it may have been influenced by the traditional judicial reliance on essentially restitutionary compensation for victims of personal injuries.[131]

An administrative solution adopted by some Mexican states similarly failed to correct the inequity of dismal recovery. The states of Baja California and Guerrero have appointed attorneys general to represent tourists in their claims against hotel owners, before the local or federal tourism office and before consumer protection agencies.[132] Effective as these attorneys may have been in improving the quality of tourist services or preventing abuses they have not enlarged the recovery pot for tourism related accidents.

One possible means for enlarging the amount of the recovery would be to "contractualize" tourism related tort claims, linking them to the hotel's mandatory liability insurance. Accordingly, courts in Mexico or in the United States could imply in Hospitalario's lodging contract a condition or an assurance of a safe stay or a stay free from strict liability or negligence hazards within Hospitalario's premises and in

131. *See generally* Kozolchyk, *Damages, supra* note 3.

132. *See* Ley de la Procuraduría de Proteccion al Turista del Estado de Baja California, 84 Periódico Oficial del Gobierno del Estado de Baja California 36; Acuerdo de 16 de Junio de 1981, 62 Periódico Oficial del Gobierno del Estado de Guerrero 24 (Procuraduría del Turista).

nearby areas, including the beach and surf. This implied assurance or condition of safety would cover the same hazards covered by Hospitalario's mandatory personal injury policy. In all likelihood this contractual solution would require raising the insurance policy coverage to realistic amounts, above the present statutory limits on recovery in negligence actions.

In the absence of legislative, administrative and contractual corrections it will be up to courts in the United States to find equitable correctives for what is essentially a glaring inequality of national or resident plaintiff treatment: If Moira, a national or resident plaintiff successfully sued a national or resident defendant for a tort that occurred nationally or locally, she would recover staggeringly more than if she sued on a tort that occurred a few hundred miles south of the U.S. border.